

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

CASE NO. 2008-1499

Plaintiff-Appellant,

vs.

ANTHONY JACKSON,

Defendant-Appellee.

ON APPEAL FROM THE COURT OF APPEALS
FIFTH APPELLATE DISTRICT
CASE NO. 2007-CA-0027

MERIT BRIEF OF PLAINTIFF-APPELLANT,
THE STATE OF OHIO

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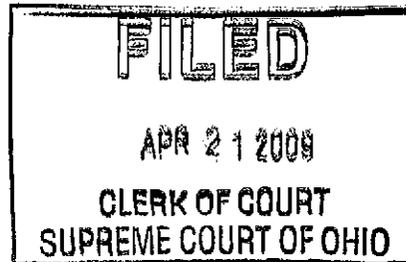
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Date stamped notice of appeal to the Supreme Court
filed July 31, 2008

Judgment Entry and Opinion filed June 16, 2008
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STATEMENT OF THE CASE AND FACTS

Canton police officer, Anthony Jackson, the appellee here, was on administrative leave as the result of pending criminal charges for driving a motor vehicle while under the influence of alcohol or drugs, leaving the scene of an accident and failing to control his vehicle. While on leave, on May 30, 2006, he carried his loaded .40 caliber Glock handgun into Lew's Tavern, a Class D liquor establishment in Perry Township, Ohio. Patrolman Jon C. Roethlisberger of the Perry Township Police Department was dispatched to the tavern in response to a "fight" call. Two persons were involved in the fight - Jackson and Tony L. Vail. Roethlisberger investigated and took statements from several witnesses and Jackson. As a result of his investigation, on June 16, 2006, he filed a complaint in the Massillon Municipal Court, Massillon, Ohio charging Jackson with possessing a .40 caliber Glock handgun in Lew's Tavern, a Class D liquor establishment. After a preliminary hearing, the Massillon Municipal Court found probable cause to believe a crime had been committed. Later, the Stark County Grand Jury indicted Jackson on one count of illegal possession of a firearm in a liquor permit premises, a violation of R.C. §2923.121(A), a felony of the fifth degree.¹ Jackson pleaded not guilty and the case was assigned to Judge Richard Reinbold of the Stark County Common Pleas Court.

Jackson requested discovery pursuant to Crim.R. 16 and the state provided him a list of possible witnesses. That list did not contain the name Vince Van, a name Jackson now claims he revealed in a statement to internal affairs. Jackson was also provided the report of the Stark County Crime Laboratory on the firearm Jackson carried that night - an operable .40 caliber

¹State v. Jackson, Stark County Common Pleas Court, Case No. 2006CR1022, Indictment, Aug. 21, 2006.

Glock model .27 semi-automatic pistol. Jackson was given a summary of statements he made and told that relevant written or recorded statements made by defendant were available by appointment with the prosecuting attorney.²

Defendant stated he was allowed to carry his weapon while on administrative leave. Defendant stated he had a gun and he was an off-duty police officer and lived in a high crime area. Defendant first denied being involved in a fight, then admitted being involved in a fight. Defendant stated he had a holstered Glock on his left hip. Defendant stated his car broke down and he thought his girlfriend was at the bar drinking and he was looking for her. Defendant stated he did not know where his car was because he was not familiar with Massillon. Defendant stated he drove the car.

State v. Jackson, Stark County Common Pleas Court, Case No. 2006CR1022, Response to Request for Discovery, Sept. 20, 2006.

After receiving discovery, Jackson filed a motion to dismiss the indictment alleging that as a police officer, he was entitled to carry a concealed weapon. Following an evidentiary hearing on November 20, 2006, that motion was overruled by the trial court. After several continuances, Jackson's trial was rescheduled for July 23, 2007.

Then, on July 6, 2007, some ten months after receiving discovery, Jackson stumbled upon a new theory and filed another motion to dismiss the indictment. This time, Jackson alleged the state "improperly utilized the fruits of the Canton Police Department's Internal Affairs investigation and as a result Defendant was unable to obtain a fair trial and/or due process of law." Jackson claimed that statements given by him during the course of the police department's internal affairs investigation were used illegally to obtain information in his criminal prosecution in violation of *Garrity v. New Jersey*, 385 U.S. 493, 87 S. Ct. 616, 17 L.Ed.2d 562 (1967) (holding that the government may not exact a statement from a public employee under threat of

²Tr., Aug. 8, 2007 at 23.

discipline, and then use that statement against the public employee in criminal proceedings).³ Again, the trial court continued Jackson's trial and treated the motion as a request for a *Kastigar* hearing. *Kastigar v. United States*, 406 U.S. 441, 460, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972) ("Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecutions, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence;" citations omitted). That motion came on for evidentiary hearing on August 8, 2007.

At that hearing, Patrolman Jon Roethlisberger of the Perry Township Police Department testified as follows: On May 30, 2006 about 8:40 pm, he was dispatched to Lew's Tavern in Perry Township for a "fight call." Two persons were involved in the fight - Jackson and Tony L. Vail. Roethlisberger completed a police report. The report lists witnesses, Shannon M. Dazey, Lora Salvatore, Krista Jones, James Walters and Lew Gerrick. A narrative supplement dated June 5, 2006 also lists the name Tina Ogle.⁴ Roethlisberger confiscated the Glock firearm that Jackson was carrying. Roethlisberger forwarded a copy of his report to the Massillon City Prosecutor. Later, Roethlisberger signed the complaint that charged Jackson with carrying a firearm into a Class D liquor establishment.⁵

Evidence at the hearing also revealed details of the internal affairs investigation. On July 10, 2006, Jackson received a letter from Lt. D. Davis of the Canton Police Department Office of

³State v. Jackson, Case No. 2006 CR 1022, Motion to Dismiss, July 6, 2007.

⁴Tr. Aug. 8, 2007, at 9.

⁵Tr. Aug. 8, 2007 at 16.

Internal Affairs. (Def. Exh. A, Hearing Aug. 8, 2007). That letter notified Jackson that an investigation was being conducted on the pending criminal charge. The letter directed Jackson to appear for an interview on July 21, 2006:

Although criminal charges were filed against you in regards to this incident, you will be afforded your *Garrity* protection prior to this interview, and none of the interview will be used against you in a court of law.

....

This letter will serve as a direct order for you to report and participate in this interview.

Def. Exh. A, Hearing Aug. 8, 2007.

Jackson appeared at Canton City Hall for the interview on July 21, 2006 accompanied by an attorney.⁶ The interview was tape recorded. Prior to the interview, Jackson was issued a (“*Garrity* Warning.”). The interview was conducted by Davis and concerned the events at Lew’s Tavern on May 30, 2006 including the charge that Jackson carried a handgun into a Class D liquor establishment. During the interview, Jackson mentioned the name, Vince Van. The name Tina Ogle was not mentioned by Jackson in his statement.⁷

At the *Kastigar* hearing, the grand jury transcript was also reviewed by the trial court and the parties. It revealed that the prosecutor who presented the case to the grand jury was not the same prosecutor who obtained Jackson’s *Garrity* statement. It also revealed that Roethlisberger and Davis were subpoenaed to give testimony.⁸ Davis did not testify about the statement of

⁶Jackson was accompanied by Bradley Iams, the same attorney who represented him in the trial court, the court of appeals and this Court.

⁷Def. Exh. B, Def. Exh. E, Hearing Aug. 8, 2007.

⁸The grand jury transcript was placed under seal and is part of the record.

Jackson given to Internal Affairs, citing Jackson's *Garrity* rights, saying "[I] can't tell you what he said because he has a *Garrity* protection."⁹ In all, the transcript revealed that Jackson's *Garrity* statement was not used to obtain the indictment, but rather the indictment was obtained through independent sources - the testimony of the Township police and some witnesses who were present at the tavern that night. When the grand jury transcript was reviewed, Jackson learned that his *Garrity* statement was not heard by the grand jury. He then modified his stance, now urging the court to consider a *Garrity* violation - this time because the prosecutor's knowledge of the *Garrity* statement could influence his trial strategy.

After hearing the evidence and arguments of the parties, the trial court took the motion under advisement. On September 10, 2007, it issued a judgment entry granting Jackson's motion to dismiss (Appendix). Admitting that Jackson's *Garrity* statement was not used by the state during the grand jury proceeding, the trial court found the "non evidentiary use" of the statement and internal affairs investigation troubling, saying, "[I]t is the 'derivative use' or the 'non-evidentiary use' of that information which poses a problem in this matter."¹⁰ The trial court took exception to the prosecutor's knowledge of Jackson's *Garrity* statement, saying [I]n that statement the State learned the defendant's actions on the 30th of May, his reasons for being at Lew's, and his account of the events and possible defenses to the charge. Through witness statements, the prosecution had information to discredit any defense the Defendant may have had. Am not able to aptly describe the effect all this information had on the right of this

⁹Tr., Aug. 10, 2006 at 32; (Grand Jury Transcript).

¹⁰State v. Jackson, Case No. 2006 CR 1022, Judgment Entry, Sept. 10, 2007 at 14.

Defendant to present a factual defense to the charges against him. However, I do know that it is extremely favorable to the State and extremely unfavorable to the Defense.”¹¹

The trial court also faulted the testimony of Lt. Davis before the grand jury saying “Lt. Davis’s testimony at the grand jury was influential in the decision of the Grand Jury to indict.”¹²

Finally, the trial court concluded that an appropriate remedy for the prosecutor’s exposure to Jackson’s *Garrity* file was not suppression but dismissal of the indictment, finding the matter capable of determination without a trial on the merits.¹³

The state timely appealed the ruling of the trial court challenging both the dismissal of the indictment as the appropriate remedy and the finding of a *Garrity* violation. The state argued that it had met its *Kastigar* burden by demonstrating that the evidence it proposed to use at Jackson’s trial was derived from a legitimate source wholly independent of his *Garrity* statement or the fruits thereof. The Fifth District Court of Appeals [Stark County] affirmed in part and reversed in part. The court of appeals agreed with the trial court that a *Garrity* violation had occurred saying “[W]e concur with the trial court’s determination that the first prong of *Kastigar* has not been met: ‘the government must deny *any* use of the accused’s own immunized testimony against him or her in a criminal case.’ *Conrad*, supra. The state cannot deny the use of appellee’s immunized statement in the criminal case. Upon review, we concur with the trial court’s analysis of a *Garrity* violation.” *State v. Jackson*, Stark App. No. 2007CA00274, 2008-

¹¹State v. Jackson, Judgment Entry Sept. 10, 2007 at 15.

¹²State v. Jackson, Judgment Entry. Sept. 10, 2007 at 15.

¹³State v. Jackson, Judgment Entry. Sept. 10, 2007 at 17.

Ohio-2944, at ¶30. The appeals court was particularly concerned that the prosecutor obtained the name of Vince Van from the *Garrity* interview, ignoring the fact that Vince Van was not named as a potential witness for the state and that his name had been revealed by Jackson during discovery.¹⁴

Yet, the appeals court did not agree with dismissal of the indictment saying [W]e understand the trial court's angst, but conclude the dismissal of the indictment was not the appropriate remedy. We so find because the information garnered from appellee's *Garrity* statement was not used to procure the indictment as in *Conrad*. " *State v. Jackson*, supra, at ¶35. With that, the appeals court fashioned a convoluted and exacting remedy - purge the prosecutor's file of the internal affairs investigation, forbid the prosecutor from calling Lieutenant Davis as a witness and order the trial court to appoint an out of county prosecutor to conduct the Jackson trial. *State v. Jackson*, supra, at ¶37.

The State appealed the case to this Court arguing that the court of appeals erred in finding a *Garrity* violation and in fashioning the remedy. Jackson cross-appealed arguing that the indictment should be dismissed. The state was joined as *animus curiae* by the Cities of Canton and Massillon, the Ohio Prosecuting Attorneys' Association, the Ohio Municipal League and the Buckeye State Sheriff's Association. Jackson was joined as *animus curiae* by the Canton Police Patrolman's Association.

On January 28, 2009, this Court accepted for review both the State's appeal and Jackson's cross-appeal.

¹⁴*State v. Jackson*, supra, at ¶30.

LAW AND ARGUMENT

STATE'S PROPOSITION OF LAW

WHEN A PUBLIC EMPLOYER COMPELS AN EMPLOYEE TO GIVE A STATEMENT UNDER THREAT OF REMOVAL FROM OFFICE, *GARRITY V. NEW JERSEY*, 385 U. S. 493 (1967) PROHIBITS THE DIRECT OR DERIVATIVE USE OF THE STATEMENT IN A SUBSEQUENT CRIMINAL TRIAL, BUT IT DOES NOT PROHIBIT A PROSECUTOR'S KNOWLEDGE, OR "NON-EVIDENTIARY" USE OF IT.

A. *Summary of Argument*

Jackson was charged by indictment with one count of illegal possession of a firearm in liquor permit premises in violation of R.C. §2923.121(A), a felony of the fifth degree. That charge required the state to prove that Jackson knowingly possessed a firearm in a facility that had a Class D liquor permit. These facts can be demonstrated independent of Jackson's *Garrity* statement. Jackson himself admitted to Perry Township Patrolman Roethlisberger, who answered the fight call that night, that he was carrying a loaded firearm. And the fact that Lew's Tavern held the requisite permit is not disputed.

Even so, this case has taken a turn from these simple facts because Jackson is a public employee - a police officer - who gave a statement to the internal affairs bureau of the Canton Police Department - a *Garrity* statement. The Fifth District Court of Appeals promoted Jackson's *Garrity* statement to a position that is not supported by common sense or Fifth Amendment jurisprudence. The Fifth District Court of Appeals found that the state committed a *Garrity* violation by merely obtaining Jackson's *Garrity* statement with no evidence that it was used in obtaining the indictment or used in any evidentiary capacity in the subsequent criminal proceedings. In so ruling, the Court of Appeals elevated the statement of a public employee in an

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A. *Summary of Argument*

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internal investigation to a position not accorded the very citizens the public employee serves. A citizen's statements given while criminal proceedings are afoot are accorded Fifth Amendment protections. Fifth Amendment jurisprudence allows the evidentiary rules to control the use of the statement. Yet, a public official, in this case a police officer, who gives a *Garrity* statement in a work related interview is allowed the extraordinary remedy of having his statement purged from the criminal file, the appointment of a special out of county prosecutor who is limited in the presentation of the case and who has no exposure to the public official's statement.

With the exception of a few rogue cases, no courts have upheld the proposition that mere exposure to a *Garrity* statement of a public official by the prosecutor is enough to shift the scales of justice in such a way that a public official has more rights in this area than a citizen of this state charged with the same crime. This result simply defies common sense and the rule of law.

Jackson's answer to this unjust result is to withhold any internal affairs investigation and abandon *Garrity* interviews until the criminal proceedings are completed. Yet, this is not a solution at all. The public which entrusts its governmental affairs to its public officials is entitled to a swift and prompt investigation when one of its public employees, who is paid with tax dollars, is charged with a wrongdoing. It is not an answer to tell the public that the law requires a waiting period, sometimes as long as a year, before action can be taken.

For these reasons, the decision of the Fifth District Court of Appeals is simply wrong. Complete insulation from a public employee's *Garrity* statement is not a prerequisite to criminal proceedings. Courts are well versed in evidentiary methods to handle exposure to a defendant's statement. The decision of the Court of Appeals finding a *Garrity* violation for an unexplained "non evidentiary" use should be reversed.

B. *De Novo standard of review applies to an error of law.*

Because the state challenges the application of the law established in *Garrity*, this Court should review the decision of the courts below under a de novo standard. De novo review is an independent review, without deference to the decisions of the courts below. *State v. Anderson* (1995), 100 Ohio App.3d 688, 691, 654 N.E.2d 1034 (de novo review is conducted on court's application of law to facts).

C. *Compelled statements of public employees under investigation for job performance are entitled to Fifth Amendment protection.*

The Fifth Amendment to the United States Constitution states that “[n]o person shall be compelled in any criminal case to be a witness against himself....” (U.S. Const., Amends. V)¹⁵. The Ohio Constitution similarly provides that “[p]ersons may notbe compelled in a criminal cause to be a witness against themselves...”(Ohio Const., Art. I, §15). These constitutional guarantees protect an individual from being forced to testify against himself in a pending criminal proceeding and more. It also prevents the use of answers a person provides to official questions in any other proceedings, “civil or criminal, formal or informal,” where he reasonably believes the answers might incriminate him in a criminal case. See *Kastigar v. United States*, 406 U.S. at 444-445, (*Kastigar*). (One cannot be forced to choose between forfeiting the privilege, on the one hand, or asserting it and suffering a penalty for doing so on the other).

Competing with the right against self incrimination is the government's legitimate interest in obtaining truthful answers to questions posed during an investigation of governmental affairs. The government's interest in initiating prompt investigative proceedings of errant public

¹⁵The Fifth Amendment applies to the states through the due process clause of the 14th Amendment.

employees cannot be ignored. Justice Scalia, writing for the majority in *Gilbert v. Homar*, 520 U.S. 924, 117 S.Ct. 1807, 138 L.Ed.2d 120 (1997) noted the state's significant interest in immediately suspending a police officer who occupied a position of great public trust and who had felony charges filed against him.

This conflict has been resolved in a body of law holding that incriminating answers may be officially compelled, without violating the privilege, when the person to be examined receives immunity against both direct and "derivative" criminal use of the statements. *Kastigar*, 406 U.S. at 449-462.; *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964), *Chavez v. Maryland*, 538 U.S. 760, 125 S.Ct. 1994, 155 L. Ed.2d 984 (2003) (witness may insist on immunity agreement before being compelled to give testimony in non criminal case; *Lefkowitz v. Cunningham*, 431 U.S. 801, 806, 97 S. Ct. 2132, 53 L.Ed.2d 1 (1977) (government cannot penalize assertion of the constitutional privilege against compelled self incrimination by imposed sanction to compel testimony which has not been immunized); *Lefkowitz v. Turley*, 414 U.S. 70, 94 S.Ct. 313, 38 L. Ed.2d 274 (1973) (witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant).

It is by now well established that incriminating answers coerced from a public employee under threat of dismissal cannot be used against the public employee in a criminal proceeding. In *United States v. Garrity*, 385 U.S. at 494, certain police officers were questioned as part of an investigation into the alleged fixing of traffic tickets. Before being questioned, they were warned that their statements could be used against them in any state criminal proceedings and that they

had the right to refuse to answer, if the disclosure would tend to incriminate them, but that if they refused to answer they would be subject to removal from office. The officers answered the questions and, because immunity had not been granted, some of these statements were used against them in subsequent criminal prosecutions. The officers were convicted. On appeal, they challenged their convictions arguing that their statements were coerced because if they had refused to answer they could have lost their positions with the police department. The officers' appeal reached the United States Supreme Court. The Court concluded that the officers' statements were coerced stating:

The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent. We think the statements were infected by the coercion inherent in this scheme of questioning and cannot be sustained as voluntary under our prior decisions.

Garrity, 385 U.S. at 497-498.

The *Garrity* holding is one of many which confers immunity on witnesses in return for testimony. *Kastigar*, 406 U.S. at 441, 447 (immunity statutes are "essential to the effective enforcement of various criminal statutes" and part of our constitutional fabric").

In *Kastigar*, the Supreme Court, in reviewing immunity under a federal statute, answered the question of whether compelled testimony under a grant of immunity is "coextensive with the scope of the Fifth Amendment privilege against compulsory self incrimination." The Court determined that the statute's grant of use and derivative use immunity is coextensive with the scope of the privilege against self incrimination, and therefore is sufficient to compel testimony over a claim of the privilege. *Kastigar*, 406 U. S. at 453. Immunity, according to the *Kastigar* court, bars the use of compelled testimony as an "investigatory lead" as well as the use of the testimony itself in a criminal proceeding. Immunity,

however, does not grant neither pardon nor amnesty for a crime. The government may prosecute a public employee who has given protected testimony using evidence from legitimate independent sources. *Kastigar*, 406 U. S. at 461. The *Kastigar* court adopted a two part test to be used when a witness claims that his immunized testimony will be used in a later criminal proceeding. First, the government must deny any intent to use the defendant's own immunized testimony against him in a criminal case. Second, the government must affirmatively prove that all of the evidence proposed to be used is derived from legitimate source, wholly independent of the compelled immunized testimony. The government has the "heavy" burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources. This Court adopted the *Kastigar* test in *State v. Conrad*, (1990), 50 Ohio St.3d 1, 552 N.E.2d 214 (*Conrad*). Thus, the term "*Kastigar*" hearing has been coined to describe the evidentiary hearing used to determine whether the criminal proceedings are free from the direct use or the derivative use of the immunized statement.

D. *Jackson's Garrity statement or its fruits were not used to obtain an indictment.*

Jackson sought to dismiss the indictment of the grand jury claiming that the grand jury's proceedings were tainted by Jackson's *Garrity* statement.¹⁶ But after obtaining the transcript of the grand jury proceedings, Jackson learned that Davis specifically testified he could not discuss Jackson's statement because it was protected by *Garrity*. Then, after learning that Jackson's *Garrity* statement played no part in the grand jury's decision to indict Jackson, Jackson abandoned his claim and argued that knowledge by the state of the *Garrity* statement was enough to dismiss the indictment. The Fifth District Court of Appeals, while conceding that the *Garrity* statement was not used during the grand jury proceedings, applied this Court's holding in

¹⁶*State v. Jackson*, Judgment Entry, Sept. 10, 2007 at 16.

Conrad and held that the trial prosecutor's mere knowledge of Jackson's *Garrity* statement was a violation, equating knowledge to use.

Application of the *Conrad* holding, however, fails to recognize an important distinction. The government in *Conrad* used an immunized statement to obtain an indictment - a factor which both the trial court and the court of appeals here agreed did not occur.

In *Conrad*, the finance director of the Ohio Democratic Party was involved in an Ohio Senate investigation of illegal solicitation of public funds. As a result, she appeared as a witness before the Ohio Senate's judiciary committee. Franklin County prosecutors attended those Senate Hearings, took detailed notes and later obtained transcripts of defendant's testimony before the Committee. Later, defendant was subpoenaed to testify before the grand jury and made three appearances. The prosecutor who attended the Senate Committee Hearing presented the case before the grand jury and used the Senate transcript to prepare questions to ask the defendant. Then, the prosecutor used the Senate Hearing transcript to impeach her grand jury testimony, professing ignorance of R.C. §101.44 which provides a witness with "use" immunity for her compelled testimony before the Senate.¹⁷ The very same grand jury then indicted defendant on six criminal counts, including complicity to commit bribery and perjury.

Conrad pleaded not guilty and filed a motion to dismiss the indictment arguing that the state violated R.C. §101.44 in using her statement to the Senate Committee in the grand jury proceeding. The trial court held a hearing and reviewed the records of the grand jury proceeding, yet would not permit *Conrad* to review those same records.

¹⁷R.C. §101.44 provides: Except a person who, in writing, requests permission to appear before a committee or subcommittee of the general assembly....or who, in writing, waives the rights, privileges, and immunities granted by this section, the testimony of a witness examined before a committee or subcommittee shall not be used as evidence in a criminal proceeding against such witness.....

The trial court denied defendant's motion to dismiss and the court of appeals affirmed, finding (among other things) that the prosecutor's minimal use of the evidence during the grand jury did not render the indictment invalid.¹⁸ This Court accepted the case for review and reversed the decision of the lower courts.¹⁹ This Court, in its syllabus, held:

Where, in obtaining an indictment from the grand jury, the prosecution uses compelled testimony of a witness immunized pursuant to R. C. 101.44 and where the right of immunity accorded such compelled testimony has not been waived by the witness under the guidelines set forth in R. C. 101.44, any indictment issued against the witness as a result of such grand jury proceedings must be dismissed. *Kastigar v. United States* (1972), 406 U.S. 441, 92 S. Ct. 1653, 32 L.Ed.2d 212 and *New Jersey v. Portash* (1979), 440 U.S. 450, 99 S.Ct. 1292, 59 L.Ed.2d 501.

There is no evidence that Jackson's *Garrity* statement played any role in the grand jury proceeding. Jackson did not testify at the grand jury proceeding and Vince Van, a name given to Lt. Davis by Jackson as a potential witness did not testify before the grand jury. Davis specifically refused to testify to the contents of Jackson's *Garrity* statement. Because Jackson's internal affairs statement was not used to obtain an indictment, the *Conrad* syllabus does not apply.²⁰ Still, the courts below strained to find a *Garrity* violation in the post indictment criminal proceedings.

¹⁸For a similar treatment, see *State v. Parsons*, Fourth Dist. App. No. 07CA2, 2007-Ohio-4812 §25, §26 where the court found that the prosecutor's use of defendant's *Garrity* statement to obtain the telephone number of a grand jury witness was harmless error.

¹⁹The *Conrad* decision was written by Justice Sweeney, with Justices Moyer, Holmes and Jones dissenting.

²⁰In the court of appeals here, a dissenting opinion was written by Judge Hoffman. Judge Hoffman finds that Jackson's *Garrity* statement was indeed used in the grand jury proceeding pointing to the testimony of Lt. Davis. *State v. Jackson*, supra, at ¶42. While Lt. Davis may very well have influenced the grand jury proceeding in discussing the authority of an off duty police officer to carry a side arm, he did not discuss Jackson's *Garrity* statement or any knowledge he obtained from it.

E. The right against self incrimination is not violated until statements obtained by compulsion or the fruits thereof are used in criminal proceedings against the person from whom the statements were obtained.

At the *Kastigar* hearing held on August 7, 2007, the state called Patrolman Roethlisberger as a witness. Roethlisberger testified that he was called to the scene of Lew's Tavern on May 30, 2006 in response to a "fight call." Roethlisberger talked with witnesses and Jackson. He completed a police report that named all of the witnesses except Vince Van. Roethlisberger observed Jackson in possession of a firearm and in fact took it from him. Roethlisberger verified that Lew's Tavern held a Class D liquor permit. Through this testimony, the state was able to demonstrate that its prosecution of Jackson for illegal possession of a firearm in liquor permit premises was based on an independent source - a Perry Township Patrolman - and wholly unrelated to any information obtained from Jackson's *Garrity* statement.

Yet, the courts below found a *Kastigar-Garrity* violation. The trial court found the "non-evidentiary use" of the statement and internal affairs investigation troubling, saying "[I]t is the 'derivative use' or the 'non-evidentiary use' of that information which poses a problem in this matter."²¹ The trial court took exception to the prosecutor's knowledge of Jackson's *Garrity* statement, saying "[I]n that statement the State learned the defendant's actions of the 30th of May, his reasons for being at Lew's and his account of the events and possible defenses to the charge. Through witness statements, the prosecution had information to discredit any defense the Defendant may have had. Am not able to aptly describe the effect all this information had on the right of this Defendant to present a factual defense to the charges against him. However, I do know that it is extremely favorable to the State and extremely unfavorable to the Defendant"

²¹*State v. Jackson*, Stark County Common Pleas Court, Case No. 2006 CR 1022, Judgment Entry, Sept. 10, 2007 at 14-17 Appendix.

The reviewing court, in finding a *Garrity* violation, was troubled that the state learned the name of a potential witness from Jackson's *Garrity* statement - the name of Vince Van. "The state cannot deny the use of appellee's immunized statement in the criminal case. As the trial court concluded, appellant failed to establish that its knowledge of Mr. Van could be derived from any other source wholly independent of appellee's *Garrity* statement. There was no evidence of any wholly independent source that could have identified Mr. Van."²² This finding fails to acknowledge, however, that Vince Van's name never appeared on the State's witness list. To be sure, the name Vince Van was supplied to the state by Jackson in his response to the State's Demand for Discovery filed prior to the *Kastigar* hearing on March 13, 2007.²³

The courts below found a *Garrity* violation because the state had knowledge of Jackson's *Garrity* statement with no evidence that it was being used in his criminal prosecution for illegal possession of a firearm in a Class D liquor establishment. In doing so, the courts adopted the rogue position of the Eighth Circuit Court of Appeals in *United States v. McDaniel*²⁴ that has since been rejected by almost every federal court, even the Eighth Circuit. In finding a Fifth Amendment violation, the *McDaniels* court discussed potential uses by the government of immunized statements - deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy.

²²*State v. Jackson*, supra, at ¶31.

²³The state demanded reciprocal discovery pursuant to Crim.R. 16(A) on September 20, 2006. Jackson responded some six months later with the names of eight witnesses, including Vince Van.

²⁴*United States v. McDaniel*, 482 F. 2d 305 (8th Cir., 1973).

In *McDaniel*, defendant, a bank president, was involved in illegal activities involving bank assets. Both the State of North Dakota and the United State's Attorney's Office were investigating whether criminal statutes had been violated. The bank president appeared before the state grand jury and gave self incriminating evidence. A state statute immunized persons who appeared before the grand jury from criminal prosecution for any subject that concerned the grand jury testimony. Later, McDaniel was charged with embezzlement, misappropriation of funds and making false statement in both state court and federal court. McDaniel filed a motion to quash the indictment on the grounds that the Fifth Amendment precluded prosecution for matters testified to before the state grand jury. The trial court dismissed the state indictment but refused to dismiss the federal indictment. McDaniel was convicted and sentenced to prison. He appealed. The government admitted that it read the 472 pages of grand jury testimony in which McDaniel implicated himself in the fraudulent scheme prior to seeking the indictment. Rejecting the government's argument of an independent source, the court of appeals found that McDaniel's Fifth Amendment rights were violated:

We find, however, that even though the voluminous reports, which we have examined, may have afforded proof of an independent source of the evidence adduced at McDaniel's trial, such reports nevertheless fail to satisfy the government's burden of proving that the United States Attorney, who admittedly read McDaniel's grand jury testimony prior to the indictment, did not use it in some significant way short of introducing tainted evidence (citation omitted). Such use could conceivably include *assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy.*

McDaniel, id, at 311. (Emp. added)

Again, *McDaniel* involved immunized testimony that infected the grand jury process.

The government reviewed the extensive three volume grand jury testimony of the defendant which implicated him in the fraudulent bank dealing before the indictment. And the indictment was returned by the same grand jury that heard McDaniel's immunized testimony.

The dicta by the *McDaniel* court that there is some Fifth Amendment violation from merely knowing about immunized testimony by the state has been soundly rejected by courts since *McDaniel*. As noted in *United States v. Poindexter*²⁵ even the Eighth Circuit has rejected the *McDaniel* dicta. See *United States v. Barker*, 543 F.2d 479, 484 n. 9 (8th Circ., 1976) (holding that the extraordinary *McDaniel* burden was appropriate there only because the prosecution in that case had thoroughly immersed itself in the immunized testimony at the outset of the case); *United States v. Garrett*, 849 F.2d 1141 (8th Circ., 1988) (affirming a conviction even though the defendant had given his immunized testimony before the same grand jury that subsequently indicted him.).

In rejecting the *McDaniel* burden, the First District noted that the *McDaniel* approach amounts to a per se rule that would in effect grant a defendant transactional immunity in contravention of *Kastigar*.²⁶

Here, the courts below adopted the soundly rejected *McDaniel* burden and took particular offense at the state's knowledge of Vince Van, a name obtained by Davis from Jackson during his *Garrity* statement. Vince Van, the name supplied by Jackson, was a witness favorable to Jackson. Van was a name not on the state's witness list and did not testify before

²⁵*United States v. Poindexter*, 727 F. Supp. 1488 (Dist. Col., 1989).

²⁶See also *United States v. Velasco*, 953 F.2d 1467, 1474 (7th Cir., 1992) (“...[W]e join three of our sister circuits and reject the reasoning of *McDaniel*.”); c.f. *State v. Brocious*, Clark App. No. 2002CA89, 2003-Ohio-4708 ¶15 (dismissing indictment against police officer where prosecutor read *Garrity* statement before indictment and presented no testimony at the *Kastigar* hearing of evidence she intended to use at trial) .

the grand jury. Indeed, the trial court found that Van's statement to put it politely, was more consistent with Officer Jackson's and, "to put it politely, terribly inconsistent with Ogle's statement."²⁷

It is hard to comprehend the damage caused by the state knowing about Vince Van. When Jackson requested discovery, the state, in turn, requested discovery from Jackson. Jackson disclosed the name Vince Van and the state could have interviewed Van.

F. Evidentiary methods are available to handle any alleged *Garrity* violation.

After finding a *Garrity* violation, the court of appeals took extraordinary steps to purge the file of *Garrity* taint, including removing the entire internal affairs file, and any reference to Mr. Van. The court of appeals also ordered the trial court to appoint an out of county prosecutor and further ordered the exclusion of Lieutenant Davis as a witness. Yet, this complex and unheard of remedy was unnecessary to preserve the case against Jackson.

The courts below prematurely found a *Garrity* violation post-indictment before any such violation occurred. The courts below failed to recognize that any improper use of Jackson's *Garrity* statement by the prosecutor could be remedied by rulings prohibiting use at trial. Jackson was issued a *Garrity* warning thus compelling potentially incriminating testimony under the threat of discipline. *Garrity* established that statements made under the threat of disciplinary action are inherently coerced and therefore cannot be used in subsequent criminal proceeding. Coerced confessions and immunized statement are treated alike under the umbrella of the Fifth Amendment.²⁸

²⁷*State v. Jackson*, Stark County Common Pleas Court, Judgment Entry, Sept.10, 2007 at 13, Appendix.

²⁸*Kastigar*, supra.

If a court rules that a confession given by a suspect was coerced and violative of the Fifth Amendment, the court grants a motion to suppress prohibiting the state from using the confession or the fruits derived from it. It does not order the file purged of the confession and more importantly order the county prosecutor removed from the case and a special out of county prosecutor appointed by the trial court. A public employee who gives an immunized statement is not eligible for more rights than those conferred upon an ordinary citizen who gives a coerced confession.

The courts below found that the prosecutor's mere possession and exposure to Jackson's *Garrity* statement was improper finding that it could be used for the following purposes - information to obtain leads, names of witnesses, knowledge of accused's immunized testimony to elicit evidence on cross-examination, information that could influence trial strategy and use as an investigative tool. Yet, a review of Jackson's *Garrity* statement yields no such use in this simple case. Even if it did, it would not warrant the extraordinary relief awarded by the court.

Exclusionary rulings are available at the trial to prevent illegal use. If Vince Van, for example, was called by Jackson during trial, the trial court could prohibit the state from using his statement in cross examination or any other means. Such a ruling solves the phantom "derivative use" problem found by the courts below.

Tina Ogle was a witness whose name was obtained not from Jackson during his *Garrity* interview but from the Perry Township police report. The trial court can prohibit the state from using her statement to Davis at trial if it finds such use offensive.

The trial court may also order the state to refrain from using Jackson's *Garrity* statement should he testify at trial. It can prohibit impeachment by use of the statement. It can also prohibit direct evidence of the statement.

The prosecutor here was clear to acknowledge the powers of the court during the trial to make exclusionary rulings:

[VANCE] This issue, Judge, I don't think we ever get to the issue you're contemplating because it's just like a motion in limine. We deal with that issue all the time. You have information that would just be swell if we could use it, you have it, but I'm telling you, prosecutor, defense lawyer, officer of the court, you have that information, but you're forbidden to use it. We deal with that in the courtroom everyday.

....

You have a prior conviction and I'm telling you you're not allowed to use it. You have this line of questioning of a prior bad act that might be admissible in one courtroom, but not this courtroom, but you're not allowed to use it. So you have to ignore that you have that information and explore some other line of questioning.

Hearing, August 8, 2007 at 40.

In all, there are a number of methods available to the trial court to limit the use of Jackson's *Garrity* statement and its "fruits" should the state attempt to use it.

STATE'S RESPONSE TO JACKSON'S PROPOSITION OF LAW

When a public employer compels an employee to give a statement under threat of removal from office, *State v. Conrad* (1990), 50 Ohio St. 3d 1, 553 N.E.2d 214 requires dismissal of the case only when the grand jury proceeding is so tainted with the statement that an indictment cannot be obtained without the immunized statement of the public employee.

In his cross-appeal to this Court, Jackson argues that the court of appeals erred when it held that dismissal of the indictment was not the appropriate remedy for the alleged *Garrity* violation that occurred. Citing this Court's *Conrad* holding, Jackson argues that it stands for the proposition that the only available remedy for a *Garrity* violation is such a dismissal. This argument must fail where the grand jury proceedings are not tainted by Jackson's *Garrity*

statement. If and when a *Garrity* violation occurs, there are more appropriate remedies than dismissal of the indictment..

Dismissal of an indictment is the most drastic remedy and should be “infrequently utilized.” *United States v. Morrison*, 449 U.S. 361, 366 (1981). *In re Grand Jury*, 103 F.3d 1140, 1145 (3rd Cir., 1997) (holding that judicial supervision and interference with grand jury proceeding should always be kept to a minimum).

Unlike *Conrad*, Jackson can point to no part of the record where the grand jury proceedings were infected by Jackson’s *Garrity* statement. So he is left with adopting the position of the trial court below that some phantom derivative use that could not be explained was the root of the *Garrity* violation. Recognizing that its remedy for alleged errors - dismissing the entire indictment - was extreme, the trial court found that the matter was capable of determination without a trial on the merits, citing Crim.R. 12 and a brief excerpt from *State v. Serban*.²⁹

But such a remedy is improper as a claim that goes beyond the face of the indictment is improperly presented in a Crim.R. 12 motion.³⁰ The indictment here contained all of the necessary elements to charge Jackson with possessing a firearm in a Class D liquor establishment. It stated the offense charged with enough particularity to allow Jackson to present a defense. Jackson can point to no affirmative defense that was jeopardized by the state’s knowledge of his *Garrity* statement. Instead, his arguments are more properly the subject of a Crim.R. 29 Motion for Acquittal at trial. In order to dismiss the indictment, the court would have

²⁹*State v. Serban*, Stark App. No. 2006 CA00198, 2007-Ohio-3634.

³⁰*State v. Varner*, 81 Ohio App.3d 85, 610 N.E.2d 476 (1991) (holding that Ohio Rules of Criminal Procedure do not allow for “summary judgment of an indictment prior to trial.”)

to go beyond its face and prematurely assume that Jackson's *Garrity* statement or its fruits would be used in the trial. It is an improper exercise of judicial authority when a trial court considers matters beyond the face of the indictment thereby converting a motion to dismiss a criminal indictment into a motion for summary judgment.

The motion to dismiss brought by Jackson required the trial court to examine the evidence prior to any attempt to introduce it at trial. The trial court reviewed the grand jury transcript and considered the testimony of Lt. Davis before Lt. Davis ever was called as a witness at trial. So too, the statements of potential witnesses and the statement of Jackson were considered in the trial court's ruling before trial.

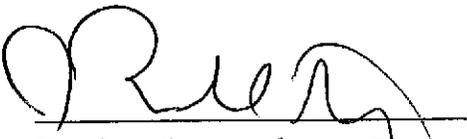
Reversal of the trial court's ruling dismissing the indictment by the court of appeals was proper. Jackson's cross appeal has no merit and the decision of the court of appeals reinstating the indictment should be affirmed.

CONCLUSION

For the reasons stated in this brief and the record, the State of Ohio respectfully requests that this Court reverse the decision of the Court of Appeals [Fifth District] below finding that a *Garrity* violation occurred because the prosecutor who was responsible for the post-indictment criminal proceedings was exposed to Jackson's *Garrity* statement.

The law is clear that any incriminating statement coerced from a public employee under threat of dismissal cannot be used against the employee in a criminal proceeding. On the other hand, the constitutional privilege against compelled self-incrimination in a criminal case does not begin until the immunized statement or fruits derived from it are used in a criminal proceeding. Jackson is entitled to no greater protection than the citizens he was entrusted to serve.

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IN THE SUPREME COURT OF OHIO
COLUMBUS, OHIO

STATE OF OHIO,

Plaintiff-Appellant

-vs-

ANTHONY JACKSON

Defendant-Appellee

Case No. **08-1499**

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

Court of Appeals
Case No. 2007CA00274

NOTICE OF APPEAL OF APPELLANT
STATE OF OHIO

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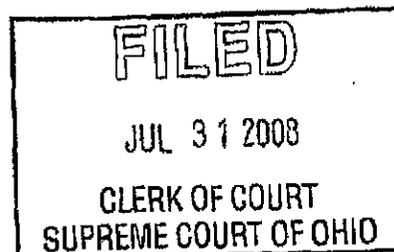
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NOTICE OF APPEAL OF APPELLANT STATE OF OHIO

The State of Ohio, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Court of Appeals for Stark County, Fifth Appellate District, entered in the Court of Appeals Case No. 2007CA00274 on June 16, 2008.

This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,
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IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

WANDA S. REINHOLD
CLERK OF COURT OF APPEALS
STARK COUNTY, OHIO
08 JUN 16 PM 2:56

STATE OF OHIO

Plaintiff-Appellant

-vs-

ANTHONY JACKSON

Defendant-Appellee

JUDGMENT ENTRY

CASE NO. 2007CA00274

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio is hereby affirmed in part and reversed in part, and the matter is remanded to said court for further proceedings consistent with this opinion. Costs to appellant.

Shirley F. ...

W. Sean G. ...

JUDGES

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COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

WILEY S. REBEOLD
CLERK OF COURT OF APPEALS
STARK COUNTY, OHIO
03 JUN 16 PM 2:56

STATE OF OHIO
Plaintiff-Appellant

-vs-

ANTHONY JACKSON
Defendant-Appellee

JUDGES:
Hon. William B. Hoffman, P.J.
Hon. W. Scott Gwin, J.
Hon. Sheila G. Farmer, J.

Case No. 2007CA00274

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Court of Common Pleas, Case
No. 2006CR1022

JUDGMENT:

Affirmed/Reversed in Part & Remanded

DATE OF JUDGMENT ENTRY:

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Farmer, J.

{¶1} On August 21, 2006, the Stark County Grand Jury indicted appellee, Anthony Jackson, on one count of illegal possession of a firearm in liquor permit premises in violation of R.C. 2923.121, a felony of the fifth degree. At the time of the incident, appellee was a Canton City police officer on administrative leave due to pending criminal charges.

{¶2} Sometime during the discovery process, appellee learned his internal affairs file and his *Garrity* statement, a statement elicited from a public employee that cannot be used in a subsequent criminal proceeding, were in the possession of appellant, the state of Ohio. On July 6, 2007, appellee filed a motion to dismiss the indictment, claiming appellant "improperly utilized the fruits of the Canton Police Department's Internal Affairs investigation." A hearing was held on August 8, 2007. By judgment entry filed September 19, 2007, the trial court granted appellee's motion, finding the "derivative use" or the "non-evidentiary use" of the information contained in the internal affairs file "poses a problem in this matter."

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶4} "THE TRIAL COURT ERRED AS A MATTER OF LAW IN DISMISSING THE INDICTMENT FOR A GARRITY VIOLATION. MERE EXPOSURE TO AN INTERNAL AFFAIRS FILE BY THE PROSECUTOR WAS NOT A GARRITY VIOLATION."

000008

II

{¶5} "THE TRIAL COURT ERRED AS A MATTER OF LAW IN DISMISSING THE INDICTMENT AND NOT CONSIDERING EVIDENTIARY METHODS TO HANDLE THE ALLEGED *GARRITY* VIOLATIONS."

I, II

{¶6} Appellant claims the trial court erred in dismissing the indictment for a *Garrity* violation, and in not considering evidentiary methods to handle the alleged violation. We agree in part.

GARRITY VIOLATION

{¶7} In *Garrity v. New Jersey* (1967), 385 U.S. 493, the United States Supreme Court reviewed a case wherein police officers being investigated were given the choice to either incriminate themselves or forfeit their jobs under a New Jersey statute dealing with forfeiture of employment, tenure, and pension rights of persons refusing to testify based on self-incrimination grounds. The officers chose to make confessions, and some of their statements were used to convict them in subsequent criminal proceedings. The officers argued their confessions were coerced because if they failed to cooperate, they could lose their jobs. In answering the question as to "whether a State, contrary to the requirement of the Fourteenth Amendment, can use the threat of discharge to secure incriminatory evidence against an employee," the *Garrity* court held the following at 500:

{¶8} "We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal

proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic."

{¶9} Five years later, the United States Supreme Court in *Kastigar v. United States* (1972), 406 U.S. 441, 442, reviewed the following question:

{¶10} "[W]hether the United States Government may compel testimony from an unwilling witness, who invokes the Fifth Amendment privilege against compulsory self-incrimination, by conferring on the witness immunity from use of the compelled testimony in subsequent criminal proceedings, as well as immunity from use of evidence derived from the testimony."

{¶11} The *Kastigar* court at 460 held the following:

{¶12} " 'Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.' [*Murphy v. Waterfront Commission of New York Harbor* (1964)] 378 U.S. [52], at 79 n. 18, 84 S.Ct., at 1609.

{¶13} "This burden of proof, which we reaffirm as appropriate, is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony."

{¶14} In *State v. Conrad* (1990), 50 Ohio St.3d 1, 4, the Supreme Court of Ohio followed the *Kastigar* holding and stated the following:

{¶15} "In *Kastigar*, the United States Supreme Court dealt with an immunity statute similar to R.C. 101.44, viz., Section 6002, Title 18, U.S.Code, and reviewed its constitutionality with respect to the Fifth Amendment protection against self-incrimination. Therein, the court essentially held, *inter alia*, that the purpose of a statute granting use immunity or derivative use immunity is to leave the witness and the prosecuting authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege. *Id.* at 457. In line with such purpose, the *Kastigar* court established a two-prong test that the prosecution must satisfy where a witness makes the claim that his or her immunized testimony was used: (1) the government must deny any use of the accused's own immunized testimony against him or her in a criminal case; and (2) the government must affirmatively prove that all of the evidence to be used at trial is derived from sources wholly independent of immunized testimony. *Id.* at 460-462."

{¶16} The *Conrad* court concluded the following at syllabus:

{¶17} "Where, in obtaining an indictment from the grand jury, the prosecution uses compelled testimony of a witness immunized pursuant to R.C. 101.44, and where the right of immunity accorded such compelled testimony has not been waived by the witness under the guidelines set forth in R.C. 101.44, any indictment issued against the witness as a result of such grand jury proceedings must be dismissed. (*Kastigar v. United States* [1972], 406 U.S. 441, and *New Jersey v. Portash* [1979], 440 U.S. 450, followed.)"

{¶18} In its judgment entry filed September 19, 2007, the trial court acknowledged, "[i]t is this 'non evidentiary ' use that is hard to define and which is most important in our case." The trial court then noted the following at 7:

{¶19} "There are two Federal decisions which reflect the differing opinions on the level of scrutiny non-evidentiary use of immunized testimony should receive. In *U.S. v. McDaniels*, 482 F2d 305 (C.A. 8 1973), the Court in citing *Kastigar* placed a 'heavy burden' on the government and enforced a strict interpretation upon the government. In *U.S. v. Semkius*, 712 F2d 891 (C.A. 3 1983), the Court refused to follow the strict interpretation of *McDaniels* and held that *Kastigar* only prohibits evidentiary use of immunized testimony."

{¶20} The trial court considered the *Garrity*, *Kastigar*, *Conrad*, *McDaniels*, and *Semkius* holdings, as well as numerous other cases and a law review article, and concluded the following:

{¶21} "I believe *United States v. McDaniels* is the appropriate measure under which to judge the issue before me. Because of the power and resources of the State, the conduct as it relates to the non-evidentiary use of immunized testimony is subject to extensive scrutiny. Under that test, set forth in *State v. Conrad*, I find that the State did use the accused' (sic) own testimony against him, and they failed to affirmatively prove that all the evidence to be used at trial is derived from sources wholly independent of the immunized testimony."

{¶22} Appellant argues any evidence it had was derived from other sources independent of appellee's *Garrity* statement. We disagree with this argument.

{¶23} As noted by the trial court throughout its judgment entry, the following facts are not in dispute:

{¶24} 1) Appellant was aware of the internal affairs investigation and appellee's *Garrity* statement at the time of the grand jury proceeding. During the proceeding, Canton City Lieutenant David Davis acknowledged the existence of the statement, but refused to divulge the statement's contents.

{¶25} 2) A witness, Vince Van, was disclosed by appellee during the *Garrity* interview.

{¶26} 3) The investigating officers from the Perry Township Police Department did not have any information about Mr. Van from their investigations. August 8, 2007 T. at 7-10.

{¶27} 4) The assistant prosecutor assigned to the case, Joseph Vance, received the entire internal affairs file including the *Garrity* statement after the September 15, 2006 felony arraignment hearing or sometime between July 24, 2006 and September 20, 2006. August 8, 2007 T. at 21-23.

{¶28} 5) Pursuant to appellee's *Garrity* interview wherein he named Mr. Van as a witness, Lieutenant Davis interviewed Mr. Van on July 24, 2006, and taped the conversation.

{¶29} 6) Appellant stipulated to the fact that Mr. Van was unknown to the state prior to the *Garrity* interview. August 8, 2007 T. at 31.

{¶30} We concur with the trial court's determination that the first prong of *Kastigar* has not been met: "the government must deny *any* use of the accused's own immunized testimony against him or her in a criminal case." *Conrad*, *supra*. The state

cannot deny the use of appellee's immunized statement in the criminal case. As the trial court concluded, appellant failed to establish that its knowledge of Mr. Van could be derived from any other source wholly independent of appellee's *Garrity* statement. There was no evidence of any wholly independent source that could have identified Mr. Van. In fact, after the *Garrity* interview on July 21, 2006 at 9:00 a.m., Lieutenant Davis took a statement from one Tina Ogle at 13:12 p.m. and attempted to identify Mr. Van (information contained in sealed documents).

{¶31} Upon review, we concur with the trial court's analysis of a *Garrity* violation.

OTHER EVIDENTIARY METHODS TO HANDLE THE GARRITY VIOLATION

{¶32} Appellant claims the trial court erred in determining the appropriate remedy was to dismiss the indictment.

{¶33} In *Conrad*, supra, the privileged statement was presented to the grand jury. In the case sub judice, the grand jury testimony establishes appellee's *Garrity* statement was not used to obtain the indictment.

{¶34} The problematic area in this case is that appellant undoubtedly has the benefit and therefore the use of appellee's *Garrity* statement post-indictment. As the trial court noted to the prosecutor, "you can't unring the bell, you can't take it out of your mind, although many people have argued you should have had a lobotomy a long time ago, but you haven't had it so you can't take it out of your mind." August 8, 2007 T. at 34. In other words, appellant cannot erase the knowledge of appellee's defense and the existence of Mr. Van.

{¶35} The trial court struggled with the appropriate remedy and determined dismissal of the indictment was the only alternative. We understand the trial court's

angst, but conclude the dismissal of the indictment was not the appropriate remedy. We so find because the information garnered from appellee's *Garrity* statement was not used to procure the indictment as in *Conrad*.

{¶36} In addition, we note that generally when a statement is suppressed, the appropriate remedy is to exclude the statement and any information derived therefrom, which would include Mr. Van as a witness. However, this also is not the appropriate remedy in the case sub judice. First, appellee's *Garrity* statement was never available to appellant for use at trial and secondly, Mr. Van is a possible witness for the defense. Any exclusion of Mr. Van at trial could potentially impact appellee's defense and trial strategy.

{¶37} We find the appropriate remedy is to purge appellant's file of appellee's *Garrity* statement, the entire internal affairs file, and any references to Mr. Van. In addition, we order the exclusion of Lieutenant Davis as a witness. Further, we order the trial court to appoint a visiting prosecutor from outside of Stark County to try the matter. We order an out-of-county prosecutor because the prosecutor for the Massillon Municipal Court conducted the preliminary hearing. We do not know, nor will we speculate, as to that office's exposure to the internal affairs file.

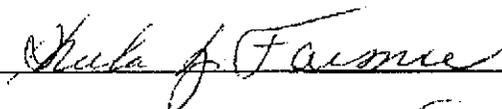
{¶38} The assignments of error are denied as to a *Garrity* violation, but granted as to the dismissal of the indictment as the appropriate remedy. The case is re-instated pursuant to the guidelines of this opinion.

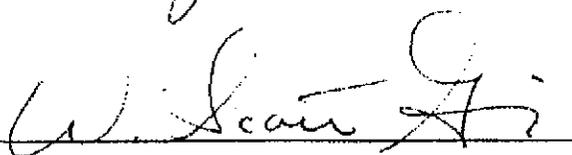
{¶39} The judgment of the Court of Common Pleas of Stark County, Ohio is hereby affirmed in part, reversed in part and remanded.

By Farmer, J.

Gwin, J. concur and

Hoffman, P.J. concurs in part and dissents in part.





JUDGES

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Hoffman, P.J., concurring in part and dissenting in part

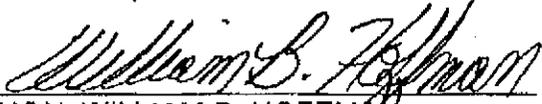
{¶40} I concur in the conclusion reached by both the majority and the trial court the state has not satisfied the first prong of the *Kastigar* test. However, unlike the majority, I find the state used Appellee's *Garrity* Statement not only to develop derivative evidence; but also, and more significantly, made use of his *Garrity* Statement (albeit indirectly and in limited fashion) to secure his indictment.

{¶41} Had the State's use of Appellee's *Garrity* Statement been limited to developing derivative evidence and not used in any manner to secure his indictment, I would concur with the majority dismissal before trial is not the appropriate remedy. My review of the case law, and more specifically the syllabus in *Conrad*, suggests pretrial dismissal is warranted only when the *Garrity* statement is used to secure an indictment or it is otherwise impossible to remove the taint on any evidence derived from it.

{¶42} I believe the majority's attempt to purge the *Garrity* violation in this case comes too late. Upon my review of the grand jury proceedings of August 10, 2006, I conclude the State did make some use of Appellee's *Garrity* Statement in securing his indictment. Under *Kastigar*, **any** use is prohibited. The use need not be actual revelation of the statement itself, it includes indirect use as well. I conclude such indirect use occurred in the case sub judice, as did the trial court. The trial court specifically found Lt. Davis' testimony at the grand jury was influential in the decision of the Grand Jury to indict, citing Tr. 31, L 6-10, Tr. 32 and 33. Having reviewed Lt. Davis's entire grand jury testimony, I concur

with the trial court's assessment. Having so found, as clearly pronounced by the Ohio Supreme Court in *Conrad*, "This fact alone ends the inquiry of whether use of the defendant's immunized testimony constituted error." *Conrad*, at 4.

{¶43} Accordingly, I would affirm the trial court's decision to dismiss the indictment.


HON. WILLIAM B. HOFFMAN

NANDY S. REINBOLD
CLERK OF COURTS
STARK COUNTY, OHIO

IN THE COURT OF COMMON PLEAS

2007 SEP 19 AM 11:16
STARK COUNTY, OHIO

STATE OF OHIO)	CASE NO. 2006CR1022
)	
PLAINTIFF)	
)	JUDGE REINBOLD
VS.)	
)	<u>JUDGMENT ENTRY</u>
ANTHONY D. JACKSON)	
)	
DEFENDANT)	

On July 6, 2007, counsel for the Defendant filed a Motion to Dismiss, alleging the State improperly utilized the fruits of an internal police investigation and therefore denied his client a fair trial and due process of law. A hearing was held on August 8, 2007 and evidence taken.

The events giving rise to the indictment occurred on May 30, 2006 in Perry Township, Ohio. The Defendant is alleged to have possessed a firearm in a Class D liquor establishment in violation of R.C. 2923.121(A).

On May 31, 2006, the Internal Affairs Division of the Canton Police Department initiated an investigation surrounding the Defendant's conduct on May 30, 2006.

Between May 30, 2006 and July 26, 2006, Lt. David Davis conducted an investigation into the matter by conducting interviews, transporting evidence and reviewing the Perry Township Police reports.

On July 21, 2006, the Defendant, pursuant to a written order issued by the Canton Police Department, appeared for an interview with the Internal Affairs Division

Officer. An interview was conducted in accordance with Article 29 Inter-Disciplinary Investigation and Canton Police Department Rule 427A and 435A.

With legal counsel present, the Defendant gave a statement concerning the events of May 30, 2006 and May 31, 2006. The statement was preceded by a "Garrity Warning" (Exhibits B and F).

Subsequent to the interview, Lt. Davis interviewed Tina Ogle and Vince Van. Prior to the Defendant's interview, Canton had not interviewed Ms. Ogle and had not known of Mr. Van. He was interviewed on July 24, 2006 (stipulated entry).

On August 10, 2006, the Stark County Prosecutor presented this matter to the grand jury. The presenting prosecutor called Sgt. John Rothlisberger of the Perry Township Police Department and Lt. David Davis, the Internal Affairs Officer from the Canton Police Department.

Sometime between July 24, 2006 and September 20, 2006, the Internal Affairs Division file was transferred to the Stark County Prosecutor's Office. The stipulated facts do not disclose whether the presenting prosecutor read the file, nor was such evidence produced at the hearing on August 8, 2007. The presenting prosecutor and the trial prosecutor are different people. Neither the stipulated facts nor the hearing disclosed whether the two prosecutors conferred. The trial prosecutor acknowledged that he had reviewed the IAD file, which contains the following:

1. Exhibit A - July 10, 2007 letter addressed to the Defendant.
2. Exhibit B - The Garrity Warning
3. Exhibit C - The Canton Police Department Internal Affairs Report prepared by Lt. Davis.

4. Exhibit D - A copy of a taped statement conducted by Lt. Davis on Vince Van on July 24, 2006 at 11:46 a.m.
5. Exhibit E - A copy of a taped statement by Lt. Davis for Tina Ogle on July 21, 2006 at approximately 2:00 p.m.
6. Exhibit F - A copy of the Defendant's statement.

A significant number of issues have been raised, briefed and ruled upon since the indictment in September of 2006. In June of 2007 this matter was set for trial, and during trial preparation the Defendant flushed out this issue and pursuant to that flushing, I scheduled a hearing on August 8, 2007.

The Defendant asserts that under *Garrity v. New Jersey*, 385 U.S. 493 (1967) the prosecutor is barred from any use or derivative use of his statement given during the July 21, 2006 disciplinary hearing. Counsel argues under *Garrity* his client was granted use and derivative use immunity from prosecution on evidence derived from his "Garrity statement".

In 1966, the United States Supreme Court reviewed a New Jersey statute (N.J. Rev. Stat. 2A:81-17.1), which provided that if a public official refused to cooperate in an official investigation initiated by the State, they were subject to termination and the forfeiture of tenure retention rights.

The Court held:

"We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in a subsequent criminal proceeding of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic." *Garrity v. New Jersey*, 385 U.S. 493 (1967).

The Garrity decision has been viewed by various state and federal courts as conferring use immunity and derivative use immunity on members of this protected class of individuals. See *Jones v. Franklin County Sheriff*, 52 Ohio St.3d 40; *State v. Brocius*, 2003 WL 22060162 (Ohio App.2d Dist.); *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977); *Lefkowitz v. Turley*, 414 U.S. 70 (1973); *Gardener v. Broderick*, 392 U.S. 273 (1968).

Whether the grant of use immunity or derivative use immunity is statutorily granted, i.e. 18 USC, Section 6002; R.C. 101.44 or derived from case law, i.e. *Garrity*, *Jones*, does not seem to be of particular significance. What is significant is the extent of protection such immunity provides the receiver and what restrictions it imposes upon the thrower. In *Kastigar v. U.S.*, 402 U.S. 441 (1972), the Petitioners were subpoenaed to appear before a United States Grand Jury in the Central District of California on February 4, 1971. The government believed that Petitioners were likely to assert their Fifth Amendment privilege. Prior to the scheduled appearance, the government applied to the District Court for an order directing Petitioners to answer questions and produce evidence before the Grand Jury under a grant of immunity conferred pursuant to 18 USC, Section 6002, 6003. The Petitioners still refused to answer questions and were held in contempt of court. The matter ultimately found its way to the United States Supreme Court. The issue presented to that Court was whether testimony may be compelled by granting immunity from the use of compelled testimony and evidence derived there from (use and derivative use immunity), or,

whether it is necessary to grant immunity from prosecution for offenses to which compelled testimony relates (transactional immunity).

The Petitioners first argued that no immunity statute, however drawn, could afford a lawful basis for compelling testimony. The Court rejected this argument and held immunity statutes themselves are Constitutional.

The Petitioners then argued that the scope of the immunity statute in question (18 USC § 6002) was not coextensive with the scope of the Fifth Amendment privilege against self-incrimination, and therefore was not sufficient to supplant the privilege and compel testimony over a claim of privilege. The Petitioners drew a distinction between statutes that provided transactional immunity and those that provide immunity from use and derivative use. They asserted that only full transactional immunity was coextensive with the scope of the Fifth Amendment.

The Court again rejected this assertion and found the government could compel testimony through statutes which provided only for use immunity and derivative use immunity.

"The statute's explicit prescription of the use in any criminal case of testimony or other information compelled under the order (or any information, directly or indirectly derived from such testimony or other information) is consonant with Fifth Amendment standards. We hold that such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination and therefore is sufficient to compel testimony over a claim of privilege."

Now "0 for 2", the Petitioners in *Kastigar* continued to press for full immunity. They argued that use and derivative use immunity would not adequately protect a witness from various possible incriminating uses of the compelled testimony. For

example, a prosecutor or other law enforcement officials could obtain leads, names of witnesses, or other information not otherwise available that might result in a prosecution. They argued that it would be "difficult, and perhaps impossible, to identify by testimony or cross examination, the subtle ways in which the compelled testimony may disadvantage a witness, especially in the jurisdiction granting the immunity."

In answer, the court stated that this argument "presupposes that the statute's prohibition will prove impossible to enforce. This statute provides a sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived there from".

"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 testimony."

In reassuring the Petitioners that sufficient safeguards were inherent in the statute to afford protection for the concerns raised, the court went on to state "that a person accorded this immunity and subsequently prosecuted, is not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities."

"Once a defendant demonstrates that he has testified under a grant of immunity, the authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence. This burden of proof which we "reaffirm as appropriate" (see *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964) is not limited to a negation of taint. Rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate wholly independent of the compelled testimony."

The *Kastigar* decision seems straightforward enough when we are determining whether the government has "used" immunized testimony as direct

evidence in a case. But what does the term "derivative use" mean; what does the court mean when it says "barring the use of compelled testimony as an 'investigatory lead'; what did the court mean when it seemed to assure the *Kastigar* Petitioners that their fear the prosecution could use immunized testimony to "obtain leads or names of witnesses" was unfounded. In *Kastigar*, the court reiterated its criticism of a prior immunity statute which failed to prevent the use of compelled testimony "to search out other testimony to be used as evidence"; "could not prevent the obtaining and the use of witnesses"; and "because the immunity granted was incomplete in that it merely forbade the use of testimony given and failed to protect a witness from future prosecution based on knowledge and information and sources of information obtained from the compelled testimony." *Kastigar v. U.S. and Counselman v. Hitchcock*, 142 U.S. 547 (1892).

It is this "non evidentiary" use that is hard to define and which is most important in our case. There are two Federal decisions which reflect the differing opinions on the level of scrutiny non-evidentiary use of immunized testimony should receive. In *U.S. v. McDaniels*, 482 F2d 305 (C.A. 8 1973), the Court in citing *Kastigar* placed a "heavy burden" on the government and enforced a strict interpretation upon the government. In *U.S. v. Semkius*, 712 F2d 891 (C.A. 3 1983), the Court refused to follow the strict interpretation of *McDaniels* and held that *Kastigar* only prohibits evidentiary use of immunized testimony.

I seldom, very seldom, read law review articles. But the breadth of the divide between the two cases caused me to seek out an independent analysis of *Kastigar* and

related cases which encompass a *Garrity* issue. I (we) found such an article in the Illinois Law Review, cited as 1992 U. ILL. L. Rev. 625. This article was written by Professor Kate E. Bloch.

The Professor began her article by stating:

"In 1972, the minimum immunity constitutionally necessary to replace silence contracted. In that year, the U.S. Supreme Court approved the substitution of use immunity from the broader transactional immunity. Use immunity protects speakers from the use and derivative use of their statements. With use immunity, prosecution of the speaker is no longer de jure, barred. But the conferring of even this narrow immunity....requires a prosecutor to demonstrate that all the evidence it intends to use has a legitimate source independent of the Defendant's immunized statements."

In referring to the *Kastigar* Hearing, the author states, "the test speaks of a legitimate, independent source for all the evidence that the prosecution proposes to use, furthering the dichotomy between the portions of the decision (*Kastigar*), assuring against any use and those suggesting that uses that do not lead to evidence do not violate the immunity promise. As we explore various representative interpretations of *Kastigar* and traditional forms of use immunity, the question of permissibility of "non-evidentiary uses" surfaces as a recurrent theme in the dissension trailing the *Kastigar* decision. Professor Bloch goes on to say:

"Without explicit guidance from the U.S. Supreme Court, commentators and other federal and state court interpreters of the conflicting language in *Kastigar* have arrayed themselves along a substantial portion of the Fifth Amendment spectrum. Often, the crux of the disparity in their positions hinges on the acceptance, rejection, or very definition of "non-evidentiary use" reflecting *Kastigar's* bipolarity on that issue."

Bloch develops four classifications of scrutiny: extreme scrutiny, substantial scrutiny, moderate scrutiny and limited scrutiny.

Extensive scrutiny is exemplified in *U.S. v. McDaniels*. *McDaniels* held:

"Immunity protection must forbid all prosecutorial use of the testimony, not merely that which results in the presentation of evidence before the jury (at 311)."

McDaniels requires extensive scrutiny of immunized information. "Even a specter of use violates the immunity promise."

The Court in *United States v. Byrd*, 765 F2d 1524 (11th Cir. 1985), while strict, was less so by holding, "the government is not required to negate all abstract possibilities of taint. Rather, the government need only show on a preponderance of the evidence that, in fact, the evidence used was derived from a legitimate source." However, the Court was concerned with the non-evidentiary issues, stating, "the government's use of its knowledge of *Byrd's* immunized testimony to illicit cross-examination...would probably constitute an impermissible use of evidence derived indirectly from immunized testimony. The *Byrd* test symbolizes the "substantial scrutiny test". Additionally, the Court in *U.S. v. North*, 910 F2d 843 (D.C. Cir. 1990) declined to "reach the precise question of the permissible quantum of non-evidentiary use by prosecutors, or whether such use is permissible at all. But the court went on to explain:

"in our view, the use of immunized testimony by witnesses to refresh their memories or otherwise focus their thoughts, organize their testimony or alter their prior or contemporaneous statements constitutes indirect evidentiary use, not "non-evidentiary use".

The third, moderate scrutiny is most comparable to the same standards used in regards to "coerced confessions". The Professor acknowledges that there "is a dearth of court opinions and scholarly commentary addressing the extent of accepted, "non-evidentiary uses" or definitions of "non-evidentiary use" in the coerced confession context. This absence fosters the uncertainty of the sweep of Fifth Amendment

protection for the accused and the indeterminacy of the burden that the prosecution is required to meet."

Bloch writes that "three doctrines may further relax the stringency of court scrutiny of "coerces confessions". They are:

1. If the fruits of the coerced confession are sufficiently attenuated from the initial coercion;
2. inevitable discovery; and
3. harmless error.

Footnote 137 in this article gives a concise summary of how various courts and commentators view the "poisonous tree" and "inevitable discovery analysis" for immunized testimony. And of course, those discussions and holdings are as diverse as the "scrutiny opinions".

The final tier is referred to as "limited scrutiny". This final tier is analogous to the exclusionary rule and partial exclusionary rules and surfaces most often in suppression hearings, probation or parole revocations, fitness and dependency hearings. *Simmons v. U.S.*, 390 U.S. 377 (1968); *Nelson v. Sard* at 402 F2d 653 (D.C. Cir. 1968 (parole revocations)).

The Ohio cases, like the Federal cases, cut across the spectrum. In 1990, the Ohio Supreme Court discussed the issue of immunity provided by R.C. 101.44 in *State v. Conrad*, 50 Ohio St.3d 1 (1990). In that decision, the Ohio Supreme Court followed *Kastigar* and the two-prong test. The Court described the test as follows: "There is a two-prong test that the prosecution must satisfy where a witness makes a claim that his or her immunized testimony was used":

1. The government must deny any (*emphasis theirs*) use of the accused own immunized testimony against him or her in a criminal case, and (*emphasis ours*);
2. the government must affirmatively prove that all the evidence to be used at trial is derived from sources wholly independent of the immunized testimony.

The Conrad Court applied the extensive scrutiny test and held that "any" meant "any". The Court found that the use of immunized testimony of the Defendant by the prosecutor to prepare a list of grand jury questions or for use as impeachment against the testifying defendant was a non-evidentiary use and dismissed the indictment.

In *Jones v. Franklin County Sheriff*, 52 Ohio St.3d 40 (1990), the Ohio Supreme Court accepted the Garrity holding and found that the Franklin County contract requiring police officers (sheriff's deputies) to cooperate with internal affairs investigation in return for immunity was a granting of use immunity to the officer.

In *State v. Brocious*, 2003 WL 22060162 (Ohio App. 2nd Dist.), the visiting prosecuting attorney had access to *Brocious'* statement prior to deciding whether to charge the deputy with a criminal offense. The trial court found the prosecutor failed to establish that she had not made any use of the immunized testimony and that the evidence to be presented at trial was derived from sources wholly independent of the defendant's statement. The Second District Court upheld the trial court's decision, agreeing that the prosecutor "used" the immunized testimony and dismissed the case.

In *State v. Sess* (1999), 136 Ohio App.3d 689, the argument was made that without access to the Defendant's statement, names of witnesses would not have been

discovered by the State. The trial court granted the Motion to Suppress, and the First District Court of Appeals upheld the decision. The Court based its analysis not on immunity so much as to the law surrounding "coerced statements" (moderate scrutiny). (I acknowledge a significant factual difference between this case and ours, but the analysis is still concerning use and use derivative information. The Court in Sess also discussed inevitable discovery and rejected it.)

In *State v. Hall*, 2004 WL 628650 (Ohio App. 6th Dist.), the Sixth District reaffirmed the same line of cases, but held the state met its burden in establishing a wholly independent source.

In this matter, the evidence obtained by the Perry Township Police on May 30, 2006 was not tainted by any immunized statement from the Defendant. Indeed, the events of May 30, 2006 preceded the Internal Affairs investigation. The Perry Police investigation, the witnesses interviewed that evening is competent evidence and untainted. Sgt. Rothlisberger's testimony at the Grand Jury on August 10, 2006 is likewise competent, and had the presentation stopped with Sgt. Rothlisberger's testimony relating solely to the events of May 30, 2006, I would find the indictment to be proper and based on "wholly independent evidence". However, I have concerns relating not just to the grand jury proceeding, but subsequent events as well. Therefore, it is necessary to return to July of 2006.

On July 10, 2006, Officer Jackson was ordered to appear for an interview pursuant to the Internal Affairs investigation concerning the events of May 30, 2006 (Exhibit A). On July 21, 2006, the Defendant, with counsel, appeared. The Defendant was given his "Garrity Warnings" and was questioned about "the incident of May 30,

2006 at Lew's Tavern and circumstances surrounding the incident" (Exhibit B). At 9:01 on July 21, 2006, a taped statement was taken from Officer Jackson (Exhibit F). As required, the Defendant answered all questions fully, and in fact, gave a rather detailed explanation of his conduct prior to the incident, his conduct during the incident and after the incident. He made statements that were somewhat inconsistent with the testimony of Sgt. Rothlisberger during his grand jury presentation. His statement disclosed information concerning the issue of intoxication and conversations the Defendant had with Tony Vale and the arresting officers. The Defendant gave the names of three witnesses. The Defendant also gave his reasoning as to why he had his weapon that evening.

On July 21, 2006 at 1:12 p.m., Lt. Davis, who took the statement from Officer Jackson, called Ogle and conducted a telephone interview. This interview was reduced to a transcript (Exhibit E). Ogle was known to the Perry Police Department, but they had not taken a taped statement from her. In the July 21, 2006 statement, Ogle made contradictory statements to that of the Defendant; gave her opinion as to the issue of intoxication; provided three names of additional witnesses, and further identified Van as "Cowboy Vince".

On July 24, 2006, Lt. Davis took a taped statement from Vince Van (Exhibit D). It is agreed that the source as to the identification of Van at the time of the interview was the Defendant. Mr. Van's testimony, to put it politely, is more consistent with Officer Jackson's, and, to put it politely, terribly inconsistent with Ogle's statement.

On August 10, 2006. Sgt. Rothlisberger testified at the grand jury. His testimony was very much restricted to the gun charge and not what occurred in the bar. However,

the Sergeant was questioned by the presenting prosecutor and grand jurors as to the Perry Township Police Department policy on police officers carrying weapons in bars and his opinion as to the Defendant's decision to carry a weapon that particular evening. Lt. Davis also testified at the Grand Jury on August 10, 2006. In citing *Garrity* and his role as the investigating officer, he did not testify as to the facts of his investigation. His testimony centered on the Defendant's status as a police officer on May 30, 2006; his right to carry a weapon, and his opinion as to whether it was against the law for a police officer to take a weapon into a bar. Grand jurors also asked Lt. Davis his opinion on the conduct of Officer Jackson that evening. There was a similarity in the questions asked by the grand jurors and the prosecutor of both Sgt. Rothlisberger and Lt. Davis.

There are two sources of information and evidence in this case; one, from the Perry Township Police Department, which I characterize as independent, and one from the Canton Police Department, specifically Lt. Davis. While some of his information was gathered from independent sources, much was gathered only after his interview with the Defendant. The problem is both sources joined and flowed together into the Prosecutor's Office.

I understand the Defendant is charged with a weapons violation and not his conduct inside Lew's Bar on May 30, 2006. I also understand that the State could very well proceed with solely that evidence that was obtained from "a wholly independent source". It is not the direct evidence that is of concern. It is the "derivative use" or the "non-evidentiary use" of that information which poses a problem in this matter.

The information in the possession of the prosecutor was not harmless. *Arizona v. Fulminante*, 111 S.Ct. 1246 (1991). The State had no statement by the Defendant

until his Garrity statement was revealed. In that statement the State learned the Defendant's actions on the 30th of May, his reasons for being at Lew's, and his account of the events and possible defenses to the charge. Through witness statements, the prosecution had information to discredit any defense the Defendant may have had. I am not able to aptly describe the effect all this information had on the right of this Defendant to present a factual defense to the charges against him. However, I do know that it is extremely favorable to the State and extremely unfavorable to the Defense.

There was no reason for Lt. Davis to testify at the grand jury. There was no reason for Lt. Davis to have any contact with the Prosecutor's Office at all. But he did, and there are consequences. Lt. Davis's testimony at the grand jury was influential in the decision of the Grand Jury to indict (see T-31, L-6-10; T-32 and 33). Lt. Davis, in a sense, became the investigating officer for the prosecutor's office almost to the exclusion of the Perry Police Department (see Exhibit C). He cannot participate in this dual role without obliterating the lines between same source and independent source.

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 defense).

At the August 8, 2007 hearing, there was no testimony as to the interaction, if any, between the grand jury prosecutor and Lt. Davis; interaction between the grand jury prosecutor and the trial prosecutor, if any; interaction between Lt. Davis and the trial prosecutor, if any; nor when the Internal Affairs investigative file was received by the prosecutor, who read it and what they read (*State v. Brocious*).

At the end of the day, then, the State possessed exactly the type of information and knowledge Kastigar and McDaniels and North were most concerned with; information to obtain leads; names of witnesses; knowledge of the accused's immunized testimony to elicit evidence on cross examination; knowledge in and of itself of the Defendant's immunized testimony; information possibly to refresh a witness' testimony; information that could influence trial strategy and charging decisions and the use of the immunized statement as an investigatory tool to the benefit of the otherwise detached prosecutor, to list but a few. These same cases assured a "total prohibition" against use of immunized statements and they must be followed. It is not my role to explain how this information or knowledge will influence this case. It is the State's burden to affirmatively prove that it will not.

I believe *United States v. McDaniels* is the appropriate measure under which to judge the issue before me. Because of the power and resources of the State, the conduct as it relates to the non-evidentiary use of immunized testimony is subject to extensive scrutiny. Under that test, set forth in *State v. Conrad*, I find that the State did use the accused' own testimony against him, and they failed to affirmatively prove that all the evidence to be used at trial is derived from sources wholly independent of the immunized testimony.

The final question is the appropriate disposition of this matter. Because I find *McDaniels* and *Conrad* controlling, treating this matter under the "coerced confession" guidelines is not acceptable.

I am in agreement that there is no such motion as a Motion to Dismiss.

However, that is the remedy applied in the cases I have relied on. Further, Crim.R. 12 states:

"Prior to trial, any party may raise by a motion any defense, objection, evidentiary issue, or request that is capable of determination without the trial of the general issue; two, defenses and objections based on the indictment information or complaint."

Further, in *State v. Serban*, No. 2006 C.A. 00198, Ohio App. 5th Dist. (2007), the

Court held:

"pretrial motions to dismiss can only raise matters that are capable of determination without a trial on the general issue...if a motion to dismiss requires examination of evidence beyond the face of the complaint, it must be presented as a motion for acquittal under Crim.R. 29 at the close of the state's case."

I find this matter is capable of determination without a trial on the merits.

Therefore, for the reasons stated, the matter of *State of Ohio vs. Anthony D.*

Jackson, Case No. 2006CR1022 is hereby Dismissed.



JUDGE RICHARD D. REINBOLD, JR.

cc: Prosecutor
Bradley Iams, Esq.