No. 11-591

# In the Supreme Court of the United States

PAUL A. SLOUGH, EVAN S. LIBERTY, DUSTIN L. HEARD, AND DONALD W. BALL, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

**BRIEF FOR THE UNITED STATES IN OPPOSITION (REDACTED VERSION)**

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## QUESTION PRESENTED

Whether, when the evidence the government uses to secure an indictment is based on legitimate sources wholly independent of a defendant's compelled testimony, the Fifth Amendment privilege against compelled self-incrimination requires the government to prove that the prosecutor's decision to seek an indictment was unaffected by his exposure to the compelled testimony.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported in its public, redacted form at 641 F.3d 544. The opinion of the district court (Pet. App. 21a-138a) is reported at 677 F. Supp. 2d 112.

## JURISDICTION

The judgment of the court of appeals was entered on April 22, 2011. A petition for rehearing was denied on July 19, 2011 (Pet. App. 139a-140a). The petition for a writ of certiorari was filed on October 17, 2011.[1] The

[1] On November 14, 2011, the Court granted petitioners' motion to file their petition under seal with redacted copies for the public record.

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

In December 2008, a federal grand jury in the United States District Court for the District of Columbia charged petitioners and a fifth defendant with 14 counts of voluntary manslaughter, in violation of 18 U.S.C. 1112, 2, and 3261(a)(1); 20 counts of attempted manslaughter, in violation of 18 U.S.C. 1113, 2, and 3261(a)(1); and one count of using and discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c), 2, and 3261(a)(1). After a hearing pursuant to *Kastigar* v. *United States*, 406 U.S. 441 (1972), the district court dismissed the indictment. Pet. App. 21a-138a. The court of appeals reversed and remanded. *Id.* at 1a-20a.

1. In 2007, petitioners worked as private security guards for Blackwater Worldwide (Blackwater), a company that contracted with the State Department to provide security services for U.S. government personnel in Iraq. Pet. App. 25a. Petitioners were part of a four-vehicle, 19-man convoy called "Raven 23,"

. *Id.* at 2a-3a; Gov't C.A. Br. 5, 7.

Shortly before noon on September 16, 2007, a car bomb was detonated in Baghdad, and the Raven 23 team was called upon to secure a safe return route to the Green Zone for a U.S. diplomat. Pet. App. 2a, 26a. The Raven 23 guards went to Nisur Square, a busy traffic circle, positioned themselves on the south side of the Square, and started gesturing in an effort to stop traffic. *Id.* at 3a, 26a. Then, "a shooting incident erupted." *Id.* at 26a. In the government's view, petitioners opened fire recklessly and unjustifiably, leaving 34 innocent

Iraqi civilians dead or wounded. Petitioners maintain that they acted in self-defense in response to mortal threats. See Pet. 3.

Within hours of the shooting, the State Department's Diplomatic Security Service (DSS) interviewed all of the Raven 23 guards about what had happened. Pet. App. 3a. In those interviews,

[2]

Two days later, on September 18, each Raven 23 guard submitted a sworn written statement about the incident to the State Department on a form stating that disciplinary action, including dismissal, could result from a refusal to provide the statement. Pet. App. 3a, 30a-31a. The form also stated that "neither [a guard's] statements nor any information or evidence gained by reason of [his] statements [could] be used against [him] in a criminal proceeding." *Ibid.*

The Nisur Square shooting was the subject of media attention in Iraq and the United States. Pet. App. 4a. Early reports quoted the claims of State Department

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[2] Two other guards—Nicholas Slatten and Jeremy Ridgeway—. Pet. App. 28a; Gov't C.A. Reply Br. 4 n.2. After the *Kastigar* hearing, the government moved to dismiss the charges against Slatten; Ridgeway pleaded guilty to two counts of manslaughter and attempted manslaughter. Gov't C.A. Br. 46, 49, 50 n.19.

and Blackwater representatives
. The State Department's claims were "presumably [based] at least in part" on the guards' interviews and written statements. *Ibid.* Later, the guards' written statements were leaked to ABC News,

. *Id.* at 5a; Gov't C.A. Reply Br. 11-12. In
, petitioner Slough's written statement was posted online. Pet. App. 5a.

2. In October 2007, a team of FBI agents went to Baghdad to investigate the shooting. As government lawyers recognized, the statements given by the Raven 23 guards to the DSS implicated the rule of *Garrity* v. *New Jersey*, 385 U.S. 493 (1967), which held that statements compelled by a government employer under a threat of job loss may not be used against the employee in a criminal proceeding, *id.* at 500. Accordingly, a protocol was established to insulate the FBI from any exposure to the Raven 23 guards' oral or written statements, and a taint attorney was designated to screen any material the FBI wanted from the DSS. Gov't C.A. Br. 18-19. As one agent later explained, "we were going to be conducting the investigation from scratch." C.A. App. 2033.

While in Baghdad for a month, the FBI interviewed U.S. military and Iraqi first responders, as well as a number of Iraqi eyewitnesses to the shooting. The FBI located and photographed vehicles that had been shot and took custody of many of them.

Between witness accounts and physical evidence, the FBI

was able to map where vehicles and victims had been struck.

Gov't C.A. Br. 9, 19-20; Gov't C.A. Reply Br. 4-5.

Interviews of Iraqi witnesses also gave the FBI a working understanding of which guards had fired. Although the witnesses did not know the shooters' names, they were able to give physical descriptions or to describe a vehicle's placement in the convoy and identify a shooter's position in the vehicle. Gov't C.A. Br. 20; C.A. App. 2258-2259.

Nearly all the Raven 23 guards declined to speak to the FBI, but three guards—Mark Mealy, Adam Frost, and Matthew Murphy—appeared willing to talk about the shooting. Gov't C.A. Br. 20-21. In November and December 2007, they testified in the grand jury pursuant to subpoenas. *Id.* at 21.

In the next two months (January and February 2008), the prosecution team learned what the Raven 23 guards, including petitioners, had said to DSS agents in their oral interviews on September 16, right after the shooting. Gov't C.A. Br. 34, 38. The prosecutors never saw the written September 18 statements. *Id.* at 28.[3]

By spring 2008, the grand jury had heard testimony from more than 40 witnesses. The government, however, recognized that some witnesses' testimony may

[3] At the *Kastigar* hearing, the lead prosecutor explained that, after doing research on *Garrity* and hearing the grand-jury testimony of the three Raven 23 guards, he believed that petitioners' oral interviews (as opposed to their written statements) were not "compelled" within the meaning of *Garrity* and that he was therefore entitled to see them, because such post-shooting interviews were typically brief, unaccompanied by threats of job loss or promises of immunity, not intended to assess criminality, and designed instead to give immediate feedback to the State Department so it could quickly assess the situation and any attendant threat. See Gov't C.A. Br. 25-29. In what the government conceded below was a serious breakdown in its taint procedures, the prosecution team was unaware that the taint attorney had recommended a more conservative course, advising that both the September 16 and September 18 statements be treated as compelled under *Garrity*. *Id.* at 29-33. The district court rejected that explanation, finding instead that prosecutors "reckless[ly]" and "aggressively" pursued the September 16 statements in "direct contravention" of the taint attorney's directive. Pet. App. 44a, 127a, 129a n.63.

have been affected by their exposure to the Raven 23 guards' statements as reported in the press, thus implicating *Garrity* and *Kastigar*. See Gov't C.A. Br. 42. In *Kastigar*, this Court held that where the government compels a witness to testify (there, under a grant of immunity under 18 U.S.C. 6002), it may make no use, directly or derivatively, of the immunized testimony in a criminal case. 406 U.S. at 453. Thus, with the guidance of two taint attorneys, the government redacted transcripts of key witnesses' previous grand-jury testimony, removing apparent references to petitioners' compelled statements; it then presented a greatly abbreviated case to a second grand jury through a summary witness (an FBI agent who had not seen any of the guards' statements). Gov't C.A. Br. 43-44.

The second grand jury received evidence from five central witnesses: Raven 23 guards Mealy, Murphy, and Frost, and two U.S. military officers who arrived at Nisur Square right after the shooting.

In December 2008, the grand jury charged petitioners and co-defendant Slatten with voluntary manslaughter, attempted manslaughter, and a related weapons offense.

3. At petitioners' urging, the district court held a *Kastigar* hearing to determine, *inter alia*, whether petitioners' statements to the DSS had been "used" to obtain the indictment against them. Over three weeks, the court heard testimony from each member of the government's trial team, the taint attorney, the central grand-jury witnesses, and petitioners. Pet. App. 23a. The hearing revealed that bits of Murphy's and Frost's testimony were "tainted" by their exposure to news reports about . See Gov't C.A. Br. 60-62. On appeal, the government also conceded that parts of Ridgeway's evidence about were not taint-free. *Id.* at 91.

After the hearing, the district court dismissed the indictment. The court rejected the government's view that petitioners' oral September 16 statements were not compelled under *Garrity*. Compare Pet. App. 64a-81a (finding that the guards believed the first DSS inter-

views were not voluntary and, because they had reported previous shooting incidents on forms bearing *Garrity* warnings, reasonably believed the same ground rules applied on September 16), with C.A. App. 4362-4371 (government's argument that the first interviews were not *Garrity*-compelled because they were part of the guards' routine, job-related reporting obligations, designed to get an immediate sense of what had happened, and that the guards would not reasonably have viewed them as part of an investigation into their conduct).[4]

The district court also found that the grand-jury testimony of Frost, Murphy, Ridgeway, and the Iraqis, and a journal Frost wrote in the aftermath of the shooting, were entirely tainted by their exposure to press accounts of petitioners' compelled statements. Pet. App. 88a-119a. The court made no findings of taint, one way or the other, as to the testimony of Raven 23 guard Mealy,

In addition to its findings of "evidentiary use," the district court addressed "nonevidentiary use," which it explained "does not culminate directly or indirectly in the presentation of evidence against the immunized person." Pet. App. 58a. Deciding an issue that had been left open in *United States* v. *North*, 910 F.2d 843, 857-858 (D.C. Cir.), modified, 920 F.2d 940 (D.C. Cir. 1990), cert. denied, 500 U.S. 941 (1991), the district court held that *Kastigar* is violated when a prosecutor has had "significant exposure to immunized testimony and makes significant nonevidentiary use of that testimony." Pet. App. 60a.

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[4] The government did not challenge that ruling on appeal.

The district court found that the government had made nonevidentiary use of statements by petitioners Heard and Ball, which it concluded had played a "central role" in the decision to charge them. Pet. App. 119a-124a.

In early drafts of an internal memorandum recommending prosecution, the lead prosecutor cited that

. After vetting by the taint attorneys, that passage (like other references to Heard's statement) was deleted from the memorandum before it was sent to the government officials who actually authorized the charging decision, and an accompanying note stated that the "prosecution recommendation" was based on the other evidence in the case against Heard. Gov't C.A. Br. 108. was not mentioned before the grand jury, but the district court nevertheless found that the reference to Heard's statements in the early drafts of the memorandum showed that the statements played a "central role" in Heard's indictment. Pet. App. 119a-122a.

As for petitioner Ball, the district court found that Ball's statement "played a determinative role in the government's decision to prosecute him," because the prosecutor placed Ball on his list of potential targets after being exposed to a draft of Ball's written statement, and because (in the court's view) that statement was the only "new evidence" against Ball. Pet. App. 122a-124a.

The district court further found that in light of the prosecutors' "aggressive" pursuit of all the Raven 23 guards' September 16 oral statements, the government

had failed to show, as to all the defendants, that it made no significant nonevidentiary use of the statements. Pet. App. 124a-133a; see *id.* at 131a-132a (noting "[i]t simply defies common sense" that the prosecution would aggressively pursue the statements but "make no use whatsoever of the fruits of their efforts").

The district court concluded that the evidentiary and nonevidentiary *Kastigar* errors were not harmless beyond a reasonable doubt. Pet. App. 136a-138a.

4. The court of appeals reversed and remanded. Pet. App. 1a-20a.

In addressing evidentiary use, it found that the district court made "a number of systemic errors based on an erroneous legal analysis." Pet. App. 8a. First, it found the district court had incorrectly treated the testimony of Murphy, Frost, Ridgeway, the Iraqis, and Frost's journal as "single lumps," viewing them as entirely tainted "when at the most only some portion of the content was tainted." *Id.* at 8a-9a. That error was particularly pronounced as to "non-overlapping" testimony (*i.e.*, testimony that had "no referent either in [petitioners'] immunized statements or news reports derived therefrom"). *Id.* at 9a-10a; see *ibid.* (citing numerous examples where substance of witnesses' testimony did not overlap with petitioners' statements). The court of appeals found that, by failing to segregate tainted and untainted parts of the testimony, the district court abdicated its responsibility under circuit precedent. *Ibid.*; see *North*, 910 F.2d at 872-873 (requiring a district court to conduct a witness-by-witness and, if necessary, "line-by-line and item-by-item" evaluation of challenged testimony, and to then inquire into harmlessness). Second, the court of appeals found the district court failed to conduct a "proper independent-source analysis" under

*Kastigar*, because it found that "any evidence responding to allegations that Raven 23 was attacked was tainted." Pet. App. 11a. The court of appeals noted many other sources for that same information—Blackwater, other Raven 23 guards, petitioners' non-immunized conversations with their teammates—and observed that "[w]here two independent sources of evidence, one tainted and one not, are possible antecedents of particular testimony, the tainted source's presence doesn't ipso facto establish taint." *Id.* at 11a-13a; see *id.* at 13a ("[C]ourts cannot bar the government from use of evidence that it would have obtained in the absence of the immunized statement."). Third, the court of appeals found that the district court applied the wrong legal standard in excluding Frost's journal, because it failed to consider whether Frost would have written the journal in the absence of exposure to petitioners' statements. *Id.* at 13a-15a. Fourth, the court of appeals found the district court wrongly assumed that tainted evidence about one defendant tainted the indictment against the others. *Id.* at 15a ("[T]he presence, extent and possible harmfulness of the taint must be assessed individually.").

With respect to nonevidentiary use, the court of appeals observed that neither *Kastigar* nor D.C. Circuit precedent barred such use of immunized statements, though it also recognized disagreement in the circuits on the issue. See Pet. App. 16a-17a (noting that the Third and Eighth Circuits have "suggested that *Kastigar* banned all non-evidentiary uses" of immunized statements, whereas the First, Second, Seventh, Ninth, and Eleventh Circuits have found otherwise). In a ruling applicable only to petitioners Heard and Ball, the court then decided, "at least as to decisions to indict," that it

would "join those circuits refusing to find such decisions vulnerable on the ground of links to immunized statements." *Id.* at 17a-18a. A contrary rule, it observed, "would entangle the court in what has hitherto normally been internal prosecutorial decision-making. And it would open a new field for courts' having to make complex causal judgments of the sort already required to assure clean evidence." *Ibid.*

The court of appeals also invalidated as speculative the district court's finding, with respect to all petitioners, that the government's exposure to their statements played a nonevidentiary role in guiding the prosecution. Pet. App. 18a ("[T]he district court also asserted that [petitioners'] September 16 statements must have been useful to the prosecution and must have guided the government's investigation, * * * but it never detailed what statements, independent of innocent sources, played exactly what role. We cannot uphold the judgment of dismissal to the extent that it rests on such vague propositions.").

The court of appeals vacated and remanded the case for the district court to determine, "as to each defendant, what evidence—if any—the government presented against him that was tainted as to him, and, in the case of any such presentation, whether in light of the entire record the government had shown it to have been harmless beyond a reasonable doubt." Pet. App. 19a-20a.

## ARGUMENT

Petitioners contend that, even where an indictment is wholly supported by independent evidence, a prosecutor's consideration of a defendant's compelled statement in deciding to seek charges against him violates his Fifth Amendment right against compelled self-incrimination.

The court of appeals' rejection of that contention, which applies only to petitioners Heard and Ball, is interlocutory, is correct, and does not present a square conflict warranting this Court's review.

1. The interlocutory posture of this case is a sufficient basis, by itself, to deny certiorari. See *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam). In a portion of its opinion that petitioners do not challenge, the court of appeals remanded the case for the district court to reevaluate whether the indictment against petitioners was tainted by *evidentiary* use of their compelled statements in the grand jury and, if so, whether any such use was harmless beyond a reasonable doubt.

Upon remand, a number of scenarios are possible. The district court could again dismiss the indictment as fatally tainted. Should the government choose to seek a new indictment (whether before or after a district-court decision), another, different round of *Kastigar* proceedings would be necessary.[5] If the district court were to deem the current (or another) indictment valid, petitioners might raise other dispositive pretrial issues, which, if ultimately resolved favorably to petitioners, could end the case before trial. And, should the case proceed to trial, petitioners could be acquitted and, if convicted and sentenced, would have the right to appeal.

This Court routinely denies petitions by parties challenging interlocutory determinations that may be reviewed at the conclusion of the proceedings. See *Vir-*

[5] The government has replaced the prosecutors who investigated and sought the indictment in this case with a new team of prosecutors who have not been exposed to any of petitioners' statements to the DSS.

*ginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., opinion respecting denial of certiorari); Eugene Gressman et al., *Supreme Court Practice* § 4.18, at 280-283 (9th ed. 2007). That practice ensures that all of a defendant's claims will be consolidated and presented in a single petition.

In this case, the interests of judicial economy would be best served by denying review now and allowing petitioners to reassert all of their claims at the conclusion of the proceedings. Those interests are especially compelling here, because the question presented affects only two of the petitioners.[6] The court of appeals directed the district court on remand to evaluate only whether *evidentiary* use of petitioners' compelled statements was made in the grand jury, Pet. App. 8a, 19a, which means that resolving the question about nonevidentiary use would not, as petitioners assert (Pet. 33), "affect the remand analysis for the remaining [p]etitioners."

2. Petitioners contend (Pet. 28) that, although "*Kastigar* did not specifically address nonevidentiary use" of compelled statements, the constitutional prohibition on their use "must include a proscription on substantial nonevidentiary use, including use in a prosecutorial decision to target the witness for investigation, to charge the witness, and to obtain authorization to seek indictment." That argument lacks merit.

The privilege against self-incrimination provides that no person "shall be compelled in any criminal case to be

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[6] Petitioners note (Pet. 12-13) the court of appeals' other ruling on nonevidentiary use—which applied to all four petitioners and invalidated the district court's broad findings as vague and speculative, Pet. App. 18a—but the petition presents no corresponding question. In any event, that factbound determination would not warrant this Court's consideration.

a witness against himself." U.S. Const. Amend. V. The text of the Fifth Amendment makes clear that it creates an evidentiary privilege against the use of a compelled statement in a criminal case. See, *e.g.*, *Chavez* v. *Martinez*, 538 U.S. 760, 767 (2003) (plurality opinion) (finding defendant "was never made to be a 'witness' against himself in violation of the Fifth Amendment's Self-Incrimination Clause because his statements were never admitted as testimony against him in a criminal case"); *id.* at 777 (Souter, J., concurring in the judgment) (noting that the text "focuses on courtroom use" of a compelled statement and affords "evidentiary protection" against such use); *United States* v. *Janis*, 428 U.S. 433, 443 (1976) ("[T]he Fifth Amendment * * * renders evidence falling within [its] prohibition inadmissible."); see also *United States* v. *Hubbell*, 530 U.S. 27, 50-52 (2000) (Thomas, J., concurring) (concluding that, for Fifth Amendment purposes, a "witness" is "a person who gives or furnishes evidence").

That focus on evidentiary protection is supported by the historical practices that led to the privilege against self-incrimination. As the Court has often explained, "the privilege was designed primarily to prevent a recurrence of the Inquisition and the Star Chamber," which compelled the accused to answer, under oath, "questions designed to uncover uncharged offenses, without evidence from another source." *Pennsylvania* v. *Muniz*, 496 U.S. 582, 596 (1990) (citations and internal quotation marks omitted); see also *Hubbell*, 530 U.S. at 34 n.8; *Doe* v. *United States*, 487 U.S. 201, 212 (1988); *Twining* v. *New Jersey*, 211 U.S. 78, 103 (1908). The Constitution's departure from "the inquisitorial system" means that "society carries the burden of proving its charge against the accused not out of his own mouth. It

must establish its case * * * by evidence independently secured." *Watts* v. *Indiana*, 338 U.S. 49, 54 (1949). Thus, state-constitution antecedents for the Fifth Amendment drew on the English "rule of evidence" against compulsory self-incrimination, *United States* v. *Balsys*, 524 U.S. 666, 676-677 (1998) (citation and internal quotation marks omitted), and specified that no one may "be compelled to give evidence against himself." *Hubbell*, 530 U.S. at 52 (Thomas, J., concurring) (quoting Virginia's 1776 Declaration of Rights and collecting similar provisions). And this Court and its members routinely describe the Fifth Amendment as protecting against evidentiary use of compelled statements.[7]

Despite petitioners' contrary contention (Pet. 24-28), *Kastigar* accords with the text and historical understanding of the Fifth Amendment as protecting against evidentiary use of compelled statements. In the earliest of its immunity cases, *Counselman* v. *Hitchcock*, 142

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[7] See, *e.g.*, *Hubbell*, 530 U.S. at 53 (Thomas, J., concurring) (Fifth Amendment was meant to protect against "compelling a person 'to furnish evidence' against himself") (citation omitted); *Balsys*, 524 U.S. at 682-683 ("at [the Fifth Amendment's] heart lies the principle that the courts of a government from which a witness may reasonably fear prosecution may not in fairness compel the witness to furnish testimonial evidence that may be used to prove his guilt"); *id.* at 703 (Breyer, J., dissenting) (same); *New York* v. *Quarles*, 467 U.S. 649, 686 (1984) (Marshall, J., dissenting) ("All the Fifth Amendment forbids is the introduction of coerced statements at trial"); *Lefkowitz* v. *Turley*, 414 U.S. 70, 84-85 (1973) ("answers elicited upon the threat of the loss of employment are compelled and inadmissible in evidence"); *Miranda* v. *Arizona*, 384 U.S. 436, 460 (1966) (the government must "produce the evidence against [the defendant] by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth"); *Hoffman* v. *United States*, 341 U.S. 479, 486 (1951) (the Fifth Amendment protects against compelling testimony "which would furnish a link in the chain of evidence needed to prosecute the claimant").

U.S. 547 (1892), the Court invalidated as inconsistent with the Fifth Amendment an immunity statute because it prohibited direct evidentiary use of a witness's compelled testimony but did not "prevent the use of his testimony to search out other testimony to be used in evidence against him * * * in a criminal proceeding." *Id.* at 564. *Kastigar* explained that its holding was "consistent with the conceptual basis of *Counselman*," which it characterized as being that "immunity from the use of compelled testimony and evidence derived therefrom is coextensive with the scope of the privilege." 406 U.S. at 452-453.[8]

Another of *Kastigar*'s forerunners, *Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964), also indicated that the Fifth Amendment is satisfied when the government is prohibited from making direct or derivative evidentiary use of compelled testimony. The petitioners in *Murphy* refused to answer certain incriminating questions because the State's grant of full transactional immunity would not protect their testimony from being used in a federal prosecution. *Id.* at 53-54. This Court held that, once the State had granted immunity, the compelled testimony and its fruits could not be used against the witness in a federal case. See *id.* at 57, 77-

[8] *Counselman* had also indicated that only "absolute immunity" against prosecution for the offense to which a compelled statement related could satisfy the Fifth Amendment, 142 U.S. at 585-586, but *Kastigar* explained that that "broad language" was "unnecessary to the Court's decision" in *Counselman* and was not "binding authority," see 406 U.S. at 454-455 & n.39. After *Counselman*, Congress enacted a series of immunity statutes providing for full, transactional immunity when the government compelled testimony from a witness; such statutes were the norm until, after a reevaluation of the constitutional requirements, Congress enacted 18 U.S.C. 6002, the use-and-derivative-use immunity statute upheld in *Kastigar*. See 406 U.S. at 451-452.

78. Significantly, however, the Court ruled that a federal prosecution could still proceed if it were based on completely independent evidence. *Id.* at 79 & n.18; see also *id.* at 79 (characterizing the constitutional protection as an "exclusionary rule"); *id.* at 101 (White, J., concurring) ("When federal officials are barred not only from introducing [compelled] testimony into evidence * * * but also from introducing any evidence derived from such testimony, the disclosure has in no way contributed to the danger or likelihood of a federal prosecution.").

*Kastigar* relied on that aspect of *Murphy*, see 406 U.S. at 457-461, and focused on evidentiary use in setting forth its standard for enforcing the Fifth Amendment's guarantee: Once a defendant testifies under a grant of immunity, the government must prove "that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony," *id.* at 460, and it must shoulder the "heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources," *id.* at 461-462. Reinforcing that its rule pertained to evidentiary uses, *Kastigar* elaborated that its "total prohibition on use" barred "the use *of any evidence obtained* by focusing investigation on a witness as a result of his compelled disclosures." *Id.* at 460 (emphasis added); see also *Chavez*, 538 U.S. at 770-771 (describing *Kastigar* as creating an "evidentiary privilege") (plurality opinion); *Hubbell*, 530 U.S. at 45 (explaining that *Kastigar* requires the government to prove "that the evidence it used in obtaining the indictment and proposed to use at trial" is wholly independent of immunized testimony); *Doe*, 487 U.S. at 208 n.6 (*Kastigar*'s "prohibition of derivative use is an implementation of the 'link in the chain

of evidence' theory"). Those evidentiary protections are "commensurate with that resulting from invoking the privilege itself," *Kastigar*, 460 U.S. at 460-461, and they put a defendant "in substantially the same position as if [he] had claimed his privilege," *id.* at 458-459 (quoting *Murphy*, 378 U.S. at 79); see also *Hubbell*, 530 U.S. at 39-40 & n.22; *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 255 (1983). Petitioners' claim (Pet. 25-27) that *Kastigar* requires more cannot be reconciled with this Court's focus on evidentiary protections.

Although petitioners rely (Pet. 25, 28) on broad language in *Kastigar* indicating that the Fifth Amendment prohibits the government from using compelled testimony "in *any* respect," 406 U.S. at 453, this Court has already recognized that that statement cannot be "taken literally." *United States* v. *Apfelbaum*, 445 U.S. 115, 120 n.6 (1980). In *Apfelbaum*, the Court held that the Amendment does not require the government to treat a defendant who had been compelled to testify under a grant of immunity as if he had remained silent, and it thus allowed the government to use the truthful aspects of compelled testimony to prove the falsity of other aspects in a perjury prosecution. *Id.* at 124-128; see *id.* at 125 ("This Court has never held * * * that the Fifth Amendment requires immunity statutes to preclude all uses of immunized testimony."); *id.* at 125-126 (the Fifth Amendment does not require a "'but for' analysis" in determining whether compelled testimony was impermissibly used).

In *Chavez*, six Justices recently agreed that the "core of the guarantee against compelled self-incrimination is the exclusion of any [self-incriminating] evidence" in a criminal case. 538 U.S. at 777 (Souter, J., concurring, joined by Breyer, J.); see *id.* at 772 (four-justice plural-

ity opinion). Justice Souter parted company with the plurality on whether that "core" right to exclude incriminating evidence provided the Amendment's only protection; in his view, the Court in its "discretionary judgment" may also fashion rules that are "outside the Fifth Amendment's core" but provide "complementary protection." *Id.* at 777-778. Even in that view, however, such rules are "in aid of the [Fifth Amendment's] privilege against *evidentiary* use." *Id.* at 778 (emphasis added). That reasoning, again, refutes petitioners' reading of this Court's Fifth Amendment jurisprudence, because a rule prohibiting nonevidentiary use of a compelled statement is neither necessary to, nor in aid of, the core guarantee against evidentiary use.

3. Consistent with the foregoing, most of the courts of appeals that have addressed the question have rejected *Kastigar* challenges based on various claims of nonevidentiary use. See *United States* v. *Velasco*, 953 F.2d 1467, 1474 (7th Cir. 1992) ("[T]he mere tangential influence that privileged information may have on the prosecutor's thought process in preparing for trial is not an impermissible 'use' of that information."); accord *United States* v. *Montoya*, 45 F.3d 1286, 1295-1296 (9th Cir.), cert. denied, 516 U.S. 814 (1995); *United States* v. *Schmidgall*, 25 F.3d 1523, 1529 (11th Cir. 1994); *United States* v. *Rivieccio*, 919 F.2d 812, 815-816 (2d Cir. 1990), cert. denied, 501 U.S. 1230 (1991); *United States* v. *Serrano*, 870 F.2d 1, 17-18 (1st Cir. 1989); *United States* v. *Mariani*, 851 F.2d 595, 600 (2d Cir. 1988), cert. denied, 490 U.S. 1011 (1989).[9]

[9] Contrary to petitioners' contention (Pet. 20-21), the Seventh Circuit in *United States* v. *Cozzi*, 613 F.3d 725 (2010), cert. denied, 131 S. Ct. 1472 (2011), did not retreat from its holding in *Velasco*, but instead reaffirmed it and rejected the contention that *Velasco*'s "view of *Kastigar*

The court of appeals here found that, "at least as to decisions to indict," it would "join those circuits refusing to find such decisions vulnerable on the ground of links to immunized statements." Pet. App. 17a-18a. Despite petitioners' assertions (Pet. 16-24), no square split in the circuits, or with state courts of last resort, exists with respect to a prosecutor's nonevidentiary use of a compelled statement in the course of making a decision to seek indictment.

a. The Eleventh and Ninth Circuits have expressly addressed *Kastigar*'s applicability to prosecutorial decisions to seek indictment. In *United States* v. *Byrd*, 765 F.2d 1524 (1985), the Eleventh Circuit held that "*Kastigar* [does not] require a court to inquire into a prosecutor's motives in seeking indictment," and a contrary rule would "negat[e] the plain import of *Kastigar* that * * * 'the Fifth Amendment allow[s] the government to prosecute using *evidence* from legitimate independent sources.'" *Id.* at 1530-1531 (quoting *Kastigar*, 406 U.S. at 461) (emphasis supplied by *Byrd*); see *id.* at 1530 ("So long as all the evidence presented to the grand jury is derived from legitimate sources independent of the defendant's immunized testimony, and the grand jury finds that independent evidence sufficient to warrant the return of an indictment, the defendant's privilege against self-incrimination has not been violated."); see also *Schmidgall*, 25 F.3d at 1529 ("[T]his Circuit has adopted the 'evidentiary' interpretation of *Kastigar*," focusing "on the direct and indirect evidentiary uses of immunized testimony, rather [than] on non-evidentiary matters such as the exercise of prosecutorial discretion.").

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immunity" had been "upset" by this Court's decision in *Hubbell*. *Id.* at 729, 732.

In *Montoya*, *supra*, the Ninth Circuit found no *Kastigar* violation where an Assistant U.S. Attorney considered the falsity and incompleteness of immunized testimony in seeking permission from the Attorney General to indict and included excerpts of the immunized testimony in his request. 45 F.3d at 1296-1297; see also *id.* at 1297 ("*Kastigar* made no mention of any burden on the government to erect an impenetrable barrier between the prosecutors who hear or read the immunized testimony and those who decide to indict, even though the potential problem was an obvious one.") (quoting *Byrd*, 765 F.2d at 1530).

b. Long before those decisions, the Eighth Circuit had suggested that all nonevidentiary use violates *Kastigar*, see *United States* v. *McDaniel*, 482 F.2d 305, 311-312 (1973) (noting district court "failed to consider the immeasurable subjective effect" that reading immunized grand-jury testimony had on prosecutor's trial preparation; prohibited nonevidentiary use "could conceivably include assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy"), and the Third Circuit later cited that suggestion with approval, see *United States* v. *Semkiw*, 712 F.2d 891, 895 (1983); *United States* v. *Pantone*, 634 F.2d 716, 720-721 (1980). Those cases, however, did not focus on decisions to seek indictments. See *Semkiw*, 712 F.2d at 895 (evaluating whether prosecutor's access to testimony affected "the preparation and conduct of the trial"); *Pantone*, 634 F.2d at 721 (noting that whether "access to immunized information may * * * [have] subliminally affect[ed] decisions to prosecute[] is not * * * in issue here"); *McDaniel*, 482 F.2d at 311-312 (finding that the United

States Attorney's "preparation and trial of the case" could have been affected by his pre-indictment exposure to the defendant's immunized statements).

That distinguishes those cases from the decision below, which did not attempt to resolve the issue of nonevidentiary use as a general matter, but addressed only prosecutors' "decisions to indict." Pet. App. 17a. Such decisions are, of course, a discretionary matter within the "special province" of prosecuting authorities. *Heckler* v. *Chaney*, 470 U.S. 821, 832 (1985); see *Wayte* v. *United States*, 470 U.S. 598, 607 (1985) ("[T]he decision to prosecute is particularly ill-suited to judicial review."); *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978) ("[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute * * * generally rests entirely in his discretion."); see also *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996). That unique consideration—which was absent from *McDaniel*, *Semkiw*, and *Patone*—expressly informed the decision below. See Pet. App. 17a (inquiring into a prosecutor's motives in seeking indictment "would entangle the court in what has hitherto normally been internal prosecutorial decision-making").

Notwithstanding the cases petitioners cite, the Eighth and Third Circuits would not necessarily accept petitioners' claims. *McDaniel*, which was decided in 1973, characterized *Kastigar* as proscribing "any use" of immunized testimony, 482 F.2d at 311, a broad reading that is difficult to reconcile with this Court's later recognition that such statements in *Kastigar* cannot be "taken literally." See p. 20, *supra*. More importantly, the Eighth Circuit has since observed that "*McDaniel* is a case limited to its unusual circumstances." *United*

*States* v. *McGuire*, 45 F.3d 1177, 1183 (internal quotation marks omitted), cert. denied, 515 U.S. 1132 (1995). And petitioners correctly do not attempt to equate their circumstances to those in *McDaniel*.[10]

In *Semkiw*, the Third Circuit was concerned that the government had granted immunity simply to gain a tactical advantage over the defendant by subjecting him to what effectively amounted to a pretrial deposition. See 712 F.2d at 892-893, 895. Notably, the court's list of possible impermissible nonevidentiary uses did not include *McDaniel*'s reference to "deciding to initiate prosecution" (482 F.2d at 311). See *Semkiw*, 712 F.2d at 895. And *Semkiw* also relied in part on a provision of the *U.S. Attorneys' Manual* that is no longer in effect.[11] In *Pantone*, the Third Circuit recognized that *McDaniel* had

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[10] The unusual circumstances in *McDaniel* arose because the U.S. Attorney had read three volumes of the defendant's state-grand-jury testimony without knowing it had been given under a grant of immunity and the question of taint was addressed only after trial. 482 F.2d at 311. The court concluded that, because the prosecutor "could have perceived no reason to segregate McDaniel's testimony from his other sources of information," that testimony "could not be wholly obliterated from the prosecutor's mind in his preparation and trial of the case." *Id.* at 311-312.

[11] See *Semkiw*, 712 F.2d at 895 (explaining that government "need have looked no further for guidance than its own" manual, which the court quoted as requiring a Justice Department lawyer who wished to prosecute a previously immunized witness to explain how he or she would show that no "'non-evidentiary' use has been or will be made of the compelled testimony"). The relevant passage in the *U.S. Attorneys' Manual* no longer refers to "non-evidentiary" use, but instead requires a request to prosecute to explain how "the government will be able to establish that the evidence it will use against the witness will meet the government's burden under *Kastigar* v. *United States*, 406 U.S. 441 (1972)." *U.S. Attorneys' Manual* § 9-23.400, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/23mcrm.htm#9-23.400.

articulated an "expansive definition of use" of immunized testimony, 634 F.2d at 721; it found no constitutional violation when a prosecutor, while preparing for a retrial, had access to immunized statements that had been taken after an earlier trial, *id.* at 720-723. Even "positing" that the prosecutor might gain "a degree of psychological confidence" from the self-incriminating statements that "he might otherwise lack," the court held that, despite "*Kastigar*'s total prohibition of the use of the immunized testimony," any "imperceptibl[e] [e]ffect" on the second trial would not "rise[] to the level of constitutional significance." *Id.* at 722.

c. Petitioners briefly address (Pet. 19-20) what they call "a third position" on "nonevidentiary use of compelled statements." By their own reckoning, however, the courts in that category—the First, Second, Seventh, and Ninth Circuits—"have not addressed whether, and if so at what point, nonevidentiary use reaches a tipping point where it is prohibited by *Kastigar*." Pet. 19. Petitioners also note that the Fourth Circuit has not found it necessary to address nonevidentiary use, even though it recognized "division among the circuits" 20 years ago. Pet. 20 n.4 (citing *United States* v. *Harris*, 973 F.2d 333, 337 n.2 (1992)). Courts that fail to address the relevant question can scarcely be in conflict with those that have.

Accordingly, the decades-old statements on which petitioners rely do not establish a direct conflict in the courts of appeals—much less a live one warranting this Court's review—with respect to how *Kastigar* should apply to immunized statements that may affect a prosecutor's discretionary decision to seek indictment.

d. As petitioners acknowledge (Pet. 23), none of the state cases that they cite involved a prosecutor's decision to seek indictment, which also precludes them from

being in direct conflict with the decision below. In *State* v. *Jackson*, 927 N.E.2d 574 (Ohio 2010), the court found that *Kastigar* had been violated in two ways, neither of which involved a decision to seek indictment: first, the police lieutenant who elicited the defendant's *Garrity* statement (and who also interviewed a potential witness identified by the defendant) testified in the grand jury, *id.* at 576-577, 579-580; and, second, the prosecutor who tried (but did not indict) the case reviewed the *Garrity* statement which, in the court's view, gave him "an impermissible advantage in trial preparation." *Id.* at 580. In *State* v. *Vallejos*, 883 P.2d 1269 (N.M. 1994), although the court stated generally that *Kastigar* prohibits nonevidentiary use, *id.* at 1274, the case itself involved only evidentiary use. See *id.* at 1276-1277 (where trial witness changed his account of events after hearing defendant's immunized statements, government failed to show that it did not make indirect evidentiary use of the statements). Similarly, while the court in *State* v. *Strong*, 542 A.2d 866 (N.J. 1988), stated (wrongly) that a "majority of jurisdictions agree that if a prosecutor actually uses immunized testimony as the basis for his trial strategy, then the result of this must be voided," *id.* at 877, and suggested that such use may have occurred, the court remanded principally for consideration of whether a trial witness had been motivated to testify based on his knowledge of the defendant's immunized statements. *Id.* at 875-877. That, of course, would be a prohibited *evidentiary* use. See, *e.g.*, *United States* v. *Hylton*, 294 F.3d 130, 134 (D.C. Cir. 2002).[12]

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[12] The other state-court cases petitioners cite (Pet. 22-23) as rejecting *McDaniel*'s bar on nonevidentiary use also did not involve the potential "use" of immunized testimony in the decision to indict. See *State* v.

4. Citing various state constitutional provisions and immunity statutes, petitioners contend (Pet. 28-31) that this Court's review is necessary to provide a "[u]niform construction of use immunity principles." But while the Fifth Amendment provides the constitutional minimum of protection for the right against self-incrimination—and *Kastigar* requires that any immunity statute proscribe use and derivative use of a compelled statement in a criminal case—States remain free to provide greater protections, and a number of them have done so. The self-incrimination provisions in some state constitutions have been held to require the government to provide a witness with transactional immunity when it compels the witness to give incriminating statements. See, *e.g.*, *State* v. *Thrift*, 440 S.E.2d 341, 350-351 (S.C. 1994); *State* v. *Gonzalez*, 853 P.2d 526, 531-533 (Alaska 1993); *Wright* v. *McAdory*, 536 So. 2d 897, 903-904 (Miss. 1988); *State* v. *Soriano*, 684 P.2d 1220, 1232-1234 (Or. Ct. App.), aff'd, 693 P.2d 26 (Or. 1984); *Attorney Gen.* v. *Colleton*, 444 N.E.2d 915, 920-921 (Mass. 1982); *State* v. *Miyasaki*, 614 P.2d 915, 923-924 (Haw. 1980). And as petitioners' own survey demonstrates (Pet. 29 n.11), many States have also adopted statutes requiring that an immunized witness be accorded full transactional immunity from prosecution. See also, *e.g.*, *State* v. *Ely*, 708 A.2d 1332, 1339-1340 (Vt. 1997) (finding that state immunity statute extends to both evidentiary and nonevidentiary use of immunized testimony); *State* v. *Gertz*, 918 P.2d 1056, 1061-1062 (Ariz. Ct. App. 1996) (declining to "linger over the conflict in the federal case law" about nonevidentiary use, because state immunity statute

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*Koehn*, 637 N.W.2d 723, 728-729 (S.D. 2001); *State* v. *Beard*, 507 S.E.2d 688, 698 (W. Va. 1998).

clearly proscribes it). Indeed, in *Murphy*, the State had provided transactional immunity, but this Court decided that federal prosecution of the immunized witness was permissible as long as federal authorities provided use and derivative-use immunity. 378 U.S. at 53, 77-79 & n.18. If States choose to provide defendants with protections against nonevidentiary use of compelled statements, they are free to do so. The Constitution does not speak to that issue, and this Court has no need to address such issues of state law.

5. Petitioners contend (Pet. 32-33) that this case "presents an ideal vehicle" for deciding whether *Kastigar* applies to a prosecutorial charging recommendation, because they say the evidence "is stark and incontrovertible" that petitioners' compelled statements were "significant[ly] use[d]" in the charging decision here. They are incorrect.

The court of appeals did not address the district court's factual findings that the prosecutors' exposure to Heard's and Ball's statements played a "central role" in the decision to charge them, because it erroneously stated that "the government [did] not challenge the factual finding on the decision to indict." Pet. App. 17a. In fact, those findings are very much in dispute; the government expressly argued in the court of appeals that they are clearly erroneous. See Gov't C.A. Br. 106-112; Gov't C.A. Reply Br. 50-55; see also Pet. C.A. Br. 48, 113-121 (acknowledging that government "challenges the district court's findings" with respect to the charging decision and arguing that the district court did not clearly err). As the record shows, by the time the prosecutors were exposed to the immunized statements of petitioners Heard and Ball, they already knew from independent sources (the Iraqi witnesses and other Raven

23 guards)

. See Gov't C.A. Br. 13, 15, 71-72.[13]

Petitioners invoke (Pet. 32) the district court's discussion of references to Heard's compelled statements in early drafts of the prosecution memorandum. But the district court erred by failing to conduct the analysis necessary to determine whether those statements actually affected the charging decision. See, *e.g.*, Pet. App. 12a-13a (under *Kastigar*, a district court must determine the "net effect" of immunized testimony on "any circumstance" claimed to have been affected by the testimony); *United States* v. *Ponds*, 454 F.3d 313, 328-329 (D.C. Cir. 2006) (where "some impermissible [*Kastigar*] use occurred," the central question is whether the same outcome would have been obtained without it). Those

[13] Courts have recognized that, where the government—as here—can prove that it had prior knowledge of the evidence contained in a defendant's compelled statement, or that the compelled testimony is not useful to its case, any further inquiry into nonevidentiary use is of scant value. See, *e.g.*, *Mariani*, 851 F.2d at 600 (prosecutor's prior knowledge of substantially all the information in immunized testimony forecloses the possibility that he used it); *United States* v. *Crowson*, 828 F.2d 1427, 1432 (9th Cir. 1987) (where government can prove prior, independent source for its evidence, "the non-evidentiary purposes of trial strategy, etc., would seemingly have been developed anyway"), cert. denied, 488 U.S. 831 (1988); cf. *United States* v. *Daniels*, 281 F.3d 168, 182 (5th Cir.) (prosecutors' exposure to immunized testimony did not prejudice defendant, where testimony contained no relevant information not independently available), cert. denied, 535 U.S. 1105 (2002); *McGuire*, 45 F.3d at 1183 ("[I]mmunized testimony which merely confirms information previously known to government agents from independent sources does not preclude prosecution.") (citation omitted).

statements were deleted from the draft memorandum before the final version was sent to decisionmakers (with a notation that the "prosecution recommendation" was based "on the other evidence in the case"), and no mention of Heard's statements was made in the grand jury itself. Gov't C.A. Br. 106-110. Given the strength of other evidence against Heard—

—the government has reasonably explained that Heard would have been charged and indicted even if the prosecutors had never seen his statements.

With respect to petitioner Ball, the district court's decision was based on its finding that the investigators' seeing a draft of Ball's written statement prompted the charging decision because that draft provided the only "new evidence" against him. Pet. App. 122a-123a. But that assumption lacked support in the record.

Gov't C.A. Br. 111; see *Ponds*, 454 F.3d at 324 (the "critical inquiry" under *Kastigar* "is whether the government can show it had * * * prior knowledge" of immunized information) (citation and internal quotation marks omitted). As a result, Ball's statement contained nothing "new."

Thus, in addition to the interlocutory nature of this case, and its failure to present a question implicating a square conflict in the lower courts, the disputed factual findings about the charging decision make it a poor vehicle for this Court's review of the question presented. Even if petitioners were to prevail in this Court, the court of appeals would still need to determine on remand

whether Heard's and Ball's statements were used in making the charging decision. If it concluded that the district court clearly erred, petitioners themselves would not be able to prevail on the legal claim they press in this Court.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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