

Case No. 2008-1499

**In the  
Supreme Court of Ohio**

State of Ohio

Plaintiff-Appellant/Cross-Appellee,

v.

Anthony D. Jackson,

Defendant-Appellee/Cross-Appellant.

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

**Brief of *Amici Curiae*,**

**National Fraternal Order of Police and the Fraternal Order of Police of Ohio, Inc.,  
In Support of Defendant-Appellee/Cross-Appellant Anthony D. Jackson**

JOHN D. FERRERO (0018590)

Stark County Prosecutor

KATHLEEN O. TATARSKY (0017115)

Assistant Prosecuting Attorney

*Counsel of Record*

110 Central Plaza South, Suite 510

Canton, OH 44702-1413

Phone: (330) 451-7883

Facsimile: (330) 451-7965

*Counsel for Plaintiff-Appellant*

*State of Ohio*

BRADLEY R. IAMS (0019009)

220 Market Avenue South

400 Huntington Plaza

Canton, OH 44702

Phone: (330) 452-6400

Facsimile: (330) 452-8260

*Counsel for Defendant-Appellee*

*Anthony D. Jackson*

LARRY H. JAMES (0021773)

*Counsel of Record*

CHRISTINA L. CORL (0067869)

LINDSAY L. FORD (0082364)

CRABBE, BROWN & JAMES LLP

500 South Front Street, Suite 1200

Columbus, OH 43215

[LJames@CBJLawyers.com](mailto:LJames@CBJLawyers.com)

[CCorl@CBJLawyers.com](mailto:CCorl@CBJLawyers.com)

[LFord@CBJLawyers.com](mailto:LFord@CBJLawyers.com)

Phone: (614) 228-5511

Facsimile: (614) 229-4559

*Counsel for Amicus Curiae*

*National Fraternal Order of Police*

PAUL COX (0007202)

222 East Town Street

Columbus, OH 43215

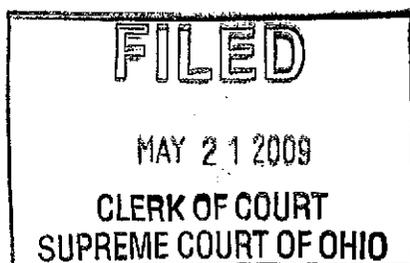
[pcox@fopohio.org](mailto:pcox@fopohio.org)

Phone: (614) 220-5239

Facsimile: (614) 224-5775

*Chief Counsel for Amicus Curiae*

*Fraternal Order of Police of Ohio, Inc.*



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## STATEMENT OF IDENTITY AND INTEREST IN CASE

The National Fraternal Order of Police (“FOP”) is the world’s largest organization of sworn law enforcement officers, with more than 325,000 members in more than 2,100 lodges. The Fraternal Order of Police of Ohio, Inc. (“Ohio FOP”) has 25,000 active and retired law enforcement members residing in almost every community in the State of Ohio. The FOP and the Ohio FOP are the voice of those who dedicate their lives to protecting and serving our communities. The FOP and the Ohio FOP represent law enforcement personnel at every level of crime prevention and investigation, nationwide and internationally.

With this Brief, the FOP and the Ohio FOP submit the views of their law enforcement members and the potential implications for officers in law enforcement that will result should this Court overturn the decision rendered by the Fifth District Court of Appeals which found that Appellant committed a *Garrity* violation. The FOP and the Ohio FOP urge this Court to adopt the Stark County Court of Common Pleas’ decision to dismiss the indictment altogether. This Brief will focus on the following:

1. Police officers do not shed their constitutional rights by virtue of their employment by the government.
2. Appellant State of Ohio urges this Court to adopt a dangerous precedent contrary to the United States Supreme Court’s holding in *Garrity v. New Jersey* that will give criminal suspects more constitutional rights than police officers.

The FOP and the Ohio FOP adopt and incorporate by reference the statement and arguments made within the Brief filed on behalf of Appellee Anthony D. Jackson.

## STATEMENT OF FACTS

In 2006, Appellee Anthony Jackson, an officer for the Canton City Police Department, was charged with carrying a concealed weapon and illegal possession of a firearm in a liquor permit premises. As part of the investigation of that incident, Appellee was ordered by the internal affairs unit of the CPD to answer questions concerning the incident. Appellee appeared with his legal counsel and was read a "*Garrity* Warning." Appellee then submitted to an interview during which he was required to give the names of any witnesses of the incident. One of the witnesses identified by Appellee was Vince Van. Van's involvement and identity were subsequently discovered by the prosecutors when they obtained Appellee's internal affairs file and *Garrity* statement.

Following grand jury proceedings, an indictment was handed up by the grand jury. Right before the trial, Appellee learned that the prosecution was in possession of his *Garrity* statement. The court then set a hearing to determine whether Appellant had committed a *Garrity* violation. The prosecutor acknowledged that he had reviewed the internal affairs file, including witness statements and the investigator's analysis of the case for the purpose of preparing for trial. The trial court ruled that Appellant had committed a *Garrity* violation and had failed to prove that it had not used the statement in question. As a result the indictment was dismissed.

On appeal the Fifth District Court of Appeals agreed that a *Garrity* violation had occurred. However, the case was remanded with instructions to cure the violation by assigning a new prosecutor, purging the file of the internal affairs information, and disqualifying the investigating officer as a witness.

## ARGUMENT

**I. The National Fraternal Order of Police and the Fraternal Order of Police of Ohio, Inc.—More than 325,000 Men and Women of Law Enforcement—Urge this Court to Uphold the Decision of the Fifth District Court of Appeals which Found that the State of Ohio Violated *Garrity* and Adopt the Trial Court’s Decision to Dismiss the Indictment Altogether.**

The National Fraternal Order of Police is the world’s largest organization of sworn law enforcement officers with more than 325,000 members. The Fraternal Order of Police of Ohio, Inc., has 25,000 members in almost every community within Ohio. The FOP was founded in 1915. What was originally contemplated as an organization for the “social welfare of all the police” has evolved into an active representative group working to protect and secure the rights of its law enforcement members. Because it is the duty of the FOP and the Ohio FOP to protect law enforcement officers, there are no groups more qualified to speak to the issues presented in this case.

Significant constitutional and Fifth Amendment issues are involved with respect to the prosecutors’ use and exposure to Jackson’s *Garrity* statement and internal affairs file. If the Court of Appeals’ decision is overturned, members’ constitutional rights throughout the United States will be jeopardized. It is with these interests in mind that the FOP and the Ohio FOP and their membership respectfully request this Honorable Court to uphold the Fifth District Court of Appeals’ decision finding that the State of Ohio violated the rule under *Garrity*. The FOP and Ohio FOP also urge this Honorable Court to adopt the Stark County Court of Common Pleas’ decision to dismiss the indictment altogether.

**II. Police officers do not shed their constitutional rights by virtue of their employment by the government.**

Appellant urges this Court to make a distinction between police officers and criminal

suspects as it relates to constitutional rights. Appellant essentially argues that this Court should allow prosecutors to have *carte blanche* to a police officer's compelled statement so long as the prosecutor does not "use" the statement in trial. This type of "use" advanced by Appellant is an egregious violation of a police officer's constitutional rights which the FOP and the Ohio FOP urge this Court not to allow. Prosecutors would never be entitled to a criminal suspect's compelled statement, much less use that statement in any respect against a criminal suspect in a subsequent criminal proceeding. Such a proposition would shock and outrage the public, as it rightly should.

Appellant puts forth the argument that the same rights that apply to protect criminal suspects' constitutional rights do not apply to protect police officers. As such, Appellant incorrectly urges this Court to adopt a law that distinguishes police officers from criminal suspects with regard to protection under the United States Constitution. This argument should and would shock and outrage the public as it is a violation of the constitutional rights of police officers. This is especially true since police officers are entitled to the same protections as criminal suspects under the United States Constitution and the United States Supreme Court's decision in *Garrity v. New Jersey*.

The Fifth Amendment of the United States Constitution and the United States Supreme Court's holding in *Garrity v. New Jersey*, 385 U.S. 493 (1967), protect **all persons**, regardless of their employment. The Fifth Amendment protects all persons, including police officers, from being compelled to provide self-incriminating statements. The Fifth Amendment provides, in relevant part that "**No person ... shall be compelled in any criminal case to be a witness against himself ...**" (U.S. Const., Amend. V) (emphasis added).

Like the Fifth Amendment, the United States Supreme Court's ruling in *Garrity* makes no distinction between criminal suspects and police officers. In fact, *Garrity* is the leading case

addressing a police officer's constitutional right against self-incrimination. In *Garrity*, law enforcement officers were interrogated about an alleged conspiracy to fix traffic tickets. *Garrity*, 385 U.S. at 494. The officers were warned their answers might be used against them in a criminal proceeding. *Id.* They had the right to remain silent, but if they asserted the right, they would be subject to termination. *Id.* The officers answered questions and no immunity was granted. *Id.* at 495. The information provided was used against them in subsequent criminal proceedings on conspiracy to obstruct justice. *Id.* The officers were later convicted of these criminal charges. *Id.*

The United States Supreme Court held that these statements were coerced as the officers were forced to choose "between self-incrimination or job forfeiture." *Id.* at 496. The Supreme Court also held "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." *Id.* at 497. Therefore, "the statements were infected by the coercion inherent in this scheme of questioning..." *Id.*

The Supreme Court also held

[P]olicemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights.

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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.

*Id.* at 500.

The Fifth Amendment and *Garrity* are not limited to protecting criminal suspects' constitutional rights. In fact, the holding in *Garrity* emphasizes that the Fifth Amendment protection against self-incrimination applies to all persons, including police officers. Police officers are no different from criminal suspects when it comes to receiving protection under the United States

Constitution. The law provides that police officers do not lose their constitutional rights when they are sworn into office and don their uniforms. Further, the Fifth District's decision achieves exactly what *Garrity* was fashioned to do: protect police officers' constitutional rights and try to put them in the same position as a criminal suspect. Therefore, the FOP and the Ohio FOP urge this Court to deny Appellant's assignment of errors, because to do so would mean to strip police officers of their constitutional rights.

**III. Appellant State of Ohio urges this Court to adopt a dangerous precedent contrary to the United States Supreme Court's holding in *Garrity v. New Jersey* that will give criminal suspects more constitutional rights than police officers.**

Imagine this scenario: A criminal suspect is detained for questioning by the police. The criminal suspect is granted immunity and then provides the police with a compelled statement. The police charge the criminal suspect with a crime. Subsequently, the prosecutor who is handling the case obtains the criminal suspect's compelled statement. The prosecutor discovers a witness previously unknown to him by reading the suspect's compelled statement and has access to the compelled statement while preparing for trial.

This scenario is contrary to the entire criminal process under the United States Constitution. The prosecutor's use of the criminal suspect's statement has completely tainted and abused the criminal process. The law simply does not allow for this type of situation. The law protects the criminal suspect from having his coerced statement used against him in a subsequent criminal proceeding. See, Fourteenth Amendment (U.S. Const., Amend. XIV) and *Payne v. State of Ark.*, 356 U.S. 560 (1958) (holding that "The use in a state criminal trial of a defendant's confession obtained by coercion, whether physical or mental, is forbidden by the Fourteenth Amendment."). The Fifth Amendment protects persons from being compelled to give self-incriminating statements. See, U.S.

Const., Amend. V. The Fifth Amendment privilege, therefore, includes the “right to remain silent,” as well as immunity from use in a criminal proceeding of information which is compelled by government. *Lefkowitz v. Turley*, 414 U.S. 70 (1973) [citing *Kastigar v. United States*, 406 U.S. 441 (1972)]. The Fifth Amendment privilege against self-incrimination, therefore, protects an individual from being forced to give information which may later be utilized against him in a criminal proceeding. *Kastigar*, 406 U.S. at 444-45.

Not only is the prosecutor prohibited from using the statement, but any evidence derived from the statement, including the discovery of witnesses, is barred from being used. The law prohibiting the use of coerced statements and its fruits preserves the sanctity of the criminal process and, therefore, protects the criminal suspect and the public.

Now imagine the same scenario above once again. All the facts are exactly the same. The only difference in the present case is that the criminal suspect is now also a police officer by the name of Mr. Anthony Jackson. It is Appellant’s position that when a criminal suspect is a police officer, a new set of rules now applies. Appellant urges this Court to set aside well-settled law which prohibits the subsequent use of a police officer’s compelled statement in subsequent criminal proceedings. Appellant finds no issue with a prosecutor possessing a police officer’s compelled *Garrity* statement and internal affairs file. Appellant’s argument sets forth an extremely dangerous precedent. Under Appellant’s argument, police officers are entitled to even fewer constitutional protections than criminal suspects. This argument is preposterous and absolutely contrary to well-settled law.

Appellant’s argument is completely outrageous, especially since unlike criminal suspects, police officers have even more at stake when giving compelled statements. Not only do police

officers have to think about the possible criminal ramifications they face once they give a compelled statement, but they also have to think about their employment. Courts have consistently held that when a police officer is forced to choose between providing a compelled statement and his or her employment, the Fifth Amendment is violated. See, *United States v. Vangates*, 287 F.3d 1315, 1320 (11th Cir. 2002), (holding “A public employee may not be coerced into surrendering his Fifth Amendment privilege by threat of being fired or subjected to other sanction.”); *Hill v. Johnson*, 160 F.3d 469, 471 (8th Cir. 1998) (holding “The Fifth Amendment is violated only by the combined risks of both compelling the employee to answer incriminating questions and compelling the employee to waive immunity from the use of those answers.”); *Harrison v. Wille*, 132 F.3d 679, 682-83 (11th Cir. 1998) quoting *Garrity v. New Jersey*, 385 U.S. at 497 (holding “When public employees are given the choice of either forfeiting their jobs or incriminating themselves, the Fifth Amendment has been violated.”). Courts are adamant about protecting police officers from being “‘put between the rock and the whirlpool’ of incriminating himself or losing his job.” See, *Singer v. Maine*, 49 F.3d 837, 847 (1st Cir. 1995).

Appellant’s argument is also absurd in light of the many court decisions protecting the Fifth Amendment rights of police officers by preventing prosecutors from using police officers’ compelled statements in subsequent criminal proceedings. Courts have been very strict about preserving the Fifth Amendment rights of police officers under *Garrity*. The United States Supreme Court cited *Garrity* when it held in *Baltimore City Dept. of Social Services v. Bouknight*, 493 U.S. 549, 562 (1990) that in a “Broad range of contexts, the Fifth Amendment limits prosecutors’ ability to use testimony that has been compelled.” As such, neither the *Garrity* statement nor any leads derived from it can be used directly or indirectly against the law enforcement officer in a subsequent criminal

proceeding. See, *Kastigar v. United States*, 406 U.S. 441, 448-49 (1972). As shown above, *Garrity* statements and alleged *Garrity* violations are taken very seriously by courts and scrutinized in detail.

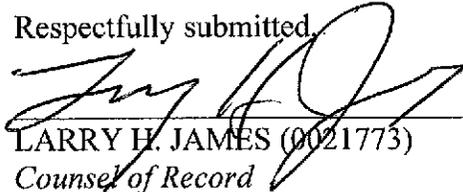
The Fifth District Court of Appeals' decision is consistent with other courts in that the lower court recognized a *Garrity* violation and took swift action in protecting Mr. Jackson's constitutional rights. The Fifth District's decision prohibiting the prosecutor's use of Mr. Jackson's compelled statement provides Mr. Jackson and other police officers with the very protection they deserve. This prohibition provides police officers with the protection that they are constitutionally entitled to and removes all possibilities of placing them "between a rock and a whirlpool." Most important to the FOP and the Ohio FOP, the Fifth District's decision does not grant criminal suspects more constitutional protections than police officers.

### CONCLUSION

The police officers who risk their lives every day to enforce the laws of the United States should be entitled to protection under the very laws they are sworn to uphold. This Court has an opportunity to protect police officers by prohibiting prosecutors from using in any respect a compelled *Garrity* statement in a subsequent criminal proceeding.

Based upon the foregoing, the National Fraternal Order of Police and the Fraternal Order of Police of Ohio, Inc. respectfully request this Court to adopt the Stark County Court of Common Pleas' decision to dismiss the indictment altogether because Appellant State of Ohio had violated the rule as promulgated under *Garrity v. New Jersey*.

Respectfully submitted,



LARRY H. JAMES (0021773)

*Counsel of Record*

CHRISTINA L. CORL (0067869)

LINDSAY L. FORD (0082364)

CRABBE, BROWN & JAMES LLP

500 South Front Street, Suite 1200

Columbus, OH 43215

[LJames@CBJLawyers.com](mailto:LJames@CBJLawyers.com)

[CCorl@CBJLawyers.com](mailto:CCorl@CBJLawyers.com)

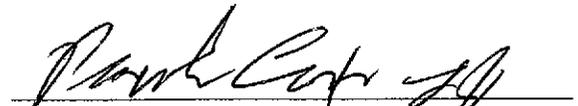
[LFord@CBJLawyers.com](mailto:LFord@CBJLawyers.com)

Phone: (614) 228-5511

Facsimile: (614) 229-4559

*Counsel for Amicus Curiae*

*National Fraternal Order of Police*



PAUL COX (0007202)

222 East Town Street

Columbus, OH 43215

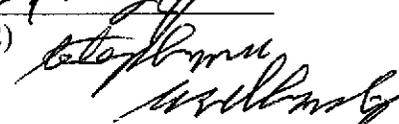
[pcox@fopohio.org](mailto:pcox@fopohio.org)

Phone: (614) 220-5239

Facsimile: (614) 224-5775

*Chief Counsel for Amicus Curiae*

*Fraternal Order of Police of Ohio, Inc.*



## CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing document has been forwarded to the following individuals via regular U.S. mail this 21<sup>st</sup> day of May, 2009:

JOHN D. FERRERO  
Stark County Prosecutor  
KATHLEEN O. TATARSKY  
Assistant Prosecuting Attorney  
*Counsel of Record*  
110 Central Plaza South, Suite 510  
Canton, OH 44702-1413  
*Counsel for Plaintiff-Appellant*  
*State of Ohio*

BRADLEY R. IAMS  
220 Market Avenue South  
400 Huntington Plaza  
Canton, OH 44702  
*Counsel for Defendant-Appellee*  
*Anthony D. Jackson*

JAMES F. MATHEWS  
Baker, Dubliker, Beck, Wiley & Mathews  
400 S. Main Street  
North Canton, OH 44720  
*Attorney for City of North Canton*

KEVIN R. L'HOMMEDIEU  
Canton Law Department  
218 Cleveland Avenue, S.S.  
P.O. Box 24218  
Canton, OH 44701-4218  
*Attorney for Amicus Curiae*  
*City of Canton*

PERICLES G. STERGIOS  
City of Massillon Law Director  
Massillon Law Department  
Two James Duncan Plaza  
Massillon, OH 44646  
*Attorney for Amicus Curiae,*  
*City of Massillon*

STEPHEN L. BYRON  
Schottenstein, Zox and Dunn, Co., LPA  
4230 State Route 306, Suite 240  
Willoughby, OH 44094  
*Attorney for Amicus Curiae,*  
*Ohio Municipal League*

STEPHEN J. SMITH  
Schottenstein, Zox and Dunn, Co., LPA  
250 West Street  
Columbus, OH 43215  
*Attorney for Amicus Curiae,*  
*Ohio Municipal League*

JOHN GOTHERMAN  
Ohio Municipal League  
175 S. Third Street, #510  
Columbus, OH 43215  
*Attorney for Amicus Curiae,*  
*Ohio Municipal League*

ROBERT L. BERRY  
Robert L. Berry, Co. LPA  
503 South High Street, Suite 200  
Columbus, OH 43215-5660  
*Attorney for Amicus Curiae,*  
*Buckeye State Sheriff's Association*

JUDITH ANTON LAPP  
JOSEPH DETERS  
230 East Ninth Street, Suite 4000  
Cincinnati, OH 45202  
*Attorney for Amicus Curiae,*  
*Ohio Prosecuting Attorney's Association*

BENJAMIN C. MIZER  
Solicitor General  
ALEXANDRA T. SCHIMMER  
Chief Deputy Solicitor General  
DAVID M. LIEBERMAN  
Deputy Solicitor  
30 East Broad Street, 17<sup>th</sup> Floor  
Columbus, OH 43215  
*Attorneys for Amicus Curiae*  
*Attorney General Richard Cordray*



---

LARRY H. JAMES (0021773)  
*Counsel for Amicus Curiae*  
*National Fraternal Order of Police*