Case No. 2008-1499

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
FIFTH APPELLATE DISTRICT
STARK COUNTY, OHIO
CASE NO. 2007CA0027

STATE OF OHIO,
Plaintiff-Appellant/Cross-Appellee,

v.

ANTHONY D. JACKSON
Defendant-Appellee/Cross-Appellant,

Appellee's Response to Appellant's Memorandum in Support of Jurisdiction and Memorandum in Support of Jurisdiction on Cross Appeal

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PROPOSITION OF LAW: WHEN A PUBLIC EMPLOYER COMPELS AN EMPLOYEE TO GIVE A STATEMENT UNDER THREAT OF REMOVAL FROM OFFICE, AND THEN SUBSEQUENTLY PROVIDES THAT STATEMENT TO THE PROSECUTING ATTORNEY WHO IS PURSUING A CRIMINAL CONVICTION AGAINST THE EMPLOYEE, *STATE V. CONRAD* (1990), 50 OHIO ST. 3D 1, 552 N.E. 2D 214, REQUIRES DISMISSAL OF THE CASE UNLESS THE PROSECUTING ATTORNEY CAN ESTABLISH THAT THE STATE HAS NOT MADE ANY USE OF THE IMMUNIZED TESTIMONY AND THAT ALL OF THE EVIDENCE TO BE USED AT TRIAL WAS DERIVED FROM SOURCES WHOLLY INDEPENDENT OF THAT IMMUNIZED TESTIMONY 10

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APPELLEE'S RESPONSE TO APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

Despite the claims of Appellant and its Amicus brethren, the issues they advance are already the subject of clear precedent and there is no reason for this Court to accept this case.

Appellant claims in this appeal that the Fifth District Court of Appeals decision in this case has somehow "jeopardized" criminal prosecutions of public employees, and thus a case of public or great general interest, and a substantial constitutional question are involved. In fact, except for the remedy ordered by the Court of Appeals, all that court did was ratify the fact that the trial court had followed, and applied, well established precedent.

Public employers throughout the Fifth Appellate district may continue to investigate, and where appropriate, discipline their employees, consistent with the opinion in this case. They simply have to follow the law and not take unfair advantage of the power to grant immunity which the United States Supreme Court provided them with in *Garrity v. New Jersey* (1967), 385 U.S. 493, 87 S. Ct. 616, 17 L. Ed 2d 562.

Contrary to Appellant's claims about the rulings in the courts below, the violation of Appellee's rights found by those courts was not based upon some abstract claim that the prosecutor was "exposed" to Appellee's *Garrity* statement, or had "mere knowledge" of it. In fact the prosecutor readily admitted that he had purposely obtained the statement, in order to assist in the criminal prosecution. In response to Appellee's motion to dismiss, counsel for the State of Ohio acknowledged that he "had the benefit" of those materials for trial preparation.

Once the trial court was made aware of this violation it followed clear precedent and scheduled a hearing. Pursuant to *Kastigar v. United States* (1972), 406 U.S. 441, 92 S. Ct. 1653, 32

L. ed. 2d 212, and *State v. Conrad* (1990) 50 Ohio St. 3d 1, 552 NE 2d 214, the prosecutor was then given an opportunity to demonstrate that it had not improperly used the statement. The trial court applied the *Kastigar/ Conrad* test, and in doing so found that the state couldn't establish that it hadn't "used" the statement.

Appellant now seeks from this court an opportunity to eviscerate the holding of *State v. Conrad.* In place of the rule that places the burden on the prosecutor to deny and disprove any use of the immunized statement, Appellant would have this Court substitute a rule which would in effect condone a violation of a *Garrity* immunity agreement, as long as a defendant couldn't prove that the words he spoke in the *Garrity* statement were literally introduced in evidence.

Appellant's principal justification for such a rule is the claim that, derivative or non-evidentiary use is hard to define. The difficulty Appellant has apparently arises from its failure to appreciate the fact that when the United States Supreme Court in *Kastigar* prohibited "any" use of immunized testimony, it meant what it said. Any doubt about that should have been resolved by this Court's decision in *Conrad.*

Of course the myriad of potential problems associated with applying the current law, as cited by Appellant in its brief, are self inflicted and can be easily avoided. If a public employer chooses to invoke *Garrity*, and conduct a parallel proceeding to a criminal investigation, it simply cannot share the compelled, immunized statement with the criminal investigators and prosecutors. If inadvertently that information is improperly shared, the prosecution bears the burden of establishing at a *Kastigar* hearing that no use was made of the information, and that the prosecution's evidence was all obtained independently. Nevertheless, in the case at bar both the trial judge, and all three members of the Court of Appeals panel found that the prosecution had made use of

Appellee's statement in tangible, not just theoretical ways. As a result this Court need not issue further pronouncements on this issue because *Conrad* is still a viable precedent and public employers simply need to follow it.

WHY APPELLEE'S CROSS APPEAL INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS OF GREAT PUBLIC OR GENERAL INTEREST

If an issue in this case has the potential for involving public or great general interest, which involves a substantial constitutional question, it is the decision of the Court of Appeals overturning the trial court's dismissal of the indictment and substituting a remedy involving removal of the prosecuting attorney and the purging of his file. As a result, Appellee has cross-appealed and proposes that if this Court decides to accept this case, it should do so for the purpose of reinstating the trial court's decision.

The trial court in this case read *Conrad* to mean that if the prosecution failed the *Kastigar/Conrad* two prong test, dismissal was the appropriate remedy. Although all three members of the Fifth District Court of Appeals agreed that a *Garrity* violation had occurred, they also concluded that because of procedural differences between *Conrad* and the case at bar, they weren't bound to affirm the trial court's dismissal. Appellee contends that the Court of Appeals has read *Conrad* too narrowly.

In *Conrad* there was specific evidence that a statutory immunity grant had been violated in obtaining an indictment. This Court ordered dismissal of the indictment. It is Appellee's contention that the same policy considerations that lead to that dismissal are present at any stage of a prosecution where an immunized statement is improperly used. As a result, even is there wasn't

clear evidence that the indictment in this case itself was dependent upon use of the immunized statement, the fact that the statement was admittedly being used by the prosecutor in his investigation and pre-trial preparations is just as wrong. In other words, if it is wrong to use the immunized statement to obtain an indictment, it is at least equally wrong to use that statement to get a conviction.

The *Conrad* court correctly adopted the logic and two prong test that the United States Supreme Court devised in *Kastigar v. United States* (1972), 406 U.S. 441, 92 S. Ct. 1653, 32 L. ed. 2d 212,. The legal principles invoked in those cases do not depend on the procedural status of the case. The point is to prevent prosecutor's from taking unfair advantage of compelled testimony, and to leave the witness in substantially the same position as if the witness had claimed his privilege in the absence of immunity. *Kastigar* at 457.

The remedy fashioned by the Court of Appeals in this case, while well intentioned, has the potential to erode the Fifth Amendment Rights of all public employees and may in fact encourage public employers to improperly exploit "*Garrity*" statements. As the Court in *Conrad* wisely noted:

> "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.

As a result, Appellee urges this Court to accept for review the appropriateness of the remedy ordered by the Court of Appeals in order to clear up any doubt about how far public employers may go in exploiting the power given to them by the United States Supreme Court in *Garrity*.

APPELLEE'S STATEMENT OF THE CASE AND FACTS

On February 14th, 2006, Appellee, an off duty, Canton, Ohio police officer, was involved in a traffic accident. As a result of that accident, he was issued citations for operating a vehicle under the influence, leaving the scene of an accident, and failure to control his vehicle. The following day Appellee was placed on paid administrative leave pending resolution of that case. He was not provided with a disciplinary hearing, and his badge and service weapon were not taken from him.

On May 30th, 2006, while that traffic case lingered in the Canton Municipal Court, Appellant while armed with his service weapon, was involved in a minor altercation in a tavern outside the Canton city limits in Perry township. The township police were called, however no arrests were made. Despite the fact that there were no allegations at the scene that Appellee has in any way used, or brandished his firearm, he voluntarily surrendered it to the Perry township police. The Canton police department internal affairs unit commenced an investigation the following day.

More than two weeks later, on June 16th, 2006, Perry police sergeant Jon Roethlisberger, after several contacts from the Canton police department internal affairs unit, and at the direction of the Perry police chief, filed criminal complaints against Appellee charging him with carrying a concealed weapon, and illegal possession of a firearm in a liquor permit premises.

After the case was bound over to the grand jury, but before an indictment was issued, the internal affairs investigation of Appellee concerning the incident continued. As part of that investigation, Appellee was ordered by Lieutenant Davis, of the internal affairs unit, to appear on July 21, 2006 to answer questions concerning the incident.

On that date, Appellee appeared with his legal counsel, and was read a "*Garrity* Warning". That warning instructed Appellee that if he refused to answer any of the questions put to him, he

would be subject to disciplinary action. Appellee was specifically advised that "... neither your self -incriminating statements nor the fruits of any self incriminating statements you make will be used against you in any criminal proceedings."

Appellee thereafter submitted to a twenty minute recorded interview concerning the incident, in which he was forced to admit that; he had consumed alcohol while possessing his firearm in the tavern, and that he briefly scuffled with another patron. Appellee was also required to give the names of any witnesses that he knew of, and to explain his actions, and any justifications he had for his conduct. Given the nature of the charge against him, Appellant at trial would have had to rely on one or more of the affirmative defenses provided by the statute. The internal affairs investigation clearly covered those issues and possible defenses.

As a result, contrary to Appellant's contention that the statement was nothing more than a self serving denial, which mirrored Appellee's statement to the police at the scene, in fact Appellant was able to extract a coerced, pre-trial roadmap of Appellee's position at trial.

In addition, Appellant was able to make immediate use of the statement to further the criminal investigation. One of the witnesses identified by Appellee was Vince Van. Van's involvement and identity were previously unknown to either the Perry police or the internal affairs investigators. The Perry police had not done any follow-up interviews with any of the witnesses, even after filing the complaints.

However, within hours of completing Appellee's interview, Lt. Davis continued the internal affairs investigation by interviewing a witness named Tina Ogle. Davis now had the knowledge gained from Appellee, and among other issues, he specifically questioned Ogle concerning the witness Van. Thereafter, on July 24, 2006 Van himself was located, and Davis obtained a recorded statement from him.

On August 4, 2006, the Stark County prosecutor issued a praecipe for grand jury subpoenas. That praecipe contained the names of six witnesses who were scheduled to appear on August 10th, 2006. In addition to Sgt. Roethlisberger and Lt. Davis, four civilian witnesses; Krista Jones, Shannon Dazey, Tony Vail, and James Walters were subpoenaed to appear on August 10, 2006.

The proceedings in the grand jury on August 10, 2006 are part of the record in this case, having been provided to the trial court upon motion of the prosecutor. That motion was made in connection with Appellee's motion to dismiss, based upon a claimed violation of his *Garrity* rights. The prosecutor who presented the case to the grand jury that day was Jonathon Baumoel. He called only two of the subpoenaed witnesses, Roethlisberger and Davis.

When questioned by Baumoel about any statement made by Appellee, Davis stated that he couldn't answer, citing *Garrity*. During their testimony both officers expressed uncertainty concerning the legality of Appellee's conduct, both in light of his position as a police officer, as well as his use of alcohol. Clearly, some of the grand jurors were concerned about those issues, as evidenced by the questions they posed to both the witnesses, as well as to the prosecutor.

Thereafter, contrary to the assertions of Appellant, the grand jury did not issue an indictment based soley upon the testimony heard on August 10, 2006. In fact the record is clear that, on August 11, 2006, prosecutor Baumoel filed a second praecipe for grand jury subpoenas, again seeking the appearance of Shannon Dazey, who apparently had not appeared in response to the initial subpoena, as well as Lora Saluatore (sic) and Perry police officer Chad Guist. Those witnesses were ordered to appear on August 17th, 2006.

In light of the fact that the prosecutor did not produce a transcript of the grand jury proceedings on August 17th, 2006 for the trial court, the record is silent as to what additional testimony was presented to the grand jury. The record is also silent as to whether prosecutor

Baumoel had access to the internal affairs report containing Appellee's *Garrity* statement, or whether he discussed the contents of the statement with Lt. Davis.

Nevertheless, an indictment was handed up by the grand jury on August 21, 2006, charging Appellee with violating R.C. 2923.121, Possession of a Firearm in a Liquor Permit Premises. To that charge Appellee entered a plea of not guilty and, *inter alia*, demanded discovery from the prosecutor.

That discovery response was made by prosecutor Joseph Vance, who in later proceedings confessed that he did not know when he actually came into possession of the *Garrity* statement. Curiously, despite claims by Appellant that the prosecutor was somehow obligated to obtain the *Garrity* statement and provide to Appellee as part of his obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), at no time did the prosecutor identify any exculpatory evidence in the possession of State of Ohio.

Appellee then filed a motion seeking dismissal of the indictment based upon his claim that a federal statute, 18 USCA §926(B) , had pre-empted the State of Ohio's efforts to prosecute him. Although evidence was taken on some of the issues raised by that motion, the trial court ultimately denied Appellee's motion by judgment entry filed December 28th, 2006.

Thereafter the case was set for trial on March 27th 2007. Appellee however renewed his motion to dismiss the indictment, based upon the fact the statute Appellee had been charged under, had been amended by the Ohio General Assembly while the case was pending. Effective March 14th, 2007, *R.C.* 2923.121(B)(2), as amended, provided for an exemption for law enforcement officers from the prohibition against carrying firearms into bars, as long as they were up to date on their firearms training and as long as their department did not have a specific policy prohibiting it.

Appellee argued that the statute should be given retroactive effect, because it had reduced the penalty for the alleged offense. *R.C.* 1.58(B). In response to that motion, the trial court, by judgement entry filed May 24th, 2007, declined to rule on the issues raised by the motion to reconsider, stating that such a motion was "not the appropriate vehicle to resolve the issues argued."

Appellee then filed a motion on June 13th, 2007, requesting a jury instruction that would permit the jury to consider the change in the law as an affirmative defense. That motion was never ruled upon, because on June 20th, 2007, the day before the scheduled trial, Appellee, upon learning that the prosecutor had his *Garrity* statement, moved the court for leave to file a motion to dismiss, and also filed a motion in limine, seeking exclusion of any tainted evidence.

The motion for leave to file was granted, without objection by the prosecutor, and the trial was continued. On July 6, 2007, Appellee filed his final motion to dismiss, alleging that the prosecutor had improperly obtained his *Garrity* immunized statement from the internal affairs unit. The prosecutor replied on July 18, 2007 by acknowledging possession of the statement, and specifically admitting that "While the State has had the <u>benefit</u> of Internal Affairs reports for the purpose of pre-trial preparation, the same is true of the defense in this case." (Emphasis added)

The court then set a *Kastigar* hearing for August 8th, 2007. That hearing was the prosecutor's opportunity to demonstrate that it had not made improper use of the immunized statement. The only witness called by the state was Perry township's Sgt. Roethlisberger who testified regarding his initial investigation into the incident. His reports were thereafter admitted as exhibits. Neither Lt. Davis, nor prosecutor Baumoel, were called, and no effort, was made to establish what their exposure to the *Garrity* statement, or fruits of the statement, had been.

A joint stipulation of facts was submitted to the Court, along with other exhibits, including the *Garrity* statement itself, and the internal affairs file. As part of the stipulations submitted to the

court, the prosecutor acknowledged that he had reviewed the internal affairs file, including witness statements and the investigator's analysis of the case, for the purpose of preparing for trial. In fact, prosecutor Vance claimed to have done the same in other cases.

By entry filed September 19th, 2007, the trial court granted Appellee's motion, ruling that the State had committed a *Garrity* violation, and had failed to prove that it had not used the statement in question. As a result the indictment was dismissed.

On appeal the State of Ohio claimed that no *Garrity* violation had occurred, but that even if it had, dismissal was not the appropriate remedy. Although all three members of the Court of Appeals panel agreed that a *Garrity* violation had occurred, by a two to one vote, the case was remanded with instructions to cure the violation by assigning a new prosecutor, purging the file of the internal affairs information, and disqualifying Lt. Davis as a witness.

APPELLEE'S PROPOSITION OF LAW

When a public employer compels an employee to give a statement under threat of removal from office, and then subsequently provides that statement to the prosecuting attorney who is pursuing a criminal conviction against the employee, *State v. Conrad* (1990), 50 Ohio St. 3d 1, 552 N.E. 2d 214, requires dismissal of the case unless the prosecuting attorney can establish that the state has not made any use of the immunized testimony and that all of the evidence to be used at trial was derived from sources wholly independent of that immunized testimony.

Public employees, like other citizens, enjoy the protections of the Bill of Rights, including the Fifth Amendment privilege against self incrimination. That privilege is not however absolute. One method of defeating the privilege is through a grant of immunity. If that immunity provides protections that are co-extensive with the privilege against self-incrimination, then a Fifth Amendment claim can be overcome, and a witness must answer questions. *Kastigar v. United States*

(1972), 406 U.S. 441, 92 S. Ct. 1653, 32 L. ed. 2d 212.

One form of immunity arises from a direct promise from the government not to use testimony or information against the witness. In situations involving government employees, those promises take the form of *Garrity* warnings, named after the seminal case of *Garrity v. New Jersey*, (1967), 385 U.S. 493, 87 S. Ct. 616, 17 L. Ed 2d 562. wherein the United States Supreme Court held that police departments may not force an employee to choose between his job and his Fifth Amendment Rights. As a result of the *Garrity* ruling, government employers may now promise not to use an employee's statements against him or her in a criminal context, thereby creating use immunity for those statements. As a result, governmental employers can conduct investigations, and potentially discipline employees by using the employee's coerced statements against him.

However, once that public employee is forced to provide a statement, the information he provides simply may not be used against him in a criminal case. If that employee later claims that the immunity promise has been broken by the government, the burden is on the government to prove that it has kept its promise. Failure to keep the promise results in sanctions, including dismissal of criminal charges. *State v. Conrad*, (1990) 50 Ohio St. 3d 1, 552 NE 2d 214.

In briefs filed in both this Court and the Court of Appeals, Appellant seriously mischaracterizes both Appellee's position, and the record with regard to Appellee's statement. By suggesting that the trial court chose to dismiss the indictment based upon a prosecutor's "mere exposure" to an internal affairs file, Appellant ignores not only the facts of the case, but also the candid written admission by the assistant prosecutor who was charged with trying the case. Claiming that the prosecutor was merely "exposed" to the file, makes it sound like the prosecutor inadvertently walked into a room where the file was sitting on a table.

In fact, both Lieutenant Davis, who in effect was the prosecution's main investigator in the case, and assistant prosecutor Joseph Vance, had not only read Defendant's *Garrity* interview, but they used that interview in both tangible, and other less tangible ways. For example, at least one witness who was previously unknown to the prosecution, Vincent Van, was identified only as a result of the *Garrity* statement, and quickly interviewed. Another witness, Tina Ogle, who had not been previously spoken to, was interviewed by Davis almost immediately after the *Garrity* statement.

What other uses Davis and Vance made of the knowledge they gained from the *Garrity* interview is impossible for Appellee, or this Court to know for sure. What is known is that Appellant provided neither a statement from Davis, nor his testimony, at the *Kastigar* hearing on August 8, 2007. What is also unknown is whether Davis communicated the contents of the *Garrity* statement to prosecutor Baumoel, who presented the case to the grand jury. Neither a statement from Baumoel nor his testimony, were presented to the trial court at the *Kastigar* hearing.

Prosecutor Vance, responding to Appellee's motion to dismiss, denied that it was improper for him to have had the statement, calling his act of obtaining the internal affairs file. "... not only relevant, but prudent." Rather than attempting to minimize the effect of his exposure to the *Garrity* materials, he acknowledged that "While the State has had the <u>benefit</u> of Internal Affairs reports for the purpose of pre-trial preparation, the same is true of the defense in this case." (emphasis added) (Prosecutor's Response to Motion To Reconsider, July 18, 2007)

The position taken by the prosecutor was simply that, as long as he did not attempt to use that statement in the prosecutor's case in chief, other uses, such as trial preparation, or use in cross-examination of Appellee if he testified, were deemed to be permissible, as part of his "mere exposure" to the file. Vance in fact, acknowledged having made use of *Garrity* immunized

statements in prior cases.

Appellant further mischaracterizes Appellee's motion to dismiss as being based exclusively upon a tainted grand jury proceeding. While certainly what happened in the grand jury is relevant to Appellee's claim, it clearly was, and remains Appellee's position that the *Garrity* violation was continuing throughout trial preparation, and had hopelessly tainted the process.

Just as clear was the fact that the trial court's action in dismissing the case was based upon more than the prosecutor's mere exposure to the statement. It was the trial court's conclusion that, despite the fact that Lt. Davis declined to testify about Appellee's *Garrity* statement in the grand jury, a violation of Defendant's rights had occurred, based upon the actions of the prosecutor and his investigator subsequent to the indictment. The court was explicitly concerned with the advantages the prosecutor had obtained for purposes of trial preparation.

Appellant's argument in the Court of Appeals sought to limit *Garrity*, and its progeny, to grand jury violations only. In effect, Appellant claimed that as long as an indictment is returned without improper use of coerced testimony, the state is free to do what it pleases with that testimony in any other respect. That position fails to take into account the policy behind the *Garrity* ruling in the first place. Having gained a partial victory in the Court of Appeals as a result of the remand, Appellant now pushes the envelope urging that no *Garrity* violation has occurred.

The whole point of the development of the law in response to the *Garrity* decision was to effect a balance between the competing interests of the government in conducting employment related investigations, and the constitutional rights of those employees being investigated. By way of analogy, the *Garrity* Court, and later courts, looked to situations involving immunized testimony and found those circumstances to be very similar.

The rule that resulted was that, governmental bodies were given the power to override Fifth Amendment claims by their employees. The trade-off was that the compelled information could not be used by the government in its efforts to prosecute the employee. Nothing in either the logic, or the language of *Garrity*, suggests that it applied only to direct, literal, use of the words spoken by the targeted employee.

Courts which have been called upon to administer *Garrity* disputes have turned to other "immunity" situations for guidance. In Ohio this Court has such an opportunity in *State v. Conrad*, (1990) 50 Ohio St. 3d 1, 552 NE 2d 214.

In *Conrad* the Ohio Supreme Court adopted a two prong test for determining whether the state has met its burden, as required by *Kastigar*, of proving that it had not improperly used immunized testimony. That test requires that:

> 1.) The government must deny <u>any</u> use of an accused own immunized testimony against him or her in a criminal case, and (emphasis in the original)
>
> 2.) The government must affirmatively prove that all of the evidence to be used at trial is derived from sources wholly independent of the immunized testimony. *Conrad* at 4,517.

There simply is no way for Appellant to get around *Conrad* as being the applicable law for the trial court to have followed. Appellant's only possible complaint can be the application of the *Conrad* test. A review of Appellant's contentions, both in the trial court as well as the brief submitted, reveals an attempt to significantly understate the "use" it made, and could have made, of the *Garrity* statement.

In order to appreciate the potential, and actual value of the *Garrity* statement to the prosecutor, it is important to understand the potential issues at trial. While Appellant would suggest

that the issue at trial was simply whether Appellee had possession of a firearm inside of a bar, that view ignores the fact that, pursuant to both federal and state laws, several affirmative defenses would have been available to Appellee at trial. (See *R.C.* 2923.121(B) listing the affirmative defenses under Ohio law, and 18 *USCA* 926(B) providing a federal law defense.)

Those potential defenses directly involve such issues as Appellee's purpose in being in the bar, his conduct inside the bar, his use of alcohol, and the circumstances of how and why he possessed the firearm. Clearly, the *Garrity* statement dealt with all of those issues, as well as Appellee's thoughts on other witnesses and their testimony.

For any litigator to suggest that they do not gain an advantage by having a sworn statement from a potential witness to assist in pretrial preparation, would be preposterous. The ability to know in advance of trial what a witness will say provides a clear benefit to a lawyer preparing a case for trial. That benefit is of course magnified when that witness is a defendant in a criminal case. Unquestionably, Appellee was not left in the same position he would have been in had he not been required to provide a statement. That is the precise evil *Kastigar* said must be avoided.

In fact the trial court clearly recognized that the concerns it had were beyond the grand jury, and extended beyond the so-called "direct use" of the statement. Those potential derivative uses of the statement were clearly at the heart of the Court's ruling. Given the fact that the law placed the burden on the State to affirmatively prove that it had not made <u>any</u> use of the statement, the trial court was certainly correct in finding that the state had not met its burden.

Certainly derivative and non-testimonial use of the statement should be prohibited. Not only did the language of the warning read to Appellee by Lt. Davis in the case at bar promise that the "fruits" of any statement would not be used, but the United States Supreme Court in *Kastigar* was clearly concerned with derivative use. That is why the court in *Kastigar* provided for a hearing,

wherein the government needed to prove the source of its evidence. If the Supreme Court had only been concerned with direct testimonial use of the immunized statement, that fact would have been easy to determine on the record itself.

Finally in a strange twist of logic, Appellant contends that it was somehow obligated to obtain the *Garrity* statement so that it could comply with its obligations under the Criminal Rules regarding discovery. That argument neglects to consider several important factors. First of all, the only reason the statement existed is because the Canton police department demanded that Appellant submit to the interview. Secondly, despite this claim of concern for Appellee's right to be informed of exculpatory evidence, at no time in the case at bar did the prosecutor identify any evidence favorable to Appellee. In fact in the written response to Appellee's request for discovery, Appellant wrote that there was "none known."

Of course if one accepts Appellant's argument, every time a *Garrity* statement is taken, it would have to be turned over to the prosecutor if an indictment is returned. Such a result literally turns *Garrity* on its head, because the state can always compel the statement, and then be "forced" to obtain it so that is could comply with its' obligations. As a result the "immunity" created by, and included in the warning read to a governmental employee, would be merely an illusion.

Certainly, Appellant can't be heard to complain about this apparent dilemma of their own creation. Unlike a classic immunity situation where a prosecutor is unable to go forward with an investigation because a witness with potentially valuable information is refusing to testify, in the case at bar, there was no reason why the Canton police department couldn't have waited until the criminal case had run its course before demanding Appellee's statement. Or they could have kept the internal affairs materials away from the criminal prosecutors.

In fact pursuant to the contract between the City of Canton and the Canton Police

Patrolmen's Association, the city was contractually prohibited from taking disciplinary action until the criminal case was over. As reflected in his August 24, 2006 letter to Appellee, the Director of Public Safety stated:

> "Pursuant to Article 22.3 in the Collective Bargaining Agreement in effect between the City of Canton and the Canton Police Patrolmen's Association, it states in its pertinent part: "... the Director will suspend the decision until the final outcome of the criminal proceedings." (See Canton Police Department Internal Affairs File)

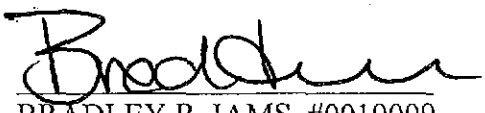
Therefore, while nothing prevented the city from conducting an investigation for administrative purposes, the decision to invoke *Garrity*, and force Appellee to choose between losing his job or waiving his constitutional rights against self incrimination, was not forced upon them by either time constraints, or the inability to move forward without the statement. The City made a conscious, and pre-meditated decision to force the issue, knowing full well that a parallel criminal proceeding was at hand.

It is precisely the nature of those actions by the prosecutor and internal affairs investigators, working in concert, which makes this type of violation so egregious. Therefore, given the practical difficulties of implementing a remedy such as was ordered by Court of Appeals, as well as the clear need for deterrence, dismissal was, and is clearly appropriate.

CONCLUSION

There is simply no need for this Court to reconsider *State v. Conrad* and no need to reaffirm that *Conrad* applies to *Garrity* violations. The only reason that this Court may want to accept this case for review would be to reverse the Court of Appeals remand and reinstate the trial court's dismissal.

Respectfully submitted,



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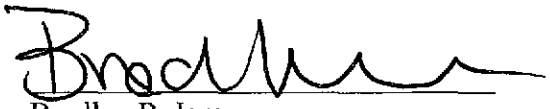
CERTIFICATE OF SERVICE

A copy of the foregoing Appellee's Response to Appellant's Memorandum in Support of Jurisdiction and Memorandum in Support of Jurisdiction on Cross Appeal was sent to Kathleen O. Tatarsky, Counsel for Appellant, by regular U.S. Mail at 110 Central Plaza South, Suite 510, Canton, Ohio 44701-0049 this 27 day of August, 2008.



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