

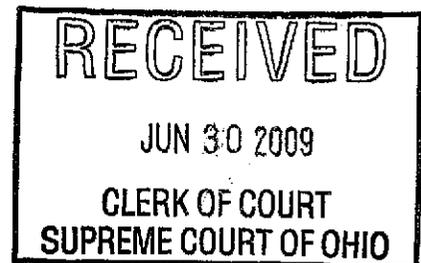
ORIGINAL

Case No. 2008-1499

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
FIFTH APPELLATE DISTRICT
STARK COUNTY, OHIO
CASE NO. 2007CA00274

STATE OF OHIO,
Plaintiff-Appellant,
v.
ANTHONY JACKSON,
Defendant-Appellee



REPLY BRIEF OF
PLAINTIFF- APPELLANT,
THE STATE OF OHIO

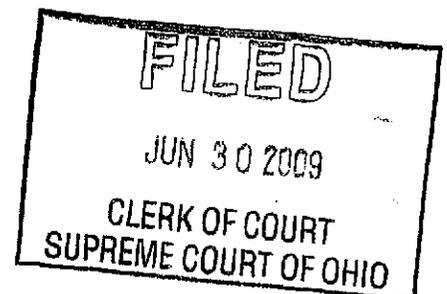
JOHN D. FERRERO
PROSECUTING ATTORNEY,
STARK COUNTY, OHIO

By: KATHLEEN O. TATARKSY
Counsel of Record
Ohio Sup. Ct. Reg. No. 0017115
Assistant Prosecuting Attorney
Appellate Division
110 Central Plaza South, Suite 510
Canton, Ohio 44702-1413
(330) 451-7897
FAX: (330) 451-7965

Counsel for Plaintiff-Appellant

BRADLEY R. IAMS
Ohio Sup. Ct. Reg. No. 0019009
220 Market Avenue South
400 Huntington Plaza
Canton, Ohio 44702
(330) 452-6400

Counsel for Defendant-Appellee
and Cross Appellant



**JOSEPH MARTUCCIO
LAW DIRECTOR
CITY OF CANTON, OHIO**

**By: KEVIN L'HOMMEDIEU
Ohio Sup. Ct. Reg. No. 0066815
Canton Law Department
218 Cleveland Avenue S.W.
Canton, Ohio 44701
330-438-4337**

*Amicus Curiae on behalf of Appellant
Canton Law Department*

**PERICLES G. STERGIOS
CITY OF MASSILLON LAW DIRECTOR**

**By: PERICLES G. STERGIOS
Ohio Sup. Ct. Reg. No. 0034537
Massillon City Law Department
Two James Duncan Plaza
Massillon, Ohio 44646
330-830-1718
*Amicus Curiae on behalf of Appellant
City of Massillon Law Director***

BUCKEYE STATE SHERIFF'S ASSOCIATION

**By: ROBERT L. BERRY
Ohio Sup. Ct. Reg. No. 00007896
503 S. High Street, Suite 200
614-221-1215**

*Amicus Curiae on behalf of Appellant
Buckeye State Sheriff's Association*

**CANTON POLICE PATROLMAN'S
ASSOCIATION**

**By: MARY LOU SEKULA
Ohio Sup. Ct. Reg. No. 0066001
122 Central Plaza, North
Canton, Ohio 44702
330-452-4005**

Amicus Curiae on behalf of Appellee

**NATIONAL FRATERNAL ORDER OF
POLICE**

**By: LARRY H. JAMES
Ohio Sup. Ct. Reg. No. 0021773**

**CHRISTINA L. CORL
Sup. Ct. Reg. No. 0067869**

**LINDSAY L. FORD
Sup. Ct. Reg. No. 0082364
CRABBE, BROWN, JAMES, LLP
500 South Front Street, Suite 1200
Columbus, Ohio 43215**

*Amicus Curiae on behalf of Appellee
National Fraternal Order of Police*

**FRATERNAL ORDER OF POLICE
OF OHIO, INC.**

**By: PAUL COX
Ohio Sup. Ct. Reg. No. 0007202
Columbus, Ohio 43215-5660
222 East Town Street
Columbus, Ohio 43215**

*Amicus Curiae on behalf of Appellee
Fraternal Order of Police of Ohio, Inc.*

OHIO MUNICIPAL LEAGUE

By: STEPHEN L. BYRON
Ohio Sup. Ct. Reg. No. 0055657
Byron & Byron Co. LPA

STEPHEN SMITH
Ohio Sup. Ct. Reg. No. 0001344

4230 State Route 306, Suite 240
Willoughby, Ohio 44094
440-951-2303

Amicus Curiae on behalf of Appellant
Ohio Municipal League

**THE OHIO PROSECUTING
ATTORNEY'S ASSOCIATION**

By: JUDITH ANTON LAPP
Ohio Sup. Ct. Reg. No. 000687

JOSEPH DETERS
Ohio Sup. Ct. Reg. No. 0012084

Assistant Prosecuting Attorney, Hamilton County, Ohio
230 East - 9th Street, Suite 400
Cincinnati, Ohio 45202
513-946-30096

Amicus Curiae on behalf of Appellant
The Ohio Prosecuting Attorney's Association

**INTERNATIONAL UNION OF POLICE
ASSOCIATIONS, AFL-CIO**

By: JOHN MICHAEL ROCA
Ohio Sup. Ct. Reg. No. 0033520

**Gallon, Takacs, Boissoneault &
Schaffer, Co., LPA**
2516 Granite Circle
Toledo, Ohio 43617
419-836-7487

AARON NISENSEN
(Pro hac vice application pending)

**International Union of Police
Associations**
1549 Ringling Blvd., 6th Floor
Sarasota, Florida 34236
941-487-2560

Amicus Curiae on behalf of Appellee
International Union of Police
Associations, AFL-CIO

OHIO ATTORNEY GENERAL RICHARD CORDRAY

By: BENJAMIN C. MIZER
Ohio Sup. Ct. Reg. No. 0083089
Solicitor General

By: ALEXANDRA T. SCHIMMER
Ohio Sup. Ct. Reg. No. 0075732
Chief Deputy Solicitor General

By: DAVID M. LIEBERMAN
(Pro hac vice application pending)
Deputy Solicitor

30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-8980

Amicus Curiae on behalf of Appellant
Ohio Attorney General Richard Cordray

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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 DOES NOT PROHIBIT A PROSECUTOR'S KNOWLEDGE OR NON-EVIDENTIARY USE OF IT.

Jackson's proposed solution to the *Garrity* issue - wait until criminal case is concluded or drop any criminal case should not be accepted by this Court.

When a police officer is suspected of criminal activity, the Police Department has a dual role to perform. First, it is responsible, as an employer, for monitoring the conduct of its employees and, if necessary, take disciplinary action. At the same time, it is responsible for carrying out its law enforcement function, which involves conducting criminal investigations. Indeed, dual purposes are routine for the majority of the state's police departments where resources are limited.

In a peculiar turn, Jackson now suggests a solution to avoid this set of dueling agendas. Jackson proposes that the state practice a kind of election of remedies - forego a criminal prosecution of the very public servants sworn to uphold the law or forego an internal investigation. Jackson's suggestion must be rejected.

When Jackson gave a *Garrity* statement to internal affairs under threat of disciplinary action, he was given "use" immunity for the contents of that statement and any "fruits" derived from it. He was not given freedom from criminal prosecution merely because the statement was turned over to the trial prosecuting attorney. Accord *Kastigar v. United States*, 406 U.S. 441, 461 (1972) ("Use immunity grants neither pardon nor amnesty."). Carrying a loaded firearm into

a liquor establishment creates a particular potential for harm. Indeed, such a charge can be accompanied by a firearm specification. *State v. Carlisle*, 2d Dist. App. No. 18960, 2002-Ohio-2274, 2279, appeal not allowed 96 Ohio St.3d 1495, 2002-Ohio 4534, 774 N.E. 2d 767, cert. denied, 537 U.S. 1146, 123 S. Ct. 946, 154 L.Ed. 2d 847 (holding that illegal possession of a firearm in a liquor permit premises with a firearm specification is a legitimate expression of the legislature's concern of the potential harm).

When a public employer turns over its internal investigation to a prosecuting attorney, it does not follow that the public employee being investigated is immune from criminal prosecution. See, e.g., *Gwillim v. City of San Jose*, 929 F.2d 465 (9th Cir., 1991) (police department did not violate officer's constitutional rights by providing to district attorney's office immunized statement obtained during internal investigation); *Pirozzi v. City of New York*, 950 F. Supp. 90 (S.D.N.Y., 1996) (civilian complaint review board did not violate officers' Fifth amendment right against self-incrimination or Fourteenth Amendment right of privacy by complying with district attorney's subpoena for record of investigation into officers' misconduct.).

Jackson's affirmative defenses not prejudiced by prosecutor's knowledge of his *Garrity* statement.

Jackson was charged with a violation of R.C. §2923.121, possessing a firearm in liquor permit premises. Jackson claims that knowledge by the prosecutor of his *Garrity* statement seriously undermined his ability to present his affirmative defenses.

Jackson's failure to explain what statements he offered during the *Garrity* interview that undermined his affirmative defenses perhaps suggest the credibility of his argument. It is as if

Jackson expects this Court to accept his unadorned protestations without inquiring as to what exactly his *Garrity* statement contained that the prosecutor did not obtain from the files of the Perry Township Police who were called to the tavern two times that evening and personally observed Jackson's possession of a firearm. Jackson suggests that the prosecutor learned he had been drinking alcoholic beverages from his *Garrity* statement. Yet, the prosecutor knew of his alcohol intake from the witnesses interviewed by the Perry Township Police and Jackson's own statements to them that evening. Indeed, voluntary intoxication has never been accepted as a defense to the crime of possessing a firearm in a liquor establishment. Still, the prosecutor learned no information from Jackson's *Garrity* statement as to whether he was acting within the scope of his duties that evening, an affirmative defense to the charge. Jackson had been placed on administrative leave as the result of pending charges of leaving the scene of an accident and driving while under the influence, facts not obtained from his *Garrity* statement. And Jackson's statement to internal affairs was given after a public preliminary hearing was held in Massillon Municipal Court at which the Perry Township Police testified to the events that evening.

To be sure, Jackson can point to no part of his *Garrity* statement that gave the prosecutor the "clear advantage" Jackson asserts, particularly where evidentiary methods are available to suppress its use at trial. Jackson's argument should be recognized for what it is - a red herring - and rejected by this Court.

***Hubbell* does not support Jackson's idea of use immunity.**

Jackson's reliance on *United States v. Hubbell*, 530 U.S. 27, 120 S.Ct. 2037, 147 L.Ed.2d 24 (2000) without any indication of how the document production at issue there relates to the *Garrity* issue here is unavailing. Jackson suggests that *Hubbell* affirms the proposition that non-

evidentiary use of an immunized statement was what the *Kastigar* court really meant. A plain reading of *Hubbell*, however, does not lend support for this proposition.

In *Hubbell*, the respondent entered a plea agreement in which he agreed to furnish the government with “full, complete, accurate, and truthful information about matters relating to the government’s Whitewater investigation.” 530 U.S. at 30. The government then initiated a second investigation to determine whether the respondent was complying with this agreement. It served respondent with a subpoena seeking production of 11 categories of documents which, essentially encompassed information about matters relating to Whitewater. 530 U.S. at 31. The respondent invoked the Fifth Amendment and was eventually granted use and derivative use immunity under 18 U.S.C. Sections. 6002 and 6003(a). The respondent then produced the documents, some 13, 000 pages, and the government subsequently attempted to prosecute respondent for tax evasion and wire fraud based on their contents. 530 U.S. at 31. At a *Kastigar* hearing, the government admitted that while it did not need to introduce the documents themselves at trial, it could not prove that all the evidence it used to obtain the indictment and proposed to use at trial was derived from legitimate, wholly independent sources - a classic example of derivative use.

When the case reached the Supreme Court, the court granted certiorari on the limited issue to “determine the precise scope of a grant of immunity with respect to the production of documents in response to a subpoena.” 530 U.S. at 34.

The Supreme Court concluded that “respondent’s act of production had a testimonial aspect, at least with respect to the existence and location of the documents” and, as a result, the “respondent could not be compelled to produce those documents without first receiving a grant

of immunity under Section 6003. 530 U.S. at 45. The Court concluded that the indictment against respondent had to be dismissed because the government could not prove that the evidence it would use at trial was derived from legitimate sources wholly independent from the testimonial aspect of respondent's immunized conduct. 530 U.S. at 45.

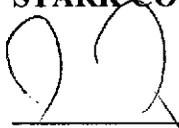
The case before this Court is different in many respects from that in *Hubbell*. To begin with, in *Hubbell* the precise issue was the grant of immunity with respect to production of documents. Respondent's acknowledgment of the existence of certain records sought in the government's subpoena would be directly incriminating. In the case here, Jackson fails to give a credible reason why the mere knowledge by the trial prosecutor of his *Garrity* statement poses a real danger of incrimination. To be sure, the *Hubbell* Court makes the very point that Jackson rails against - that use and derivative use immunity is coextensive with the scope of the constitutional privilege against self incrimination - the Fifth Amendment.

The *Hubbell* Court did nothing more than forbid the derivative use of documents produced under immunity. The State here has never suggested that it can use the *Garrity* statement directly or derivatively in obtaining the indictment and preparing the case for trial. Instead, it demonstrated that it intended to prosecute Jackson through sources wholly independent of his statement to internal affairs. *Hubbell* simply does not lend support to Jackson's proposition that knowledge of an immunized statement by a prosecutor is fatal to criminal prosecution because of some phantom non-evidentiary use.

CONCLUSION

The State of Ohio, appellant here, respectfully requests that this Court reverse the decision of the Court of Appeals, Fifth Appellate District, as it relates to its finding of a *Garrity* violation and affirm its decision reinstating the Jackson indictment for violation of illegally possessing a firearm in a Class D liquor establishment, a violation of R.C. §2923.121.

**JOHN D. FERRERO, #0018590
PROSECUTING ATTORNEY,
STARK COUNTY, OHIO**

By: 

Kathleen O. Tatarsky
Ohio Sup. Ct. Reg. No. 0017115
Assistant Prosecuting Attorney
Appellate Section
110 Central Plaza, South - Suite 510
Canton, Ohio 44702-1413
(330) 451-7897

FAX: (330) 451-7965

Counsel for Appellant

PROOF OF SERVICE

A copy of the foregoing REPLY BRIEF OF APPELLANT was sent by ordinary U.S. mail, postage prepaid, this 29th day of June, 2009, to BRADLEY R. IAMS, counsel for defendant-appellee, by ordinary U.S. mail, postage prepaid, at 220 Market Avenue, South, 400 Huntington Plaza, Canton, Ohio 44702, KEVIN L'HOMMEDIEU of the Canton Law Department -218 Cleveland Avenue S.W., Canton, Ohio 44701; PERICLES G. STERGIOS of the Massillon City Law Department -Two James Duncan Plaza, Massillon, Ohio 44646; ROBERT L. BERRY of the Buckeye State Sheriff's Association - 503 S. High Street, Suite 200, Columbus, Ohio 43215; STEPHEN L. BYRON and STEPHEN SMITH of the Ohio Municipal League -Byron & Byron Co. LPA, 4230 State Route 306, Suite 240, Willoughby, Ohio 44094; JUDITH ANTON LAPP and JOSEPH DETERS on behalf of the Ohio Prosecuting Attorneys' Association, Assistant Prosecuting Attorney, Hamilton County, Ohio - 230 East - 9th Street, Suite 400, Cincinnati, Ohio 45202; BENJAMIN C. MIZER, ALEXANDRA T. SCHIMMER and DAVID M. LIEBERMAN on behalf of the Ohio Attorney General Richard Cordray - 30 East Broad Street, 17th Floor, Columbus, Ohio 43215 ; MARY LOU SEKULA - 122 Central Plaza, North, Canton, Ohio 44702; LARRY H. JAMES, CHRISTINA L. CORL AND LINDSAY L. FORD on behalf of the National Fraternal Order of Police - 500 South Front Street, Suite 1200, Columbus, Ohio 43215; PAUL COX, on behalf of Fraternal Order of Police of Ohio, Inc. - 222 East Town Street, Columbus, Ohio 43215; JOHN MICHAEL ROCA on behalf of International Union of Police Associations, AFL-CIO - 3516 Granite Circle, Toledo, Ohio 43617 and AARON NISENSEN, on behalf of International Union of Police Associations, AFL-CIO - 1549 Ringling Blvd., 6th Floor, Sarasota, Florida 34236.



Kathleen O. Tatarsky
Sup. Ct. Reg. No. 0017115

Counsel for Appellant