Case No. 2008-1499

ORIGINAL

# 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/Cross-Appellee,*

v.

ANTHONY D. JACKSON
*Defendant-Appellee/Cross-Appellant,*

## Merit Brief of Appellee/Cross Appellant Anthony D. Jackson


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## APPELLEE'S STATEMENT OF THE CASE AND FACTS

On February 14, 2006, Appellee, an off duty, Canton, Ohio police officer, was involved in a traffic accident. As a result of that accident, he was issued citations for operating a vehicle under the influence, leaving the scene of an accident, and failure to control his vehicle. The following day Appellee was placed on paid administrative leave pending resolution of that case.[1] He was not provided with a disciplinary hearing, and his badge and service weapon were not taken from him.[2]

On May 30, 2006, while that traffic case lingered in the Canton Municipal Court, Appellant was involved in a minor altercation in a tavern in Perry township. The township police were called, however no arrests were made. At that time Appellant made a brief unrecorded statement to the police, stating he was an off-duty officer on administrative leave; that he lived in a high crime area; and that he was allowed to carry his weapon while on leave.[3] Despite the fact that there were no allegations at the scene that Appellee had in any way used, or brandished his firearm, he voluntarily surrendered it to the Perry township police. The Canton police department internal affairs unit commenced an investigation the following day.[4]

More than two weeks later, on June 16, 2006, Perry police sergeant Jon Roethlisberger, after several contacts from the Canton Police Department internal affairs unit, and at the direction

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[1]Transcript of Hearing on November 20, 2006, page 66 hereinafter Tr. Nov. 20, 2006 p.66.

[2]Tr. Nov. 20, 2006 p.77.

[3]State's Response to Defendant's Request For Discovery filed September 20, 2006.

[4]Canton Police Department Internal Affairs Reports admitted by agreement at August 8, 2007 hearing.

of the Perry police chief, filed criminal complaints against Appellee charging him with Carrying a Concealed Weapon, and Illegal Possession of a Firearm in a Liquor Permit Premises.[5]

After the case was bound over to the grand jury, but before an indictment was issued, the internal affairs investigation of Appellee concerning the incident continued. As part of that investigation, Appellee was ordered by Lieutenant Davis, of the Canton police department internal affairs unit, to appear on July 21, 2006 to answer questions concerning the incident.

On that date, Appellee appeared with his legal counsel, and was read a "*Garrity* Warning". That warning instructed Appellee that if he refused to answer any of the questions put to him, he would be subject to a separate disciplinary action. Appellee was specifically advised that "... neither your self -incriminating statements nor the fruits of any self incriminating statements you make will be used against you in any criminal proceedings."[6]

Appellee thereafter submitted to a twenty minute, recorded interview, concerning the incident, in which he was forced to admit, inter alia, that; he had consumed alcohol while possessing his firearm in the tavern, and that he briefly scuffled with another patron. Appellee was also required to give the names of any witnesses that he knew of, and to explain his actions, and any justifications he had for his conduct. Given the nature of the charge against him,

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[5]Transcript of Hearing on August 8, 2007 p.15, hereinafter Tr. Aug. 8, 2007 p.15.

[6]"Garrity Warning" admitted by agreement at August 8, 2007 hearing.

Appellant's state of mind and his use of alcohol were clearly relevant to his defense.[7] [8] [9] The internal affairs interview, and subsequent internal affairs investigation clearly covered those issues and possible defenses.

As a result, contrary to Appellant's contention that the *Garrity* statement was nothing more than a self serving denial, which mirrored Appellee's statement to the police at the scene, in fact, the statement was under oath and was quite detailed. In fact, Appellant was able to extract a coerced, pre-trial roadmap of Appellee's potential position at trial, prior to indictment.

In addition, Appellant was able to make immediate use of the statement to further the criminal investigation. One of the witnesses identified by Appellee was Vince Van. Van's involvement and identity were previously unknown to either the Perry police or the internal affairs investigators.[10] The Perry police had not done any follow-up interviews with any of the witnesses, even after filing the complaints. [11]

However, within hours of completing Appellee's interview, Lt. Davis continued his investigation by interviewing a witness named Tina Ogle. Davis now had the knowledge gained

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[7]RC 2923.121(B) and (C) providing affirmative defenses for law enforcement officers acting within the scope of their duties and for persons reasonably fearing attacks.

[8]18 USCA § 926(B) The Law Enforcement Officers Safety Act of 2003, which specifically overruled state and local laws which attempted to restrict qualified law enforcement officers from carrying concealed weapons unless, inter alia, they were the subject of disciplinary actions or under the influence of alcohol.

[9] *State v. Shay*, 151 Ohio App 3d 538, 784 N.E2d 1186 (2003) holding that RC 2923.121 is not a strict liability offense.

[10]Stipulations filed Aug. 8, 2007.

[11]Tr. Aug 8, 2007 p.11.

from Appellee, and among other issues, he specifically questioned Ogle concerning the witness Van, and Appellee's consumption of alcohol. Thereafter, on July 24, 2006 Van was located, and Davis obtained a recorded statement from him. In that statement Van disputed many of the allegations concerning Appellee's conduct.

On August 4, 2006, the Stark County Prosecutor issued a praecipe for grand jury subpoenas. That praecipe contained the names of six witnesses who were scheduled to appear on August 10th, 2006. In addition to Sgt. Roethlisberger and Lt. Davis, four civilian witnesses; Krista Jones, Shannon Dazey, Tony Vail, and James Walters were subpoenaed to appear on August 10, 2006.

The proceedings in the grand jury on August 10, 2006 are part of the record in this case, having been provided to the trial court upon motion of the prosecutor. That motion was made in connection with Appellee's July 6, 2007 motion to dismiss, based upon a claimed violation of his *Garrity* rights. Although the transcript was prepared and provided to the trial court, Appellee was not provided with a copy, and the transcript was sealed by the trial court.[12] The prosecutor who presented the case to the grand jury that day was Jonathon Baumoel. He called only two of the subpoenaed witnesses, Roethlisberger and Davis.

When asked by Baumoel about any statement made by Appellee, Davis stated that he couldn't answer, citing *Garrity*. Nevertheless Davis did provide other testimony concerning the results of his investigation. During their grand jury testimony both officers expressed uncertainty concerning the legality of Appellee's conduct, both in light of his position as a police officer, as well as his alleged use of alcohol. Clearly, some of the grand jurors were concerned about those

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[12]Tr. Aug 8, 2007 p.20-2.

issues, as evidenced by the questions they posed to both the witnesses, as well as to the prosecutor.

Thereafter, contrary to the assertions of Appellant, in both the Court of Appeals and in this Court, the grand jury did not issue an indictment based solely upon the testimony heard on August 10, 2006. In fact the record is clear that, on August 11, 2006, prosecutor Baumoel filed a second praecipe for grand jury subpoenas, again seeking the appearance of Shannon Dazey, who apparently had not appeared in response to the initial subpoena, as well as Lora Saluatore (sic) and Perry police officer Chad Guist. Those witnesses were ordered to appear on August 17, 2006.

In light of the fact that the prosecutor did not produce a transcript of the grand jury proceedings on August 17, 2006 for the trial court, the record is silent as to what additional testimony was presented to the grand jury. The record is also silent as to whether prosecutor Baumoel had direct access to the internal affairs report containing Appellee's *Garrity* statement, or whether he discussed the contents of the statement with Lt. Davis.

Nevertheless, an indictment was handed was handed up by the grand jury on August 21, 2006, charging Appellee with violating R.C. 2923.121, Possession of a Firearm in a Liquor Permit Premises. To that charge Appellee entered a plea of not guilty and, *inter alia*, demanded discovery from the prosecutor.

That discovery response was made by prosecutor Joseph Vance, who in later proceedings confessed that he did not know when he actually came into possession of the *Garrity* statement.[13] Curiously, despite claims by Appellant in this appeal that the prosecutor was somehow obligated

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[13]Tr. Aug. 8, 2007 p.22.

to obtain the *Garrity* statement and provide it to Appellee as part of his obligations under *Brady v. Maryland*, (1963) 373 U.S. 83, 83 S. Ct.1194, 10 L.Ed 2d 215, at no time did the prosecutor identify any exculpatory evidence in the possession of State of Ohio. Furthermore, although Vince Van's recorded statement to Lt. Davis was clearly exculpatory, it was neither identified by the prosecutor nor provided to Appellee in discovery.

Appellee on September 19, 2006 filed a motion seeking dismissal of the indictment based upon his claim that a federal statute, 18 USCA §926(B) , had pre-empted the State of Ohio's efforts to prosecute him. Although evidence was taken on some of the issues raised by that motion[14], the trial court ultimately denied Appellee's motion by judgment entry filed December 28th, 2006.

Thereafter the case was set for trial on March 27, 2007. Appellee however re-newed his motion to dismiss the indictment on March 27, 2007, based in part upon the fact the statute Appellee had been charged under, had been amended by the Ohio General Assembly while the case was pending. Effective March 14th, 2007, *R.C.* 2923.121(B)(2), as amended, provided for an exemption for law enforcement officers from the prohibition against carrying firearms into bars, as long as they were up to date on their firearms training, and as long as their department did not have a specific policy prohibiting it.

Appellee argued that the statute should be given retroactive effect, because it had reduced the penalty for the alleged offense. *R.C.* 1.58(B). In response to that motion, the trial court, by judgement entry filed May 24, 2007, declined to rule on the issues raised by the motion to reconsider, stating that such a motion was "not the appropriate vehicle to resolve the issues

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[14]Tr. Nov. 20, 2007.

argued." The case was again re-set for trial.

Appellee then filed a motion on June 13, 2007, requesting a jury instruction that would permit the jury to consider the change in the law as an affirmative defense. That motion was never ruled upon, because on June 20, 2007, the day before the scheduled trial, Appellee, upon learning that the prosecutor had his *Garrity* statement, moved the Court for leave to file a motion to dismiss, and also filed a motion in limine, seeking exclusion of any tainted evidence.

The motion for leave to file was granted, without objection by the prosecutor, and the trial was continued. On July 6, 2007, Appellee filed his final motion to dismiss, alleging that the prosecutor had improperly obtained and used his *Garrity* immunized statement from the internal affairs unit. The prosecutor replied on July 18, 2007 by acknowledging possession of the statement, and specifically admitting that "While the State has had the <u>benefit</u> of Internal Affairs reports for the purpose of pre-trial preparation, the same is true of the defense in this case." (emphasis added)

The court then set a *Kastigar* hearing on August 8, 2007. That hearing was the prosecutor's opportunity to demonstrate that it had not made improper use of the immunized statement. The only witness called by the state was Sgt. Roethlisberger, who testified regarding his initial investigation into the incident. His reports were thereafter admitted as exhibits. Neither Lt. Davis, nor prosecutor Baumoel, were called by the state, and no effort, was made to establish what their exposure to the *Garrity* statement, or fruits of the statement, had been.

A joint stipulation of facts was submitted to the Court, along with other exhibits, including the *Garrity* statement itself, and the internal affairs file.[15] As part of the stipulations

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[15]Tr. Aug. 8, 2007 p.20-2.

submitted to the court, 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. In fact, prosecutor Vance claimed to have done the same in other cases. [16]

The grand jury testimony of August 10, 2006 having been provided to the trial court upon motion of the prosecuting attorney remained sealed. Contrary to the assertions of Appellant, that testimony was not reviewed at the hearing and Appellee was not provided with a copy of the testimony.

By entry filed September 19, 2007, the trial court granted Appellee's motion, ruling that the state had committed a *Garrity* violation, and had failed to prove that it had not used the statement in question. The trial court specifically found that Lt. Davis' testimony was influential in the decision of the grand jury to indict, and that the statement has been used to locate and interview witnesses. As a result based upon *State v. Conrad*,[17] *United States v. Kastigar*[18] and *Garrity v. New Jersey*[19] the indictment was dismissed.

On appeal the State of Ohio claimed that no *Garrity* violation had occurred, but that even if it had, dismissal was not the appropriate remedy. Although all three members of the Court of Appeals panels agreed that a *Garrity* violation had occurred, by a two to one vote, 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 Lt. Davis as a witness. Judge Hoffman

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[16]Tr. Aug. 8, 2007 p.44-5.

[17](1990) 50 Ohio St. 3d 1, 552 N.E.2d 214

[18](1972) 406 U.S. 441, 92 S.Ct. 1653, 32 L. Ed. 2d 212

[19](1967) 385 U.S. 493, 87 S.Ct. 616, 17 L. Ed 2d 562

dissenting from the remedy issued, would have affirmed the dismissal based upon his view that the testimony of the internal affairs officer at the grand jury was "influential" and therefore justified the dismissal.

Upon remand, Appellant filed a motion on June 19, 2008 asking the trial Court to order production of the August 17, 2006 grand jury testimony. The State of Ohio however instituted the instant appeal, and that motion was never ruled upon. Anthony Jackson thereupon cross-appealed from the remedy ordered by the Court of Appeals.

## APPELLEE'S RESPONSE TO APPELLANT'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**

**THE TRIAL COURT'S DETERMINATION THAT A *GARRITY* VIOLATION HAD OCCURRED WAS CORRECT AND IS ENTITLED TO DEFERENCE UPON REVIEW.**

A. The trial court considered and applied the correct law.

The right of the government to compel an individual to surrender his Fifth Amendment privilege against self incrimination does not come without a cost. In the context of a public employer deciding to compel an employee to answer potentially incriminating questions, or face the loss of his or her employment, the trade-off is that the employer must promise not to use the information obtained against the employee in any criminal action. In other words the employee

receives "use" immunity. *Garrity v. New Jersey.*[20]

When an employee contends that the immunity agreement has been breached by the government, the government bears a heavy burden of proving that it did not violate the agreement. First the government must deny <u>any</u> use of the accused's own testimony against him or her in the criminal case. Secondly, the government must affirmatively prove that all of the evidence to be used at trial is derived from sources wholly independent of immunized testimony. *Kastigar v. United States,*[21] *State v. Conrad.*[22]

If the government fails to establish either one of those matters, they have violated the immunity agreement and any conviction obtained thereafter would violate a defendant's constitutional rights. As a result, dismissal of the charges against a defendant so impacted is both appropriate and required. As this court opined in *Conrad,*

> "Since improper use of immunized testimony by the prosecution under *Kastigar* should never be countenanced, dismissal of the indictment will greatly discourage such abuses by prosecuting authorities in future cases." *id* at 5

B. <u>The trial court's finding that the state failed to meet its burden under *Kastigar* is clearly supported by the evidence</u>

As a starting point it is critical to keep in mind that the burden was on the State of Ohio to prove to the trial court that it had not made any use of the *Garrity* statement, and that all of its evidence was derived from independent sources. In appealing the trial court's decision Appellant

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[20](1967) 385 U.S. 493, 87 S.Ct. 616, 17 L. Ed 2d 562

[21](1972) 406 U.S. 441, 92 S.Ct. 1653 32 L. Ed 2d 212

[22](1990) 50 Ohio St. 3d 1 1990, 552 N.E.2d 214

claims that the trial court equated knowledge of the statement with use of the statement. Of course, a review of the trial court's decision reveals that Appellant is wrong in that characterization.

In its opinion the trial court clearly found that the prosecution had "used" Defendant's *Garrity* statement rather than being merely "exposed" to it. Not only did the trial court make specific findings that a witness unknown to the criminal investigation was identified and interviewed as a direct consequence of having obtained the *Garrity* statement, but the court also concluded that the testimony of the internal affairs investigator was significant in obtaining the indictment.

Beyond those specific findings of use, the trial court, understanding the dynamics of criminal trials, was also concerned with less concrete aspects of the prosecutor's possession of the immunized statement. With a prosecutor candidly admitting that he had the benefit of the statement for pre-trial preparation, and stipulating that he intended to use the results of the internal affairs reports for trial preparation, the trial court correctly found that the state had gained an unfair advantage by using the statement even before a trial had commenced.

Given the fact that the state was faced with the heavy burden of disproving these types of uses, the trial court's findings are clearly sufficient to justify its conclusion that a *Garrity* violation had occurred.

Appellant however attempts to minimize the trial court's findings by suggesting that the uses found by the court really couldn't have affected the outcome of the case. Appellant's difficulty in appreciating the significance of the potential harm to Appellee is perhaps understood by its failure to recognize the potential issues at trial.

In its brief Appellant describes the case against Appellee as a simple matter of proving that he possessed a firearm in a class D liquor permit premises. Reasoning that it could prove those basic facts without resort to the *Garrity* materials, Appellant suggests that nothing else matters.

Clearly however the case was not that simple. Pursuant to both state and federal statutes Appellee was entitled to present affirmative defenses based upon his reasons for being in the bar, his level of sobriety , and his reason reasons for having the weapon.[23] Furthermore, inasmuch as 2923.121 is not a strict-liability offense, Appellee potentially could have presented evidence that he reasonably believed that he was entitled to have the weapon.[24] Unlike Appellant, the trial court clearly appreciated the potential issues at trial and the effect of having a sworn statement from the defendant to use for trial preparation.

By forcing Appellee to submit to what was, in effect, a pre-trial discovery deposition, before he was even indicted, the state gained a clear advantage in both preparing to charge Appellee and in trying the case if necessary. Suggesting that having that statement as a pre-trial preparation tool did not provide an advantage to the prosecution is to ignore the realities of trial practice.

Why else would civil litigants spend so much time and expense conducting discovery depositions? Any trial lawyer knows that the key to success at trial is preparation, and that the opportunity to obtain a sworn statement from your adversary as a trial preparation tool may be priceless.

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[23]RC 2923.121 (B), 18 USCA § 926 (B)

[24]*State v, Shay*, 151 Ohio App 3d 538,784 N.E.2d 1186 (2003)

Of course if the case were as simple as Appellant claims, one would have to wonder why they bothered to obtain the *Garrity* statement in the first place. Unless the issues Appellee was questioned about were relevant, it is hard to understand why the prosecutor would admit that he benefitted from having the statement to prepare. In any event, the suggestion that the improper uses of the Garrity statement should be subject to some type of harmless error analysis is contrary to this Court's pronouncement in *Conrad* that

> "In this vein, we agree with defendant that whenever compelled testimony is used against the witness who provided it, any error cannot be harmless." *id* at 5

C. Contrary to Appellant's claim, the standard of review for a trial court's *Kastigar* findings is not a de novo review.

Appellant asks this Court to conduct a de novo review of the trial court's findings by attempting to characterize its' objections to the trial court's decision as involving the application of the wrong law. The sole case cited in support of this claim, *State v. Anderson*[25], of course has nothing to do with either *Kastigar* or *Garrity* cases. In fact it is an appeal from the denial of a motion to suppress in a drug possession case. Nothing in that case purports to discuss the standard of review in connection with *Kastigar* hearings.

There are however a plethora of decisions confirming the fact that a trial court's resolution of the *Kastigar* two prong test are entitled to deference, and may only be overturned when they are "clearly erroneous". For example the Sixth Circuit Court of Appeals explained:

> "We review a district court's determination that the government has satisfied its burden under *Kastigar* for clear error. *United States v. Overmyer*, 899 F. 2d 457, 463 (6th Cir), cert denied, 498 U.S. 939, 111 C. Ct. 344, 112 L.Ed.2d 308

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[25](1995), 100 Ohio App 3d 688, 654 N.E.2d 1034

(1990). A finding is clearly erroneous when, despite evidence to support it, the reviewing court on the entire evidence harbors a definite and firm conviction that a mistake has been made." *United States v. Streck*, 958 F. 2d 141, 144 (6th Cir. 1992)

The Second Circuit has similarly ruled that:

"A district court's determination of whether the government improperly has used privileged information in a criminal prosecution is an issue of fact that will not be reversed unless the district court's finding is clearly erroneous." *United States v. Schwimmer,* 924 F. 2d 443, 446 (2nd Cir. 1991)

Also in accord are: *United States v. Rogers*, 722 F.2d 557, 560 (9th Cir. 1983) and, *United States v. Harris*, 973 F. 2d 333 (4th Cir. 1992)

Given the trial courts proper application of controlling precedent, its clear findings that the state had failed to meet its *Kastigar* burden, and the fact that those findings must be accepted unless found to be clearly erroneous, this Court should refuse to overturn the finding of, not only that trial judge, but all three judges of the court of appeals as well, that the state committed a *Garrity* violation in this case.

**THE PROHIBITION IN *KASTIGAR* OF "ANY" USE OF AN IMMUNIZED STATEMENT ENCOMPASSES MORE THAN DIRECT EVIDENTIARY USE OF THE STATEMENT.**

The rule set out in the seminal case of *Kastigar v. United States*[26] remains basically unchanged since it was announced in 1972. In its decision the Court did precisely what the Supreme Court is required to do when faced with a conflict between a significant governmental interest, and the constitutional rights of an individual. The Court reached an accommodation between the government's legitimate interest in obtaining information from witnesses, and that

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[26] *supra*

individual's right not to be compelled to be a witness against himself.

The accommodation was really quite simple; as long as the witness remained in substantially the same situation, vis a vis any potential criminal charges, the government could obtain its information without violating the rights of the witness. Of course the Court was clear to note that the protection must be coextensive with the privilege being surrendered in order to remain constitutional.

Unless the Court in *Kastigar* intended to prohibit more than testimonial use there would have been no reason for the Court to use language prohibiting the prosecutorial authorities:

> "...from using the compelled testimony in any respect..." *id* at 453

Appellee submits that the Court recognized that uses other than testimonial use would be prejudicial and therefore rather than attempting to provide a comprehensive list, instead proscribed using the statement in any respect. Such a prohibition was necessary to insure that the immunized statement:

> "...cannot lead to criminal penalties on the witness." *id* at 453

Appellant seeks from this Court an interpretation of *Kastigar* which would, at least in *Garrity* circumstances, greatly reduce the protections for public employees. As a justification for reducing those protections Appellant suggests, in a twisted piece of logic, that unless this Court permits prosecutors to have unfettered access to the *Garrity* statements of public employees they seek to prosecute, that somehow those public employees will have more rights that the taxpayers who employ them.[27]

That claim, while perhaps invoking some type of populist appeal, fails for a number of

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[27]Appellant's brief p. 9.

reasons. First of all, non -public employers do not face a *Garrity* problem when they choose to question their employees, because the Fifth Amendment doesn't apply to them. Therefore, while a private employer need not be concerned with the Fifth Amendment issues, by definition a public employer must. That was the basis for the *Garrity* decision in the first place.

In effect Appellant is now complaining about an alleged dilemma that it created for itself. By insisting upon exercising its rights under *Garrity* to force Appellee to surrender his Fifth Amendment privilege, the Canton police department incurred the resulting obligation of not allowing the statement to be used in the criminal investigation. Appellant's claim that it was somehow powerless to keep the internal affairs investigation separate from the criminal investigation is specious. Just as Lt. Davis was able to decline to answer the prosecutor's grand jury inquiry about the *Garrity* statement, he could have easily kept the internal affairs investigation from the county prosecutor's office. Certainly prosecutors across the country have developed methods of "isolating" immunized statements from parties who shouldn't have access to them.

What seems clear from the record in this case is that, rather than trying to keep the *Garrity* statement from the criminal investigators and prosecutors, the Canton police internal affairs department was more than willing to provide the statement and the fruits of that statement to the prosecutor. And it is equally clear that the prosecutor was glad to have those materials declaring that he had the benefit[28] of the statement to assist him in trial preparation, and that he had done the same in other cases.[29]

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[28]Prosecutor's Vance's July 18, 2007 Response To Motion To Dismiss

[29]Tr. Aug. 8, 2007 p. 44-5.

On those rare occasions when it is truly impossible or not feasible to keep the investigations separate, the government simply has to make a choice; they can wait until the criminal case has been concluded, or if the need for the information is so compelling that it can't wait, then perhaps the criminal case can't be pursued. *United States v. North,* 920 F. 2d 940 (D.C. Cir 1990)

In any event, administrative difficulties, and/or the occasional loss of an opportunity prosecute, cannot outweigh the fundamental right involved under the Fifth Amendment. Absent the accommodations provided to the government by *Kastigar* and *Garrity* , the state would be powerless to compel the statements anyway. By taking advantage of those means of overcoming the Fifth Amendment privilege, they should not be heard to complain about the cost.

Authority for the position that use of immunized statements encompasses more than direct evidentiary use is not based upon an isolated, "soundly rejected" case, but it is in fact found in the text of the *Kastigar* opinion:

> "The statute's explicit proscription of the use in any criminal case <u>of 'testimony or other information</u> 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 privilege against self incrimination, and therefore is sufficient to compel testimony over a claim of privilege." *id* at 453 (emphasis added)

Appellant in its brief seizes upon the trial court's discussion of a law review article in its' decision to suggest that the trial court was basing its decision on a discredited case. Of course this argument is somewhat of a "red herring" given the fact that the trial court explicitly based its decision primarily on *Conrad,* not *United States v. McDaniel*, 482 F.2d 305 (8th Cir. 1973)

Nevertheless the *McDaniel* decision is not as far out of the mainstream as Appellant would suggest. In fact, a review of the law review article itself[30] reveals significant support for the concept that "use", as that term is used in *Kastigar,* can be more than actual testimonial use. In fact, any suggestion that the Supreme Court itself was considering backing away from its prohibition of "any" use, should have been answered by the *United States v. Hubbell*[31] decision.

In that opinion the Supreme Court reaffirmed the basic concept behind *Kastigar* by upholding the dismissal of charges where the violation of the immunity agreement was much less direct than the one found by the trial court in the case at bar. In *Hubbell* the immunity violation involved forcing a witness to produce documents before a grand jury, which in effect established the witnesses' knowledge of the documents. Those documents were then used to construct a case against *Hubbell.*

Despite the government's claim that it could present a case without the witnesses' immunized testimony, the Supreme Court nonetheless affirmed a pre-trial dismissal based upon the derivative, non-evidentiary, use of the production of the documents. Rejecting the suggestion that the protection offered by immunity is limited to the testimony itself, the Court observed:

> "It has, however, long been settled that its protection encompasses compelled statements that lead to the discovery of incriminating evidence even though the statements themselves are not incriminating and are not introduced into evidence." *id* at 37

Finally, rejecting the government's contention that a prosecution is proper unless the defendant can show that there was some substantial connection between the immunized

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[30]Bloch, *Police Officers Accused of Crime: Prosecutorial And Fifth Amendment Risks Posed By Police- Elicited "Use immunized" Statements,* 1992 U. Ill. L. Rev. 625

[31](2000) 530 U.S. 27, 120 S.Ct. 2037, 147 L. Ed. 2d 24

testimony and some evidence to be used at trial, the court responded:

> "We could not accept this submission without repudiating the basis for our conclusion in *Kastigar* that the statutory guarantee of use and derivative use immunity is as broad as the constitutional privilege itself. This we are not prepared to do" *id* at 45-6

**UNLESS PROSECUTORS ARE DENIED ACCESS TO *GARRITY* IMMUNIZED STATEMENTS AND THE FRUITS OF THOSE STATEMENTS, THE RIGHTS OF ALL PUBLIC EMPLOYEES ARE JEOPARDIZED.**

If this Court accepts Appellant's invitation to allow prosecutors to obtain *Garrity* immunized statement, with the only caution being that they not introduce those statements into evidence, prosecutor's will surely get those statements. In fact it is reasonable to assume that in cases where *Garrity* statements have not been taken, criminal prosecutors will "arrange" to have them taken.

Under Appellant's theory, that non-evidentiary uses of a *Garrity* statement are not prohibited, prosecutor's could easily obtain detailed sworn statements from any public employee and then use that information in its charging determination, trial preparation, and trial strategy with impunity.

Of course routinely turning *Garrity* statements over to prosecutors would surely result in the need for *Kastigar* hearings in almost every case. If all prosecutor's had to do was deny their intention to introduce the statement itself, the burden would then shift to the accused to somehow prove that his or her immunized statement was used. That reversal of the burden is clearly not what the Court in *Kastigar* intended.

Trial judges would certainly be faced with a daunting task of trying to determine how exposure to a *Garrity* statement may have influenced strategic decisions made at trial. Could a

judge for example determine why a witness was or was not called, or why a question was asked or not asked, based upon the fact that the prosecutor had prepared for trial by utilizing the immunized material?

Arming prosecutors with the clear advantages they would obtain from having unfettered access to *Garrity* statements would unquestionably not satisfy the *Kastigar* requirement that the immunized witness be left in substantially the same position he or she would have been in had they been able to remain silent. Fortunately, the solution is not difficult. When public employers exercise their rights to obtain a *Garrity* statement, they simply can't turn it over to the criminal investigators and prosecutors.

On those occasions, where through inadvertence, or mistake, or ignorance, a statement finds its way into the prosecutor's file, a *Kastigar* hearing, properly assigning the burden upon the prosecutor to disavow and disprove <u>any</u> use of the statement will be called for.

On the other hand, where the act of obtaining and using the *Garrity* statement was pre-mediated, and part of accepted practice, and where the trial court finds that the prosecution actually made tangible use of the statement, dismissal is warranted and appropriate. That is precisely what happened in the case at bar.

**THE SO-CALLED EVIDENTIARY METHODS WHICH APPELLANT CLAIMS ARE AVAILABLE TO HANDLE *GARRITY* VIOLATIONS ARE NOT ADEQUATE TO PROTECT A DEFENDANT'S RIGHTS.**

In its brief Appellant makes the blanket assertion that "coerced confessions and immunized statements are treated alike under the umbrella of the Fifth Amendment", simply citing "*Kastigar* supra" for that proposition. Appellant then proceeds to the conclusion that the

exclusionary rule is the only remedy needed to deal with government violations of immunity agreements.

This claim that a resort to Fifth Amendment jurisprudence will handle the problem ignores the fact that there are fundamental differences between statements which are illegally obtained, and those which are obtained through a clearly legal process.[32] On the one hand are cases where a police officer violates the rights of a suspect by mistreating the suspect, or making illegal promises, or refusing to allow the suspect to consult his lawyer, or failing to properly advise the suspect of his or her rights.

In those circumstances courts are asked to intercede after the fact to determine whether a violation of the suspect's constitutional rights has occurred, and if so, what would be the appropriate remedy. One such remedy created by the courts has been to apply an exclusionary rule to the illegally obtained evidence. Although controversial, because in many cases it deprives the state of reliable evidence of guilt, the rule in various forms has survived over time against challenges.

A primary justification for the rule is that it is intended to have a deterrent effect on future police misconduct. Of course that justification is undermined in a case where a police officer makes an innocent or good faith mistake. In addition, the victim of illegal police conduct may have other remedies available by way of a lawsuit against the offending state actors.

In stark contrast to illegally obtained statements, is the grant of immunity to obtain information. Whether by statute or otherwise, the granting of immunity in exchange for

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[32]See generally, Strachan, Self-Incrimination, Immunity, and Watergate, 56 Tex L. Rev 791, for a thorough analysis of these issues as applied to a post-mortem on some of the Watergate prosecutions.

information is a clearly legal method of obtaining evidence. Except in very rare circumstances, the decision to grant immunity will be made by lawyers who have had an opportunity to balance the need for the statement with the costs involved.

Furthermore, in immunity cases, deterrence of illegal conduct is not the issue. The government has every right to grant immunity if it is willing to accept the consequences. Of course those consequences really are not that drastic considering the fact that, but for the power to grant immunity , the evidence the prosecutor is deprived of wouldn't have existed anyway.

Therefore despite Appellants assertion to the contrary, *Kastigar* certainly does not stand for the proposition that immunity violations are simply another variety of Fifth Amendment violations to be dealt with through the exclusionary rule. In *Kastigar*, the Court even pointed out the fact that

> " ... a defendant against whom incriminating evidence has been obtained through a grant of immunity may be in a stronger position at trial than a defendant who asserts a Fifth Amendment coerced confession claim" *id* at 461

In any event, the suggestion by Appellant that evidentiary rulings will be sufficient to deal with immunity violations has already been considered and rejected by this Court in the *Conrad* decision.[33] There is no need to revisit that determination, and the case at bar is certainly presents no justification to do so.

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[33](1990), 50 Ohio St. 3d 1, 5, 552 N.E.2d 214, 218

## APPELLEE'S PROPOSITION OF LAW

**WHEN A PUBLIC EMPLOYER COMPELS AN EMPLOYEE TO GIVE A STATEMENT UNDER THREAT OF REMOVAL FROM OFFICE, AND THEN SUBSEQUENTLY PROVIDES THAT STATEMENT TO THE PROSECUTING ATTORNEY WHO IS PURSUING A CRIMINAL CONVICTION AGAINST THE EMPLOYEE, *STATE V. CONRAD* (1990), 50 OHIO ST. 3D 1, 552 N.E. 2D 214, REQUIRES DISMISSAL OF THE CASE UNLESS THE PROSECUTING ATTORNEY CAN ESTABLISH THAT THE STATE HAS NOT MADE ANY USE OF THE IMMUNIZED TESTIMONY AND THAT ALL OF THE EVIDENCE TO BE USED AT TRIAL WAS DERIVED FROM SOURCES WHOLLY INDEPENDENT OF THAT IMMUNIZED TESTIMONY.**

Despite the fact that all three members of the Fifth District Court of Appeals panel which heard this case agreed with the trial court's determination that Appellee had been the victim of a *Garrity* violation, the majority substituted an exclusion of evidence, and other restrictions, for the dismissal which the trial court had ordered. It is Appellee's contention that the majority read this court's decision in *State v. Conrad* too narrowly and was therefore wrong in not upholding that dismissal.

Public employees, like other citizens, enjoy the protections of the Bill of Rights, including the Fifth Amendment privilege against self incrimination. That privilege is not however absolute. One method of defeating the privilege is through a grant of immunity. If that immunity provides protections that are co-extensive with the privilege against self-incrimination, then a Fifth Amendment claim can be overcome, and a witness must answer questions. *Kastigar v. United States* (1972), 406 U.S. 441, 92 S.Ct. 1653, 32 L. ed. 2d 212.

One form of immunity arises from a direct promise from the government not to use

testimony or information against the witness. In situations involving government employees, those promises take the form of *Garrity* warnings, named after the seminal case of *Garrity v. New Jersey*, (1967), 385 U.S. 493, 87 S.Ct. 616, 17 L. Ed 2d 562, wherein the United States Supreme Court held that police departments may not force an employee to choose between his job and his Fifth Amendment Rights. Based upon the *Garrity* ruling, government employers may promise not to use an employee's statements against him or her in a criminal context, thereby creating use and derivative use, immunity for those statements. As a result, governmental employers can conduct investigations, and potentially discipline employees by using the employee's coerced statements against him.

However, once that public employee is forced to provide a statement, the information he provides simply may not be used against him in a criminal case. If that employee later claims that the immunity promise has been broken by the government, the burden is on the government to prove that it has kept its promise. Failure to keep the promise results in sanctions, including dismissal of criminal charges. *State v. Conrad*, (1990) 50 Ohio St. 3d 1, 552 NE 2d 214.

In briefs filed in both this Court and the Court of Appeals, Appellant seriously mischaracterizes both Appellee's position, and the record with regard to Appellee's statement. By suggesting that the trial court chose to dismiss the indictment based upon a prosecutor's "mere exposure" to an internal affairs file, Appellant ignores not only the facts of the case as found by the trial court, but also the candid written admission by the assistant prosecutor who was charged with trying the case. Claiming that the prosecutor was merely "exposed" to the file, makes it sound like the prosecutor inadvertently walked into a room where the file was sitting on a table.

In fact, both Lieutenant Davis, who in effect was the prosecution's main investigator in the case, and assistant prosecutor Joseph Vance, had not only read Defendant's *Garrity* interview, but they used that interview in both tangible, and other less tangible ways. For example, at least one witness who was previously unknown to the prosecution, Vince Van, was identified only as a result of the *Garrity* statement, and quickly interviewed by Lt. Davis. Another witness, Tina Ogle, who had not been previously spoken to, was interviewed by Davis almost immediately after the *Garrity* statement. What other uses Davis and Vance made of the knowledge they gained from the *Garrity* interview is impossible for Appellee, or this Court to know for sure. What is known is that Appellant provided neither a statement from Davis, nor his testimony, at the *Kastigar* hearing on August 8, 2007. What is also unknown is whether Davis communicated the contents of the *Garrity* statement to prosecutor Baumoel, who presented the case to the grand jury. Neither a statement from Baumoel nor his testimony, were presented to the trial court at the *Kastigar* hearing.

Prosecutor Vance, however, responding to Appellee's motion to dismiss, denied that it was improper for him to have had the statement. Rather than attempting to minimize the effect of his exposure to the *Garrity* materials, he acknowledged that "While the State has had the <u>benefit</u> of Internal Affairs reports for the purpose of pre-trial preparation, the same is true of the defense in this case." (emphasis added)[34]

The trial court, at the conclusion of the *Kastigar* hearing, made a number of findings and observations, including the express determination that Lt. Davis' testimony at the grand jury was influential in the decision to indict. As Judge Hoffman later pointed out in his dissenting

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[34](Prosecutor's Response to Motion To Dismiss, July 18, 2007)

opinion, *Conrad* did not require the court to find a specific level of prejudice to a defendant, it prohibited any use of the immunity statement in obtaining an indictment.

The position taken by Appellant is that, as long as the state did not attempt to use the immunized statement in the prosecutor's case in chief, other uses, such as trial preparation, or use in cross-examination of Appellee if he testified, were deemed to be permissible, as part of his "mere exposure" to the file. Vance in fact, acknowledged having made use of *Garrity* immunized statements in prior cases.[35]

Appellant continually mischaracterizes Appellee's motion to dismiss as being based exclusively upon a tainted grand jury proceeding. While certainly what happened in the grand jury is relevant to Appellee's claim, it clearly was, and remains Appellee's position, that the *Garrity* violation was continuing throughout trial preparation, and had hopelessly tainted the process. As Judge Reinbold astutely observed at the *Kastigar* hearing, you can't "unring a bell".[36]

The trial court's action in dismissing the case was explicitly based upon more than the prosecutor's mere exposure to the statement. It was the trial court's conclusion that, despite the fact that Lt. Davis declined to testify directly about Appellee's *Garrity* statement in the grand jury, his testimony was nonetheless significant. Added to the significant possibility that Davis' testimony was a factor in the grand jury's decision to indict, was the continuing use of the statement and information derived from it. The court was explicitly concerned with the advantages the prosecutor had obtained for purposes of trial preparation.

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[35]Tr. Aug. 8, 2007 p.44-5.

[36]Tr. Aug. 8, 2007 p.34.

Appellant's argument in the Court of Appeals and before this Court seeks to limit *Conrad* to grand jury violations only. In effect, Appellant claims that as long as an indictment is returned without actual use of coerced testimony, the state is free to do what it pleases with that testimony in any other respect. That position fails to take into account the policy behind the *Garrity* ruling in the first place.

The whole point of the accommodation reached in the *Garrity* decision was to effect a balance between the competing interests of the government in conducting employment related investigations, and the constitutional rights of those employees being investigated. By way of analogy, the *Garrity* Court, and later courts, looked to situations involving immunized testimony and found those circumstances to be very similar.

The rule that resulted was that, governmental entities were given the power to override Fifth Amendment claims by their employees. The trade-off was that the compelled information could not be used by the government in its efforts to prosecute the employee. Nothing in either the logic, or the language of *Garrity*, suggests that it applied only to direct, literal, use of the words spoken by the targeted employee.

Courts which have been called upon to administer *Garrity* disputes have turned to other "immunity" situations for guidance. In Ohio, this Court has such an opportunity in *State v. Conrad*, (1990) 50 Ohio St. 3d 1, 552 NE 2d 214.

In *Conrad* this Court adopted a two prong test for determining whether the state has met its burden, as required by *Kastigar*, of proving that it had not improperly used immunized testimony. That test requires that:

1.) The government must deny <u>any</u> use of an accused own immunized testimony against him or her in a criminal case, and (emphasis in the original)

2.) The government must affirmatively prove that all of the evidence to be used at trial is derived from sources wholly independent of the immunized testimony. *Conrad* at 4,517.

There simply is no way for Appellant to get around *Conrad* as being the applicable law for the trial court to have followed. Appellant's only possible complaint can be the application of the *Conrad* test. A review of Appellant's contentions, both in the trial court as well as the brief submitted, reveals an attempt to significantly understate the "use" it made, and could have made, of the *Garrity* statement.

In order to appreciate the potential, and actual value, of the *Garrity* statement to the prosecutor, it is important to recognize the potential issues at trial. While Appellant would suggest that the issue at trial was simply whether Appellee had possession of a firearm inside of a bar, that view ignores the fact that, pursuant to both federal and state laws, several affirmative defenses would have been available to Appellee at trial. (See *R.C.* 2923.121(B) listing the affirmative defenses under Ohio law, and 18 *USCA* 926(B) providing a federal law defense.)

Those potential defenses directly involve such issues as Appellee's purpose in being in the bar, his conduct inside the bar, his use of alcohol, and the circumstances of how and why he possessed the firearm. Clearly, the *Garrity* statement dealt with all of those issues, as well as Appellee's thoughts on other witnesses and their testimony.

For any litigator to suggest that they do not gain an advantage by having a sworn

statement from a potential witness to assist in pretrial preparation, would be preposterous. The ability to know in advance of trial what a witness will say provides a clear benefit to a lawyer preparing a case for trial. That benefit is of course magnified when that witness is a defendant in a criminal case. Unquestionably, Appellee was not left in the same position he would have been in had he not been required to provide a statement. That is the precise evil *Kastigar* said must be avoided.

In fact the trial court clearly recognized that the concerns it had were beyond the grand jury, and extended beyond the so-called "direct use" of the statement. Those potential derivative uses of the statement were clearly a large part of the Court's ruling. Given the fact that the law placed the burden on the State to affirmatively prove that it had not made <u>any</u> use of the statement, the trial court was certainly correct in finding that the state had not met its burden.

In order to satisfy the requirement that immunity be coextensive with the privilege, derivative and non-testimonial use of the statement must be prohibited. Not only did the language of the warning read to Appellee by Lt. Davis in the case at bar promise that the "fruits" of any statement would not be used, but the United States Supreme Court in *Kastigar* was obviously concerned with derivative use. That is one reason why the court in *Kastigar* provided for a hearing, wherein the government needed to prove the source of its evidence. If the Supreme Court had only been concerned with direct testimonial use of the immunized statement, that fact would have been easy to determine on the record itself, without the need for a hearing.

Finally in a strange twist of logic, Appellant contends that it was somehow obligated to obtain the *Garrity* statement so that it could comply with its obligations under the criminal rules regarding discovery. That argument neglects to consider several important factors. First of all,

the only reason the statement existed is because the Canton police department demanded that Appellee submit to the interview. Secondly, the statement involved was Appellee's. Since it wasn't being used against him in the criminal case, it is hard to understand why he would need to be provided with it. In any event, if Appellee had wanted to review his own internal affairs statement he could have gotten it from the police department. Ironically, despite this claim of concern for Appellee's right to be informed of exculpatory evidence, at no time in the case at bar did the prosecutor identify any evidence favorable to Appellee. In fact in the written response to Appellee's request for discovery, Appellant wrote that there was "none known."

Of course if one accepts Appellant's argument, every time a *Garrity* statement is taken, it would have to be turned over to the prosecutor if an indictment is returned. Such a result literally turns *Garrity* on its head, because the state can always compel the statement, and then be "forced" to obtain it so that is could comply with its' obligations. As a result the "immunity" created by, and included in the warning read to a governmental employee, would be merely an illusion.

Certainly, Appellant can't be heard to complain about this apparent dilemma of their own creation. Unlike a classic immunity situation where a prosecutor is unable to go forward with an investigation because a witness with potentially valuable information is refusing to testify, in the case at bar, there was no reason why the Canton police department couldn't have waited until the criminal case had run its course before demanding Appellee's statement. Or they could have simply kept the internal affairs materials away from the criminal prosecutors.

In fact pursuant to the contract between the City of Canton and the Canton Police Patrolmen's Association, the city was contractually prohibited from taking disciplinary action

until the criminal case was over. As reflected in his August 24, 2006 letter to Appellee, the Director of Public Safety stated:

> "Pursuant to Article 22.3 in the Collective Bargaining Agreement in effect between the City of Canton and the Canton Police Patrolmen's Association, it states in its pertinent part: "... the Director will suspend the decision until the final outcome of the criminal proceedings."[37]

Therefore, while nothing prevented the city from conducting an investigation for administrative purposes, the decision to invoke *Garrity*, and force Appellee to choose between losing his job or waiving his constitutional rights against self incrimination, was not forced upon them by either time constraints, or the inability to move forward without the statement. The City made a conscious, and pre-meditated decision to force the issue, knowing full well that a parallel criminal proceeding was at hand.

It is precisely the nature of those actions by the prosecutor and internal affairs investigators, working in concert, which makes this type of violation so egregious. Therefore, given the practical difficulties of implementing a remedy such as was ordered by Court of Appeals, as well as the clear need for deterrence, dismissal was, and is clearly appropriate.

The remedy ordered by the Court of Appeals, while well intentioned, is not only impractical, but is not adequate to remedy the harm caused to Appellee, and does not adequately send a message to prosecutors and public employers that they can't violate these types of immunity agreements.

Finally, although this Court in *Conrad* was dealing with an immunity violation which occurred during the grand jury phase of the case, there is no reason to limit the remedy applied to

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[37]See Canton Police Department Internal Affairs File

any particular phase of the prosecution. If it is wrong for a prosecutor to obtain and use immunized testimony in preparing grand jury questions, when the only prejudice to a defendant is to be accused, it is certainly just as wrong, if not more so, to use that immunized testimony to obtain a conviction where the consequences are more severe.

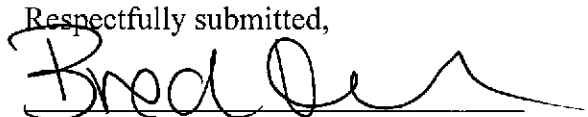
In fact, if this Court accepts Appellant's suggestion that the prohibition on use only applies to grand jury proceedings, a prosecutor can simply indict the case and then compel a *Garrity* statement for trial preparation purposes.

Therefore, while Appellee would not go as far as to suggest that dismissal is the only remedy which can ever be imposed for the violation of a *Garrity* immunity agreement, in a case such as this one where the act of obtaining the statement was intentional, and the use was both substantial and tangible, and the benefit to the prosecution was admitted, dismissal is the only appropriate remedy.

## CONCLUSION

WHEREFORE, for the reasons stated above, Appellee respectfully requests that this Court affirm the decision of the Fifth District Court of Appeals finding that a *Garrity* violation occurred and reverse that Court's remand for trial by upholding the trial court's dismissal of the criminal charges against him.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief of Appellee/Cross Appellant was served upon counsel for Appellant/Cross-Appellee, John D. Ferrero and Kathleen O. Tatarsky by regular U.S. mail addressed to 110 Central Plaza South, Suite 510, Canton, Ohio 44702-1413 this 9 day of June, 2009.

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