

IN THE  
SUPREME COURT OF OHIO

STATE OF OHIO : NO. **08-1499**  
Plaintiff-Appellant : On Appeal from the Stark County,  
Court of Appeals, Fifth Appellate  
vs. : District  
ANTHONY JACKSON : Court of Appeals  
Defendant-Appellee : Case Number 2007 CA 00274

**AMICUS CURIAE OHIO PROSECUTING ATTORNEYS ASSOCIATION  
MEMORANDUM IN SUPPORT OF JURISDICTION**

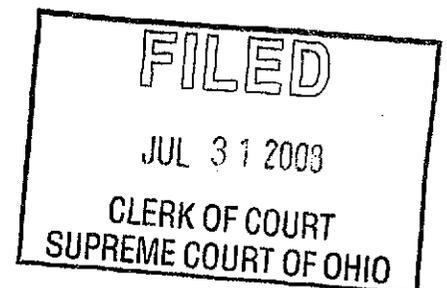
**Kathleen O. Tatarsky (0017115)**  
Assistant Prosecuting Attorney  
Counsel of Record  
Appellate Section  
110 Central Plaza, South-Suite 510  
Canton, OH 44702-1413  
(330) 451-7897  
Fax No. (330) 451-7965

**Bradley Iams**  
Attorney at Law  
Counsel of Record  
400 Huntington Plaza  
220 Market Avenue, South  
Canton, OH 44702  
(330) 452-6400  
COUNSEL FOR DEFENDANT- APPELLEE

COUNSEL FOR PLAINTIFF-APPELLANT

Joseph T. Deters (0012084P)  
Prosecuting Attorney  
Judi A. Lapp (0008687P)  
Assistant Prosecuting Attorney  
230 East Ninth Street, Suite 4000  
Cincinnati, Ohio 45202  
(513) 946-3009  
Fax No. (513) 946-3021

COUNSEL FOR AMICUS CURIAE,  
OHIO PROSECUTING ATTORNEYS ASSOCIATION



**TABLE OF CONTENTS**

|  | <b><u>PAGE</u></b> |
|--|--------------------|
| INTEREST OF AMICUS CURIAE AND EXPLANATION OF WHY THIS CASE INVOLVES<br>A SUBSTANTIAL CONSTITUTIONAL QUESTION .....   | 1.                 |
| STATEMENT OF THE CASE AND FACTS .....  | 2.                 |
| ARGUMENT .....   | 4.                 |
| Proposition of Law .....   | 4.                 |
| When a public employee makes a Garrity statement, its direct or derivative use is<br>prohibited in subsequent criminal trials, but Garrity does not forbid a prosecutor’s<br>mere knowledge, or “non-evidentiary” use of it. |                    |
| CONCLUSION .....   | 9.                 |
| CERTIFICATE OF SERVICE .....   | 9.                 |

IN THE  
THE SUPREME COURT OF OHIO

|                     |   |          |
|---------------------|---|----------|
| STATE OF OHIO       | : | CASE NO. |
| Plaintiff-appellant | : |          |
| vs.                 | : |          |
| ANTHONY D. JACKSON  | : |          |
| Defendant-Appellee  | : |          |

**INTEREST OF AMICUS CURIAE AND EXPLANATION OF WHY THIS CASE IS A  
CASE THAT INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

The Fifth District Court of Appeals has taken an extreme view of what constitutes a “*Garrity*” violation and in the remedies it may impose to restrict the non-evidentiary use of a statement given in this context.<sup>1</sup> The manner in which the appellate court has tied the hands of the prosecution is not what was envisioned in prior case law and is in conflict with the decisions of other appellate courts in Ohio. The Fifth District’s decision invalidates the reasoning set forth in *Garrity v. New Jersey* and produces results so prejudicial as to put the use of such an interview in jeopardy. The Ohio Prosecuting Attorneys Association (“OPAA”) files this brief in support of Plaintiff-Appellant’s Memorandum in Support of Jurisdiction and urges this Court to grant jurisdiction.

The Fifth District in *State v. Jackson*, 2008-Ohio-2944, has concluded that mere exposure to an internal affairs file by the prosecutor constitutes a *Garrity* violation. As described in the Memorandum in Support of Jurisdiction of Amici Curiae City of Canton, etc., *Garrity* did

---

<sup>1</sup> See *Garrity v. New Jersey* (1967), 384 U.S. 493.

not intend to provide public employees with greater protection than a defendant in a criminal proceeding; the appellate court's decision in *State v. Jackson* produces this result.

### STATEMENT OF THE CASE AND FACTS

The OPAA joins in the Statement of the Case and Facts as presented in memorandum of Plaintiff-Appellant to the Supreme Court of Ohio and memorandum of Amicus Curiae, City of Canton, to the Supreme Court of Ohio. On May 30, 2006, John Roethlisberger, a patrolman of the Perry Township Police Department, investigated a fight occurring at Lew's Tavern. After arriving on the scene, Roethlisberger discovered Jackson, the appellee, who was a Canton police officer on administrative leave as a result of pending criminal charges. That night, Roethlisberger took statements from numerous witnesses, as well as from Jackson, in conducting his investigation. At that time, Jackson admitted to carrying a loaded .40 caliber Glock handgun, which the Township police confiscated from him. On June 16, 2006, Roethlisberger filed a formal complaint in the Massillon Municipal Court, charging Jackson with possession of a gun in a Class D liquor establishment, in violation of R.C. 2923.121(A), a felony of the fifth degree.

In initiating its own investigation, the Internal Affairs Division of the Canton Police Department ordered Jackson to appear for an interview. The investigation was led by Sergeant David Davis. On July 21, 2006, Jackson was read his *Garrity* rights, and he gave an explanation similar to the one originally given the night of the incident. During the interview, Jackson revealed a name not previously provided to police—Vince Van—a witness favorable to Jackson.

On August 21, 2006, the Stark County Grand Jury indicted Jackson on one count of illegal possession of a firearm in liquor permit premises. During the grand jury proceedings, nothing was revealed from Jackson's *Garrity* statement. Vince Van did not testify to the grand

jury, and nothing from Jackson's *Garrity* statement was used in an evidentiary manner. After arraignment, the trial prosecutor received the IA file from the City of Canton, which included a copy of Jackson's *Garrity* interview. Ultimately, Jackson moved to dismiss the indictment on *Garrity* grounds, alleging that the prosecutor's review of his *Garrity* statements violated his due process rights and his right to a fair trial. The trial court eventually dismissed the indictment, granting Jackson's motion to dismiss, on grounds that the prosecutor could not erase the information provided in Jackson's *Garrity* statement from his mind. In doing so, the trial court acknowledged that the prosecutor could use the information for a non-evidentiary use, such as in preparing a trial strategy.

On appeal, the state challenged both the finding of the *Garrity* violation and the remedy. In affirming in part and reversing in part, the Stark County Court of Appeals upheld the trial court's finding that the first prong of the *Kastigar* test had not been met and that the use of the accused's immunized statement must be denied in the criminal case against him. However, the Fifth District concluded that a dismissal of the indictment was an inappropriate remedy, and it fashioned its own remedy instead. The court of appeals determined that the internal affairs papers must be removed from the prosecutor's file, Lieutenant Davis must not be used as a witness, and the trial court was ordered to appoint an out-of-county special prosecutor to conduct Jackson's trial.

## ARGUMENT

### **Proposition of Law:**

*When a public employee makes a Garrity statement, its direct or derivative use is prohibited in subsequent criminal trials, but Garrity does not forbid a prosecutor's mere knowledge, or "non-evidentiary" use of it.*

1. *Garrity statements receive the protections provided by the Fifth Amendment to the United States Constitution.*

The OPAA argues that the non-evidentiary use of a *Garrity* statement of a public employee does not amount to a *Garrity* violation. The case at the center of this issue, *Garrity v. New Jersey*<sup>2</sup>, stood for principles that had their foundation in the fourteenth amendment - freedom from coerced statements and protection from situations of duress.<sup>3</sup> In *Garrity*, police officers were accused of fixing traffic tickets. They were questioned during an internal affairs investigation.<sup>4</sup> After being threatened with termination if they refused to answer, the officers delivered responses to the questions asked of them.<sup>5</sup>

At trial, the officers challenged the introduction of their answers as evidence, arguing that the statements were coerced and their rights violated. In its opinion, the *Garrity* court held that the defendants' "Hobson's choice," was the "antithesis of free choice to speak out or to remain

---

<sup>2</sup> 384 U.S. 493 (1967).

<sup>3</sup> *Id.* at 499.

<sup>4</sup> *Id.* at 494.

<sup>5</sup> *Id.*

silent.”<sup>6</sup> The fear expressed in the Supreme Court in *Garrity* was that a state could use the “threat of discharge to secure incriminatory evidence against an employee.”<sup>7</sup>

In the aftermath of *Garrity*, the case came to rest on Fifth Amendment protections, made applicable to the states by the Fourteenth amendment.<sup>8</sup> Consequently, the United States Supreme Court outlined the path for immunized *Garrity* statements - they were to be given restrictions identical to ones applied to compelled confessions.

In *Kastigar v. United States*, the United States Supreme Court rejected giving complete transactional immunity for compelled statements, reasoning that such immunity expanded beyond the protections of the Fifth Amendment.<sup>9</sup> Instead, the *Kastigar* Court acknowledged that the prosecution faced the burden of showing that the evidence it aimed to introduce derived “from a legitimate source wholly independent of the compelled testimony.”<sup>10</sup> In *State v. Conrad*, the Ohio Supreme Court followed the reasoning outlined in *Kastigar*.<sup>11</sup>

*2. The Jackson court strayed from the intentions and purpose of Garrity, and its holding produced results not anticipated by Garrity and its progeny.*

Here, the Fifth District found that the prosecutor’s exposure to Jackson’s internal affairs file, as well as his *Garrity* statements, constituted a *Garrity* violation.<sup>12</sup> In its analysis, the Fifth

---

<sup>6</sup> *Id.* at 497.

<sup>7</sup> *Id.*

<sup>8</sup> *Kelley v. Johnson*, 425 U.S. 238 (1976).

<sup>9</sup> *Kastigar v. United States*, 406 U.S. 449.

<sup>10</sup> *Id.* at 460.

<sup>11</sup> (1990), 50 Ohio St.3d 1.

<sup>12</sup> *State v. Jackson*, 5<sup>th</sup> Cir. (June 16, 2008), 2008-Ohio-2944, at ¶31.

District outlined the *Kastigar* holding, as well as that of *State v. Conrad*, and concluded that the government failed to show that its evidence was derived from other sources independent of Jackson's *Garrity* statement.<sup>13</sup> The opinion included a quotation from the *Conrad* decision:

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.<sup>14</sup>

In addition, the court of appeals made reference to the trial court's application of *United States v. McDaniel* to the case at hand, in reaching its conclusion that the state failed to prove it had evidence from an independent source.<sup>15</sup> Finally, it chose a remedy which included an order to purge the IA file from the prosecutor's file and appoint a special out-of-county prosecutor to the case.<sup>16</sup>

However, these cases stray from the intent of the *Garrity* court and expand the established restrictions placed on *Garrity* statements. For instance, *Garrity* and *Kastigar* do not outlaw a prosecutor's "non-evidentiary" use of a *Garrity* statement. The Supreme Court of the United States, as well as the Supreme Court of Ohio, have not addressed the issue of whether mere knowledge of a *Garrity* statement constitutes a *Garrity* violation. The Jackson relied heavily on

---

<sup>13</sup> *Id.* at ¶22.

<sup>14</sup> *Id.* at ¶17.

<sup>15</sup> *Id.* at ¶21.

<sup>16</sup> *Id.* at ¶37.

*United States v. McDaniel*,<sup>17</sup> an Eighth Circuit opinion that is widely criticized.<sup>18</sup> In *McDaniel*, the prosecutor inadvertently examined immunized testimony before charging the defendant. Although the Eighth Circuit reached the conclusion that the prosecutor presented evidence derived from an independent source, it reversed the defendant's conviction on the grounds that the immunized statement had an "immeasurable subjective effect" on the prosecutor.<sup>19</sup> The *McDaniel* court feared the "non-evidentiary" use of the statement—such as preparing a trial strategy.

Here, the appellate court's reliance on *McDaniel* is misplaced. The trial court could not even articulate a specific fear that it hoped to prevent, acknowledging that it could not "aptly describe the [non-evidentiary] . . . effect" on Jackson. Instead, it produced a hypothetical scenario, stating that it could potentially "influence trial strategy." However, this is beyond the protections extended to *Garrity* statements and far from the original purpose behind their immunity. For instance, the Fifth Amendment is not designed to protect against remote and speculative possibilities.<sup>20</sup> The *McDaniel* reasoning is unsubstantiated, for courts do not assume a prosecution will misuse the information, or that a court will allow for such misuse.<sup>21</sup>

Furthermore, *Kastigar* only requires a prosecutor to prove by a preponderance of the

---

<sup>17</sup> 482 F.2d 305 (8<sup>th</sup> Cir. 1973).

<sup>18</sup> *United States v. Velasco*, 953 F.2d 1467 (7<sup>th</sup> Cir. 1992); *United States v. Serrano*, 870 F.2d 1 (1<sup>st</sup> Cir. 1989); *United States v. Bryd*, 765 F.2d 1524 (11<sup>th</sup> Cir. 1985).

<sup>19</sup> *McDaniel*, 482 F.2d at 312.

<sup>20</sup> *Zicarelli v. New Jersey State Commission of Investigation*, 406 U.S. 472 (1972); *In re Grand Jury Subpoena v. United States*, 40 F.3d 1096, 1103 (10<sup>th</sup> Cir. 1994).

<sup>21</sup> *In re Grand Jury Subpoena*, 40 F.3d at 1103.

evidence that the evidence potentially used is from an independent source. This standard was ignored by the *McDaniel* court.<sup>22</sup> Consequently, the decision, and the Fifth District's use of the case, conflicts with the *Kastigar* standard.

In addition, the court of appeals' reflection on *Conrad*, as it applied to Jackson, was in error. As already stated, the prosecution did not use any of the compelled statement during the Grand Jury hearing. Consequently, the indictment did not flow from information provided from the immunized testimony. Moreover, there is nothing that suggests that the prosecutor in this case aimed to use any information from the *Garrity* statement or its "fruits." The one witness who was first named during the interview was a witness most likely helpful to the defense.

Finally, the Jackson court's opinion produced reasoning that could lead to disturbing results in the future. Police departments would have to guarantee that IA investigations have been withheld from prosecutors, or a surplus of special prosecutors would have to be appointed in the instance that a prosecutor comes within even remote contact of an IA investigation. Furthermore, internal affairs records are public record. If statements from an investigation would happen to be printed in a newspaper, the prosecutor would have to produce evidence that he or she did not have knowledge of such information. Additionally, "non-evidentiary" use, as already explained, has not been analyzed by the Supreme Court of the United States or the Supreme Court of Ohio. Its definition remains vague and could be subject to various interpretations. Without such a definition, the prosecutors face insurmountable barriers in overcoming the *Kastigar* standard. The Supreme Court's intent is to protect against improper use of immunized statements, not mere knowledge of the statement itself. Nothing in the present case demonstrated an improper use of

---

<sup>22</sup> *McDaniel*, 482 U.S. at 311.

any information obtained during the *Garrity* interview and the restrictions imposed by the appellate court are unwarranted and overbroad.

**CONCLUSION**

For the foregoing reasons, amicus curiae respectfully request that this Court accept discretionary jurisdiction of the instant case.

  
Judith Anton Lapp, 0008687P  
Assistant Prosecuting Attorney  
230 East Ninth Street, Suite 4000  
Cincinnati, Ohio 45202  
Phone: 946-3009

**CERTIFICATE OF SERVICE**

I hereby certify that I have sent a copy of the foregoing memorandum, by United States mail, this ~~30<sup>th</sup>~~ day of July, 2008 to:

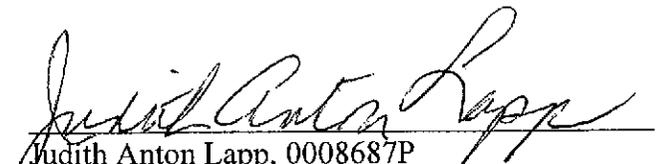
James F. Mathews  
Baker, Dublikar, Beck, Wiley & Mathews  
400 South Main Street  
North Canton, Ohio 44720  
*Attorney for Appellant,  
City of North Canton*

Bradley R. Iams  
220 Market Avenue South, Suite 400  
Canton, Ohio 44702  
*Attorney for Appellee,  
Anthony D. Jackson*

Kevin R. L'Hommedieu  
Canton Law Department  
218 Cleveland Avenue, S.W.  
P.O. Box 24218  
Canton, Ohio 44701-4218  
*Attorney for Amicus Curiae,  
City of Canton*

Kathleen O. Tatarsky  
Assistant Prosecuting Attorney  
Appellate Section  
110 Central Plaza South-Suite 510  
Canton, Ohio 44702-1413  
*Attorney for Plaintiff-Appellant*

Frank M. Strigari  
Assistant Attorney General  
Constitutional Offices Section  
30 East Broad Street, 17<sup>th</sup> Floor  
Columbus, Ohio 43215-3400  
*Attorney for Ohio Attorney General*

  
Judith Anton Lapp, 0008687P  
Assistant Prosecuting Attorney