

In the  
**Supreme Court of Ohio**

STATE OF OHIO,	:	Case No. 2008-1499
	:	
Plaintiff-Appellant/ Cross-Appellee,	:	On Appeal from the
	:	Stark County
v.	:	Court of Appeals,
	:	Fifth Appellate District
ANTHONY D. JACKSON,	:	
	:	Court of Appeals Case
Defendant-Appellee/ Cross-Appellant.	:	No. 2007 CA 00274
	:	

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**MERIT BRIEF OF *AMICUS CURIAE***  
**OHIO ATTORNEY GENERAL RICHARD CORDRAY**  
**IN SUPPORT OF APPELLANT/CROSS-APPELLEE STATE OF OHIO**

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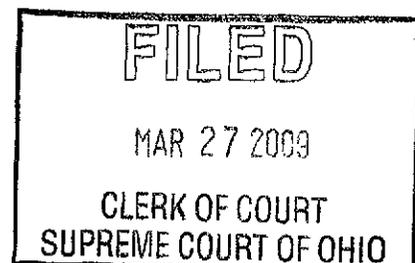
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## INTRODUCTION

It has long been established that public employees are constitutionally entitled to immunity when they are compelled to give incriminating statements to their employers under threat of termination. See *Garrity v. New Jersey* (1967), 385 U.S. 493. The immunity prevents the prosecutor from introducing that “*Garrity* statement” and any fruits derived therefrom in a subsequent criminal prosecution against the employee. See *Kastigar v. United States* (1972), 406 U.S. 441. And when a prosecutor introduces the immunized statement in a criminal proceeding, this Court has ordered a strong remedy—the dismissal of the indictment. See *State v. Conrad* (1990), 50 Ohio St. 3d 1, 5.

The defendant in this case seeks an unwarranted extension of *Garrity* immunity. Anthony Jackson gave an immunized statement to his employer, the Canton City Police Department, about an incident where he carried a firearm into a liquor establishment. That statement was placed in an Internal Affairs file, which was later turned over to the Stark County Prosecutor’s Office. The prosecutor sought, and the grand jury returned, an indictment for illegal possession of a firearm. There was no finding, however, that the grand jury ever heard or considered Jackson’s immunized statement or any evidence derived from that statement. Rather, it appears that Jackson’s statement was appropriately screened from the grand jury. In short, no evidentiary use was made of Jackson’s statement.

Nevertheless, both the common pleas court and the Fifth District found a *Garrity* violation based on the prosecutor’s mere exposure to the statement and the potential that the prosecutor’s trial preparation could be aided by the statement. This was based on an erroneous reading of *Kastigar* and *Conrad* that expands *Garrity* to bar even non-evidentiary use of a *Garrity* statement. A survey of this Court’s precedent and other Fifth Amendment doctrines demonstrates the opposite: So long as prosecutors do not introduce evidence derived from a

defendant's immunized statement in a criminal proceeding, no constitutional issue arises. Any broader protection would give public employees a shield from prosecution that the Constitution does not afford.

A *Garrity* violation does not occur until the prosecutor actually introduces tainted evidence—the immunized statement or any fruits derived from that statement—into a criminal proceeding. Because no such event took place in this case, the Court should reverse the Fifth District and allow this prosecution to proceed.

#### **STATEMENT OF AMICUS INTEREST**

Ohio Attorney General Richard Cordray is Ohio's chief law officer. R.C. 109.02. Accordingly, he has a strong interest in protecting the integrity of criminal proceedings and ensuring their compliance with the U.S. and Ohio Constitutions.

#### **STATEMENT OF THE CASE AND FACTS**

On May 30, 2006, Defendant Anthony Jackson allegedly carried a firearm into a bar, violating Ohio's prohibition against guns in liquor establishments. *State v. Jackson* (Ct. Com. Pleas 2007), No. 2006-CR-1022, slip op. at 1 ("Trial Ct. Op."). Jackson, a police officer, was on administrative leave from his position at the time because criminal charges were pending against him. *Id.* The day after the incident, Lieutenant David Davis of the Canton City Police Department's Internal Affairs Division began investigating Jackson's conduct. *Id.*

Some time into the investigation, the Police Department ordered Jackson to interview with Lieutenant Davis. *Id.* Jackson appeared for the interview and received a "*Garrity* warning," informing him that neither his self-incriminating statement nor its fruit would be used against him in criminal proceedings. *Id.* at 2. Jackson then gave an incriminatory statement and provided the names of two witnesses, one of whom—Vince Van—the State had no earlier knowledge of. *Id.* Lieutenant Davis interviewed both witnesses shortly thereafter. *Id.*

Several weeks later, a grand jury was convened. Lieutenant Davis testified before the grand jury, but he did not disclose any facts about his investigation of Jackson or the contents of Jackson's *Garrity* statement. *Id.* at 14. There has never been a finding that Vince Van's statement, which Lieutenant Davis obtained during his investigation, was ever presented to the grand jury.<sup>1</sup> The evidence for the gun charge was gleaned from the testimony of Sergeant John Rothlisberger of the Perry Township Police Department. *Id.* Rothlisberger had no involvement in the Canton Police Department's internal investigation or interview of Jackson. *Id.* at 15.

The grand jury indicted Jackson. *Id.* at 15. Later, Jackson learned that his Internal Affairs file, including his *Garrity* statement and the statements of the two witnesses he identified, had been transferred to the Stark County Prosecutor's Office. *Id.* at 2. Jackson filed a motion to dismiss the indictment, claiming that the State had "improperly utilized the fruits" of his *Garrity* statement. *Id.* at 6. After a hearing, the common pleas court granted the motion. *Id.* at 17.

On appeal, the Fifth District agreed that a *Garrity* violation had occurred. See *State v. Jackson* (5th Dist.), 2008 Ohio App. Lexis 2458, 2008-Ohio-2944. The court focused on the fact that the State had discovered the identity of a witness, Vince Van, from Jackson's statement. *Id.* ¶ 30. Instead of affirming the dismissal, however, the Fifth District opted for a less drastic remedy; it reinstated the indictment, ordered the prosecutor's file purged of the *Garrity* statement and all information derived from the statement, and instructed the common pleas court to appoint a visiting prosecutor to try the matter. *Id.* ¶ 37.

The State appealed, arguing that the prosecutor's mere knowledge and non-evidentiary use of Jackson's statement does not constitute a *Garrity* violation. Jackson cross-appealed,

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<sup>1</sup> Jackson says that the grand jury proceedings may have been tainted by improper *Garrity* evidence. See, e.g., Jackson Jur Mem. at 12. Because the grand jury records are sealed, the Attorney General takes no position on this allegation. The transcripts, which have been lodged with the Clerk, are available for the Court's review.

contending that the circumstances of this case required dismissal of the indictment under *Conrad*. This Court accepted jurisdiction over both the appeal and cross-appeal.

## ARGUMENT

### *Amicus Curiae* Ohio Attorney General's Proposition of Law:

*A Garrity violation does not occur unless prosecutors use a defendant's immunized statement or evidence derived from that statement during a criminal proceeding.*

Statements given by public employees to their employers under threat of removal from office are involuntary and are therefore afforded some measure of constitutional protection. See *Garrity*, 385 U.S. at 500. Public employees that give *Garrity* statements receive “use and derivative use” immunity, prohibiting prosecutors from using the immunized statement and the fruits of that statement in a subsequent criminal proceeding unless prosecutors can demonstrate that they derived the evidence from an independent source. See *Kastigar*, 406 U.S. at 453, 460. This immunity adequately preserves the employee-defendant’s Fifth Amendment privilege against self-incrimination. See *Kastigar* 406 U.S. at 453; *Jones v. Franklin Cty. Sheriff* (1990), 52 Ohio St. 3d 40, 44.

It is well established that *Garrity* prevents evidentiary use of an immunized statement—in other words, the introduction of an immunized statement or its fruits—during a criminal proceeding. Jackson argues, and the courts below agreed, that a *Garrity* violation can also occur in a “non-evidentiary” capacity—that is, when the prosecutor has knowledge of the immunized statement but has not introduced or sought to introduce the statement in a criminal proceeding. Jackson and the courts below are wrong. So long as the contents and fruit of an immunized statement are excluded from the fact-finder, no constitutional violation occurs.

**A. The Fifth Amendment requires only that prosecutors refrain from using an immunized statement or its fruits during a criminal proceeding.**

The government may compel a person to give incriminating testimony under the Fifth Amendment, provided that he first receives use and derivative use immunity. *Kastigar*, 406 U.S. at 460. This immunity is “substantial.” *Id.* at 461. A prosecutor cannot use an immunized statement, or any incriminating evidence derived from the statement, as evidence against the individual during a criminal proceeding. Put simply, “the compelled testimony can in no way lead to the infliction of criminal penalties” on the individual. *Id.* And if the defendant is prosecuted on matters related to his immunized testimony, *Kastigar* instructed the courts to conduct a searching inquiry. “The prosecution,” it said, has “an affirmative duty to prove that the evidence it *proposes to use* is derived from a legitimate source wholly independent of the compelled testimony.” *Id.* at 460 (emphasis added).

The prosecutor’s knowledge of Jackson’s immunized statement in this case was consistent with these rules. *Kastigar* does not require the prosecutor to prove his complete ignorance of the defendant’s immunized statements. He need only establish that the material he “proposes to use” as evidence against the defendant was derived from an independent source. See *United States v. Byrd* (C.A.11, 1985), 765 F.2d 1524, 1529 (“The government is not required to negate all abstract ‘possibility’ of taint. Rather, the government need only show that . . . the evidence used was derived from legitimate, independent sources.”).

If further confirmation is required, one need only look to *Kastigar*’s analysis. The Court openly compared an immunized statement to a coerced confession because each one “‘is compelled incrimination in violation of the privilege.’” *Kastigar*, 406 U.S. at 461 n.52 (citation omitted). Yet, the courts have never found a Fifth Amendment violation based solely on the prosecutor’s *knowledge* of a defendant’s coerced confession. Rather, the Fifth Amendment

prevents the prosecutor's use of the coerced confession to obtain a criminal conviction. See, e.g., *Brown v. Mississippi* (1936), 297 U.S. 278, 286; see also *United States v. Serrano* (C.A.1, 1989), 870 F.2d 1, 18 (“[N]o case involving a coerced confession has prohibited the nonevidentiary use of an involuntary statement.”). Therefore, if a prosecutor's knowledge of a coerced statement does not violate the Fifth Amendment, then a prosecutor's knowledge of a *Garrity* statement does not violate the Fifth Amendment.

Finally, a number of federal appellate courts have recognized that *Kastigar* prevents only the introduction of an immunized statement or its fruits at a criminal proceeding. For instance, in *Byrd*, the Eleventh Circuit found no constitutional violation where a prosecutor who had improperly used immunized testimony to secure an indictment later participated in an internal decision to re-indict. *Byrd*, 765 F.2d at 1530. The court reasoned that *Kastigar* only required the state to demonstrate that “all the evidence presented . . . is derived from legitimate sources independent of the defendant's immunized testimony.” *Id.* Other circuits have reached similar conclusions. See, e.g., *United States v. Serrano* (C.A.1, 1989), 870 F.2d 1, 18 (“[W]e reject the notion that the mere exposure to immunized testimony or the mere possibility of nonevidentiary use automatically results in the dismissal of the indictment”); *United States v. Mariani* (C.A.2, 1988), 851 F.2d 595, 600 (declining to find that prosecution of an immunized witness is foreclosed “where his immunized testimony might have tangentially influenced the prosecutor's thought processes in preparing the indictment and preparing for trial”); *United States v. Riviuccio* (C.A.2, 1990), 919 F.2d 812, 815 (“To the extent the Government's thought process or questioning of witnesses may have been influenced by . . . immunized testimony, we hold that any such use was merely tangential and was therefore not a prohibited use.”); *United States v. Velasco* (C.A.7, 1992), 953 F.2d 1467, 1474 (“[T]he mere tangential influence that privileged

information may have on the prosecutor's thought process in preparing for trial is not an impermissible 'use' of that information.”).

Some courts have reached the opposite conclusion and expansively protected immunized statements based on a single line in *Kastigar*: that a grant of immunity “prohibits the prosecutorial authorities from using the compelled testimony in *any* respect.” 406 U.S. at 453 (original emphasis). See, e.g., *United States v. McDaniel* (C.A.8, 1973), 482 F.2d 305, 311 (“[The immunity protection] must forbid all prosecutorial use of the testimony, not merely that which results in the presentation of evidence before the jury.”); accord *United States v. Semkiw* (C.A.3, 1983), 712 F.2d 891, 894-95. But such a narrow focus on one sentence in *Kastigar* ignores the remainder of the opinion. The Court recognized that, when immunity has been granted to a defendant, “the Fifth Amendment allow[s] the government to prosecute” him, albeit with “evidence from legitimate independent sources.” *Kastigar*, 406 U.S. at 461. And when there is a dispute about the independence of those sources, as there is here, the government must “prov[e] that all of the evidence it proposes to use was derived from legitimate independent sources.” *Id.* at 461-62. These holdings demonstrate that the U.S. Supreme Court was concerned not with the thought processes of the prosecutor, but with the introduction of tainted evidence before the jury.

In this case, the Fifth District concluded that Jackson's immunized *Garrity* statement was *not* introduced before the grand jury. See *Jackson*, 2008-Ohio-2944 ¶ 24. Nor did the Fifth District find that the State presented Vince Van's statement—a fruit of Jackson's *Garrity* statement—to the grand jury. Rather, what the Fifth District found problematic was the mere fact that the State learned of Van, a potential defense witness, through Jackson's statement. *Id.* ¶ 26. Therefore, the court reasoned, the State “used” the statement in violation of *Kastigar*

because it “cannot deny the use of [Jackson’s] immunized statement in the criminal case.” *Id.* ¶ 30.

The Fifth District’s analysis was wrong. The fact that the State has knowledge of Jackson’s *Garrity* statement—specifically, the knowledge of Vince Van’s existence—is of no constitutional import. The State did not use Van’s statement to obtain the indictment against Jackson—indeed, as is undisputed, Van is a *defense* witness—nor has the State sought to use the statement in Jackson’s criminal trial. See State Jur. Mem. at 13. Therefore, the State has not trespassed on Jackson’s Fifth Amendment privilege. This prosecution can and should go forward.

**B. Dismissal of the indictment is appropriate only when prosecutors actually use an immunized statement or its fruits in a criminal proceeding.**

Like the Fifth Amendment, Article I, Section 10 of the Ohio Constitution affords a privilege against self-incrimination. And like the U.S. Supreme Court, this Court has held that the State cannot compel testimony from an individual unless it first grants use or derivative use immunity. See *State v. Sinito* (1975), 43 Ohio St. 2d 98. If the State then introduces the immunized testimony in a later criminal proceeding against the individual, the entire criminal case must be dismissed. See *Conrad*, 50 Ohio St. 3d at 5.

In his cross appeal, Jackson claims that the Fifth District misapplied this Court’s decision in *Conrad* by failing to dismiss the indictment. His invocation of *Conrad* is not persuasive.

In *Conrad*, this Court endorsed and followed the “insightful” approach of *Kastigar*. *Id.* Therefore, when the State brings a criminal prosecution against a defendant who has given an immunized statement, it must (1) “deny *any* use of the accused’s own immunized testimony against him or her in a criminal case”; and (2) “affirmatively prove that all of the evidence to be used at trial is derived from sources wholly independent of immunized testimony.” *Id.* at 4 (citing *Kastigar*, 406 U.S. at 460-62). But *Conrad* did not afford any protections to defendants

beyond that required by *Kastigar*. See generally *State v. Farris*, 109 Ohio St. 3d 519, 2006-Ohio-3255 ¶ 47 (“[W]hen provisions of the Ohio Constitution and the United States Constitution are essentially identical, we should harmonize our interpretations of the provisions unless there are persuasive reasons to do otherwise.”).

A straightforward application of *Conrad* confirms the legitimacy of this prosecution. In that case, the prosecutor used a transcript of the defendant’s immunized statement to impeach the defendant as she testified before the grand jury. *Id.* at 1. This Court was displeased *not because the prosecutor had a copy of the transcript*, but because the prosecutor had “obtain[ed] an indictment from the grand jury . . . us[ing] compelled testimony.” *Id.* at 5. The situation is far different in this case. As discussed above, the State did not use any portion of Jackson’s immunized *Garrity* statement during its presentation before the grand jury. See *Jackson*, 2008-Ohio-2944 ¶ 24. Accordingly, the indictment is not tainted and dismissal is not appropriate.

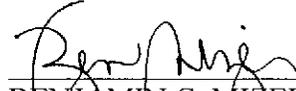
To the extent that there are lingering questions about the legitimacy of the State’s evidence for trial, such concerns are speculative and unwarranted. As the common pleas court recognized, “the State could very well proceed [to trial] with solely that evidence that was obtained from ‘a wholly independent source,’” Trial Ct. Op. at 14, thereby satisfying the dictates of *Kastigar* and *Conrad*. And if Jackson is still unhappy, he can ask the court to exercise the tried-and-true remedy for handling inadmissible evidence—the exclusion of his *Garrity* statement, and all fruits from that statement, from the trial.

## CONCLUSION

For these reasons, this Court should reverse the judgment below.

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## CERTIFICATE OF SERVICE

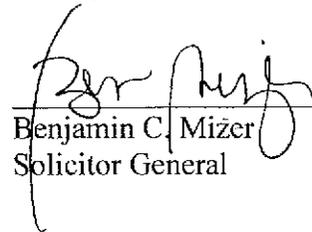
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