

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,

v.

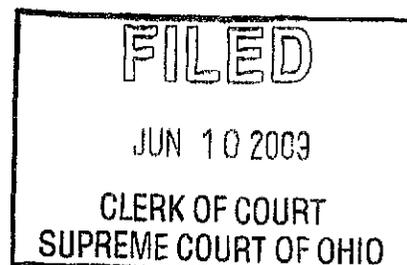
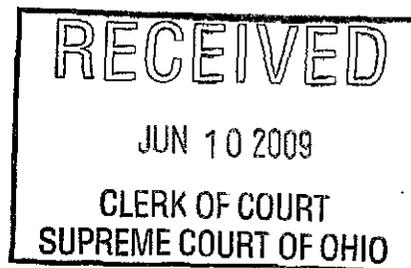
ANTHONY D. JACKSON,
Defendant-Appellee.

Merit Brief of Amicus Curiae International Union of Police, AFL-CIO, in Support of Appellee, Anthony D. Jackson

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MISCELLANEOUS

United States Attorneys' Manual
§ 9-23.40013

STATEMENT OF THE CASE AND THE FACTS

Appellant is a police officer employed by the Canton Police Department. At the time of the incident giving rise to this case, Appellant was on administrative leave. However, he was still employed by the Canton Police Department, and was subject to discipline by the Department.

On May 30th, 2006, Appellant while armed with his service weapon, was involved in an altercation in a tavern outside the Canton city limits in Perry Township. The Perry Township Police Department was called to the scene. Patrolman Jon Roethlisberger of the Perry Police Department conducted a criminal investigation into the incident, including interviewing witnesses and gathering evidence. He forwarded a copy of his criminal report to the prosecutor, and on June 16th, 2006, criminal complaints were filed against Appellee charging him with carrying a concealed weapon, and illegal possession of a firearm in a liquor permit premises.

The Canton Police Department Internal Affairs Unit commenced an internal investigation on May 31, 2006. As part of the Department's internal investigation, Appellee was given a letter ordering him to appear before Lieutenant Davis, of the internal affairs unit, on July 21, 2006, to answer questions concerning the incident. The letter stated, in part:

This letter is to inform you that the Office of Internal Affairs is scheduling an interview with you in reference to the attached investigation.

...
Although criminal charges were filed against you in regards to this incident, you will be afforded your *Garrity* Protection prior to this interview, and none of the interview will be used against you in a court of law. This interview is being conducted strictly for departmental administrative matters.

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

At the interview, Lt. Davis gave to Appellee a document titled "*Garrity Warning*", and read this warning into the record. The warning stated in part,

This questioning concerns administrative matters relating to the official business of the Canton Police Department. During the course of this questioning, 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. Since this is an administrative matter and any self-incriminating information you may disclose will not be used against you in a court of law, you are required to answer my questions fully and truthfully. If you refuse to answer all my questions, this in itself is a violation of the rules and procedures of the department, and you will be subject to separate disciplinary action.

Appellees counsel raised concerns that this *Garrity Warning* may not have protected all of Appellee's constitutional rights. Nonetheless, Appellee submitted to a twenty minute recorded interview, in which he responded to numerous questions regarding the incident: as a result, he gave the names of witnesses (including one unknown to the criminal investigator), explained his actions, and provided justifications for his conduct.

After the interview of Appellee, Lt. Davis interviewed additional witnesses, and completed a report that included his analysis of the case. The internal affairs file, including Appellee's *Garrity* statement, witness statements and the investigator's analysis of the case, was turned over to the prosecutor's office. The prosecutor has acknowledged possession of the Appellee's *Garrity* statement, and specifically admitted that "the State has had the benefit of Internal Affairs reports for the purpose of pre-trial preparation."

The matter was presented to the grand jury by prosecutor Jonathon Baumel. He called only two of the subpoenaed witnesses, Perry Township Detective Roethlisberger and the Canton Internal Affairs Lt. Davis. An indictment was handed up by the grand jury on August 21st, 2006, charging Appellee with violating R.C.2923.121, Possession of a Firearm in a Liquor Permit

Premises. Subsequently, Joseph Vance was assigned to prosecute the case. Appellee entered a plea of not guilty and, *inter alia*, demanded discovery from the prosecutor.

On June 20th, 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 6th, 2007, Appellee filed his final motion to dismiss, alleging that the prosecutor had improperly obtained his *Garrity* immunized statement from the internal affairs unit. The court then set a *Kastigar* hearing for August 8th, 2007. The only witness called by the state was Perry Township's Detective Roethlisberger who testified regarding his initial investigation into the incident. His reports were thereafter admitted as exhibits. Neither Lt. Davis, nor Prosecutor Baumoeel, were called, 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 and the internal affairs file. As part of the stipulations submitted to the court, the prosecutor acknowledged that he had reviewed the internal affairs file for the purpose of preparing for trial. In fact, Prosecutor Vance claimed to have reviewed *Garrity* statements of officers he had prosecuted in other cases.

By entry filed September 10th, 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. As a result, 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 panel 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. This appeal followed.

INTEREST OF THE AMICI CURIAE

The International Union of Police Associations, AFL-CIO, (“I.U.P.A.”) is a 501(c)(5) labor organization and the AFL-CIO’s law enforcement affiliate. The I.U.P.A. is composed of over three hundred affiliated law enforcement unions and associations representing over 50,000 street level law enforcement officers in law enforcement agencies throughout the United States. The I.U.P.A. has over a dozen affiliated unions representing officers in the State of Ohio, ranging from officers in large departments such as Toledo to smaller ones such as Upper Sandusky. The I.U.P.A. has extensive experience representing officers in internal investigations, including interviews conducted under *Garrity*, and in disciplinary appeals.

The I.U.P.A. has actively advocated for the rights of law enforcement officers in state and federal courts. For example, in *State v. Brockdorf*, 291 Wis.2d 635, 717 N.W.2d 657 (Wis. 2006), the Supreme Court of Wisconsin accepted an *amicus curia* from the I.U.P.A. addressing the appropriate standard for determining whether a statement by a police officer was compelled under *Garrity*, and the Supreme Court of Nebraska recently accepted an *amicus curiae* brief from the I.U.P.A. in a case concerning the appropriate standard of review of an arbitration decision involving a state law enforcement officer. *State v. Henderson*, 277 Neb. 240, 762 N.W.2d 1 (Neb. Feb 27, 2009) *Petition for Certiorari Filed* (May 06, 2009)(NO. 08-1377). Further, the General Counsel’s Office of the I.U.P.A. has argued three cases before the U.S. Supreme Court.

Christensen v. Harris County, 529 U.S. 576 (2000); *Auer v. Robbins*, 519 U.S. 452 (1997);
Moreau v. Klevenhagen, 502 U.S. 22 (1993).

The I.U.P.A. and its affiliated locals and members have a significant interest in the outcome of this case. The decision of the Court raises vital issues regarding the rights of officers that would apply to affiliates of the I.U.P.A. in the State of Ohio and could have implications for officers throughout the country. Moreover, while the issue on appeal is a criminal one, it may have a significant impact on the employment rights of officers in Ohio. The I.U.P.A., as a labor representative, will primarily address the employment ramifications of the issues before this court.

ARGUMENT

PROPOSITION OF LAW

WHEN A PUBLIC EMPLOYER COMPELS AN EMPLOYEE TO GIVE A STATEMENT UNDER THREAT OF REMOVAL FROM OFFICE, *GARRITY V. NEW JERSEY* PROHIBITS ANY USE OF THE STATEMENT IN A SUBSEQUENT PROSECUTION.

Summary of Argument

Officers dedicate themselves, and all too often their lives, to serving the public. In so doing, officers put their careers and livelihood at the mercy of the state. However, officers do not sacrifice their constitutional rights as citizens by dint of their employment, and they cannot be compelled to choose between an exercise of their constitutional rights and their livelihood as police officers. *Garrity v. New Jersey*, 385 U.S. 493, 497 (1967).

To protect officer's constitutional rights, and the interests of the department and prosecuting authorities, the Supreme Court has established an intertwined set of constitutional rules involving the questioning of police officers. In particular, officers can, under threat of discipline "be compelled to respond to questions about the performance of their duties but only if their answers cannot be used against them in subsequent criminal prosecutions". *Lefkowitz v. Turley*, 414 U.S. 70, 79 (1973); accord *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation*, 392 U.S. 280, 285, 88 S.Ct. 1917, 20 L.Ed.2d 1089 (1968). Put another way, if the officers' statements are immunized, then officers must answer the department's questions in an internal interview. However, if the officer's statements are *not* immunized, then officers can remain silent and the department *cannot* compel a response or discipline an officer for refusing to respond.

While an officer can be disciplined for the refusal to answer a lawful question, in order for the discipline to stand, the officer must be aware of the choice that confronts him. Thus, this Court has required that in order to discipline an officer for refusing to provide a statement, the "officer be informed that his answers cannot be used against him in any criminal proceeding and that he may be discharged if he refuses to comply with the order." See *City of Warrensville Heights v. Jennings*, 569 N.E 2d. 489, 58 Ohio St. 3d 206 (1991).

However, the appellant and the supporting *amici* propose that an officer's answers can be "used" against him: in particular that "a prosecutors knowledge, or non-evidentiary use of" the statement is permitted. Appellant's Merit Br. at 8 (State's Proposition of Law.) Thus, appellant seeks to render the warning required by this Court invalid at best and misleading at worst.

Even if such a change were necessary, the appellant's proposition is so confusing, and contrary to common sense, that it will defy any simple explanation, engendering significant

litigation and slowing internal investigations to a crawl. Moreover, even if an adequate warning could be formulated, or if no warning is required, if departments regularly provides officers' statements to the prosecution, officers will have no assurance that their statements will in fact be treated as immunized. Because it will be difficult to provide an adequate warning, or to assure that *Garrity* statements will in fact be treated as immunized, officers will be under no obligation to give a statement to the department. Therefore, at worst the appellant's proposition will prevent departments from requiring statements in internal affairs investigations; at best it will lead to constant litigation regarding the propriety of the warning and the extent of the immunity.

Such a situation can be easily avoided. Currently, departments regularly conduct separate investigations of police officers: one criminal and one internal. The department can simply not provide to the prosecution information from the internal investigation. The prosecution can instead rely on information from the criminal investigation, as the prosecution would do in every other case. This simple rule preserves the rights of the officers and allows the department to compel statements in internal affairs investigations, and it removes the uncertainty and litigation that will be spawned by the appellant's proposition.

Overview of Garrity Rights

Under *Garrity*, the state may not use the power it holds over their careers and livelihood to compel officers to sacrifice their constitutional rights. *Garrity*, 385 U.S. at 497 ("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.") To counteract the state's coercive power, and to protect officer's constitutional rights, and the interests of the department and prosecuting authorities, the Supreme Court has established a set of constitutional rules involving the questioning of police officers. These rights do not cover police officers alone. Rather the *Garrity* Court's holding

“extends to all whether they are policemen or other members of our body politic.” *Garrity*, 385 U.S. at 501. Thus, *Garrity* rights are extended to others over whom the government holds additional coercive power, be they contractors, employees, lawyers or politicians. *Lefkowitz*, 414 U.S. 70 (*Garrity* rights apply to government contractors); *Spevack v. Klein*, 385 U.S. 511 (1967) (disbarment as penalty for refusal to testify at a judicial inquiry); *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977) (*Garrity* applies to political party officials).

First, officers can, under threat of discipline “be compelled to respond to questions about the performance of their duties but only if their answers cannot be used against them in subsequent criminal prosecutions.” *Lefkowitz*, 414 U.S. at 79; accord *Uniformed Sanitation Men Ass'n v.*, 392 U.S. at 285. Therefore, the department can investigate misconduct, and can interview the officer, provided that the officers’ statements are immunized. *Driebel v. City of Milwaukee*, 298 F.3d 622, 638 (7th Cir. 2003) (The Government “has every right to investigate allegations of misconduct, including criminal misconduct by its employees, and even to force them to answer questions pertinent to the investigation, but if it does that it must give them immunity from criminal prosecution on the basis of their answers.”) (*Citing Atwell v. Lisle Park Dist.*, 286 F.3d 987, 990 (7th Cir. 2002)). These immunized statements can be used for other important governmental purposes, including to support discipline of an employee (including termination), and to monitor work place conduct.

Second, an officer cannot be disciplined for refusal to give a statement that is not immunized. *Gardner v. Broderich*, 392 U.S. 273 (1968); *Lefkowitz*, 431 U.S. at 806 (After reviewing *Garrity*, *Gardner*, *Turley*, and other cases, the court stated “These cases settle that government cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony that has not been immunized.”) As

one Court explained, “In short, the state has a choice between either demanding a better statement from an employee on job-related matters, in which case it [cannot] use the statements in a criminal prosecution, or prosecuting the employee, in which case it cannot terminate the employee for refusing to give a statement.” *United States v. Camacho*, 739 F.Supp. 1504, 1514-15 (S.D.Fla.1990)(citations omitted).

Third, if an officer provides a statement, under threat of punishment, then that statement is considered immunized. Immunity is granted in part because, like others granted immunity, officers can be punished by the state solely for refusing to provide testimony they could otherwise withhold under the Fifth Amendment, and independent of any separate wrongdoing.¹ *See Lefkowitz*, 431 US at 801, 808 note 5 (The “refusal to waive the Fifth Amendment privilege leads automatically and without more to imposition of sanctions.”). Similarly, the punishment, whether financial in the case of employees and contractors or jail in the case of immunized testimony, is instituted by the state as an entity. By comparison, a normal suspect in an investigation is not subject to punishment by the state simply for refusing to give a statement. Rather, if the suspect refuses to give a statement, the prosecutor must present evidence supporting conviction of an underlying crime. Therefore, the *Garrity* immunity extends to statements that the state would not have but for the additional coercive power it holds over police officers, and is designed to ensure that these statements are not then used against officers in criminal proceedings. Thus, as the Supreme Court stated in *Turley*, “if answers are to be

¹ There may be additional protections or conditions for disciplining employees, but if these are met, the employee can be punished for refusing to answer questions as an independent charge. *See City of Warrensville Heights v. Jennings*, 569 N.E 2d. 489, 58 Ohio St. 3d 206 (1991) (Garrity warning required, but if given, failure to answer can serve as the sole cause for discipline.)

requested in such circumstances, States must offer to the witness whatever immunity is required to supplant the privilege [to refuse to provide a statement].”

As the other parties to this case have discussed, this Court has previously held that the government must “deny *any* use of the accused own testimony against him or her in a criminal case.” *State v. Conrad*, 50 Ohio St. 3d 1, 552 N.E.2d 214 (1990)(emphasis in original); *see also U.S. v. McDaniels*, 482 F.2d 305 (8th Cir. 1973); *State v. Gault*, 551 N.W. 2d 719 (Minn App. 1996) (Court found that the prosecutor’s initial review of these statements in deciding to charge the officers, and its continuing knowledge of the statements, constituted use of the statements prohibited by *Kastigar*.) Nonetheless, appellant proposes that some form of “non-evidentiary use” be allowed. Such an interpretation would wreak havoc on the current practice relied upon by departments and officers in the investigation and discipline of officers.

The Regular Practice of Police Departments’ is to Conduct Separate Internal And Criminal Investigations of Officers Suspected of Criminal Conduct, and to Only Provide Evidence From the Criminal Investigation to Prosecutors

The *Garrity* line of cases has established a fairly straightforward system for the investigation of police officers: the officers can be compelled to provide statements in an internal investigation, even though they normally would have the right to remain silent; in return, the statements provided by the officers are considered immunized, and the statements cannot be used against the officers in any criminal proceeding. This system works particularly smoothly because it dovetails with the normal practice in which departments generally segregate criminal investigations and internal investigations.

Internal affairs investigations are generally conducted separate and apart from any criminal investigation. The separation of the investigations stems not only from *Garrity*, but from the fact that the two investigations arise from very different roles of the department. An

internal investigation arises from the department's role as employer and manager of departmental personnel. And the criminal investigation arises from the department's law enforcement role. These two different roles require investigations of very different natures.

Internal affairs investigations are generally conducted by an independent internal affairs branch or office. (In small departments, as with many duties, the internal affairs duties may be assigned part-time to a superior officer or a detective.) The "Police Department's internal affairs office is a prophylactic body. The internal affairs office not only investigates misconduct, its existence, powers, and the confidential nature of the information it acquires serves as a deterrent to police misconduct on a regular basis." *U.S. v. Doe*, 434 F.Supp.2d 377 (E.D.Va.,2006) *aff'd In re Grand Jury, John Doe No. G.J.2005-2*, 478 F.3d 581 (4th Cir. 2007).

The investigations involve the typical gamut of employment issues: from absenteeism to violations of policies, from sexual harassment to personality disputes. "The vast majority of [internal investigations] are unlikely to have criminal implications." *Spielbauer v. County of Santa Clara*, 45 Cal.4th 704, 199 P.3d 1125 (Cal.,2009.). *See also U.S. v. Doe*, 434 F.Supp.2d at 377 (A grand jury investigation "must only be a remote concern compared to the more visible, everyday presence of the internal affairs office.")

Because of these considerations, both the internal investigators and the officers generally approach internal investigations from a perspective very different than that in criminal investigations. First, since the vast majority of internal investigations do not involve potential criminal matters, the degree of caution and distrust associated with a criminal investigation is not present. Second, internal investigations are often performed quickly, and with minimal procedural wranglings. Third, the investigators must be familiar with the variety of rights and protections that officers have as employees of the department. A number of states have statutes

that provide officers with specific rights in internal investigations. *See* Florida Code 112.532; Maryland Code 3-101 (Law Enforcement Officers' Bill of Rights). And officers are accorded rights in internal interviews under collective bargaining laws, and under merit laws. These rights are often very different than those extant in criminal investigations. In fact, the use of tactics commonly used on criminal suspects are often forbidden in internal personnel investigations. For example, having two persons conduct an interview is often prohibited by statute, as is the use of offensive language. *See* Florida Code 112.532(1)(c) and (f) (“All questions directed to the officer under interrogations shall be asked by or through one interrogator.”)

Officers and Departments are also generally aware of the concept of *Garrity* rights in internal investigations. In particular, departments are generally required to provide *Garrity* warnings to officers in internal investigations. This Court has required such warnings in order to discipline officers. Such warnings also arise as a result of collective bargaining agreements,² under general concepts applicable to the discipline of employees, and in order to protect employees' constitutional rights.³ Accordingly, virtually all departments provide officers with a *Garrity* rights statement that articulates the basic rights of officers in internal interviews.

The particular terminology in these *Garrity* rights statements varies widely. However, all impart the basic concept that the officer's statement cannot be used against him in any criminal proceedings, and that the officer can be disciplined for refusing to provide a statement that has this protection. For example, in this case the department gave two warnings, one in a letter and one at the interview. While there are distinctions between the two statements, such distinctions

² For example, the warning in this case was also required by the collective bargaining agreement with the union.

³ *See Atwell v. Lisle Park Dist.*, 286 F.3d 987, 990 (7th Cir. 2002).

are not now legally significant (or unusual) as the warnings impart the basic information that the statement will not be used against the officer in a criminal proceeding.

Generally, departments honor the promise that the officers' *Garrity* statements will not be used in any criminal proceeding against the officer. Thus, departments do not generally provide internal affairs statements to prosecutors who are involved in criminal proceedings against the officer. To the contrary, departments, and even prosecutors normally go to great lengths to ensure that *Garrity* statements are not even seen by prosecutors. For example, the United States Department of Justice utilizes a "*Garrity* review process" to ensure that *Garrity* protected statements are not used by the prosecuting attorney or the grand jury.⁴ As the Department of Justice explained in *In re Grand Jury Subpoenas*, 40 F.3d at 1103, under this process

"When immunized statements are received in a case handled by the Criminal Section of the Civil Rights Division, personnel from the Criminal Section sanitize the reports by redacting statements and fruits of statements by the target of the investigation which could violate the standards of use immunity if used against the individual who made the statement." Appellee [United States of America, Department of Justice brief] at 20; see *United States Attorneys' Manual* § 9-23.400.

As a result of this screening, "incriminating statements are, in theory, never seen by either the government attorney handling the case or the grand jury." *Id.*

While some Federal Courts of Appeals have recognized that such procedures can protect the constitutional rights of the officers, other Circuits have noted that these procedures alone may not be sufficient. Compare *In re Grand Jury Subpoenas*, 40 F.3d at 1103, and *In re Grand Jury, John Doe No. G.J.2005-2*, 478 F.3d 581 (4th Cir. 2007). Most recently, the Fourth Circuit upheld

⁴ The Department of Justice likely uses this process as it often investigates pattern and practice cases involving multiple police officers. Therefore, it can request information from one officer for potential use investigating another officer. This process has little utility in a single officer case. However, it provides a good example of the Department of Justice's recognition of the need to keep officers' *Garrity* statements from prosecutors.

the quashing of a subpoena for internal affairs files, notwithstanding that the prosecutors would never see the *Garrity* statements due to the use of the *Garrity* review teams. *Id.* The Court noted that the concerns over “preserving confidentiality and forestalling possible self-incrimination problems” justified denying the grand jury the opportunity to review even the redacted statements. *Id.* at 587.

Similarly, *State v. Gault*, 551 N.W. 2d 719 (Minn App. 1996), illustrates the lengths that state prosecutors will go to ensure that *Garrity* statements are not used against officers. In *Gault*, an initial prosecutor received a *Garrity* protected statement, and reviewed the statement when determining whether to file charges. A more senior prosecutor reviewed the matter, discovered the *Garrity* statements “recognized the nature [of the officers] statements and ordered them removed from the file and sealed.” *Id.* at 722. The senior prosecutor also assigned the case to a third prosecutor who had not seen the *Garrity* statements or any reports referring directly to them. Notwithstanding these efforts, the Court upheld the dismissal of the criminal case, finding that the prosecutors continuing knowledge of the statements constituted use prohibited by *Kastigar*.

In fact, the right to not have a *Garrity* statement not turned over to the prosecution by the department has been found to have been “clearly established.” For example, the Sixth Circuit recently held that the departmental supervisors who turned over a *Garrity* protected statement to a prosecutor were liable for violating the officer’s Constitutional rights. *McKinley v. City of Mansfield*, 404 F.3d 418 (6th Cir.2005). In *McKinley*, an officer was compelled to provide a statement to internal affairs by the supervisors in the City of Mansfield Ohio Police Department, including internal affairs investigator Lieutenant Detective Dale Fortney, who then turned over

this statement to the prosecutor. The officers' statement was used by the prosecutor in a criminal prosecution against the officer. As the court explained,

McKinley's claim is that Fortney and his colleagues broke [the promise not to use the statements in a criminal proceeding against the employee] by compelling him to incriminate himself under the false promise of *Garrity* immunity and by turning the incriminating statements over to the prosecutor, who then prosecuted McKinley for the very crimes about which McKinley was compelled to make incriminating statements.

Id. at 439, note 24. The Sixth Circuit found that "what Fortney and his colleagues are alleged to have done violates the Fifth Amendment right against self-incrimination," and it found that such actions violated "clearly established" rights of the officer. *Id.* at 442.

However, the Court also affirmed the propriety of the general practice in departments -- to not turn over internal affairs files to prosecutors -- noting that a supervisor (or a department) who obtains a *Garrity* statement from an officer may defend against a suit for violation of the officer's Fifth Amendment rights "on the grounds that he attempted to prevent the use of the allegedly incriminating statements at trial, or that he never turned the statements over to the prosecutor in the first place." *Id.* at 439.

The common practice among departments and prosecutors to avoid any use of *Garrity* statements demonstrates that this practice is thoroughly consistent with the sound prosecution of criminal cases, and does not harm the interests of the prosecution or of society.⁵

In addition to internal investigations, departments also conduct criminal investigations of police officers and other employees. Such criminal investigations are performed in the department's role as a law enforcement agency, and not as any employer. These criminal

⁵ Contrary to appellant's assertion is almost inconceivable that prosecutors would go to such lengths to protect officers statements if in doing so they were violating the officers rights to Brady material, preventing internal investigations by cash strapped departments, denying the prosecution any investigative assistance, or granting officers transactional immunity.

investigations of employees are often much more contentious than internal investigations. The mere fact that a criminal investigation of an employee is undertaken will almost always create a very different climate. Employees who may otherwise be cooperative with the employer will often clam up in a criminal investigation. Similarly, criminal investigators approach their investigations from a very different perspective than internal personnel investigations, with a host of legal concerns different than those facing the internal investigators. And criminal investigations are often drawn out affairs, with a great deal of procedural wrangling amongst those involved.

Because the criminal investigation is conducted in the department's law enforcement role, the file of a criminal investigation of an employee can be turned over to the prosecution, and the criminal investigator can assist the prosecutor. Most importantly here, the results of these criminal investigations, and any statements elicited from a suspect in the investigation, can be used directly and indirectly against the individual in a criminal prosecution.

Further, because evidence properly obtained in a criminal investigation would not be considered compelled, such evidence may be used in an internal investigation or in the discipline of a law enforcement officer. In any event, questioning of a law enforcement officer after the criminal case has concluded, and there is no potential for criminal prosecution, does not raise *Garrity* concerns. *See Franklin v. Evanston*, 384 F.3d 838 (7th Cir. 2004)(If employer did not want to provide immunity to employee, it could wait till the criminal case was resolved to conduct the interview.) Therefore, if the local governments are unwilling to use a separate investigator for the internal personnel investigation and criminal investigation, then the same investigator can conduct the personnel investigation after the criminal case has concluded. *Id.*

The Practice Of Routinely Turning Over Internal Affairs Files And Garrity Protected Statements To Prosecutors Violates The Constitution Rights Of The Officers, And Harms The Interests Of The Department And The State

As discussed above, the criminal and employment aspects of *Garrity* and its progeny are intertwined. However, in their zeal to use the internal affairs statement in the instant prosecution, the appellants are blinded to the damage that their proposition will cause to the ability of departments to conduct internal investigations.

The failure to accord immunity to a compelled statement may rob departments of their ability to discipline employees for refusing to give a statement in an internal interview. Officers cannot be disciplined for refusing to give a statement that has not been immunized. *Lefkowitz*, 431 U.S. at 806 (The “government cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony that has not been immunized.”) Therefore, if a department demands a statement that is not accorded immunity protection, then the department cannot discipline the officer for refusing to provide the statement.

In order to discipline an employee for refusal to provide a statement, the employer must warn the employee that the statement will not be used against him in a criminal proceeding and that the employee may be disciplined for a refusal to answer the questions. *Supra*. If these requirements are not met at the time the statement is demanded, then the employer cannot discipline an employee for refusing to give a statement.

This Court has noted that this warning need not be overly detailed, as the extent of the protection against use of the statement is evident. In *City of Warrensville Heights*, this Court found that it was not necessary, “that the officer be told that any ‘fruits’ derived from his answers cannot be used in a criminal prosecution. When the officer is told that his answers cannot be used

in a later criminal prosecution, we believe there is an adequate implicit assurance that the fruits derived from the answers likewise cannot be used.” 569 N.E. 2d 489. Thus, the warning simply requires that the officer “be informed that his answers cannot be used against him in any criminal proceeding and that he may be discharged if he refuses to comply with the order.” *Id.*

However, appellant’s proposition -- that the prosecution can make non-evidentiary “use” of the officers statements in a criminal proceeding -- is directly contrary to the warning required by this Court. It defies common sense to assert that a simple warning that an officer’s statement “cannot be used against him in a criminal proceeding” is consistent with appellant’s proposition that the prosecution can make non-evidentiary “use” of the statement. The futility of trying to reconcile appellant’s position with the current *Garrity* warnings is evident from the facts in this case.

Here the appellant asserts that it would have been proper to use Appellee’s *Garrity* statement in a non-evidentiary manner. Yet in the *Garrity* warnings given to Appellee, the department stated that neither Appellee’s statement, nor any fruits of the “statements you make will be used against you in any criminal legal proceedings.” The prosecution’s admitted “use” of the statements in preparation for the criminal trial is contrary to the basic promise to the officer that the statement would not be “used.” Therefore, the simple warning now required by this Court -- that the officers statement will not be used against him in a criminal proceeding -- would be misleading under the appellant’s proposition of law.

Revision of this Court’s warning precedent would cause untold damage. Departments and officers have for years relied on the Court’s common sense perspective on the warning and the rights of the officers. This has allowed departments and officers to have a practical approach to the *Garrity* warnings. The exact wording of the *Garrity* warning is generally not significantly

disputed, so long as it generally imparts that the statement will not be used against the officer in a criminal proceeding. Thus there are innumerable versions of the *Garrity* statement currently in use. The validity of each would be brought into question were the appellant's proposition adopted.

Further, any new warning adequate to apprise officers of the appellant's proposition would be incredibly complex, and subject to endless dispute. Explaining a standard that defies common sense -- such as one that allows for "use" of a statement, when "use" of the statement is prohibited -- is incredibly complex.⁶ While this may be capable of articulation and resolution in a formal legal proceeding, such as in a *Kastigar* hearing or formal criminal trial, an accurate articulation of the standard in the midst of an internal affairs investigations seems virtually impossible.

Moreover, any articulation of the standard would be subject to endless uncertainty and dispute. If the concept and practice of using a simple common sense warning is reversed, officers would be justifiably leery of any new *Garrity* warning. This would lead to endless bickering over the details of the *Garrity* warning. Take for example the two warnings given to Appellee: one in a letter requiring that he attend the interview, and one in the *Garrity* Warning.. Because these explanations are different, deciding on which one or which elements govern could cause a significant dispute: for example, does the purported prohibition on use apply so that "none of the interview" can be used as stated in the letter, or only so that any "self-incriminating statements" cannot be used as stated in the *Garrity* Warning. Further, how would any differences in the explanation of the complex prohibition on "use" be resolved? Would Lt. Davis

⁶ Thus, for example, even appellant and the supporting *amici* cannot seem to agree on the correct proposition of law, or on whether any prohibition on use applies to grand jury proceedings. Compare Appellant's Merit Brief at 8 and Ohio Attorney General Amicus Brief at 4.

and counsel for Appellee need to engage in an extensive debate over what exact “use” was contemplated, would Lt. Davis be able to articulate the parameters of the use, or would the entire interview need to be delayed until lawyers (and potentially the prosecutor) came to agreement on what “use” would be appropriate? What if the department explained the standard incorrectly by defining use too narrowly: Would the prosecution be bound by this limitation?

Such disputes, which were avoided under the current common sense rule, would abound under appellant’s proposition. Until any disputes are resolved and the standard is accurately explained, an officer could justifiably refuse to provide a statement. As a result, internal investigations would slow to a crawl, including those “vast majority” of internal investigations that are unlikely to have any criminal implications.

Finally, even if the appellant’s proposition could be adequately explained, or even if no explanation was required, an officer must still be assured that his statement will be immunized in order to be compelled to give one.⁷ Without an assurance of immunity, the department cannot compel the officer to give a statement, and cannot discipline an officer for refusing to give a statement. However, when a department assures an officer of immunity (whether explicitly or implicitly), it must honor this assurance. As the Sixth Circuit recently explained: “To comport with *Garrity*, a state employer who compels an employee to make incriminating statements must not only promise not to use those statements in a criminal proceeding against the employee, but must also *keep* that promise.” *Id.* at 439 (emphasis in original). If the department fails to honor

⁷ The requirement for a *Garrity* warning would not be eliminated even if this Court overturned *City of Warrensville Heights*, as the right to a warning is also guaranteed by collective bargaining agreements with the police unions, by general concepts of just cause for discipline, and by the United States Constitution. *See supra* pg. 12.

the *Garrity quid pro quo*, and releases the statement to the prosecutor, the department has violated the rights of the officer under *Garrity*. *Id.*⁸

Further, a systematic or regular failure to honor the *Garrity* protections would undercut the department's ability to impose discipline on officers for a refusal to answer questions in an internal investigation. Normally, the department would be able to discipline an officer who refuses to answer questions if it has assured the officer that his statement will have use immunity. Yet, how can the department provide a genuine assurance that the statement will not be used in a criminal prosecution, when it routinely gives the statement to the criminal prosecutor? As the Court noted in *McKinley* this action itself is sufficient to render the compelling of the statement illegal. Thus the appellant's position would again undermine not only the rights of the officers, but the ability of departments to compel statements from officers in internal investigations.

The routine transmission of *Garrity* protected material to prosecutors causes a number of additional problems. First, prosecutorial access to *Garrity* statements will result in a *Kastigar* hearing in virtually every case. Under *Kastigar*, a person granted immunity and subsequently prosecuted, "need only show that he testified under a grant of immunity" in order to trigger the right to a *Kastigar* hearing. *Kastigar v. United States* 406 U.S. 441 (1972). Since all *Garrity* statements are by definition immunized, any officer who has given a statement in the possession of a prosecutor would be entitled to a *Kastigar* hearing.

⁸ The fact that any misuse may be addressed by a *Kastigar* hearing in the criminal trial, does not nullify the department's violation of the officer's rights. Instead, as the Sixth Circuit found, the attempted use in the criminal trial renders the initial compelled statement coercive questioning in violation of the officers constitutional rights. *See also Gardner*, 392 U.S. 273 (the Supreme Court found that the discipline of employees for refusing to waive their rights was unconstitutional, even though any waiver executed would have been invalid.)

Second, the systematic transmission of internal files to prosecutors will transform internal investigations from relatively simple and often informal matters, into full blown disputes common in criminal investigations. Officers fearful that their internal statements will routinely be turned over to prosecutors will likely demand representation by attorneys on a much more frequent basis and will require that the state live up to every single requirement for an investigation. This will slow the investigations to a crawl.

Third, the department, and its employees, may be sued by the officer for violating the officer's constitutional rights as a result of turning over the *Garrity* statements to the prosecutor. *McKinley, supra*. This potential for liability, and the potential liability arising from improperly imposed discipline, will far outweigh any costs to the small governments of having two separate investigations.⁹

Finally, for the officer, the failure to honor *Garrity* means that he may face criminal charges that would not otherwise have been filed, he may need to challenge the government's use of the statements in a *Kastigar* hearing, and he may ultimately be faced with having to counter the use of his own compelled statement. Moreover, the officer will have been denied the benefit of the *Garrity* bargain: that in return for providing the statement, the department has promised, both explicitly and by operation of law, that the statement will not be used against the officer in a criminal proceeding.

On the other hand, minimizing threats arising from the use or misuse of *Garrity* protected statements is simple: the prosecutors can avoid requesting or receiving the statements or investigatory files, and the departments can avoid providing these files to the prosecutors. *See*

⁹ In any event, if the department wishes to save any costs involved in conducting separate investigations, it can use the evidence in the criminal case in the internal investigation or it can wait till the end of the criminal case to conduct the internal investigation.

McKinley, supra; Grand Jury, John Doe No. G.J.2005-2, 478 F.3d 581 (Prosecutor can avoid any threats to prosecution by not receiving internal affairs files.) This non-transmission of the internal affairs file will not leave the prosecution any worse off than it is with any other suspect. If the officer was not a government employee who can be compelled to give a statement, the statement, and its fruits, would not exist. Instead, the prosecution can do what it does in other criminal cases, use the criminal investigation file.

While the negative consequences of these disclosures are far reaching and significant, the benefits are minimal at best. The prosecutor's possession of the internal affairs statements serves no purpose if they cannot be used. Yet *Garrity* and its progeny forbid the use of these statements. Even if some "non-evidentiary use" is permitted, any possible benefit would arise only if the prosecutor can eke out this non-evidentiary use, without stepping over the "non-evidentiary use" line (however that may be defined). The likelihood that the prosecutors will be able to gain some significantly beneficial use of the statements, while successfully meeting their heavy burden under *Kastigar*, seems remote. When the interests of all of the parties are considered, the value of the remote possibility that in some odd case the prosecution would gain a benefit, balanced against all of the negative consequences, is insignificant.

The Court does not have to allow such an inequitable circumstance: it can be remedied by recognizing that prosecutors are barred from making "any use" of the *Garrity* protected statements, as was previously held by this Court in *Conrad*, by the Eighth Circuit in *McDaniel*, and by the Minnesota Supreme Court in *Gault*.¹⁰ *Supra* at 10.

¹⁰ Even if such a standard is not required by *Garrity* or *Kastigar*, this Court can adopt this rule to equitably balance these competing rights and interests. Compare *Grand Jury, John Doe No. G.J.2005-2*, 478 F.3d at 587 (Court may squash a grand jury subpoena relying on significant interests outside of the scope of a recognized privilege, if compliance is likely to "entail

Therefore the decision of the Court of Appeals should be upheld to the extent that it ruled that *any* use of an officer's *Garrity* statement is prohibited.

CONCLUSION

Police Officers put their lives on the line protecting the citizens, and put their careers and livelihoods in the hands of the state. In doing so they cannot be compelled to sacrifice their constitutional rights. However, officers accept that they are subject to demands not placed on the ordinary citizen: officers must answer questions in internal investigations, and they may be subject to discipline for their answers, on the condition that these statements will not be used against the officers in a criminal proceeding. All that officers are asking is that the state, whether the department or the prosecutor, honor this condition.

Honoring such a condition is simple, the department can avoid providing the *Garrity* statements to the prosecutor, and the prosecutor can avoid any use of these statements in a criminal proceeding. This leaves prosecutors are no worse off than they are with any other defendant. The department will be able to conduct administrative investigations without fear of damaging any criminal proceedings, and without fear of liability for violating the officers' constitutional rights. And the officers will have clarity regarding the use of any statements they make in internal investigations.

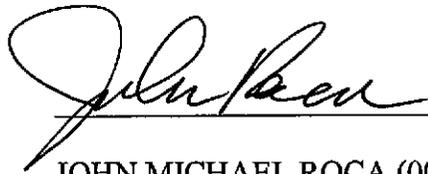
consequences more serious than even severe inconveniences occasioned by irrelevant or overbroad requests for records." *Quoting In re Grand Jury Matters*, 751 F.2d 13, 18 (1st Cir.1984)).

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Respectfully Submitted,

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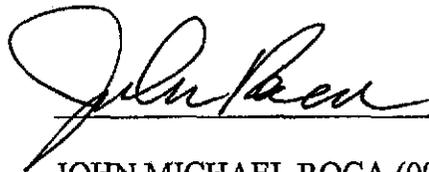
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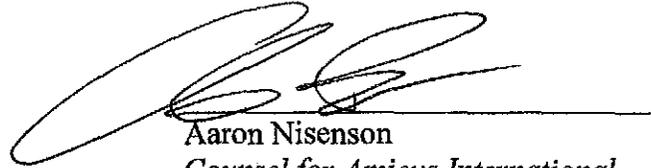
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