

IN THE SUPREME COURT OF OHIO
COLUMBUS, OHIO

STATE OF OHIO,

Plaintiff-Appellant,

-vs-

ANTHONY JACKSON

Defendant-Appellee.

Case No.

08-1499

On Appeal from the Court of
Appeals for Stark County,
Fifth Appellate District

Court of Appeals
Case No. 2007 CA 00094

MEMORANDUM IN SUPPORT OF JURISDICTION
OF PLAINTIFF-APPELLANT,
STATE OF OHIO

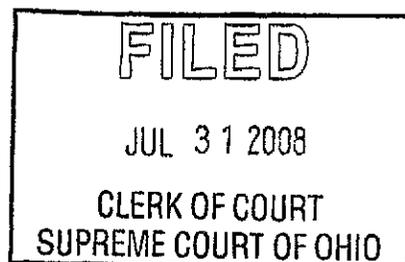
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OPINION filed June 16, 2008
State of Ohio v. Anthony Jackson, Stark App. No.
2007 CA 00274, 2008-Ohio-2944

State v. Jackson, Stark County Court of
Common Pleas, Case No. 2006-CR-1022, Judgment
Entry dismissing Indictment, Sept. 10, 2006

**EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC
OR GREAT GENERAL INTEREST AND INVOLVES A
SUBSTANTIAL CONSTITUTIONAL QUESTION**

The Supreme Court of Ohio should accept this case for review because the appellate ruling below jeopardizes criminal prosecutions in this State of any public employee who has given a statement during an internal disciplinary investigation under the protection of *Garrity v. New Jersey*, 385 U.S. 493 (1967) (holding that the government may not exact a statement from a public employee under threat of discipline, and then use that statement against the public employee in criminal proceedings.). This ruling arose when Canton police officer, Anthony Jackson, the appellee here, was indicted on charges of illegal possession of a firearm in liquor permit premises. Jackson also made a statement to the internal affairs division of the Canton Police Department (IA) and was accorded immunity protection under *Garrity*. The Fifth District Court of Appeals [Stark County] ruled that the trial prosecutor was not permitted to obtain or read the IA file. The effect of the ruling and the unique remedy fashioned by the appellate court forbids the prosecutor from obtaining the internal affairs file of a public employee-defendant even if no use is made of it. In other words, mere exposure is enough to taint the criminal prosecution.

This Court has not considered a similar issue for eighteen years. In *State v. Conrad*, (1990), 50 Ohio St.3d 1, 552 N.E.2d 214, this Court reviewed the use of statements made by a public official to a grand jury that were immune under R.C. 101.44 and subsequently used by the state to prosecute that public official for complicity to commit bribery and perjury. The *Conrad* Court held that the prosecutor may not compel testimony of a public official before a grand jury that is granted immunity and then base an indictment on the compelled testimony:

Where, in obtaining an indictment from the grand jury, the prosecution uses compelled testimony of a witness immunized pursuant to R.C. 101.44 and where the right of immunity accorded such compelled testimony has not been waived by the witness under the guidelines set forth in R.C. 101.44, any indictment issued against the witness as a result of such grand jury proceeding must be dismissed. *Kastigar v. United States* (1972), 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed. 2d 212, and *New Jersey v. Portash* (1979), 440 U.S. 450, 99 S.Ct. 1292, 59 L.Ed.2d 501, followed).

Conrad, supra, at syllabus

The Fifth District Court of Appeals [Stark County] here interpreted the holding of *Conrad* and *Kastigar* to mean that the prosecutor's knowledge of an immunized statement, in this case a *Garrity* statement of a police officer, violated state and federal law simply because the State was exposed to the internal affairs file including the *Garrity* statement during the course of a criminal proceeding against him. Citing *Conrad* and *Kastigar*, the court of appeals held the prosecutor did not affirmatively prove that evidence it intended to use in Jackson's trial was not derived from a source wholly independent of compelled testimony. Yet, it pointed to no evidence derived from Jackson's *Garrity* statement the prosecutor intended to use. Instead, it determined that a *Garrity* violation occurred when the prosecutor obtained the internal affairs file. Adopting the premise of the trial court, the court of appeals found that "non-evidentiary use" of a *Garrity* statement was a *Garrity* violation. The effect of this ruling, if allowed to stand, will preclude prosecutors, at least in the jurisdiction of this appeals court, from obtaining the *Garrity* statement of a police officer during a criminal prosecution even though there is no evidence the contents of the *Garrity* statement will be used in the criminal proceedings and the prosecution is wholly based on sources independent of the *Garrity* statement. This decision undermines the meaningful internal affairs investigatory process contemplated by this Court in

Jones v. Franklin Cty. Sheriff (1990), 52 Ohio St.3d 40, 555 N.E.2d 940 as well as effective criminal prosecution of the offending public employee.

The appellate court's decision is wrong since it expands the holdings of *Conrad*, *Garrity* and *Kastigar* to forbid a prosecutor from ever obtaining a statement made by a defendant-public employee in the course of a *Garrity* interview. The United States Supreme Court and this Court never contemplated the treatment that the court of appeals here gave to an indicted public employee - that mere exposure to the *Garrity* statement of a public employee by the prosecutor violates *Garrity* and its progeny. This Court should accept this case for review to clarify its *Conrad* holding with regard to immunized statements made by public employees and their impact on subsequent criminal prosecutions.

The ruling of the court of appeals is troubling in another respect that merits this Court's attention. After finding that indeed a *Garrity* violation had occurred, it reinstated the indictment fashioning a remedy that was, at best, creative and at worst beyond the scope of its authority. It purged the prosecutor's file of the *Garrity* statement, the entire internal affairs file and any references to a witness whose name was obtained from the defendant - a man who supported the defendant's story and who the prosecutor had no intention of calling at trial.

Not stopping there, the court of appeals ordered the trial court to appoint a visiting prosecutor outside of Stark County to prosecute the matter and excluded the internal affairs investigator as a witness saying, "[W]e find the appropriate remedy is to purge appellant's file of appellee's *Garrity* statement, the entire internal affairs file, and any references to Mr. Van. In addition, we order the exclusion of Lieutenant Davis as a witness. Further, we order the trial court to appoint a visiting prosecutor from outside of Stark County to try the matter." *State v.*

Jackson, Stark App. No. 2007CA00274, 2008-Ohio-2944 ¶37. Therefore, this Court should accept this case for review because the court of appeal has usurped the authority of the prosecutor. The court of appeals has no authority to order the trial court, not the duly elected prosecutor, to appoint a special prosecutor outside of the county to try the matter and only after the file has been purged of documents and witnesses it deems violative of *Garrity*?

This case has implications beyond simply the parties involved as evidenced by the interest of amicus - the Cities of Canton and Massillon, the Buckeye State Sheriff's Association, the Ohio Prosecuting Attorneys' Association and the Ohio Municipal League.

This court should accept this case for review and reverse the decision of the Fifth District Court of Appeals.

STATEMENT OF THE CASE AND FACTS

While Canton police officer, Anthony Jackson, was on administrative leave as the result of pending criminal charges for driving a motor vehicle while under the influence of alcohol or drugs, leaving the scene of an accident and failing to control his vehicle, he decided to carry his loaded .40 caliber Glock handgun into Lew's Tavern, a Class D liquor establishment in Perry Township, Ohio. As a result of a "fight call," Patrolman John Roethlisberger of the Perry Township Police Department was dispatched. Two persons were involved in the fight - Jackson and Tony L. Vail. Roethlisberger investigated and took statements from several witnesses and Jackson. Roethlisberger noted and Jackson admitted to carrying a loaded firearm into the tavern. No arrests were made that night, but Jackson's firearm was taken by the Township police. Roethlisberger's report and narrative supplement were forwarded to the Massillon Law Director. About two weeks later, a formal complaint was filed in the Massillon Municipal

Court charging Jackson with carrying a firearm into a Class D liquor establishment, a violation of R.C. 2923.121(A), a felony of the fifth degree. The Massillon Municipal Court found probable cause and bound the case over to the Stark County Grand Jury.

Meanwhile, the Internal Affairs Division (IA) of the Canton Police Department launched its own investigation and in a letter from Lieutenant D. Davis, Jackson was ordered to appear for an interview. Jackson appeared for the interview with his attorney and was promised that none of the interview would be used against him in a court of law - "neither your self-incriminating statements nor the fruits of any self incriminating statements you make will be used against you in any criminal proceedings." The warnings given to Jackson were based on *Garrity v. New Jersey*, 385 U.S. 493 (1967) (holding that the government may not exact a statement from a public employee under threat of discipline, and then use that statement against the public employee in criminal proceedings). Jackson then gave a statement to Internal Affairs consisting of little more than the explanation he gave to Township police who filed the complaint. The only nugget of new information provided by Jackson was the name of a witness - Vince Van - who was then interviewed by IA. Van was a witness favorable to Jackson.

The Stark County Grand Jury indicted Jackson on one count of illegal possession of a firearm in liquor permit premises, a violation of R.C. 2923.121(A), a fifth degree felony. In issuing the indictment, the grand jury did not hear any of the contents of Jackson's *Garrity* statement. In other words, the *Garrity* statement was not used in any evidentiary capacity in obtaining the indictment. And the only witness name provided by Jackson, Vince Van, did not testify before the grand jury.

Jackson was arraigned on the charges in the indictment accompanied by the same

attorney who witnessed his *Garrity* statement and pleaded not guilty. His case was assigned to a prosecutor not involved in the grand jury proceeding. The trial prosecutor obtained the IA file from the City of Canton which included Jackson's *Garrity* interview. Jackson requested and received discovery from the State including a written summary of oral statements made by Jackson to law enforcement officials. A series of continuances and an unsuccessful motion to dismiss based on a federal preemption argument followed.

Finally, some two weeks before trial, Jackson filed a motion to dismiss the indictment and for the first time alleged a *Garrity* violation arguing the state "improperly utilized the fruits of the Canton Police Department's Internal affairs investigation and as a result Defendant was unable to obtain a fair trial and/or due process of law." This motion was the *turning point* for Jackson. Again, the trial court continued Jackson's trial and set the motion for an evidentiary *Kastigar* hearing. *Kastigar v. United States*, 405 U.S. 441, 460 (1972) ("Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecutions, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." citation omitted).

Patrolman Roethlisberger was called as a witness at the *Kastigar* hearing and testified to the events that night, including his knowledge that Jackson carried his loaded firearm into Lew's Tavern, a liquor establishment.

At the hearing, the grand jury transcript was reviewed by the trial court and the parties. The transcript revealed that Jackson's *Garrity* statement was not used to obtain the indictment, but rather the indictment was obtained through independent sources - the testimony of the

Township police and some witnesses who were present at the tavern that night. But Jackson would not be swayed and continued to urge the court to consider a *Garrity* violation - this time because the prosecutor's knowledge of the *Garrity* statement could influence his trial strategy.

The trial court took the motion to dismiss the indictment under advisement and about a month later issued a judgment entry granting Jackson's motion to dismiss. Admitting that Jackson's *Garrity* statement was not used by the state during the grand jury proceeding, the trial court found the "non-evidentiary use" of the statement and internal affairs investigation troubling, saying [I]t is the 'derivative use' or the 'non-evidentiary use' of that information which poses a problem in this matter." The trial court took exception to the prosecutor's knowledge of Jackson's *Garrity* statement, saying [I]n that statement the State learned the defendant's actions of the 30th of May, his reasons for being at Lew's and his account of the events and possible defenses to the charge. Through witness statements, the prosecution had information to discredit any defense the Defendant may have had. Am not able to aptly describe the effect all this information had on the right of this Defendant to present a factual defense to the charges against him. However, I do know that it is extremely favorable to the State and extremely unfavorable to the Defense."

Finally, the trial court concluded that an appropriate remedy for the prosecutor's exposure to Jackson's *Garrity* statement was not suppression but dismissal of the indictment, finding the matter capable of determination without a trial on the merits.¹

The State appealed the ruling of the trial court challenging both the dismissal of the

¹*State v. Jackson*, Stark County Common Pleas Court, Case No. 2006CR1022, Judgment Entry, Sept. 10, 2006 at 14-17, Appendix.

indictment as the appropriate remedy and the finding of a *Garrity* violation. The State argued that it had met its *Kastigar* burden by demonstrating that the evidence it proposed to use at Jackson's trial was derived from a legitimate source wholly independent of his *Garrity* statement or the fruits thereof. The Fifth District Court of Appeals [Stark County] affirmed in part and reversed in part. The court of appeals agreed with the trial court that a *Garrity* violation had occurred saying "[W]e concur with the trial court's determination that the first prong of *Kastigar* has not been met: 'the government must deny *any* use of the accused's own immunized testimony against him or her in a criminal case.' *Conrad*, supra. The state cannot deny the use of appellee's immunized statement in the criminal case....Upon review, we concur with the trial court's analysis of a *Garrity* violation." *State v. Jackson*, supra, at ¶30.

Yet, the appeals court did not agree with dismissal of the indictment saying [W]e understand the trial court's angst, but conclude the dismissal of the indictment was not the appropriate remedy. We so find because the information garnered from appellee's *Garrity* statement was not used to procure the indictment as in *Conrad*." *State v. Jackson*, supra, at ¶35. With that, the appeals court fashioned a convoluted and exacting remedy - purge the prosecutor's file of the internal affairs investigation, forbid the prosecutor from calling Lieutenant Davis as a witness and order the trial court to appoint an out of county prosecutor to conduct the Jackson trial. *State v. Jackson*, supra, at ¶37.

The State submits that the court of appeals erred in finding a *Garrity* violation. And the State, while agreeing with the court of appeals that the indictment should be reinstated, submits that the remedy ordered is not proper under the law.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

PROPOSITION OF LAW: WHEN A PUBLIC EMPLOYER COMPELS AN EMPLOYEE TO GIVE A STATEMENT UNDER THREAT OF REMOVAL FROM OFFICE, *Garrity v. New Jersey*, 385 U. S. 493 (1967) PROHIBITS THE DIRECT OR DERIVATIVE USE OF THE STATEMENT IN A SUBSEQUENT CRIMINAL TRIAL, BUT IT DOES NOT PROHIBIT A PROSECUTOR'S KNOWLEDGE, OR "NON-EVIDENTIARY" USE OF IT.

Jackson was charged by indictment with one count of illegal possession of a firearm in liquor permit premises in violation of R.C. 2923.121(A), a felony of the fifth degree. That charge required the state to prove that Jackson possessed a gun in a facility that had a Class D liquor permit. These facts are not in dispute and can be demonstrated independent of Jackson's *Garrity* statement. Jackson himself admitted to Patrolman Roethlisberger, who answered the fight call that night that he was carrying a gun. In fact, Jackson gave the gun to Roethlisberger that evening. And the fact that Lew's Tavern held the requisite permit is also not disputed.

Yet, this case has taken a turn from these simple facts because the defendant is a public employee - a police officer. Now, the center of this case is the United State Supreme Court's holdings in *Garrity v. New Jersey*, 384 U.S. 493 (1967) and *Kastigar v. United States*, 406 U.S. 441 (1972). The appeals court below found that the prosecutor's mere exposure to Jackson's internal affairs file tainted the criminal prosecution to such an extent that it required a purging of the entire internal affairs file and the appointment of a special out of county prosecutor.

What is more, the next time that a police officer commits a criminal act in this jurisdiction, the police department must withhold an IA investigation or the prosecutor is forbidden to even look at the IA file during the criminal prosecution. Such a result is not contemplated by *Garrity*, *Kastigar* and its progeny. With the exception of one rogue case

relied upon by the court, no court has ever gone to the lengths of the appellate court here in holding that a prosecutor cannot even look at a defendant's *Garrity* statement.

In *Garrity*, certain officers were questioned as part of an investigation into the alleged fixing of traffic tickets. Before being questioned, they were warned that their statements could be used against them in any state criminal proceeding and that they had the right to refuse to answer if the disclosure would tend to incriminate them, but that if they refused to answer they would be subject to removal from office. The officers answered the questions and, because immunity had not been granted, some of their statements were used against them in subsequent criminal prosecutions. The officers were convicted. They challenged their convictions arguing that their statements were coerced because if they had refused to answer they could have lost their positions with the police department. The officers appealed their convictions to the United States Supreme Court. The Court concluded that the officers' statements were coerced stating:

The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent. We think the statements were infected by the coercion inherent in this scheme of questioning and cannot be sustained as voluntary under our prior decisions.

Garrity, 384 U. S. at 497-498.

The Court reversed the convictions, holding that "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceeding of statements obtained under threat of removal from office." *Id* at 500.

Since *Garrity*, courts have applied it to mean that neither the statements nor the fruits of those statements can be used in a subsequent criminal prosecution of a public employee.

In *Kastigar v. United States*, supra, the Court held that the prosecution has the burden of proving affirmatively that evidence proposed to be used is derived from a source wholly independent of compelled testimony.

In the aftermath of *Garrity* and *Kastigar*, courts particularly view as suspect the use of *Garrity* or immunized statements in the grand jury proceeding to obtain an indictment. This Court considered just this issue in *State v. Conrad*. There, the finance director of the Ohio Democratic Party was involved in an Ohio Senate investigation of illegal solicitation of public funds. As a result, she appeared as a witness before the Ohio Senate's judiciary committee. Franklin County prosecutors attended those Senate Hearings, took detailed notes and later obtained transcripts of defendant's testimony before the Committee. Later, defendant was subpoenaed to testify before the grand jury and made three appearances. The prosecutor who attended the Senate Committee Hearing presented the case before the grand jury and used the Senate transcript to prepare questions to ask the defendant. Not stopping there, the prosecutor used the Senate Hearing transcript to impeach her grand jury testimony, professing ignorance of R.C. 101.44 which provides a witness with use immunity for her compelled testimony before the Senate.² That same grand jury indicted defendant on six counts including complicity to commit bribery and perjury. After defendant's motion to dismiss was denied, she appealed. The court of appeals affirmed the finding of the trial court saying that the prosecutor's minimal use of the evidence during grand jury did not render the indictment invalid. This Court reversed

²R.C. 101.44 provides: Except a person who, in writing, requests permission to appear before a committee or subcommittee of the general assembly...or who, in writing waives the rights, privileges, and immunities granted by this section, the testimony of a witness examined before a committee or subcommittee shall not be used as evidence in a criminal proceeding against such witness.....

the decision of the lower court finding that a prosecutor may not use immunized testimony to obtain an indictment. *Conrad*, syllabus.

None of these cases lead to the conclusion reached by the Jackson courts here that exposure to a public official's immunized statement somehow taints the criminal prosecution when there is no evidence that the prosecutor ever intended to use the statement or its "fruits" as evidence in the case. Even the court of appeals admits that the *Garrity* statement was not used to obtain the indictment from the grand jury.

Still, the Jackson courts found especially egregious the prosecutor's knowledge of witness Vince Van, a name supplied by Jackson and completely favorable to his position. The courts suggest that such knowledge can be used in a non-evidentiary basis to influence trial strategy and cross examination. The courts took comfort in language found in *United States v. McDaniel*, 482 F. 2d 305 C. A. 8, 1973) holding that a defendant's Fifth Amendment rights were violated when the government had knowledge of defendant's immunized statements even though it was able to demonstrate that it used wholly independent sources to obtain a conviction. It was the "non-evidentiary" use that was a problem for the *McDaniel* Court - "[S]uch 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" *McDaniel*, 482 F.2d at 311.

The *McDaniel* standard has been soundly rejected. As noted in *United States v. Poindexter*, 727 F. Supp. 1488 (D. D. C., 1989), even the Eighth Circuit has abandoned the *McDaniel* holding. See also , *United States v. Serrano*, (C.A. 1, 1989), 970 F. 2d 1, 17 (holding that the *McDaniel* approach amounts to a per se rule that would in effect grant a defendant transactional immunity in contravention of *Kastigar*).

Yet, it is the *McDaniel* standard that was adopted by the Jackson courts here.

According to *Kastigar*, if the prosecutor develops the facts it intends to use to prosecute a public official wholly independent of the *Garrity* statement or its fruits, then the criminal prosecution may proceed. And that is precisely what occurred here.

Patrolman Roethlisberger of the Perry Police Department testified at the *Kastigar* hearing that he was called to the scene of Lew's Tavern on May 30, 2006 in response to a "fight call." Roethlisberger talked with witnesses and completed a police report. That report named all of the witnesses except Vince Van. Roethlisberger observed Jackson in possession of a firearm and in fact took it from him. Roethlisberger verified that Lew's Tavern held a Class D liquor permit.

Based on these facts, wholly independent of any *Garrity* statement by Jackson, the State proceeded to charge Jackson with carrying a firearm into a Class D liquor establishment, a fifth degree felony.

Moreover, no derivative use was made of Jackson's *Garrity* statement. The only witness name supplied by Jackson was Vince Van, a witness favorable to Jackson and not even named on the state's witness list. Indeed, if the trial court found any "fruits" of Jackson's *Garrity* statement were known by the prosecutor, it could have remedied the problem by ordering the state to refrain from using the statement to cross examine any witnesses including Jackson. There are a number of methods available to the trial court to limit the use of the *Garrity* statement and its fruits even if the state attempted to use it. That is precisely what is done when a trial court prohibits the use of a coerced confession. Even *Miranda* violations are subject to harmless error analysis. The prosecutor is not prohibited from prosecuting the case because he

knows of the statement. A public employee is not entitled to any greater remedy than any other defendant.

Instead, the court of appeals ordered the trial court to appoint a special prosecutor who would operate with a file purged of all IA investigation and the testimony of Lieutenant Davis. The decision of the Fifth District Court of Appeals [Stark County] should be reversed and the State's proposition of law should be accepted for review.

CONCLUSION

The State respectfully requests that this Court accept this case for review because it involves matters of public and great general interest and a substantial constitutional question. The decision of the appellate court allows police officers who may have committed criminal acts to escape criminal responsibility because of participation in administrative disciplinary investigations. Indeed, it impedes the internal affairs disciplinary process so necessary for the public trust. The dilemma the appeals court has caused is whether to proceed with an internal affairs investigation when the acts of the police officer may be cause for a criminal complaint, or if an internal affairs investigation has ensued, the prosecutor may not even look at it.

Jackson is entitled to the rights accorded him under *Garrity* and its progeny. As such, he is entitled only to be free from confrontation at a criminal trial with evidence which follows from the statements he gave at his *Garrity* hearing. At most, *Garrity* provided Jackson with use immunity. The prosecutor's exposure to Jackson's *Garrity* statement is simply not a *Garrity-Kastigar* violation where the prosecutor demonstrates that Jackson will be tried on facts wholly independent of his *Garrity* statement.

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STATE OF OHIO
Plaintiff-Appellant

-vs-

ANTHONY JACKSON
Defendant-Appellee

JUDGES:
Hon. William B. Hoffman, P.J.
Hon. W. Scott Gwin, J.
Hon. Sheila G. Farmer, J.

Case No. 2007CA00274

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Court of Common Pleas, Case
No. 2006CR1022

JUDGMENT:

Affirmed/Reversed in Part & Remanded

DATE OF JUDGMENT ENTRY:

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Farmer, J.

{¶1} On August 21, 2006, the Stark County Grand Jury indicted appellee, Anthony Jackson, on one count of illegal possession of a firearm in liquor permit premises in violation of R.C. 2923.121, a felony of the fifth degree. At the time of the incident, appellee was a Canton City police officer on administrative leave due to pending criminal charges.

{¶2} Sometime during the discovery process, appellee learned his internal affairs file and his *Garrity* statement, a statement elicited from a public employee that cannot be used in a subsequent criminal proceeding, were in the possession of appellant, the state of Ohio. On July 6, 2007, appellee filed a motion to dismiss the indictment, claiming appellant "improperly utilized the fruits of the Canton Police Department's Internal Affairs investigation." A hearing was held on August 8, 2007. By judgment entry filed September 19, 2007, the trial court granted appellee's motion, finding the "derivative use" or the "non-evidentiary use" of the information contained in the internal affairs file "poses a problem in this matter."

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶4} "THE TRIAL COURT ERRED AS A MATTER OF LAW IN DISMISSING THE INDICTMENT FOR A GARRITY VIOLATION. MERE EXPOSURE TO AN INTERNAL AFFAIRS FILE BY THE PROSECUTOR WAS NOT A GARRITY VIOLATION."

II

{¶5} "THE TRIAL COURT ERRED AS A MATTER OF LAW IN DISMISSING THE INDICTMENT AND NOT CONSIDERING EVIDENTIARY METHODS TO HANDLE THE ALLEGED *GARRITY* VIOLATIONS."

I, II

{¶6} Appellant claims the trial court erred in dismissing the indictment for a *Garrity* violation, and in not considering evidentiary methods to handle the alleged violation. We agree in part.

GARRITY VIOLATION

{¶7} In *Garrity v. New Jersey* (1967), 385 U.S. 493, the United States Supreme Court reviewed a case wherein police officers being investigated were given the choice to either incriminate themselves or forfeit their jobs under a New Jersey statute dealing with forfeiture of employment, tenure, and pension rights of persons refusing to testify based on self-incrimination grounds. The officers chose to make confessions, and some of their statements were used to convict them in subsequent criminal proceedings. The officers argued their confessions were coerced because if they failed to cooperate, they could lose their jobs. In answering the question as to "whether a State, contrary to the requirement of the Fourteenth Amendment, can use the threat of discharge to secure incriminatory evidence against an employee," the *Garrity* court held the following at 500:

{¶8} "We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal

proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic."

{¶9} Five years later, the United States Supreme Court in *Kastigar v. United States* (1972), 406 U.S. 441, 442, reviewed the following question:

{¶10} "[W]hether the United States Government may compel testimony from an unwilling witness, who invokes the Fifth Amendment privilege against compulsory self-incrimination, by conferring on the witness immunity from use of the compelled testimony in subsequent criminal proceedings, as well as immunity from use of evidence derived from the testimony."

{¶11} The *Kastigar* court at 460 held the following:

{¶12} "'Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.' [*Murphy v. Waterfront Commission of New York Harbor* (1964)] 378 U.S. [52], at 79 n. 18, 84 S.Ct., at 1609.

{¶13} "This burden of proof, which we reaffirm as appropriate, is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony."

{¶14} In *State v. Conrad* (1990), 50 Ohio St.3d 1, 4, the Supreme Court of Ohio followed the *Kastigar* holding and stated the following:

{¶15} "In *Kastigar*, the United States Supreme Court dealt with an immunity statute similar to R.C. 101.44, viz., Section 6002, Title 18, U.S.Code, and reviewed its constitutionality with respect to the Fifth Amendment protection against self-incrimination. Therein, the court essentially held, *inter alia*, that the purpose of a statute granting use immunity or derivative use immunity is to leave the witness and the prosecuting authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege. *Id.* at 457. In line with such purpose, the *Kastigar* court established a two-prong test that the prosecution must satisfy where a witness makes the claim that his or her immunized testimony was used: (1) the government must deny any use of the accused's own immunized testimony against him or her in a criminal case; and (2) the government must affirmatively prove that all of the evidence to be used at trial is derived from sources wholly independent of immunized testimony. *Id.* at 460-462."

{¶16} The *Conrad* court concluded the following at syllabus:

{¶17} "Where, in obtaining an indictment from the grand jury, the prosecution uses compelled testimony of a witness immunized pursuant to R.C. 101.44, and where the right of immunity accorded such compelled testimony has not been waived by the witness under the guidelines set forth in R.C. 101.44, any indictment issued against the witness as a result of such grand jury proceedings must be dismissed. (*Kastigar v. United States* [1972], 406 U.S. 441, and *New Jersey v. Portash* [1979], 440 U.S. 450, followed.)"

{¶18} In its judgment entry filed September 19, 2007, the trial court acknowledged, "[i]t is this 'non evidentiary ' use that is hard to define and which is most important in our case." The trial court then noted the following at 7:

{¶19} "There are two Federal decisions which reflect the differing opinions on the level of scrutiny non-evidentiary use of immunized testimony should receive. In *U.S. v. McDaniels*, 482 F2d 305 (C.A. 8 1973), the Court in citing *Kastigar* placed a 'heavy burden' on the government and enforced a strict interpretation upon the government. In *U.S. v. Semkius*, 712 F2d 891 (C.A. 3 1983), the Court refused to follow the strict interpretation of *McDaniels* and held that *Kastigar* only prohibits evidentiary use of immunized testimony."

{¶20} The trial court considered the *Garrity*, *Kastigar*, *Conrad*, *McDaniels*, and *Semkius* holdings, as well as numerous other cases and a law review article, and concluded the following:

{¶21} "I believe *United States v. McDaniels* is the appropriate measure under which to judge the issue before me. Because of the power and resources of the State, the conduct as it relates to the non-evidentiary use of immunized testimony is subject to extensive scrutiny. Under that test, set forth in *State v. Conrad*, I find that the State did use the accused' (sic) own testimony against him, and they failed to affirmatively prove that all the evidence to be used at trial is derived from sources wholly independent of the immunized testimony."

{¶22} Appellant argues any evidence it had was derived from other sources independent of appellee's *Garrity* statement. We disagree with this argument.

{¶23} As noted by the trial court throughout its judgment entry, the following facts are not in dispute:

{¶24} 1) Appellant was aware of the internal affairs investigation and appellee's *Garrity* statement at the time of the grand jury proceeding. During the proceeding, Canton City Lieutenant David Davis acknowledged the existence of the statement, but refused to divulge the statement's contents.

{¶25} 2) A witness, Vince Van, was disclosed by appellee during the *Garrity* interview.

{¶26} 3) The investigating officers from the Perry Township Police Department did not have any information about Mr. Van from their investigations. August 8, 2007 T. at 7-10.

{¶27} 4) The assistant prosecutor assigned to the case, Joseph Vance, received the entire internal affairs file including the *Garrity* statement after the September 15, 2006 felony arraignment hearing or sometime between July 24, 2006 and September 20, 2006. August 8, 2007 T. at 21-23.

{¶28} 5) Pursuant to appellee's *Garrity* interview wherein he named Mr. Van as a witness, Lieutenant Davis interviewed Mr. Van on July 24, 2006, and taped the conversation.

{¶29} 6) Appellant stipulated to the fact that Mr. Van was unknown to the state prior to the *Garrity* interview. August 8, 2007 T. at 31.

{¶30} We concur with the trial court's determination that the first prong of *Kastigar* has not been met: "the government must deny *any* use of the accused's own immunized testimony against him or her in a criminal case." *Conrad*, *supra*. The state

cannot deny the use of appellee's immunized statement in the criminal case. As the trial court concluded, appellant failed to establish that its knowledge of Mr. Van could be derived from any other source wholly independent of appellee's *Garrity* statement. There was no evidence of any wholly independent source that could have identified Mr. Van. In fact, after the *Garrity* interview on July 21, 2006 at 9:00 a.m., Lieutenant Davis took a statement from one Tina Ogle at 13:12 p.m. and attempted to identify Mr. Van (information contained in sealed documents).

{¶31} Upon review, we concur with the trial court's analysis of a *Garrity* violation.

OTHER EVIDENTIARY METHODS TO HANDLE THE GARRITY VIOLATION

{¶32} Appellant claims the trial court erred in determining the appropriate remedy was to dismiss the indictment.

{¶33} In *Conrad*, *supra*, the privileged statement was presented to the grand jury. In the case sub judice, the grand jury testimony establishes appellee's *Garrity* statement was not used to obtain the indictment.

{¶34} The problematic area in this case is that appellant undoubtedly has the benefit and therefore the use of appellee's *Garrity* statement post-indictment. As the trial court noted to the prosecutor, "you can't unring the bell, you can't take it out of your mind, although many people have argued you should have had a lobotomy a long time ago, but you haven't had it so you can't take it out of your mind." August 8, 2007 T. at 34. In other words, appellant cannot erase the knowledge of appellee's defense and the existence of Mr. Van.

{¶35} The trial court struggled with the appropriate remedy and determined dismissal of the indictment was the only alternative. We understand the trial court's

angst, but conclude the dismissal of the indictment was not the appropriate remedy. We so find because the information garnered from appellee's *Garrity* statement was not used to procure the indictment as in *Conrad*.

{¶36} In addition, we note that generally when a statement is suppressed, the appropriate remedy is to exclude the statement and any information derived therefrom, which would include Mr. Van as a witness. However, this also is not the appropriate remedy in the case sub judice. First, appellee's *Garrity* statement was never available to appellant for use at trial and secondly, Mr. Van is a possible witness for the defense. Any exclusion of Mr. Van at trial could potentially impact appellee's defense and trial strategy.

{¶37} We find the appropriate remedy is to purge appellant's file of appellee's *Garrity* statement, the entire internal affairs file, and any references to Mr. Van. In addition, we order the exclusion of Lieutenant Davis as a witness. Further, we order the trial court to appoint a visiting prosecutor from outside of Stark County to try the matter. We order an out-of-county prosecutor because the prosecutor for the Massillon Municipal Court conducted the preliminary hearing. We do not know, nor will we speculate, as to that office's exposure to the internal affairs file.

{¶38} The assignments of error are denied as to a *Garrity* violation, but granted as to the dismissal of the indictment as the appropriate remedy. The case is re-instated pursuant to the guidelines of this opinion.

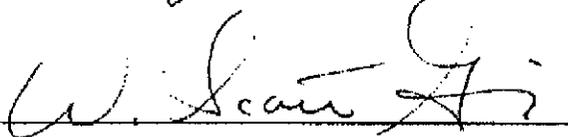
{¶39} The judgment of the Court of Common Pleas of Stark County, Ohio is hereby affirmed in part, reversed in part and remanded.

By Farmer, J.

Gwin, J. concur and

Hoffman, P.J. concurs in part and dissents in part.





JUDGES

SGF/sg 0512

Hoffman, P.J., concurring in part and dissenting in part

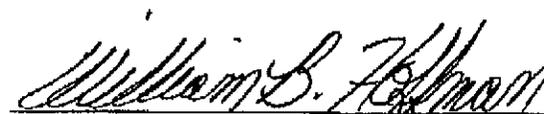
{¶40} I concur in the conclusion reached by both the majority and the trial court the state has not satisfied the first prong of the *Kastigar* test. However, unlike the majority, I find the state used Appellee's *Garrity* Statement not only to develop derivative evidence; but also, and more significantly, made use of his *Garrity* Statement (albeit indirectly and in limited fashion) to secure his indictment.

{¶41} Had the State's use of Appellee's *Garrity* Statement been limited to developing derivative evidence and not used in any manner to secure his indictment, I would concur with the majority dismissal before trial is not the appropriate remedy. My review of the case law, and more specifically the syllabus in *Conrad*, suggests pretrial dismissal is warranted only when the *Garrity* statement is used to secure an indictment or it is otherwise impossible to remove the taint on any evidence derived from it.

{¶42} I believe the majority's attempt to purge the *Garrity* violation in this case comes too late. Upon my review of the grand jury proceedings of August 10, 2006, I conclude the State did make some use of Appellee's *Garrity* Statement in securing his indictment. Under *Kastigar*, **any** use is prohibited. The use need not be actual revelation of the statement itself, it includes indirect use as well. I conclude such indirect use occurred in the case sub judice, as did the trial court. The trial court specifically found Lt. Davis' testimony at the grand jury was influential in the decision of the Grand Jury to indict, citing Tr. 31, L 6-10, Tr. 32 and 33. Having reviewed Lt. Davis's entire grand jury testimony, I concur

with the trial court's assessment. Having so found, as clearly pronounced by the Ohio Supreme Court in *Conrad*, "This fact alone ends the inquiry of whether use of the defendant's immunized testimony constituted error." *Conrad*, at 4.

{¶43} Accordingly, I would affirm the trial court's decision to dismiss the indictment.


HON. WILLIAM B. HOFFMAN

NANCY S. REINBOLD
CLERK OF COURTS
STARK COUNTY, OHIO
IN THE COURT OF COMMON PLEAS
2007 SEP 19 AM 11:16
STARK COUNTY, OHIO

STATE OF OHIO)	CASE NO. 2006CR1022
)	
PLAINTIFF)	JUDGE REINBOLD
)	
VS.)	<u>JUDGMENT ENTRY</u>
)	
ANTHONY D. JACKSON)	
)	
DEFENDANT)	

On July 6, 2007, counsel for the Defendant filed a Motion to Dismiss, alleging the State improperly utilized the fruits of an internal police investigation and therefore denied his client a fair trial and due process of law. A hearing was held on August 8, 2007 and evidence taken.

The events giving rise to the indictment occurred on May 30, 2006 in Perry Township, Ohio. The Defendant is alleged to have possessed a firearm in a Class D liquor establishment in violation of R.C. 2923.121(A).

On May 31, 2006, the Internal Affairs Division of the Canton Police Department initiated an investigation surrounding the Defendant's conduct on May 30, 2006.

Between May 30, 2006 and July 26, 2006, Lt. David Davis conducted an investigation into the matter by conducting interviews, transporting evidence and reviewing the Perry Township Police reports.

On July 21, 2006, the Defendant, pursuant to a written order issued by the Canton Police Department, appeared for an interview with the Internal Affairs Division

Officer. An interview was conducted in accordance with Article 29 Inter-Disciplinary Investigation and Canton Police Department Rule 427A and 435A.

With legal counsel present, the Defendant gave a statement concerning the events of May 30, 2006 and May 31, 2006. The statement was preceded by a "Garrity Warning" (Exhibits B and F).

Subsequent to the interview, Lt. Davis interviewed Tina Ogle and Vince Van. Prior to the Defendant's interview, Canton had not interviewed Ms. Ogle and had not known of Mr. Van. He was interviewed on July 24, 2006 (stipulated entry).

On August 10, 2006, the Stark County Prosecutor presented this matter to the grand jury. The presenting prosecutor called Sgt. John Rothlisberger of the Perry Township Police Department and Lt. David Davis, the Internal Affairs Officer from the Canton Police Department.

Sometime between July 24, 2006 and September 20, 2006, the Internal Affairs Division file was transferred to the Stark County Prosecutor's Office. The stipulated facts do not disclose whether the presenting prosecutor read the file, nor was such evidence produced at the hearing on August 8, 2007. The presenting prosecutor and the trial prosecutor are different people. Neither the stipulated facts nor the hearing disclosed whether the two prosecutors conferred. The trial prosecutor acknowledged that he had reviewed the IAD file, which contains the following:

1. Exhibit A - July 10, 2007 letter addressed to the Defendant.
2. Exhibit B - The Garrity Warning
3. Exhibit C - The Canton Police Department Internal Affairs Report prepared by Lt. Davis.

4. Exhibit D - A copy of a taped statement conducted by Lt. Davis on Vince Van on July 24, 2006 at 11:46 a.m.
5. Exhibit E - A copy of a taped statement by Lt. Davis for Tina Ogle on July 21, 2006 at approximately 2:00 p.m.
6. Exhibit F - A copy of the Defendant's statement.

A significant number of issues have been raised, briefed and ruled upon since the indictment in September of 2006. In June of 2007 this matter was set for trial, and during trial preparation the Defendant flushed out this issue and pursuant to that flushing, I scheduled a hearing on August 8, 2007.

The Defendant asserts that under *Garrity v. New Jersey*, 385 U.S. 493 (1967) the prosecutor is barred from any use or derivative use of his statement given during the July 21, 2006 disciplinary hearing. Counsel argues under *Garrity* his client was granted use and derivative use immunity from prosecution on evidence derived from his "Garrity statement".

In 1966, the United States Supreme Court reviewed a New Jersey statute (N.J. Rev. Stat. 2A:81-17.1), which provided that if a public official refused to cooperate in an official investigation initiated by the State, they were subject to termination and the forfeiture of tenure retention rights.

The Court held:

"We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in a subsequent criminal proceeding of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic." *Garrity v. New Jersey*, 385 U.S. 493 (1967).

The Garrity decision has been viewed by various state and federal courts as conferring use immunity and derivative use immunity on members of this protected class of individuals. See *Jones v. Franklin County Sheriff*, 52 Ohio St.3d 40; *State v. Brocious*, 2003 WL 22060162 (Ohio App.2d Dist.); *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977); *Lefkowitz v. Turley*, 414 U.S. 70 (1973); *Gardener v. Broderick*, 392 U.S. 273 (1968).

Whether the grant of use immunity or derivative use immunity is statutorily granted, i.e. 18 USC, Section 6002; R.C. 101.44 or derived from case law, i.e. *Garrity*; *Jones*, does not seem to be of particular significance. What is significant is the extent of protection such immunity provides the receiver and what restrictions it imposes upon the thrower. In *Kastigar v. U.S.*, 402 U.S. 441 (1972), the Petitioners were subpoenaed to appear before a United States Grand Jury in the Central District of California on February 4, 1971. The government believed that Petitioners were likely to assert their Fifth Amendment privilege. Prior to the scheduled appearance, the government applied to the District Court for an order directing Petitioners to answer questions and produce evidence before the Grand Jury under a grant of immunity conferred pursuant to 18 USC, Section 6002, 6003. The Petitioners still refused to answer questions and were held in contempt of court. The matter ultimately found its way to the United States Supreme Court. The issue presented to that Court was whether testimony may be compelled by granting immunity from the use of compelled testimony and evidence derived there from (use and derivative use immunity), or,

whether it is necessary to grant immunity from prosecution for offenses to which compelled testimony relates (transactional immunity).

The Petitioners first argued that no immunity statute, however drawn, could afford a lawful basis for compelling testimony. The Court rejected this argument and held immunity statutes themselves are Constitutional.

The Petitioners then argued that the scope of the immunity statute in question (18 USC § 6002) was not coextensive with the scope of the Fifth Amendment privilege against self-incrimination, and therefore was not sufficient to supplant the privilege and compel testimony over a claim of privilege. The Petitioners drew a distinction between statutes that provided transactional immunity and those that provide immunity from use and derivative use. They asserted that only full transactional immunity was coextensive with the scope of the Fifth Amendment.

The Court again rejected this assertion and found the government could compel testimony through statutes which provided only for use immunity and derivative use immunity.

"The statute's explicit prescription of the use in any criminal case of testimony or other information compelled under the order (or any information, directly or indirectly derived from such testimony or other information) is consonant with Fifth Amendment standards. We hold that such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination and therefore is sufficient to compel testimony over a claim of privilege."

Now "0 for 2", the Petitioners in *Kastigar* continued to press for full immunity. They argued that use and derivative use immunity would not adequately protect a witness from various possible incriminating uses of the compelled testimony. For

example, a prosecutor or other law enforcement officials could obtain leads, names of witnesses, or other information not otherwise available that might result in a prosecution. They argued that it would be "difficult, and perhaps impossible, to identify by testimony or cross examination, the subtle ways in which the compelled testimony may disadvantage a witness, especially in the jurisdiction granting the immunity."

In answer, the court stated that this argument "presupposes that the statute's prohibition will prove impossible to enforce. This statute provides a sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived there from".

"This total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an investigatory lead, and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled testimony."

In reassuring the Petitioners that sufficient safeguards were inherent in the statute to afford protection for the concerns raised, the court went on to state "that a person accorded this immunity and subsequently prosecuted, is not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities."

"Once a defendant demonstrates that he has testified under a grant of immunity, the authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence. This burden of proof which we "reaffirm as appropriate" (see *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964) is not limited to a negation of taint. Rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate wholly independent of the compelled testimony."

The *Kastigar* decision seems straightforward enough when we are determining whether the government has "used" immunized testimony as direct

evidence in a case. But what does the term "derivative use" mean; what does the court mean when it says "barring the use of compelled testimony as an 'investigatory lead'; what did the court mean when it seemed to assure the *Kastigar* Petitioners that their fear the prosecution could use immunized testimony to "obtain leads or names of witnesses" was unfounded. In *Kastigar*, the court reiterated its criticism of a prior immunity statute which failed to prevent the use of compelled testimony "to search out other testimony to be used as evidence"; "could not prevent the obtaining and the use of witnesses"; and "because the immunity granted was incomplete in that it merely forbade the use of testimony given and failed to protect a witness from future prosecution based on knowledge and information and sources of information obtained from the compelled testimony." *Kastigar v. U.S. and Counselman v. Hitchcock*, 142 U.S. 547 (1892).

It is this "non evidentiary" use that is hard to define and which is most important in our case. There are two Federal decisions which reflect the differing opinions on the level of scrutiny non-evidentiary use of immunized testimony should receive. In *U.S. v. McDaniels*, 482 F2d 305 (C.A. 8 1973), the Court in citing *Kastigar* placed a "heavy burden" on the government and enforced a strict interpretation upon the government. In *U.S. v. Semkius*, 712 F2d 891 (C.A. 3 1983), the Court refused to follow the strict interpretation of *McDaniels* and held that *Kastigar* only prohibits evidentiary use of immunized testimony.

I seldom, very seldom, read law review articles. But the breadth of the divide between the two cases caused me to seek out an independent analysis of *Kastigar* and

related cases which encompass a *Garrity* issue. I (we) found such an article in the Illinois Law Review, cited as 1992 U. ILL. L. Rev. 625. This article was written by Professor Kate E. Bloch.

The Professor began her article by stating:

"In 1972, the minimum immunity constitutionally necessary to replace silence contracted. In that year, the U.S. Supreme Court approved the substitution of use immunity from the broader transactional immunity. Use immunity protects speakers from the use and derivative use of their statements. With use immunity, prosecution of the speaker is no longer de jure, barred. But the conferring of even this narrow immunity....requires a prosecutor to demonstrate that all the evidence it intends to use has a legitimate source independent of the Defendant's immunized statements."

In referring to the *Kastigar* Hearing, the author states, "the test speaks of a legitimate, independent source for all the evidence that the prosecution proposes to use, furthering the dichotomy between the portions of the decision (*Kastigar*), assuring against any use and those suggesting that uses that do not lead to evidence do not violate the immunity promise. As we explore various representative interpretations of *Kastigar* and traditional forms of use immunity, the question of permissibility of "non-evidentiary uses" surfaces as a recurrent theme in the dissension trailing the *Kastigar* decision. Professor Bloch goes on to say:

"Without explicit guidance from the U.S. Supreme Court, commentators and other federal and state court interpreters of the conflicting language in *Kastigar* have arrayed themselves along a substantial portion of the Fifth Amendment spectrum. Often, the crux of the disparity in their positions hinges on the acceptance, rejection, or very definition of "non-evidentiary use" reflecting *Kastigar's* bipolarity on that issue."

Bloch develops four classifications of scrutiny: extreme scrutiny, substantial scrutiny, moderate scrutiny and limited scrutiny.

Extensive scrutiny is exemplified in *U.S. v. McDaniels*. *McDaniels* held:

"Immunity protection must forbid all prosecutorial use of the testimony, not merely that which results in the presentation of evidence before the jury (at 311)."

McDaniels requires extensive scrutiny of immunized information. "Even a specter of use violates the immunity promise."

The Court in *United States v. Byrd*, 765 F2d 1524 (11th Cir. 1985), while strict, was less so by holding, "the government is not required to negate all abstract possibilities of taint. Rather, the government need only show on a preponderance of the evidence that, in fact, the evidence used was derived from a legitimate source." However, the Court was concerned with the non-evidentiary issues, stating, "the government's use of its knowledge of *Byrd's* immunized testimony to illicit cross-examination...would probably constitute an impermissible use of evidence derived indirectly from immunized testimony. The *Byrd* test symbolizes the "substantial scrutiny test". Additionally, the Court in *U.S. v. North*, 910 F2d 843 (D.C. Cir. 1990) declined to "reach the precise question of the permissible quantum of non-evidentiary use by prosecutors, or whether such use is permissible at all. But the court went on to explain:

"in our view, the use of immunized testimony by witnesses to refresh their memories or otherwise focus their thoughts, organize their testimony or alter their prior or contemporaneous statements constitutes indirect evidentiary use, not "non-evidentiary use".

The third, moderate scrutiny is most comparable to the same standards used in regards to "coerced confessions". The Professor acknowledges that there "is a dearth of court opinions and scholarly commentary addressing the extent of accepted, "non-evidentiary uses" or definitions of "non-evidentiary use" in the coerced confession context. This absence fosters the uncertainty of the sweep of Fifth Amendment

protection for the accused and the indeterminacy of the burden that the prosecution is required to meet."

Bloch writes that "three doctrines may further relax the stringency of court scrutiny of "coerces confessions". They are:

1. If the fruits of the coerced confession are sufficiently attenuated from the initial coercion;
2. inevitable discovery; and
3. harmless error.

Footnote 137 in this article gives a concise summary of how various courts and commentators view the "poisonous tree" and "inevitable discovery analysis" for immunized testimony. And of course, those discussions and holdings are as diverse as the "scrutiny opinions".

The final tier is referred to as "limited scrutiny". This final tier is analogous to the exclusionary rule and partial exclusionary rules and surfaces most often in suppression hearings, probation or parole revocations, fitness and dependency hearings. *Simmons v. U.S.*, 390 U.S. 377 (1968); *Nelson v. Sard* at 402 F2d 653 (D.C. Cir. 1968 (parole revocations)).

The Ohio cases, like the Federal cases, cut across the spectrum. In 1990, the Ohio Supreme Court discussed the issue of immunity provided by R.C. 101.44 in *State v. Conrad*, 50 Ohio St.3d 1 (1990). In that decision, the Ohio Supreme Court followed *Kastigar* and the two-prong test. The Court described the test as follows: "There is a two-prong test that the prosecution must satisfy where a witness makes a claim that his or her immunized testimony was used":

1. The government must deny any (*emphasis theirs*) use of the accused own immunized testimony against him or her in a criminal case, and (*emphasis ours*);
2. the government must affirmatively prove that all the evidence to be used at trial is derived from sources wholly independent of the immunized testimony.

The Conrad Court applied the extensive scrutiny test and held that "any" meant "any". The Court found that the use of immunized testimony of the Defendant by the prosecutor to prepare a list of grand jury questions or for use as impeachment against the testifying defendant was a non-evidentiary use and dismissed the indictment.

In *Jones v. Franklin County Sheriff*, 52 Ohio St.3d 40 (1990), the Ohio Supreme Court accepted the Garrity holding and found that the Franklin County contract requiring police officers (sheriff's deputies) to cooperate with internal affairs investigation in return for immunity was a granting of use immunity to the officer.

In *State v. Brocious*, 2003 WL 22060162 (Ohio App. 2nd Dist.), the visiting prosecuting attorney had access to *Brocious'* statement prior to deciding whether to charge the deputy with a criminal offense. The trial court found the prosecutor failed to establish that she had not made any use of the immunized testimony and that the evidence to be presented at trial was derived from sources wholly independent of the defendant's statement. The Second District Court upheld the trial court's decision, agreeing that the prosecutor "used" the immunized testimony and dismissed the case.

In *State v. Sess* (1999), 136 Ohio App.3d 689, the argument was made that without access to the Defendant's statement, names of witnesses would not have been

discovered by the State. The trial court granted the Motion to Suppress, and the First District Court of Appeals upheld the decision. The Court based its analysis not on immunity so much as to the law surrounding "coerced statements" (moderate scrutiny). (I acknowledge a significant factual difference between this case and ours, but the analysis is still concerning use and use derivative information. The Court in *Sess* also discussed inevitable discovery and rejected it.)

In *State v. Hall*, 2004 WL 628650 (Ohio App. 6th Dist.), the Sixth District reaffirmed the same line of cases, but held the state met its burden in establishing a wholly independent source.

In this matter, the evidence obtained by the Perry Township Police on May 30, 2006 was not tainted by any immunized statement from the Defendant. Indeed, the events of May 30, 2006 preceded the Internal Affairs investigation. The Perry Police investigation, the witnesses interviewed that evening is competent evidence and untainted. Sgt. Rothlisberger's testimony at the Grand Jury on August 10, 2006 is likewise competent, and had the presentation stopped with Sgt. Rothlisberger's testimony relating solely to the events of May 30, 2006, I would find the indictment to be proper and based on "wholly independent evidence". However, I have concerns relating not just to the grand jury proceeding, but subsequent events as well. Therefore, it is necessary to return to July of 2006.

On July 10, 2006, Officer Jackson was ordered to appear for an interview pursuant to the Internal Affairs investigation concerning the events of May 30, 2006 (Exhibit A). On July 21, 2006, the Defendant, with counsel, appeared. The Defendant was given his "Garrity Warnings" and was questioned about "the incident of May 30,

2006 at Lew's Tavern and circumstances surrounding the incident" (Exhibit B). At 9:01 on July 21, 2006, a taped statement was taken from Officer Jackson (Exhibit F). As required, the Defendant answered all questions fully, and in fact, gave a rather detailed explanation of his conduct prior to the incident, his conduct during the incident and after the incident. He made statements that were somewhat inconsistent with the testimony of Sgt. Rothlisberger during his grand jury presentation. His statement disclosed information concerning the issue of intoxication and conversations the Defendant had with Tony Vale and the arresting officers. The Defendant gave the names of three witnesses. The Defendant also gave his reasoning as to why he had his weapon that evening.

On July 21, 2006 at 1:12 p.m., Lt. Davis, who took the statement from Officer Jackson, called Ogle and conducted a telephone interview. This interview was reduced to a transcript (Exhibit E). Ogle was known to the Perry Police Department, but they had not taken a taped statement from her. In the July 21, 2006 statement, Ogle made contradictory statements to that of the Defendant; gave her opinion as to the issue of intoxication; provided three names of additional witnesses, and further identified Van as "Cowboy Vince".

On July 24, 2006, Lt. Davis took a taped statement from Vince Van (Exhibit D). It is agreed that the source as to the identification of Van at the time of the interview was the Defendant. Mr. Van's testimony, to put it politely, is more consistent with Officer Jackson's, and, to put it politely, terribly inconsistent with Ogle's statement.

On August 10, 2006. Sgt. Rothlisberger testified at the grand jury. His testimony was very much restricted to the gun charge and not what occurred in the bar. However,

the Sergeant was questioned by the presenting prosecutor and grand jurors as to the Perry Township Police Department policy on police officers carrying weapons in bars and his opinion as to the Defendant's decision to carry a weapon that particular evening. Lt. Davis also testified at the Grand Jury on August 10, 2006. In citing *Garrity* and his role as the investigating officer, he did not testify as to the facts of his investigation. His testimony centered on the Defendant's status as a police officer on May 30, 2006; his right to carry a weapon, and his opinion as to whether it was against the law for a police officer to take a weapon into a bar. Grand jurors also asked Lt. Davis his opinion on the conduct of Officer Jackson that evening. There was a similarity in the questions asked by the grand jurors and the prosecutor of both Sgt. Rothlisberger and Lt. Davis.

There are two sources of information and evidence in this case; one, from the Perry Township Police Department, which I characterize as independent, and one from the Canton Police Department, specifically Lt. Davis. While some of his information was gathered from independent sources, much was gathered only after his interview with the Defendant. The problem is both sources joined and flowed together into the Prosecutor's Office.

I understand the Defendant is charged with a weapons violation and not his conduct inside Lew's Bar on May 30, 2006. I also understand that the State could very well proceed with solely that evidence that was obtained from "a wholly independent source". It is not the direct evidence that is of concern. It is the "derivative use" or the "non-evidentiary use" of that information which poses a problem in this matter.

The information in the possession of the prosecutor was not harmless. *Arizona v. Fulminante*, 111 S.Ct. 1246 (1991). The State had no statement by the Defendant

until his Garrity statement was revealed. In that statement the State learned the Defendant's actions on the 30th of May, his reasons for being at Lew's, and his account of the events and possible defenses to the charge. Through witness statements, the prosecution had information to discredit any defense the Defendant may have had. I am not able to aptly describe the effect all this information had on the right of this Defendant to present a factual defense to the charges against him. However, I do know that it is extremely favorable to the State and extremely unfavorable to the Defense.

There was no reason for Lt. Davis to testify at the grand jury. There was no reason for Lt. Davis to have any contact with the Prosecutor's Office at all. But he did, and there are consequences. Lt. Davis's testimony at the grand jury was influential in the decision of the Grand Jury to indict (see T-31, L-6-10; T-32 and 33). Lt. Davis, in a sense, became the investigating officer for the prosecutor's office almost to the exclusion of the Perry Police Department (see Exhibit C). He cannot participate in this dual role without obliterating the lines between same source and independent source.

The prosecution had taped transcripts of interviews containing a wealth of information that would have multiple uses at trial, (i.e. trial strategy, impeachment, possible defense).

At the August 8, 2007 hearing, there was no testimony as to the interaction, if any, between the grand jury prosecutor and Lt. Davis; interaction between the grand jury prosecutor and the trial prosecutor, if any; interaction between Lt. Davis and the trial prosecutor, if any; nor when the Internal Affairs investigative file was received by the prosecutor, who read it and what they read (*State v. Brocious*).

At the end of the day, then, the State possessed exactly the type of information and knowledge Kastigar and McDaniels and North were most concerned with; information to obtain leads; names of witnesses; knowledge of the accused's immunized testimony to elicit evidence on cross examination; knowledge in and of itself of the Defendant's immunized testimony; information possibly to refresh a witness' testimony; information that could influence trial strategy and charging decisions and the use of the immunized statement as an investigatory tool to the benefit of the otherwise detached prosecutor, to list but a few. These same cases assured a "total prohibition" against use of immunized statements and they must be followed. It is not my role to explain how this information or knowledge will influence this case. It is the State's burden to affirmatively prove that it will not.

I believe *United States v. McDaniels* is the appropriate measure under which to judge the issue before me. Because of the power and resources of the State, the conduct as it relates to the non-evidentiary use of immunized testimony is subject to extensive scrutiny. Under that test, set forth in *State v. Conrad*, I find that the State did use the accused' own testimony against him, and they failed to affirmatively prove that all the evidence to be used at trial is derived from sources wholly independent of the immunized testimony.

The final question is the appropriate disposition of this matter. Because I find *McDaniels* and *Conrad* controlling, treating this matter under the "coerced confession" guidelines is not acceptable.

I am in agreement that there is no such motion as a Motion to Dismiss.

However, that is the remedy applied in the cases I have relied on. Further, Crim.R. 12

states:

"Prior to trial, any party may raise by a motion any defense, objection, evidentiary issue, or request that is capable of determination without the trial of the general issue; two, defenses and objections based on the indictment information or complaint."

Further, in *State v. Serban*, No. 2006 C.A. 00198, Ohio App. 5th Dist. (2007), the

Court held:

"pretrial motions to dismiss can only raise matters that are capable of determination without a trial on the general issue...if a motion to dismiss requires examination of evidence beyond the face of the complaint, it must be presented as a motion for acquittal under Crim.R. 29 at the close of the state's case."

I find this matter is capable of determination without a trial on the merits.

Therefore, for the reasons stated, the matter of *State of Ohio vs. Anthony D.*

Jackson, Case No. 2006CR1022 is hereby Dismissed.



JUDGE RICHARD D. REINBOLD, JR.

cc: Prosecutor
Bradley Iams, Esq.