ORIGINAL

IN THE SUPREME COURT OF OHIO

State Of Ohio,	)	Supreme Court Case No. 2008-~~1469~~ 1499
	)	
Appellant,	)	On Appeal from the Fifth District Court of Appeals
	)	
v.	)	
	)	
Anthony D. Jackson,	)	Court of Appeals Case No. 2007CA00274
	)	
Appellee.	)	
	)	
	)	
	)	

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TABLE OF CONTENTS

STATEMENT OF INTEREST OF AMICUS CURIAE 1

ARGUMENT 2

Proposition of Law I: Use in a criminal investigation or case of statements immunized with Garrity protections or the fruits thereof is prohibited 2

Proposition of Law II: The proper remedy for use of immunized Garrity statements in a criminal investigation or case is dismissal of the indictment 8

Proposition of Law III: The immunized Garrity statement is not subject to disclosure until the completion of the criminal case, if disclosure is warranted at all 9

Proposition of Law IV: The appropriate standard of review is clearly erroneous 11

CONCLUSION 12

CERTIFICATE OF SERVICE 13

TABLE OF AUTHORITIES

City of Medina v. Hobbie, 29 Ohio App.3d 306, 505 N.E.2d 276 3

D'Aquisto v. Washington (N.D.Ill.1986), 640 F. Supp 594,622 7

Donohoe v. Smith, 1988 WL 60426 5

Gardner v. Broderick, (1968), 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2d 1082 ..... 5, 7

Garner v. U.S. 424 U.S. 648,655 (1976) 5

In Re Grand Jury Proceedings v. Hartmann, 757 F.2d 1580 5

Jones v. Franklin County Sheriff, (1990) 51 Ohio St.3d 40, 44 ..... 7, 8

Kastigar v. U.S., 406 U.S.441, 92 S.Ct. 1653, 1656 ..... 5, 8, 9

Lefkowitz v. Cunningham, (1977), 431 U.S. 801, 97 S. Ct.2132 7

Lefkowitz v. Turley, 414 U.S. 70 3

Murphy v. Waterfront, 378 U.S.52, 84 S.Ct.1594 4

Securities and Exchange Commission v. Willis, 142 F.R.D. 100, 103 5

State of Ohio v. Conrad, 50 Ohio St.3d 1, 4, 552 N.E.2d 214 8

State v. Farris, 109 Ohio St.3d 519, 2006-Ohio-3255 2

State v. Jackson (5th Dist.), 2008 Lexis 2458, 2008-Ohio-2944 6

State v. Sinito, 43 Ohio St.2d 98, 102, 330 N.E. 2d 896 ..... 2, 5

States v. Erwin, 778 F.2d 668 (11th circ.) 3

State ex. Rel. Munici v. Kovacic, 1994 WL 264265 10

State ex rel Vindicator Printing v. Watkins, 66 Ohio St.3d 129, 609 N.E.2d 551 10

Strachan, 56 Tex.L.Rev. at 806-10 6

United States v. Gallo, 863 F.2d 185,190 (2nd Cir.1988), *cert. denied*,
489 U.S., 1083, 109 S.Ct. 1539, 103 L.Ed.2d 843 (1989) 11

United States v. Jones, 542 F.2d 186, 199 (4th cir. 1976), *cert denied*,

426 U.S. 922, 96 S. Ct. 2629, 49 L.Ed.2d 375 (1976) 11

U. S. v. Lacey, 827 F. Supp.1540, 1543 6

U.S. v. Harris, 973 F.2d 333 6

U.S. v. Hubbell, 120 S. Ct. 2037, 530 U.S. 27, 120 S. Ct. 2037 ..... 4, 5

U.S. v. Lord, 711 F.2d 887 5

United States v. Lipkis, 770 F.2d 1447, 1450, (9th cir.1985) 11

U.S. v. Mariani, 851 F.2d 595, 596 4

U.S. v. Pagnotti, 507 F. Supp2d 494, 500 5

U.S. v. Quatermain, 467 F. Supp. 782 5

United States v. Rogers, 722 F.2d 557, 560 (9th cir. 1983, *cert. denied*, 469 U.S.835, 105 S.Ct.129, 83 L.Ed.2d 70 (1984) 11

U. S. v. Schwimmer, 924 F.2d 443, 446 (2nd cir. 1991) 11

U.S. v. Velasco, 953 F.2d 1467 7

United States v. McDaniel, 482 F.2d 305 at 311 (8th Cir.1973) 6

United States v. Serrano, 870 F.2d 1 at 16 (1st Cir. 1989) 6

STATEMENT OF INTEREST OF AMICUS CURIAE

Canton Police Patrolmen's Association (CPPA) is a non-profit organization established pursuant to the laws of the State of Ohio, is an institutional advocacy organization which seeks to protect the rights of and improve the treatment of police officers of the City of Canton, Ohio, and serves as the exclusive bargaining unit for police officers of the City of Canton. Defendant Anthony Jackson, at all times complained of, is and has remained, a member of Canton Police Patrolmen's Association.

This case of is substantial public interest as it involves all police officers in Ohio, and the public in general.

ARGUMENT

Proposition of Law I:

Use in a criminal investigation or case of statements immunized with Garrity protections or the fruits thereof is prohibited.

The liberty interest of a person accused of a crime is protected by the Fifth Amendment of the United States Constitution. Similar protections are also granted by 18 U.S.C. 6002. Additional protections are afforded under Section 10, Article 1 of the Ohio constitution which provides greater protection than the U.S. Constitution. *State v. Farris*, 109 Ohio St.3d 519, 2006-Ohio-3255.

> ...no person shall be compelled, in any criminal case, to be a witness against himself... Section 10, Article 1, Ohio Constitution.
>
> The Federal Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. *State v. Farrris*, 109 Ohio St.3d 519, 849 N.E.2d 985.

Additional immunity statues, O.R.C. 2945.44 and 101.44 provide similar immunities to a witness or defendant. The immunity provided by this statute is coextensive in scope with the Fifth Amendment privilege against self-incrimination. *State v. Sinito*, 43 Ohio St.2d 98, 102, 330 N.E. 2d 896. A witness or defendant can voluntarily waive those rights in exchange for certain protections against use and derivative use of those statements against him or he can be compelled to do so. 18 U.S.C. Sect. 6002, O.R.C. 2945.44, O.R.C. 101.44. When they are compelled to waive those rights implicating their liberty interests, broad protections are afforded proscribing use and derivative use of those statements.

Certain state employees, however face not only loss of a liberty interest, but also loss of a property interest. Courts have held that a police officer is protected and may refuse to answer questions "unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal *case* in which he is a defendant. *United States v. Erwin*, 778 F.2d 668 (11th circ.), 669, quoting *Lefkowitz v. Turley*, 414 U.S. 70, 78, 94 S.Ct.316, 322, 38 L.Ed.2d 274 (1973). See also City of *Medina v. Hobbie*, 29 Ohio App.3d 306, 505 N.E.2d 276, (... and statements so obtained may not be used against policemen in subsequent criminal *prosecution.*), (...but the answers he gives and fruits thereof cannot be used against him in criminal *proceedings*) *Hobbie* at 308, 277. The police officer is compelled, once those protections are in place to answer all questions truthfully, even if incriminatory, or lose his property interest, i.e. his job. Erwin at syllabus. The police officer, and other civil servants, face not only the loss of a liberty interest as other criminal defendants, but also loss of property interest.

The dispute has arisen as to the scope of the immunity afforded.

In *Kastigar v. U.S.*, 406 U.S.441, 92 S.Ct. 1653, 1656, the Supreme Court stated that:

> Though grant of immunity must afford protection commensurate with that afforded by privilege against compulsory self-incrimination, it need not be broader, and immunity from use and derivative use is coextensive with scope of privilege and is sufficient to compel testimony over claim of privilege; transactional immunity is not required. *Id.*
>
> Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it

therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness. *Id.* at 453, 1661.

The Court states in *Murphy* that it must leave the witness and the federal government in substantially the same position as if the witness had claimed his privilege...*Id.* at 459,1664, quoting *Murphy v. Waterfront*, 378 U.S.52, 84 S.Ct.1594. The second Circuit note non-evidentiary use as also impermissible. *U.S. v. Mariani*, 851 F.2d 595, 596, and states:

> The government bears a heavy burden to show that the evidence it uses in subsequent prosecution was not derived directly or indirectly from witness' immunized testimony; to sustain that burden, Government must prove that it relied solely on evidence from legitimate independent sources. *Id.* at syllabus; 18 U.S.C.A. Sect. 6002.

In 2000, the United States Supreme Court stated:

> Fifth Amendment protection encompasses compelled statements that lead to discovery of incriminating evidence even though statements themselves are not incriminating and are not introduced into evidence. U.S.C.A. Const. Amend 5, *U.S. v. Hubbell*, 120 S. Ct. 2037, 530 U.S. 27, 120 S. Ct. 2037.

It is also well settled that compelled testimony communicating information that may lead to incriminating evidence is privileged even if the information itself is not inculpatory. *Id* at 2038, 28.

The fact that the Government does not intend to use the act of production in respondent's criminal trial leaves open the separate question whether it has already made "derivative use" of the testimonial aspect of that act in obtaining the indictment and *preparing for trial.* It clearly has. Id at 2039, 28. The testimonial aspect of respondent's

act of production was the first step in a chain of evidence leading to this prosecution. *Id.* at 2039, 28-29.

R. C. 2945.44 became effective on January l, 1974, almost 19 months after the United States Supreme Court, in *Kastigar* had clearly mandated that less of a shield than that supplied by use and derivative use immunity was not commensurate with the privilege against self-incrimination. As enacted, the statute allows for immunity to be granted in any criminal investigation or case. *State v. Sinito*, 43 Ohio St.2d 98, 2006-Ohio-3255.

The Ninth Circuit proscribed the use of testimony and any of its fruits thereof in any criminal case. *U.S. v. Lord*, 711 F.2d 887. See also *Securities and Exchange Commission v. Willis*, 142 F.R.D. 100, 103. The Tenth District proscibes the use of immunized testimony in a subsequent criminal investigation. *Donohoe v. Smith*, 1988 WL 60426, p. 3, 4, also quoting *Gardner v. Broderick*, 392 U.S. 273, 276 (2968), *Garner v. U.S.* 424 U.S. 648,655 (1976). *In the United States District Court, E.D. Pennsylvania*, the court states..."use immunity" refers to immunity which will not allow a person's compelled testimony or any evidence derived from that testimony, e.g. leads or witnesses, to be used against him or her in any criminal prosecution... *U.S. v. Quatermain*, 467 F. Supp. 782. The United States District Court, M.D. Pennsylvania, states the Government may not use immunized testimony to "obtain leads, names of witnesses, or other information not otherwise available to support a prosecution". *U.S. v. Pagnotti*, 507 F. Supp2d 494, 500 quoting *United States v. Hubbell*, 530 U.S. 27, 39, 120 S.Ct. 2037, 147 L.Ed.2d 24 (2000). See also *in re Grand Jury Proceedings v. Hartmann*, 757 F.2d 1580 (could not be used to develop investigatory leads).

The Fourth Circuit indicated that a prosecutor's failure to withdraw certainly makes it more difficult for the government to prove that the compelled testimony did not contribute to the prosecution. *U.S. v. Harris*, 973 F.2d 333,337.

Non-evidentiary use is proscribed and has been defined as "conceivably including assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea bargain, interpreting evidence, planning cross-examination, and otherwise planning trial strategy. *U. S. v. Lacey*, 827 F. Supp.1540, 1543 quoting *United States v. Serrano*, 870 F.2d 1 at 16 (1st Cir. 1989) quoting *United States v. McDaniel*, 482 F.2d 305 at 311 (8th Cir.1973). Prosecutorial knowledge of the immunized testimony may help explicate evidence theretofore unintelligible, and it may expose as significant facts once thought irrelevant (or vice versa). Compelled testimony could indicate which witnesses to call, and in what order. Compelled testimony may be helpful in developing opening and closing arguments. Id. See also *Strachan, 56 Tex.L.Rev.* at 806-10.

The undisputed facts in this case as stated in *State v. Jackson* (5th Dist.), 2008 Lexis 2458, 2008-Ohio-2944, is that a witness, Vince Van, was disclosed to the prosecutor in the immunized statement of Officer Anthony Jackson, subsequently interviewed by the prosecution and added to their witness list. The existence of Mr. Van as a witness, not previously known to the prosecution was a "use" of evidence obtained from the immunized statement in the criminal investigation as evidenced by their subsequently interviewing Mr. Van. The preparation of the prosecution, trial strategy, and planning cross examination for trial was permanently altered when they subsequently added Mr. Van to their witness list. The prosecution had obtained an unfair advantage in that they then knew the defense strategy and preparation for trial once they interviewed the witness Van who was not previously available to them.

Further, the Garrity agreement signed by both the Government and the Defendant in this case prior to giving his statement indicates:

If 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. Agreements between Government and defendant are taken very seriously by courts, and Government must scrupulously perform and keep any agreement it makes. *U.S. v. Velasco*, 953 F.2d 1467. In the Velasco case, the court found that prosecutor's statement to trial judge outside of jury presence after agreement not to refer to proffer was not improper use as Defense counsel himself had informed trial judge that defendant had made proffer to Government. *Id* at 1472. That case involved an immunized proffer and a post arrest statement. The proffer was argued by defense counsel, and the very remote influence that would have on the prosecution thought process was deemed insufficient to be an impermissible use of that information. *Id* at 1474. The case is clearly distinguishable as there was absolutely no reference to the witness Van by the Defendant's counsel in this case.

In this case, the Defendant, as a police officer, faced not only loss of a liberty interest but a competing property interest was at stake.

The United States Supreme Court has consistently held that a public employee may not be forced to choose between making incriminating statements and facing dismissal, since such choice would effectively negate Fifth Amendment privilege against self-incrimination. *Jones v. Franklin County Sheriff*, (1990) 51 Ohio St.3d 40, 44, 555 N.E.2d 940, 945, quoting *D'Aquisto v. Washington* (N.D.Ill.1986), 640 F. Supp 594,622, citing *Lefkowitz v. Cunningham*, (1977), 431 U.S. 801, 97 S. Ct.2132, 53 L.Ed.2d 1, *Gardner v. Broderick*, (1968), 392 U.S. 273, 88 S.Ct.

1913, 20 L.Ed.2d 1082. Yet, public employee can be required to answer potentially incriminating questions, so long as he is not asked to surrender his constitutional privilege against self-incrimination. *Jones v. Franklin County Sheriff*, supra, Lefkowitz v. Cunningham, supra, Gardner v. Broderick, supra. However, courts have clearly protected the public's interest in the integrity and trustworthiness of the department's officers. It is critical to any IAD (internal affairs investigation) that, once officers have been assured their constitutional guarantees remain intact, they are required to respond to specific questions dealing with job performance. *Jones v. Franklin County Sheriff*, 52 Ohio St.3d 40, 44, 555 N.E.2d 940, 945. When, as in the instant case, that statement is used against them in any manner, it not only jeopardizes the liberty interests of the officers, but the integrity and trustworthiness of the department in general and the public at large.

Proposition of Law II

The proper remedy for use of immunized Garrity statements in a criminal investigation or case is dismissal of the indictment.

This court, in Conrad, made it clear, that once a witness makes the claim that his or her immunized testimony was used: (1) the government must deny any use of the accused's own immunized testimony against him or her in a criminal case; and (2) the government must affirmatively prove that all of the evidence to be used at trial is derived from sources wholly independent of immunized testimony. *State of Ohio v. Conrad*, 50 Ohio St.3d 1, 4, 552 N.E.2d 214. The so called *Kastigar* hearing was held and the lower court determined that the prosecution had not met its burden. The court cited to *Kastigar* and said:

The purpose of a statute granting use immunity or derivative use immunity is to leave the witness and the prosecuting authorities in substantially the same position as if the witness had

claimed the Fifth Amendment privilege. *Id.* at 4 quoting *Kastigar v. United States* (1972), 406 U.S.441, 457.

[Immunity] prohibits the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness. Id. The court found that the immunized testimony was utilized in Grand Jury and found that dismissal of the indictment was the appropriate remedy. *Id* at 5. The court also opined that dismissal of the indictment will greatly discourage such abuses by prosecuting authorities in future cases. *Id.*

In this case, the prosecutor admitted that they routinely obtained the immunized statements of police officers for their use in prosecuting the officers. Obviously the Conrad case was not sufficient to greatly discourage such abuses by the prosecuting authorities. Dismissal of the indictment will send that message.

Proposition of Law III

The immunized Garrity statement is not subject to disclosure until the completion of the criminal case, if disclosure is warranted at all.

Amicus City of Canton argues that it would be unfair for the press to obtain copies of the immunized Garrity statement of the defendant when the prosecutor is precluded from obtaining the statement.

O.R.C. 149.43 governs disclosure of public records and under (A)(1) excepts from disclosure trial preparation, confidential law enforcement records and records the release of which is prohibited by state or federal law. (A)(2) defines confidential law enforcement records as (c) specific confidential investigatory techniques, procedure or work product. (A)(4) defines trial preparation records as any record that contains information that is specifically compiled in

reasonable anticipation of, or in defense of, a civil or criminal action, including independent thought processes and personal trial preparation of an attorney. *State ex. Rel. Munici v. Kovacic*, 1994 WL 264265.

Information compiled by police and prosecutors during criminal investigation would be exempt disclosure during pendency of criminal proceeding under statutory except for confidential law enforcement records and trial preparation materials. *State ex rel Vindicator Printing v. Watkins*, 66 Ohio St.3d 129, 609 N.E.2d 551.

Where in camera inspection reveals that release of records concerning pretrial investigation by police and prosecutor would prejudice right of criminal defendant to fair trial, such information would be exempt from disclosure under public records disclosure statute's exception for trial preparation records and confidential law enforcement investigatory records, during pendency of defendant's criminal proceeding. *Id.*

In Watkins, the court proscribed release to the news media of information that could affect the fairness of a criminal when they stated:

Inasmuch as such disclosures would prejudice the Defendant's rights under the state and federal Constitutions, the information at issue would constitute "records the release of which is prohibited by state and federal law". Where a subsequent in camera inspection reveals that release of the records would prejudice the right of a criminal defendant to a fair trial, such information would be exempt from disclosure pursuant to R.C. 149.43 (A) (1) during the pendency of the Defendant's criminal proceeding. *Id.* at 138, 559.

It is clear that this Honorable Court will not permit the Defendant's constitutional right against self-incrimination to be pre-empted by statute. No dilemma exists, therefore as to the potential release of said immunized Garrity statement to the press during the pendency of the criminal or civil trial as such release would jeopardize the defendant's right against self-incrimination.

Proposition of Law IV

The appropriate standard of review is clearly erroneous.

We review under the clearly erroneous standard the district court's finding that the government's evidence was untainted by a grant of immunity. *United States v. Lipkis*, 770 F.2d 1447, 1450, (9th cir.1985) quoting *United States v. Rogers*, 722 F.2d 557, 560 (9th cir. 1983, *cert. denied*, 469 U.S.835, 105 S.Ct.129, 83 L.Ed.2d 70 (1984).

When the court uses correct legal principles, its taint determination is a factual finding subject to review under the clearly erroneous standard. *United States v. Harris*, 973 F.2d 333, 336, (4th cir. 1992) quoting *United States v. Jones*, 542 F.2d 186, 199 (4th cir. 1976), *cert denied*, 426 U.S. 922, 96 S. Ct. 2629, 49 L.Ed.2d 375 (1976).

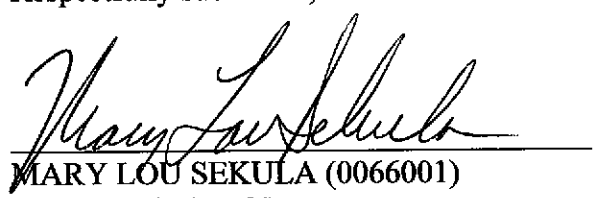
A district court's determination of whether the government improperly has used privileged information in a criminal prosecution is an issue of fact that will not be reversed unless the district court's finding is clearly erroneous. *U. S. v. Schwimmer*, 924 F.2d 443, 446 (2nd cir. 1991) quoting *United States v. Gallo*, 863 F.2d 185,190 (2nd Cir.1988), cert. denied, 489 U.S., 1083, 109 S.Ct. 1539, 103 L.Ed.2d 843 (1989).

The correct standard of review of the lower court's *Kastigar* hearing in the instant action is clearly erroneous.

CONCLUSION

Amicus Curiae respectfully requests that this Court hold that the Garrity rights of Defendant Anthony Jackson were violated, that any use of said Garrity statements in a criminal investigation and/or prosecution is prohibited, and that the proper remedy is dismissal of the indictment.

Respectfully submitted,



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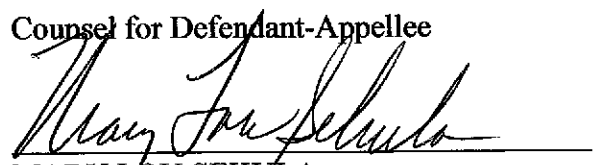

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