

Case No. 2008-1499

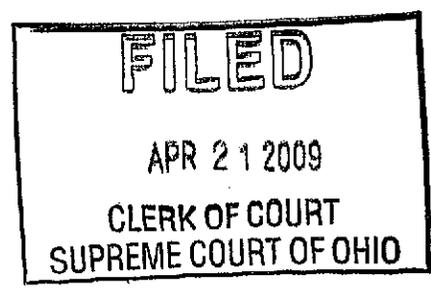
In the Supreme Court of Ohio

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

STATE OF OHIO,
Plaintiff-Appellant,

v.

ANTHONY D. JACKSON,
Defendant-Appellee.



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Association, on Behalf of Appellant, State of Ohio

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STATEMENT OF THE CASE AND FACTS

On May 30, 2007, patrolman John Roethlisberger of the Perry Township Police Department responded to a fight call at Lew's Tavern involving the appellee, Anthony Jackson. At the time, Jackson was a suspended Canton police officer. Roethlisberger's investigation focused not on the fight, but on Jackson's admitted possession of a loaded gun inside the bar. Roethlisberger did not arrest Jackson that night, but sent his report to the Massillon Law Department, which charged Jackson with carrying a gun into a Class D liquor establishment in violation of R.C. 2923.121(A), a fifth degree felony. On June 30, 2006, the Massillon Municipal Court bound the case over to the Stark County Grand Jury.

Meanwhile, the Internal Affairs Division ("I.A.") of the Canton Police Department had launched its own administrative investigation led by Sergeant David Davis, who ordered Jackson to submit to an interview on July 21, 2006. Jackson appeared with his attorney and Davis read him the following "*Garrity* warning":

[I]f you disclose information which indicates that you may be guilty of criminal conduct, neither your self-incriminating statements nor the fruits of any self-incriminating statements you make will be used against you in any criminal legal proceedings.

Jackson did not reveal any information that was not already known to investigators, except the name of Vince Van, an alleged witness. Davis then interviewed Van, who provided information that, if anything, was favorable to Jackson.

About a month later, on August 21, 2006, the Stark County Grand Jury indicted Jackson with illegal possession of a gun in a liquor permit premises on August 21, 2006.

What followed was Jackson's year-long odyssey to obtain dismissal of the charges. Initially, Jackson claimed that federal law provided an affirmative defense that preempted the application of the Ohio statute with which he was charged. After the court rejected that claim because his suspension from the Canton Police Department meant he was not a "qualified law enforcement officer" under the federal statute, Jackson shifted his strategy.

Jackson then claimed the prosecutor made direct or derivative, also known as "evidentiary," use of his *Garrity* statement at the grand jury. As a result, the court held a hearing on August 8, 2007, in accordance with *Kastigar v. United States*, in which the Court held that once a defendant demonstrates that he has testified under a grant of immunity, the prosecution has the burden of showing their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.¹

At the *Kastigar* hearing, the prosecutor, who was not the same prosecutor that presented the case to the grand jury, informed the court that he had obtained Jackson's I.A. file including his *Garrity* statement.² The prosecutor, however, then proved that the evidence he proposed to use at trial was derived from a source wholly independent from Jackson's *Garrity* statement. Roethlisberger testified at the *Kastigar* hearing that Jackson admitted having a gun and that Lew's Tavern was a class D liquor premises, facts that were not in dispute, and that Roethlisberger learned the night of the incident.

¹ 405 U.S. 441, 460 (1972).

² During discovery, the prosecutor had previously disclosed Jackson's *Garrity* statement to his attorney, who also represented Jackson during his I.A. interview.

Finally, the prosecutor presented the grand jury transcript to the court to prove that the grand jury prosecutor did not make evidentiary use of Jackson's *Garrity* statement in obtaining the indictment.³ Except for Roethlisberger, Davis was the only witness to testify in front of the grand jury. Davis only testified regarding Jackson's employment status at the time of the incident, which was relevant to defeat his federal preemption argument. Davis did not, however, testify about Van or reveal the contents of Jackson's *Garrity* interview:

Q: Have you talked to Anthony Jackson at all about this incident?

* * *

A: When I spoke to him it was in internal investigation and it was an administrative interview and he was under his *Garrity* protection at that time so I can't . . .divulge that.

Even though Jackson's *Garrity* statement had not been used to obtain the indictment, and even though the evidence needed to convict Jackson at trial was completely independent of it, Jackson still urged for dismissal. Now, he invited the court to expand the holding in *Garrity* by prohibiting not just the evidentiary use of his statement, but its "non-evidentiary" use as well, ostensibly including such things as "influencing" a prosecutor's trial strategy.

The trial court agreed with Jackson its Judgment Entry filed September 19, 2007. Relying on the Second Circuit Court of Appeals' 1973 decision in *United States v. McDaniel*, the trial court held that the prosecutor had "knowledge" of Jackson's *Garrity* statement which might have some "non-evidentiary" use, albeit one the court admittedly could not

³ On Jackson's request, the court ordered the grand jury testimony be transcribed.

“aptly describe.” The trial court then dismissed the charge against Jackson despite acknowledging that the prosecutor had not made evidentiary use of Jackson’s *Garrity* statement in obtaining the indictment and would not need to do so to convict Jackson: “I also understand that the State could very well proceed with solely that evidence that was obtained from a ‘wholly independent source.’”⁴

On appeal, the Fifth Appellate District disagreed that dismissal was the proper remedy because “the grand jury testimony establishes [Jackson’s] *Garrity* statement was not *used* to obtain the indictment.”⁵ Still, the Fifth District, apparently relying in part on this Court’s decision in *Conrad*,⁶ held that a *Garrity* violation occurred because the prosecutor “failed to establish that its *knowledge* of Mr. Van could be derived from any other source wholly independent” of Jackson’s *Garrity* statement, and that the prosecutor “cannot erase the knowledge” of Van.⁷ On remand, the Fifth District prohibited Davis from testifying and ordered the trial court to appoint an out-of-county prosecutor to prosecute Jackson, but only after the Stark County Prosecutor purged his file of the entire I.A. file.⁸

It is from this Judgment Entry that the State of Ohio prosecutes the instant discretionary appeal and the amici curiae submit the following merit brief.

⁴ *State v. Jackson*, Stark County Common Pleas Court, Case No. 2006 CR 1022, Judgment Entry, Sept. 10, 2006, attached to the appellant State of Ohio’s brief, at appendix.

⁵ *State v. Jackson*, 5th Dist. No. 2007CA00274, 2008-Ohio-2944, at ¶35 (emphasis added).

⁶ *State v. Conrad* (1990), 50 Ohio St.3d 1.

⁷ *Id.* at ¶¶30, 34. (Emphasis added)

⁸ *Id.* at ¶37.

INTEREST OF THE AMICI CURIAE

The Ohio Municipal League is an Ohio non-profit corporation incorporated in 1952 by city and village officials who recognized the need for a statewide association to serve the interests of Ohio municipal governments. Since then, its membership has grown to approximately 750 cities and villages, including two other amici curiae here, the cities of Canton and Massillon, all collectively dedicated to improving municipal government and administration, and promoting the general welfare of their residents.

The Buckeye State Sheriffs' Association is a non-profit organization representing all sheriffs of the State of Ohio, and is dedicated to providing quality, professional law enforcement.

All of the amici curiae are interested in this case because it significantly affects their ability to provide fair and effective law enforcement as well as their obligations as employers. As public employers, the amici curiae are responsible for investigating alleged wrongdoing of their employees. Thorough investigations often require compelling an employee's statement under *Garrity*. But the Fifth Appellate District's decision casts doubt on the wisdom of requiring a *Garrity* statement for fear it might jeopardize any future prosecution of that employee. This decision will force public employers to choose between their responsibility as an employer to conduct a thorough internal investigation, and their responsibility to administer the law. Public employers must not be forced to make that choice; they must be allowed to accomplish both objectives in order to ensure that they can be responsible and accountable to those they serve.

ARGUMENT

Proposition of Law:

When a public employer compels an employee to give a statement under threat of removal from office, Garrity v. New Jersey prohibits the direct or derivative use of the statement in a subsequent prosecution, but it does not prohibit a prosecutor's knowledge, or "non-evidentiary" use of it.

1. *Compelled statements under Garrity are entitled to Fifth Amendment protection.*

At the center of this case is the United States Supreme Court's decision in *Garrity v. New Jersey*, in which several police officers were questioned about fixing traffic tickets as part of an internal investigation.⁹ The officers answered questions after they were told that their refusal to do so would result in their termination. The officers challenged the introduction of their answers at trial, arguing they were coerced in violation of the Fifth Amendment.

The Court held that, just as in *Miranda*,¹⁰ the defendants' "Hobson's choice," which was either to forfeit their jobs or to incriminate themselves, is "the antithesis of free choice to speak out or to remain silent."¹¹ The Court held that the Fifth and Fourteenth Amendments precluded the use of a public employees' statement made under threat of removal from office from being used in a subsequent prosecution for the conduct under investigation.¹²

⁹ *Garrity v. New Jersey*, 385 U.S. 493, 494 (1967).

¹⁰ *Miranda v. Arizona*, 384 U.S. 436 (1964).

¹¹ *Garrity*, 385 U.S. at 497; *Kelley v. Johnson*, 425 U.S. 238, 248 (1976).

¹² *Garrity* at 500; *McKinley v. City of Mansfield*, 404 F.3d 418, 427 (6th Cir. 2005).

It was therefore clear that the Court intended that the restrictions on the use of immunized *Garrity* statements were to be identical to those applied to coerced confessions. But the type of immunity – whether use or transactional – had not yet been resolved by the Court.

2. *Public employees who provide Garrity statements are only entitled to use immunity and are therefore subject to prosecution for matters related to the statement, but the prosecutor must prove the evidence they intend to use at trial is derived from a source independent of the Garrity statement.*

The United States Supreme Court rejected full transactional immunity for compelled statements in *Kastigar v. U.S.*¹³ The Court reasoned that transactional immunity afforded greater protection than the Fifth Amendment required and that use immunity is “coextensive with the scope of the privilege” against self-incrimination.¹⁴ Therefore, an individual who gave a compelled statement is only entitled to use immunity, and they may still be prosecuted for matters related to it.

In that event, however, the Court imposes the “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.”¹⁵ Although this burden has been characterized as “heavy,” it is clear that the prosecutor is only required to prove an absence of taint by a

¹³ 405 U.S. 441, 460 (1972).

¹⁴ *Id.* at 449.

¹⁵ *Id.* at 460.

preponderance of the evidence, and that negation of all abstract possibility of taint is not necessary.¹⁶

This Court followed *Kastigar* in *State v. Conrad*.¹⁷ In that case, a witness who gave immunized testimony to the Judiciary Committee of the Ohio Senate was subsequently subpoenaed to testify in front of the grand jury.¹⁸ The prosecutor impeached the witness with the transcript of her immunized Committee testimony. In a 4-3 decision, this Court held that *Kastigar* required that the indictment be dismissed because the prosecutor's use of the immunized statement to impeach the defendant meant that the State could not prove that the evidence it proposed to use at trial derived from sources wholly independent of the immunized testimony.¹⁹

In *Conrad* this Court only considered the prosecutor's *actual* use of immunized testimony, not his "non-evidentiary" use of it. This case provides this Court the first opportunity to rule on this issue.

Other courts have considered the issue, however, and although it seemed clear that *Kastigar* only prohibited evidentiary use of an immunized statement, a handful of courts gave it an unjustifiably expansive interpretation and imposed greater restrictions on immunized

¹⁶ *U.S. v. Byrd*, 765 F.2d 1524, 1529 (11th Cir.1985).

¹⁷ 50 Ohio St.3d 1.

¹⁸ The immunity in *Conrad* stemmed from R.C. 101.44, while the immunity in *Kastigar* stemmed from 18 U.S.C. §6002.

¹⁹ *Id.* at 4-5. The dissent found that dismissal of the indictment was not necessary because the immunized statement was exculpatory and the prosecutor's use of it was minimal, and therefore, harmless error applied.

statements than had ever been applied to coerced confessions, beginning with the Eighth Circuit Court of Appeals' decision in *U.S. v. McDaniel*.²⁰

3. *Use immunity under Garrity and Kastigar prohibits only direct or derivative use of a Garrity statement, and does not prohibit a prosecutor's knowledge, or so-called "non-evidentiary" use of the statement.*

In *McDaniel*, the prosecutor inadvertently reviewed immunized testimony before charging the defendant. Using the *Kastigar* analysis, the court determined that the prosecutor had presented only evidence that derived from a source independent of the immunized statement. The Eighth Circuit, however, reversed the conviction based upon its belief that the statement had an "immeasurable subjective effect" on the prosecutor. It could, according to the court, be used for non-evidentiary purposes, "conceivably includ[ing] assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea bargain, interpreting evidence, planning cross-examination, and otherwise planning trial strategy."²¹ As such, the prosecutor had an "insurmountable task in discharging the heavy burden of proof imposed by *Kastigar*."²² This was the first time a prosecution had been barred not by a prosecutor's use of an immunized statement, but by his knowledge of it. It should have been the last.

And for the most part, it was. But a handful of courts embraced the "non-evidentiary"

²⁰ 482 F.2d 305 (8th Cir. 1973).

²¹ *McDaniel*, 482 F.2d at 311; One author has defined non-evidentiary uses as those that "do not furnish a link in the chain of evidence against the defendant. . . ." Humble, *Non-evidentiary use of compelled testimony: Beyond the Fifth Amendment*, 66 Tex. L. Rev. 351, 355-56 (1987).

²² *Id.* at 311.

approach taken by the *McDaniel* court, including a Minnesota appellate court and the Third Circuit Court of Appeals.²³ Likewise in Ohio, a divided Second Appellate District embraced the view that *Garrity* prohibited a prosecutor's knowledge of a statement when it affirmed the dismissal of an indictment where the prosecutor had "made use of" a police officer's *Garrity* statement in "solidifying her decision to charge him."²⁴ Though they are few, these opinions were apparently enough to breathe life into the claim made by Jackson, which was ultimately embraced by the Fifth Appellate District.

Most federal appellate courts, however, reject the Fifth District's non-evidentiary interpretation of *Garrity*, including the First,²⁵ Second,²⁶ Third,²⁷ Fourth,²⁸ Fifth,²⁹ Seventh,³⁰ Ninth,³¹ and Eleventh Circuits.³² At least two state supreme courts have also rejected the non-evidentiary approach.³³

There are several reasons why these courts were correct to reject the non-evidentiary

²³ *U.S. v. Semkiw*, 712 F.2d 891 (3rd Cir. 1983); *State v. Gault*, 551 N.W.2d 719 (Minn. App. 1996).

²⁴ *State v. Brocious*, 2nd Dist. No. 2002CA89, 2003-Ohio-4708, at ¶15.

²⁵ *U.S. v. Serano*, 870 F.2d 1 (1st Cir. 1989).

²⁶ *U.S. v. Mariani*, 851 F.2d 595 (2nd Cir. 1988).

²⁷ *U.S. v. Pantone*, 634 F.2d 716 (3rd Cir. 1980).

²⁸ *U.S. v. Harris*, 973 F.2d 333 (4th Cir. 1992).

²⁹ *U.S. v. Daniels*, 281 F.3d 168 (5th Cir. 2002).

³⁰ *U.S. v. Velasco*, 953 F.2d 1467 (7th Cir. 1992).

³¹ *U.S. v. Crowson*, 828 F.2d 1427 (9th Cir. 1987).

³² *U.S. v. Byrd*, 765 F.2d 1524 (11th Cir. 1985).

³³ *State v. Beard*, 203 W.Va. 325, 507 S.E.2d 688 (1998); *State v. Koehn*, 2001 SD 144, 637 N.W.2d 723.

approach. Not the least of which is that it ignores the Fifth Amendment foundation of *Garrity* and *Kastigar*. The Court in both cases analogized immunized statements to coerced confessions.³⁴ The *Kastigar* Court then rejected transactional immunity for immunized statements because it “afforded greater protection than the Fifth Amendment required” and that use immunity is “coextensive with the scope of the privilege against self-incrimination.”³⁵ The Court’s opinion made clear that the protection for immunized statements should be no greater than, nor less than, the protection afforded to coerced confessions under Fifth Amendment. To ensure that balance, the Court allowed an individual to be prosecuted for matters related to an immunized statement, but required the prosecutor to prove by a preponderance of the evidence that the evidence it proposes to use is derived from a legitimate source wholly independent of the immunized testimony.

But in embracing the non-evidentiary approach, the Fifth Appellate District held that a prosecutor with access to the immunized statement, in fact, cannot overcome the *Kastigar* burden. This was a burden that the *McDaniel* court called “insurmountable.”³⁶ By embracing the non-evidentiary approach, the Fifth Appellate District essentially eliminated the *Kastigar* standard altogether, gutting the entire holding.

In embracing the “non-evidentiary” approach, the Fifth Appellate District imposes a

³⁴ *Kastigar*, 406 U.S. at 461.

³⁵ *Id.*

³⁶ *McDaniel*, 482 U.S. at 311

restriction on the use of a *Garrity* statement that no court has ever applied to a coerced confession.³⁷ Doing so allows an absurd irony. In the latter situation, police may use illegal physical or psychological pressure to coerce a possibly unreliable confession from an uncounseled, in-custody citizen in the secrecy of an interrogation room. In the former situation, IA officers conduct a civil, administrative interview of a police officer familiar with such a format, affording them many procedural protections often including representation by a union official and an attorney. While prevailing law permits the prosecutor to use the citizen's coerced confession for some purposes, including impeachment,³⁸ the Fifth Appellate District prohibits that same prosecutor from *even seeing* a public employee's *Garrity* statement. This approach is constitutionally unsound.

Public employees should not enjoy greater Fifth Amendment protections than the public they serve.

Additionally, nothing in the *Kastigar* case even remotely suggests that knowledge or "non-evidentiary" uses were contemplated. The Court specifically limited the prosecutor's burden to showing that the evidence it "*proposes to use* is derived from a legitimate source wholly independent from the compelled testimony."³⁹ This indicates that the Court is referencing evidentiary usage and not something as intangible as a prosecutor's motivation

³⁷ *Serrano*, 870 F.2d at 18 (1st Cir. 1989) ("[N]o case involving a coerced confession has prohibited the non-evidentiary use of an involuntary statement.")

³⁸ *Oregon v. Hass*, 420 U.S. 714, 722-24 (1975).

³⁹ *Kastigar*, 406 U.S. at 460. (Emphasis added.)

in bringing a case, or something even more ambiguous – if that is even possible – the “immeasurable subjective effect” on the prosecutor.⁴⁰

In addition to ignoring *Kastigar*'s precise language and its constitutional foundation, the Fifth Appellate District's decision compromises, and even cripples, the ability of public employers to investigate wrongdoing on the part of their employees. Many public employers will now be unwilling to risk that a possible criminal prosecution would be barred if there was even the slightest revelation of the *Garrity* statement, and therefore abandon *Garrity* interviews altogether. Without affording *Garrity* protections, public employers cannot terminate the employee for failing to answer the investigator's questions. As such, public employees, especially police officers knowledgeable in investigative techniques, will likely refuse to answer questions, rendering any investigation toothless and inert. The public deserves accountability from its employees, but may not get it if the Fifth Appellate District's decision is allowed to stand.

In the event a public employer decides to order a *Garrity* interview, the Fifth District's decision might then have disastrous results to any subsequent prosecution. Even if a prosecutor could prove he had no knowledge of a defendant's *Garrity* statement, the Fifth Appellate District's decision would force that prosecutor to proceed without an investigator, or any witness, who did.⁴¹ While that might not be an obstacle in this case because the

⁴⁰ See *Rameses v. Kernan*, Case No. CIV S-04-1173 GEB GGH P (E.D. Cal. Nov. 27, 2007).

⁴¹ *Jackson*, 2008-Ohio-2944, at ¶37 (In addition, we order the exclusion of Lieutenant Davis [who took Jackson's *Garrity* interview, but testified at the grand jury only about Jackson's employment status, relevant to an affirmative defense Jackson was advancing] as a witness.”

alleged crime was committed outside the jurisdiction where Jackson worked, it might have been a problem if he had done so in Canton. That is because although Canton has an I.A. division separate from a detective bureau, it is often more efficient for I.A. to perform both investigations. In that case, the I.A. investigator necessary for a criminal prosecution would be barred from testifying under the Fifth Appellate District's decision simply because that investigator may have also been responsible for taking the accused's *Garrity* statement. Even if departments like Cleveland are large enough to guarantee complete separation between its I.A. and criminal investigations, Ohio's smaller departments do not have that luxury. Those departments have no choice but to complete both investigations.⁴² Therefore, those departments will be forced to choose between fully investigating wrongdoing of its employees by ordering a *Garrity* interview, and possibly forfeiting any prosecution for doing so.

But there are still more flaws in the Fifth District's rationale that no court has yet addressed. For example, prohibiting non-evidentiary use of a *Garrity* statement cannot be reconciled with prosecutor's constitutional obligation to reveal exculpatory evidence under *Brady v. Maryland*.⁴³ As this Court is aware, prosecutors are responsible for disclosing to the defense "any favorable evidence known to the others acting on the government's behalf

⁴² The West Virginia Supreme Court made this same observation in *Beard*: "We are not unmindful of the fact that many rural areas in our state do not have the luxury of being able to transfer investigatory or prosecutorial duties to other police officers or prosecutors. Many West Virginia counties have only part-time prosecuting attorneys; a number of West Virginia counties have three or fewer deputies." 203 W.Va at 334, 507 S.E.2d at 697, fn. 37.

⁴³ 373 U.S. 83 (1963).

. . . including the police.”⁴⁴ Therefore, if a trial prosecutor is not permitted to even see a defendant’s *Garrity* statement, they could not discover a possibly exculpatory fact and could not therefore disclose it to the defendant. This would result in a “Hobsen’s choice” for the prosecutor: either jeopardize the prosecution by violating *Garrity*, or risk doing so by violating *Brady*. Such a choice cannot possibly have been contemplated by the Court in *Garrity* or *Kastigar*.

Finally, the Fifth District’s non-evidentiary interpretation of *Garrity* cannot be reconciled with Ohio’s Public Records laws. Under most circumstances, entire contents of IA files are public records.⁴⁵ So in this case for example, the Canton Repository would be entitled to report on the contents of Jackson’s file, and the public entitled to read about it. Yet according to the Fifth Appellate District, not only does a criminal charge have to be dismissed if the prosecutor reads a *Garrity* statement, it would also have to be dismissed if the prosecutor even read a newspaper account of it. There are countless scenarios whereby a prosecutor might be accused of having knowledge of a *Garrity* statement, and every one of them would operate as a bar on prosecution according to the Fifth Appellate District.

⁴⁴ *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). Prosecutors also have that duty under Ohio Rule of Professional Conduct, 3.8(d) (“The prosecutor in a criminal case shall not . . . fail to make the timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense. . . .”) Finally, prosecutors have the duty under Crim.R. 16(B)(1)(a) to provide the defendant with written summaries of any oral statement made to any law enforcement officer.

⁴⁵ R.C. 149.43(G); *State ex rel. Akron Beacon Journal Publishing Co. v. City of Akron*, 104 Ohio St.3d 399, 2004-Ohio-6557, at ¶50.

CONCLUSION

For the foregoing reasons, the amicus curiae respectfully request that this Court reverse the decision of the Fifth Appellate District and hold that *Garrity v. New Jersey* prohibits the direct or derivative use of the statement in a subsequent prosecution, but it does not prohibit a prosecutor's knowledge, or "non-evidentiary" use of it.

Respectfully submitted,

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I certify that I sent a copy of the foregoing Memorandum in Support of Jurisdiction by regular U.S. Mail this 21st day of April, 2009 to:

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