

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellant/
Cross-Appellee,

vs.

ANTHONY D. JACKSON

Defendant-Appellee/
Cross-Appellant

CASE NO. 2008-1499

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

Court of Appeals Case No.
2007CA00274

MERIT BRIEF OF *AMICUS CURIAE*
OHIO PROSECUTING ATTORNEY'S ASSOCIATION
IN SUPPORT OF APPELLANT/CROSS-APPELLEE STATE OF OHIO

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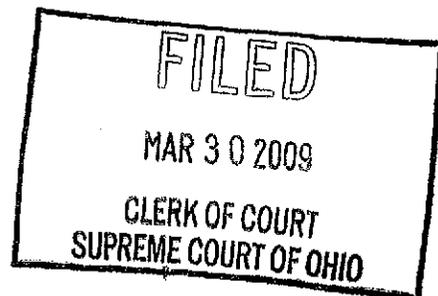


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STATEMENT OF INTEREST OF AMICUS

The decision in *State v. Jackson* has effectively manacled the hands of prosecutors in the State of Ohio and thwarted the furtherance of justice. As one of the primary reasons for the existence of the Ohio Prosecuting Attorneys Association is to aid in the furtherance of justice, all prosecutors – and by extension – all defense attorneys - have been hindered by this decision. In the most basic interpretation of the case, it ignores the doctrine which holds that evidence in the hands of the police is imputed to the possession of the prosecution. Taken in a broader context, it prevents the prosecution from fulfilling its ethical responsibility to reveal exculpatory evidence as required by *Brady v. Maryland*. And of as much import, it haphazardly expands upon the protections of the Fifth Amendment without any constitutional basis. It not only prevents prosecutors from exposing perjury at trial, it makes perjury a prosecution-free crime. It creates a liar's field-day.

Because the United States Supreme Court in *Garrity v. New Jersey* and *Kastigar v. U. S.* neither authorized nor intended such results, this Court should reverse the Fifth District Court of Appeals and dispense with the overreaching effects of its decision.

ARGUMENT IN SUPPORT

Both parties have assailed the decision of the Fifth District Court of Appeals – albeit from different points of view. The State of Ohio, Plaintiff-Appellant, argues that no *Garrity* violation ever occurred. Neither Officer Jackson's *Garrity* interview nor the contents of the Internal Affairs file was used to obtain the indictment against him. Despite this, the appellate court expanded the law of *Garrity*, *Kastigar* and *State v. Conrad* to prohibit mere exposure by a prosecutor to an internal affairs file. And beyond that, the court usurped the authority of the prosecutor by knitting a variety of self-authored remedies into the fabric of the state's case.

Jackson, Defendant-Appellee and Cross-Appellant, contends that there was indeed a *Garrity* violation, and that the only proper remedy is dismissal of the criminal indictment against him. In his eyes, the Fifth District's tailored remedy only encourages the police to exploit its own employees' *Garrity* statements and possibly erode the Fifth Amendment rights of all public employees.

Both parties have asked this Court to re-examine the parameters of 1) what constitutes a *Garrity* violation and 2) what remedies are permissible if it is determined that a *Garrity* violation indeed occurred.

SUMMARY OF THE FACTS

Perrysburg Police Officer John Roethlisberger responded to dispatch regarding a fight in progress at Lew's Tavern. Once there, he spoke to several witnesses to the fight, including Anthony Jackson, an off-duty Canton Police Officer. Jackson was admittedly carrying a handgun, although he was on administrative leave from the Canton police department due to pending criminal charges that included operating a vehicle while impaired, leaving the scene of an accident and failure to control his vehicle. Lew's Tavern was a Class D liquor establishment. In addition to Jackson, Roethlisberger spoke with a number of other eye-witnesses that night.

Subsequently, a formal complaint was filed against Jackson under R.C. 2923.121(A), a fifth degree felony. Probable cause was found by the municipal court, and the case was bound over to the Grand Jury. Prior to the grand jury presentation, Jackson was interviewed for purposes of an Internal Affairs investigation and gave a *Garrity* statement to Lt. D. Davis, of the Canton Police Department. His statement was not appreciably different from what he told Roethlisberger at the tavern on the night of the altercation.

At the Grand Jury, the state presented the testimony of Officer Roethlisberger and witnesses at the scene. Although Lt. Davis was called, he stated that he could not testify to any

statement obtained during the *Garrity* interview. The Grand Jury returned an indictment against Jackson.

Prior to trial, the Internal Affairs file was given to the prosecutor who was assigned to Jackson's case. The only information contained in the file not known to the state was the name of a witness provided by Jackson. That witness, Vince Van, was favorable to Jackson's case.

The Motion to Dismiss the Indictment and the Kastigar Hearing

Two weeks prior to trial, counsel for Jackson filed a motion to dismiss the indictment based upon the improper use of Jackson's *Garrity* statement. Pursuant to *Kastigar v. United States*, a hearing was held. At its conclusion, although the trial judge found that "the evidence obtained by the Perry Township Police was not tainted by any immunized statement from the Defendant," he dismissed the indictment. He did *not* find that the state made use of the statement; nor could he even describe what effect he felt the Internal Affairs file may have had on the prosecutor's case. Yet he interpreted one federal case to subject the state's use of the information to an "extensive scrutiny" standard. Under such scrutiny, he held that the state, in a *Kastigar* hearing, must "affirmatively prove that all the evidence to be used at trial is derived from sources wholly independent of the immunized testimony." (Emphasis in original.) He ruled the state failed to do so.

The Appellate Court's Decision

With this background, the case came before the Fifth District Court of Appeals. The Court of Appeals agreed that a *Garrity* violation had occurred and ruled that dismissal was not the appropriate remedy. It remanded the case for trial but ordered that the entire Internal Affairs file be purged from the state's case, that Lt. Davis be barred as a witness at trial, and that a special "out-of-county" prosecutor be appointed to try the case.

Amicus Curiae O.P.A.A. 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.

The appellate court's decision failed to consider salient facts when it misapplied the law of both the *Garrity* and *Kastigar* cases. The court's ruling that a *Garrity* violation existed was based entirely upon the fact that the name of Jackson's witness, Vince Van, was obtained by the prosecution through the *Garrity* statement given by Officer Jackson. The court failed to acknowledge that Vince Van was a witness *favorable to the defense*.¹ At the *Kastigar* hearing, Officer Roethlisberger testified that while at Lew's Tavern, he spoke with a number of other persons who either witnessed the fight or were present. These included Tina Ogle, Shannon Davey, Tony Vail, Lora Salvatore, Krista Jones, James Walters and Lewis Gerrick.

Regardless, the Fifth District declared that the state could not deny its use of Jackson's immunized statement. This was apparently derived simply from the fact that the prosecutor saw the statement, because the appellate court never stated what impermissible use was made by the state. The only possible "use" the court can cite to is the fact that Lt. Davis asked a witness known to the state about the identity of Mr. Van. No claim is made that this question, apparently left unanswered, was ever made a part of the state's case for any reason. Nowhere in this analysis does the appellate court acknowledge that Vince Van was favorable to the defense. The court concludes, despite this, that the state had an impermissible "knowledge of appellee's defense and the existence of Mr. Van." (§34)

From atop of this house of cards, the appellate court built a new, multi-tiered remedy. This included a complete purge of any information from the Internal Affairs file, the exclusion of

¹ In other words, this case was reversed because the State provided *Brady* material. *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194.

Lt. Davis as a witness at trial, and the appointment of a special prosecutor to handle the case. While the state is not precluded from trying Officer Jackson, and could do so from the testimony of Officer Roethlisberger and witnesses known to the state prior to the Internal Affairs interview, nothing in the case law or the U.S. Constitution supports this bootstrapping of the prosecution.

Even more cogently, nothing in this “remedy” protects the defendant’s right to be made aware of exculpatory evidence and the ethical obligation of the prosecution to disclose it. Nothing in this decision ensures that a perjury prosecution is not impeded or prevented altogether when a public employee testifies in his own behalf. While a defendant’s *Garrity* statement may not be used against him at trial, he has never been protected from the possibility of a prosecution for perjury if he lies. If the Stark County Appellate Court’s decision is allowed to stand, a public employee/defendant may blatantly lie in a criminal prosecution unbeknownst to the state attorney who has been banned from mere exposure to the *Garrity* statement. Any potential for a prosecution for perjury would be erased. This was never the intent of the *Kastigar* case.

Support for the position of the Amicus Curiae can be found in a myriad of federal cases. A review of these cases also illustrates that the case relied upon by the appellee, *United States v. McDaniels*, is an aberration. (C.A. 8, 1973), 482 F.2d 305. *McDaniels* applies an “extensive scrutiny” standard to judge whether a non-evidentiary use of immunized testimony is justified; the United States Supreme Court in *Kastigar* did not. Neither did this Court in *State v. Conrad*, where the state was prohibited from using R.C. 101.44 immunized testimony before the Ohio Senate Judiciary Committee to secure a grand jury indictment. *State v. Conrad* (1990), 50 Ohio St.3d 1, 552 N.E.2d 214.

In *United States v. Serrano*, the First Circuit Court of Appeals rejected a claim that mere exposure to an immunized statement destroys the purpose of the immunity granted. (1st Cir.

1989), 870 F.2d 1, 27 Fed. R. Evid. Serv. 880. (See also *United States v. Pantone* (3rd Cir. 1980), 634 F.2d 716; *U.S. v. Crowson* (9th Cir. 1987), 828 F.2d 1427.) To require the government to prove that it was not even exposed to the immunized statement would, in effect, grant transactional immunity. 456, 1663. As stated in *Kastigar*, “the purpose of the Fifth Amendment bar against the use of immunized testimony is to ‘leave [] the witness and the Federal Government in *substantially* the same position as if the witness had claimed his privilege’ in the absence of the grant of immunity.” *Id.* at 456, 1663. To leave the witness in a *better* position, by granting transactional immunity, was not the intent.

Along this line, the United States Supreme Court has held that immunized testimony is never protected from prosecution for perjury. *United States v. Apfelbaum* (1980), 445 U.S. 115, 100 S.Ct. 948. Therefore, a defendant who refrains from testifying in his own defense for fear of contradicting his compelled testimony is not in an unconstitutionally worse position after being compelled to give a *Garrity* statement. (See Nonevidentiary Use of Compelled Testimony: Beyond the Fifth Amendment, 66 *Tex. L. Rev.* 351 (1987).)

Again, in *U.S. v. Mariani*, the Second Circuit Court of Appeals held that “a prosecution is not foreclosed merely because the ‘immunized testimony might have tangentially influenced the prosecutor’s thought processes in preparing the indictment and preparing for trial.’ ” (2nd Cir. 1982) 851 F.2d 595.

The Remedy to be Employed

The Fifth District centered solely on the fact of Vince Van’s interview to find that a *Garrity* violation occurred and tailored a remedy to extricate this information from the prosecutor’s knowledge. (See ¶31) This finding was in error, as knowledge of the witness, by Jackson’s own admission, was purely exculpatory. This flawed ruling led to the “cut and paste”

approach in which the appellate court purged files, excluded a witness and banned the current prosecutor from the case.

In the past, this Court has been divided on the identification of a *Garrity* violation and the application of the harmless error doctrine. In *State v. Conrad*, this Court found that a violation occurred when a witness' immunized statement before the Senate Judiciary Committee was used to examine her in a subsequent grand jury hearing. *State v. Conrad* (1990), 50 Ohio St.3d 1, 552 N.E.2d 214. Prosecutors attended the hearing and took detailed notes, obtained transcripts of the testimony, and then subpoenaed the witness to testify before the grand jury. The witness was asked, by paraphrasing her immunized testimony, to confirm the content of this testimony. Following this, she was indicted on one count of perjury and three counts of bribery. The trial and appellate courts had agreed that the indictment was obtained by evidence derived from sources wholly independent of the witness's statement and denied the motion to dismiss. The appellate court agreed.

The majority in the 4-3 decision reversed the appellate court and held that the use of the testimony before the Senate committee constituted a *Garrity* violation and ordered that the indictment against the witness be dismissed. Because the grand jury heard and considered the immunized testimony, the court found that the error could not be held harmless and dismissed all indictments against the witness.

The dissent pointed out that the witness' testimony was brief and completely exculpatory. The most that could be said, according to the dissent, was that "miniscule" use of the immunized testimony was made by the prosecution. Under a harmless error analysis, the dissent would have affirmed the lower court.

In a concurring dissent, it was pointed out that the witness' immunized testimony, used to impeach her in the grand jury, formed the basis of a perjury indictment. The concurring dissent felt the proper remedy would have been to dismiss only the perjury charge and to affirm the ruling below in all other respects.

Here, the interview of Vince Van cannot be said to have advanced the investigation of Jackson's case. Jackson admitted his possession of the weapon at the scene. None of this assessment was affected by the prosecutor's exposure to the *Garrity* statement, which was exculpatory, or the Internal Affairs file. The appellate court found as such, when it ruled that no information from the *Garrity* statement was used to procure the grand jury indictment. Any later use of Jackson's immunized testimony, through the interview of the exculpatory witness, caused no harm to Jackson. Owing to this, the court should find that no violation occurred.

CONCLUSION

The O.P.A.A. asks this Court to find that no *Garrity* violation occurred in this case. Exposure to the Internal Affairs file alone cannot be seen as error, as it would infringe on the prosecutor's duty to be aware of what information is known to the police for purposes of discovery and *Brady* material. Banning the prosecutor from the contents of the file would make it impossible to uncover perjury, were it to occur, a result never contemplated in the scope of protection created by use immunity.

Respectfully submitted,

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I hereby certify that on this 27th day of March, 2009, I have sent a copy of the foregoing Merit Brief of Amicus Ohio Prosecuting Attorney's Association, by regular United States mail, addressed to the following:

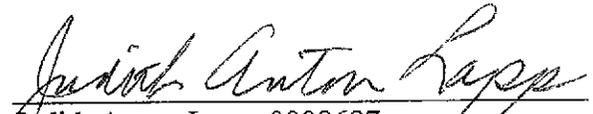
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