

IN THE SUPREME COURT OF OHIO

State of Ohio,)
)
 Appellant,) On Appeal from the Fifth District
) Court of Appeals
 v.)
)
 Anthony D. Jackson,) Court of Appeals Case No. 2007CA00274
)
 Appellee.) Case No. 2008-1499
)
)
)
)

**MEMORANDUM IN SUPPORT OF JURISDICTION OF COUNSEL FOR
AMICIS CURIAE CANTON POLICE PATROLMAN'S ASSOCIATION**

MARY LOU SEKULA (0066001)
122 Central Plaza N.
Canton, Ohio 44702
(330) 452-4005
Fax No. (330) 452-3661

Counsel for Amici Curiae CPPA

KATHLEEN O. TATARSKY
Ohio Sup. Ct. Reg. No. 0017115
Assistant Prosecuting Attorney
Appellate Division
110 Central Plaza S., Suite 510
Canton, Ohio 44701-0049
330-451-7883

Counsel for Plaintiff-Appellant

BRADLEY IAMS (0019009)
400 Huntington Plaza
220 Market Avenue, South
Canton, Ohio 44702
330-452-6400

Counsel for Appellee

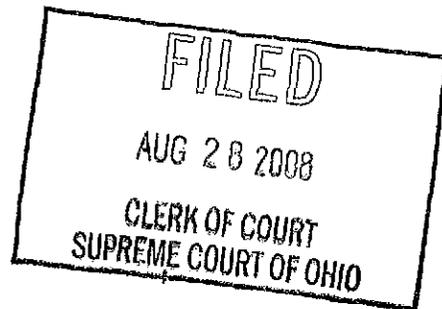


TABLE OF CONTENTS

EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION.....	1
STATEMENT OF THE CASE AND FACTS	4
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW.....	5
Proposition of Law No. 1: When a public employer contractually and constitutionally violates an employee’s right against self-incrimination by using a statement given by the employee under threat of termination, and the public employer does not sustain his burden to prove he did not use the statement in criminal proceedings against the employee in the Kastigar Hearing, the appropriate remedy under Conrad is dismissal of the indictment.....	5
INTEREST OF AMICI CURIAE CPPA.....	5
CONCLUSION.....	15
CERTIFICATE OF SERVICE	16

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

CPPA (Canton Police Patrolman's Association) argues that this Court should accept jurisdiction in this matter as the case presents an issue of the remedy for a flagrant violation of the 5th Amendment, a contractual violation of a Garrity agreement, and the deterrence necessary to the forces of the government that come to bear on an individual.

Amicus curiae for the City of Canton, et al, argues that if the decision (as to use of an immunized statement such as a Garrity statement) is allowed to stand, such a ruling "compromises and even cripples the ability of public employers to investigate wrongdoing on the part of their employees."

In fact, no such dilemma exists. Public employers would simply need to conduct their internal affairs investigation, or specifically the Garrity statement of the target officer or employee, subsequent to the close of the criminal case. All of the arguments of the amicus City of Canton and the County of Stark fail if such investigation occurs after the close of the criminal case, specifically the Garrity statement. The small public employers would economically benefit in that a criminal case that concludes in a guilty verdict with a substantial sentence would be dispositive of the internal affairs case, and therefore minimal, if any, investigation by the internal affairs department would need to be conducted, saving the small employer significant public funds. Further, the investigation by the criminal investigators would be available to internal affairs, thereby shortcutting the investigation. If, in fact, the internal affairs department would also serve as the criminal investigators, then obviously an investigation can be conducted but forgo the immunized statement of the focus employee until after resolution of the criminal case.

The only purpose left for conducting the Garrity statement of the target employee before or concurrent with the criminal case is to glean information from that statement to aid in the

criminal investigation of the target employee. Such use is specifically prohibited under Conrad, Garrity and numerous other cases.

The City of Canton creates its own dilemma and then argues that it is powerless to solve the dilemma and, a constitutional right against self-incrimination should therefore, be abandoned.

The City's argument that "police may use illegal physical or psychological pressure to coerce a possibly unreliable confession from an uncounselled, in-custody citizen in the secrecy of an interrogation room" is an incredible argument for a prosecutor's office who counsels the police and sounds as a ratification of such illegal behavior.

The City's argument that Garrity prohibited the prosecutor's mere knowledge of the statement even if he never used or intended to use the statement or evidence derived from it, is inopposite of the case of *Jackson*. The prosecutor, in the *Jackson* case, admitted that he used the Garrity statement and internal affairs file in preparation of his case. *State of Ohio v. Jackson*, Fifth Dist. No.2007CA00274, 2008 Ohio-2944. Further, there is little debate that only through the Garrity statement of Officer Jackson was one of the witnesses, later interviewed by the prosecution, identified.

The City of Canton mistakes a "confusing and conflicting body of caselaw" with cases not on point. In the Oregon case cited by amicus, the court held inadmissible statements given by the Defendant after he requested a lawyer but was told he would have to wait until they got to the stationhouse to call a lawyer. He subsequently made incriminating statements. *Oregon v. Haas* (1975) 95 S. Ct. 1215, 420 U.S. 704, 721. The court noted that: "assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, such deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief. *Oregon v. Haas*, 95 S. Ct. 1215, 420 U.S. 704, 721 quoting *Harris v. New York*, 91 S. Ct. 643, 645, 401

U.S. 222. In that case there was an inadvertent admission after a request for counsel. This case, by contrast, involved a purposeful use of an immunized and contractually excluded statement of the defendant.

In the *State v. Horton-Alomar*, 2005-Ohio-1537, case cited by amicus, the City of Canton failed to properly state the reason that the immunized statement admitted in a motion to withdraw a guilty plea, was harmless error. The trial court, the trier of fact in the motion to withdraw, expressly stated that it did not rely on appellant's statements during her disciplinary hearings in its decision and disavowed any reliance on those statements specifically.

In *State v. Parson* 2007-Ohio-4812, the internal affairs investigator was actually advised by the prosecution not to divulge any information in the Garrity statement. ¶12. A conscious effort on the part of the prosecution not to use the Garrity statement was effected by the prosecutor's office. The prosecutor did not have a copy of the Garrity statement. At some point someone asked the investigator to utilize the phone number for a witness given in the Garrity statement to find an address of a known witness, an address that the prosecution proved it could have obtained independently. The court found that use harmless error.

These cases dealt with inadvertent use. The Amicus brief attempts to align their direct and illegal use with inadvertent use. Amicus attempts to open a floodgate, allowing all prosecutors to obtain the Garrity statements and then attempt to find other sources for the information in those statements, effectively stripping Garrity of all meaning and assaulting the 5th amendment beyond repair.

The amicus then argues that, although the prosecutor could not read the internal affairs case, the public and press could. Yet O.R.C. 149.32 (A) (1) (h) exempts confidential law enforcement investigatory records. Further, the City of Canton again creates its own dilemma.

There is no dilemma if the Garrity statement is not taken from the officer until the close of the criminal case, even if the City institutes an internal affairs investigation but postpones the Garrity immunized statement until the close of the criminal case.

Further, as to the argument by the City that any favorable evidence known to police has to be disclosed, by not taking the Garrity statement until after the conclusion of the criminal case, again the dilemma is solved.

Clearly, the City's only reason to obtain a Garrity statement before the close of the criminal case, and then to turn it over to the criminal prosecutors, is to usurp the 5th amendment rights of the employee involved.

But we urge the Court to accept Jurisdiction in this matter not based on whether the instant case involved a Garrity violation, as it clearly did, but on the appropriate remedy for such a violation.

This Court has stated in *Conrad*:

“...we agree with the defendant that whenever compelled testimony is used against the witness who provided it, any error cannot be held harmless...The Fifth and Fourteenth Amendment provide a privilege against compelled self-incrimination, not merely against unreliable self-incrimination. Here we deal with the constitutional privilege against compulsory self-incrimination in its most pristine form. Balancing [of interests] therefore, is not simply unnecessary, it is impermissible.” *State v. Conrad*, 50 Ohio St.3d. 1, 5; 552 N.E.2d 214, quoting *New Jersey v. Portash* (1979), 440 U.S. 450, 459. Since improper use of immunized testimony by the prosecution under *Kastigar* should

never be countenanced, dismissal of the indictment will greatly discourage such abuses by prosecuting authorities in future cases.

STATEMENT OF THE CASE AND FACTS

The Amici Curiae concur in the statement of facts and procedural history as presented in the Memorandum in Support of Jurisdiction of Appellee.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. 1: When a public employer contractually and constitutionally violates an employee's right against self-incrimination by using a statement given by the employee under threat of termination, and the public employer does not sustain his burden to prove he did not use the statement in criminal proceedings against the employee in the Kastigar Hearing, the appropriate remedy under Conrad is dismissal of the indictment.

INTEREST OF AMICI CURIAE CPPA

Canton Police Patrolman's Association (CPPA) represents all patrol officers in the Canton Police Department numbering over 100 officers, of which Officer Anthony Jackson has been a member for several years and continues to be a member of the organization. The organization represents the interests of the patrolmen in contract negotiations; disciplinary matters; and generally any matter affecting patrol officers in dealing with the City of Canton.

The matter at issue here is of *extreme* interest to all the patrolmen as it will involve their 5th amendment rights not only in the near past but for all future cases. All officers will be affected if they can be compelled to honestly make statements in an investigation of them, or lose their job, and then have the statements turned over to the Stark County Prosecutor's office for pursuit of criminal charges. The signing of the Garrity statement, a contract with the City of Canton, will be affected by the outcome of the decision in this case, and therefore, contract negotiations with the City of Canton and Canton Police Patrolman's Association will also be affected.

ARGUMENT AND LAW

In *Garrity v. State of New Jersey*, 385 U.S. 493, 87 S.Ct.616, the United States Supreme Court stated:

Where police officers being investigated were given choice either to incriminate themselves or to forfeit their jobs under New Jersey statute dealing with forfeiture of the office or employment, tenure, and pension rights of persons refusing to testify on ground of self-incrimination, and officers chose to make confessions were not voluntary, but were coerced, and Fourteenth Amendment prohibited their use in subsequent criminal prosecution of officers in state court.

Protection of individual under Fourteenth Amendment against coerced confessions prohibits use in subsequent criminal *proceedings* of confessions obtained under threat of removal from office, and protection extends to all, whether they are policemen or other members of the body politic. *Id.* at 500, 620.

This Court signed in on the matter in *State v. Conrad* (1990) 50 Ohio St.3d 1, 5, 552

N.E.2d 214, 217, when it stated:

Clearly the use of the transcript by the state at the grand jury proceedings militates strongly against a finding that it derived its information concerning defendant's actions from wholly independent sources.

...we agree with the defendant that whenever compelled testimony is used against the witness who provided it, any error cannot be held harmless". *Id.*

The Fifth and Fourteenth Amendment provide a privilege against compelled self-incrimination, not merely against unreliable self-incrimination. Here we deal with the constitutional privilege against compulsory self-incrimination in its most pristine form. Balancing [of interests] therefore, is not simply unnecessary, it is impermissible. *Id.* at 5, 217.

Since improper use of immunized testimony by the prosecution under *Kastigar* should never be countenanced, dismissal of the indictment will greatly discourage such abuses by prosecuting authorities in future cases. *Id.* at 5, 218.

This Court in *Conrad* continued with a differentiation of the types of immunity.

The first type of immunity is known as 'transactional immunity' which protects a witness from prosecution when he or she provides compelled testimony which may be incriminating. The second type of immunity, found here in R.C. 101.44 is called 'use immunity', which allows the witness to be prosecuted, but prohibits any immunized testimony given by the witness from being used against him or her in a subsequent prosecution. The third type of immunity is referred to as 'derivative use immunity' and it provides immunity from the use of any information directly or indirectly derived from such testimony. *Id.* at 4, 217, quoting *Kastigar v. United States* (1971) 406 U.S. 441,453, 92 S.Ct. 1653, 1661.

The United States Supreme Court has proscribed any use of the immunized

testimony and any evidence derived directly or indirectly therefrom, and the Ohio Supreme Court concurred, indicating that the proscription was automatic under the 5th and 14th amendments. But in the case at bar, the City of Canton also concurred with the proscription when they presented Officer Jackson with a “Garrity Warning” that he was instructed to sign which extended not only to the statement of Officer Jackson but also to the fruits of the testimony creating also a contract between the City of Canton and Officer Jackson of use and derivative use of his statement and the fruits thereof. The courts place the burden to prove affirmatively that evidence *proposed* to be used is derived from legitimate sources wholly independent of compelled testimony. *Id.* at Syllabus, what has become known as a “Kastigar Hearing”. The trial court, in the case at bar, held a Kastigar hearing in this matter on August 8, 2007.

The lower Court went on to describe this ‘derivative use’ which the Court also, albeit inartfully, termed ‘non-evidentiary’ use.

In the Kastigar Hearing in this matter of August 8, 2007, the prosecutor presented *no* sworn testimony that the Investigator for Internal affairs, Lt. Davis, had not discussed the testimony of Officer Jackson with the prosecutor for Grand Jury, nor any testimony that the prosecutors had not conferred at any time, nor any testimony that Lt. Davis had not conferred with the prosecutor assigned after Grand Jury, facts that were certainly essential to affirmatively carry the burden that the evidence proposed to be used is derived from legitimate sources wholly independent of compelled testimony. The Supreme Court, in *Kastigar*, set the standard for the prosecution when a prosecutor is contaminated by the inadvertent exposure to immunized testimony of a defendant.

In subsequent criminal prosecution of person who has been compelled to testify under grant of immunity, prosecution has burden of proving affirmatively that evidence

proposed to be used is derived from legitimate source wholly independent of compelled testimony. *Kastigar* supra at Syllabus.

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 disclosures. *Kastigar* supra at 460.

The Stark County Prosecutor's office argues that no leads were developed from Jackson's Garrity statement because they said so. But the Court in *Kastigar* stated:

A person accorded this immunity under 18 U.S.C. Section 6002, and subsequently prosecuted, is not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities.. *Kastigar* supra at 460.

In the *Kastigar* Hearing in this case, the transcripts indicated that the immunized testimony was utilized in pretrial preparation.

The Prosecutor's office goes on to argue that the threshold question is not reached until trial. The state fails to note that in *Garrity*, the court prohibits use of coerced confessions in subsequent criminal *prosecutions*. *Garrity* at syllabus. Further the Court states:

...the protection of individual under 14th amendment against coerced confessions prohibits use in subsequent criminal *proceedings*...*Id.*,

proceedings which obviously would include pretrial proceedings.

The case at bar involves use and derivative use of testimony. Some courts have found that under derivative use, there is a subcategory of non-evidentiary use. The court in the instant case inartfully refers to the proscribed evidence as derivative or non-evidentiary use. But the use cited by the Trial Court pursuant to the *Kastigar* Hearing falls into the category of derivative use, with some possible non-evidentiary use included, if that term can be defined at all. The amicus brief completely ignores the finding of fact by the trial court of derivative use and focuses exclusively on the obscure term, non-evidentiary, and proceeds to cite cases from

certain circuits that are not on point. The lower Court cited to the 8th circuit case *McDaniel* which stated:

To be coextensive with constitutional privilege against self-incrimination, the immunity granted a witness on compelling him to testify must forbid all prosecutorial use of such testimony, direct as well as indirect, and not merely that which results in presentation of evidence before a jury; immunized use includes assistance in focusing investigation, deciding to initiate prosecution, refusing to plea bargain, interpreting evidence, planning cross-examination and otherwise generally planning trial strategy. *U.S. v. McDaniel*, 482 F.2d 305.

In the case at bar, the Trial Court, pursuant to the Kastigar hearing, found that the evidence utilized from the immunized statement and the fruits thereof gave the state the Defendant's actions on the date in question, his reasons for being in the tavern in question, his account of the events and possible defenses to the charge. Also through the witnesses named by the Defendant, the prosecution had information to discredit any defense of the Defendant. The evidence the state gleaned from the statement was extremely favorable to the state and extremely unfavorable to the Defendant. The Internal Affairs investigator who interviewed the Defendant in effect became the investigator for the prosecutor's office and his testimony in Grand Jury was influential in their decision to indict. Through the fruits of the immunized statement, 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 defenses.) The court concluded that the factual evidence presented at the Kastigar hearing did not meet the burden of proof as there was no testimony as the interaction, if any, between the Grand Jury prosecutor and Lt. Davis; between the Grand Jury prosecutor and the trial prosecutor, between Lt. Davis and the trial prosecutor, nor even testimony as to when the Internal Affairs Investigation (with the immunized testimony and fruits thereof) file was received by the prosecutor, who read it and what they read. The court went on to give an extensive list of all the prohibited uses that the

prosecutor would have been able to take advantage of with the fruits of the immunized testimony.

The trial court found that the burden was on the State to present independent evidence (and independent sources of evidence) and the state clearly failed to do so.

In the amicus brief, the City of Canton attempts to cloud a very clear issue by attacking the McDaniel case, the Eighth Circuit case that has not been overruled, and the term ‘non-evidentiary’ use, by initially stating it is an obscure term not capable of definition then offering the “accepted” definition. The amicus brief takes tremendous liberties when it states that the term non-evidentiary use has been rejected by various circuits. The amicus brief ignores the prevailing law of this Court and the Supreme Court of the United States. The amicus brief ignores findings of the trial court in its extensive factual findings of the derivative, not non-evidentiary uses of the testimony in question, and the factual finding that the State did not meet its burden thereof.

But a review of the cases cited by the amicus brief supports the proscription in the very types of uses the Trial Court has stated occurred in the instant case. In the Ninth Circuit case cited by the amicus brief, *Gwillim v. City of San Jose*, 929 F2d 465, the court stated:

Use of immunized statement by prosecutor to refresh recollection of witnesses may be improper evidentiary use of statement, in violation of defendant’s right against self-incrimination.

The *Gwillim* court stated that the use of the testimony in that case came close to such evidentiary use. However, the court did not reach the issue of *use* of the testimony. As the defendant had only questioned the *transmission* and not the *use* of the testimony. *Id.* at 468. In the instant case, it is the use that is prohibited.

In the Third Circuit case cited by the City of Canton, the court actually held:

...record failed to show that the Government and defendant, who contended that the Government violated his use immunity by giving prosecutor access to his prior grand jury testimony, remained in substantially same position as if defendant had not testified, and under the circumstances, case would be remanded for evidentiary hearing on immunity issue, including inquiry into prosecutor's access to grand jury testimony and extent to which she may have used that testimony in preparation and conduct at trial" *U.S. v. Semkiw*, 712 F.2d 891.

The court stated:

The testimony compelled from a witness under immunity must leave him and the government in substantially the same position as if the witness retained his right to remain silent. *Semkiw* at 893-894 quoting *The Pillsbury Co. v. Conboy*, 459 U.S. 248, *Kastigar v. United States*, 406 U.S. 441,457, *Murphy v. Waterfront Commission*, 378 U.S. 52, 79.

The Court found that the record did not show that the defendant and the prosecution remained in substantially the same position as if defendant had not testified, and the court remanded for a Kastigar hearing. *Semkiw* at 895.

In the case at bar, the Court has made findings of fact related to the Kastigar hearing and found the prosecution failed to meet its burden and that, consistent with the *Semkiw* case, the defendant was not in substantially the same position as if he had never given the immunized statement.

In the Second Circuit case cited in the amicus brief, the court actually found that no privileged information was used by the government in its prosecution. *U.S. v. Schwimmer*, 924 F.2d 443. The court held that "no preview of defense strategy was derived from work papers". *Id.* at syllabus. The lower court had determined that:

There had been no derivative use of the information contained in the workpapers in question, and the information derived was not used to *prepare* for the prosecution of defendant. *Id.* at 445.

The agent in charge of the investigation was never in possession of the workpapers and never had discussed them with the agent who had retrieved the workpapers.

The district court also found that the workpapers had not been used by the prosecution either to prepare for cross-examination of witnesses or to gain an understanding of the strengths and weaknesses of its case so that the evidence could be presented in the light most favorable to the government. *Id.* at 446.

The court applied a clearly erroneous standard. *Id.* at syllabus.

The *Schwimmer* case involved none of the uses described by the lower court in the instant case. The tangential use in *Schwimmer* was the fact that the evidence was there, not viewed by any investigator or prosecutor and not utilized, inopposite to the case at bar. *Id.* at 445-446.

In the 11th circuit case cited by the amicus brief, the court held:

Government failed to meet burden of proving by preponderance of evidence that none of defendant's immunized testimony was used in obtaining indictment against him. *U.S. v. Schmidgall*, 25 F.3d 1523.

The court noted prohibited indirect derivation includes using immunized testimony to help shape the questioning of another witness. *Id.* at 1528. quoting *Kastigar*, 406 U.S. 441,460. A government agent's denials that he made use of the immunized testimony, standing alone, are generally insufficient to meet the government's burden, even if made in good faith. *Id.* at 1528 quoting *U.S. v. Hampton*, 775 F.2d 1479, 1485. It is these very uses of the compelled testimony, i.e. investigatory leads and focusing an investigation on a witness, that the lower court in the instant case found troublesome and the *Schmidgall* court found to be derivative use, not non-evidentiary use.

In the 7th Circuit case cited by the Amicus, the Court held that the defendant had waived consideration of allegedly improper use of immunized testimony. *U.S. v. Bolton*, 977 F.2d 1196. The case involved 4 indictments. The court found not even a tangential influence in the third indictment. *Id.* at 1199.

In the First circuit case cited by the amicus brief, the immunized testimony in question was nationally televised. *U.S. v. Serrano*, 870 F.2d 1, 13. The court in that case held that the government agent's statement that defendant had discussed kickbacks in the immunized testimony was harmless beyond a reasonable doubt because the kickbacks concerned a *different* indictment from the one in question. *Id.* at 15. Further, the court declined to consider the claim of improper nonevidentiary use of immunized testimony as the claim was first raised on appeal. *Id.* at 16

In recent caselaw, the Second Appellate District Court of Ohio acknowledged the controlling law as stated in *Kastigar* and *Conrad* in determining whether the trial court correctly determined that the state failed to establish that the special prosecutor did not improperly use [Deputy Brocious'] statements. *State v. Brocious*, 2003-Ohio-4708. The court utilized the standard established in those cases:

The burden is upon the state to establish that no use was made of the immunized statement and that the evidence to be used at trial was derived from sources wholly independent of the immunized statement. *Id.* at 4.

The court in the *Brocious* case found that the prosecutor had not established that it had made no use of the immunized testimony and dismissal of the indictment was the appropriate remedy. *Id.* at 4.

In the case, *In Re Grand Jury*, the U.S. Fourth circuit Court of Appeals was faced with a city police department, as in the instant case, and a separate and distinct prosecutor's office, as in the instant case. The federal prosecutor tried to subpoena the internal affairs records and the statements of the officers in question. *In Re Grand Jury*, 478 F.3d 581, 583-584. The city, appropriately supportive of the rights of its officers, inopposite to the instant case, recognized that would put its officers in jeopardy, moved to quash the subpoena, which the court granted.

Id. The court questioned why the prosecutor's office would need this information when they could subpoena the officers directly. Id. at 587.

The trial court in the instant case, pursuant to a Kastigar hearing found derivative use of the immunized testimony, which, according to the cases cited by the amicus brief, is a finding of fact requiring a clearly erroneous standard. The tangential or non-evidentiary use, a term which has no meaning, is far removed from the finding of facts by the trial court in this case.

The argument that the prosecutor has to turn over exculpatory evidence, and therefore must seize evidence in violation of the 5th and 14th amendments is ridiculous. The suggestion would open a panacea of abuses of the constitutional proscription of self-incrimination.

The City of Canton has created a dilemma, then requests this court to solve the dilemma by eroding the rights afforded an individual under the 5th amendment. The City of Canton can commence the internal affairs case after the conclusion of the criminal case, which would be dispositive of all their arguments in the instant case. They are suggesting the criminal prosecutors should routinely be given the immunized statement, and as long as they can find independent sources for information contained in that statement, any indictment should stand. Further, they are suggesting that defendant's 5th amendment right against self-incrimination should rest on the "promise" of the prosecutor not to use it. The constitution has never rested on the 'promise' of a prosecutor and should not as they are men and women with all the shortcomings and failings of mankind in general.

CONCLUSION

The controlling law on this issue was established by Garrity, Kastigar, Conrad, McDaniel and subsequent cases. Although the amicus brief of the City of Canton tries to confuse the issue, the derivative use of Officer Jackson's immunized statements as clearly delineated by the trial court in the Kastigar Hearing of August 8, 2007, is proscribed by even the courts and cases cited by the City of Canton. The cases cited by the amicus brief strengthen the findings in Kastigar and Conrad. The findings of fact by the Trial Court in this case are clearly derivative use, and not the obscure tangential use noted in the cases cited by the City of Canton.

But the most frightening statement by the county prosecutor was when he stated they routinely offer by contract, immunity to the officers for their statements and the fruits thereof [the "Garrity" statement] as does the constitution without need for a contractual agreement, and then turn over the files including the immunized statement to the county prosecutor's office for pursuing criminal charges. This practice clearly circumvents the Constitution and a clear message should be sent as stated in Conrad, that it will not be tolerated. The remedy under Conrad is dismissal of the indictment.

Therefore, the indictment should be dismissed in this matter.

Respectfully submitted,



MARY LOU SEKULA (0066001)

122 Central Plaza N.

Canton, Ohio 44702

(330) 452-4005

Fax No. (330) 452-3661

Email: Mazzie569@aol.com

Counsel for Amici Curiae
CPPA (Canton Police Patrolman's
Association)

CERTIFICATE OF SERVICE

KATHLEEN O. TATARSKY
Ohio Sup. Ct. Reg. No. 0017115
Assistant Prosecuting Attorney
Appellate Division
110 Central Plaza S., Suite 510
Canton, Ohio 44701-0049

Counsel for Plaintiff-Appellant



MARY LOU SEKULA
Counsel for Amici Curiae
CPPA (Canton Police Patrolman's
Association)