

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

CASE NO. 2008-1499

Plaintiff-Appellant,

vs.

ANTHONY JACKSON,

Defendant-Appellee.

ON APPEAL FROM THE COURT OF APPEALS  
FIFTH APPELLATE DISTRICT  
CASE NO. 2007-CA-0027

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**MOTION FOR RECONSIDERATION OF  
PLAINTIFF-APPELLANT, THE STATE OF OHIO**

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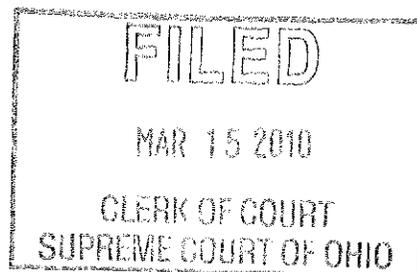
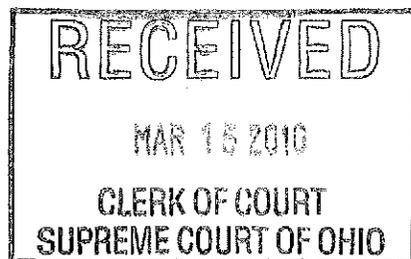
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*Ohio Attorney General Richard Cordray*

The State of Ohio respectfully asks this Court to reconsider its decision released March 3, 2010, *State v. Jackson*, \_\_\_\_\_ Ohio St. 3d \_\_\_\_\_, 2010-Ohio-621, \_\_\_\_\_ N.E.2d \_\_\_\_\_ pursuant to S. Ct. R. Proc. XI,§2. The purpose of this motion is not to reargue the merits of the case, but rather to request this Court to reconsider it. The syllabus does not correctly reflect the fractured 3-2-2 decision of this Court and the Court did not consider the effect of its opinions.

This Court has held that “[o]nly that what is stated in a syllabus or in a *per curiam* opinion represents a pronouncement of the law of Ohio by this court.” *Masheter v. Kebe* (1976), 49 Ohio St. 2d 148, 150, 359 N.E. 2d 74, 76, citing *State ex rel. Canada v. Phillips* (1958), 168 Ohio St. 191, 151 N.E. 2d 722. See also Rule 1(B)(1) of Supreme Court Rules for the Reporting of Opinions (the law stated in a Supreme Court opinion is contained within its syllabus (if one is provided), and its text, including footnotes)

Here, there is no majority opinion over the crucial issue of whether the appropriate remedy for improper use of a public employee’s *Garrity* statement in preparation for trial after indictment is to suppress that statement and all evidence derived from statement.

Justice Lanzinger, writing the lead opinion, in which Justices Moyer and O’Connor concur, wrote “.....when a trial court rules after a *Kastigar* hearing that a prosecutor has used the defendant’s compelled statement in preparation for trial after indictment, the appropriate remedy is for the trial court to suppress that statement and all evidence derived from the statement.”

*Jackson* at ¶32.

The concurring Justices O'Donnell and Pfeifer, on the other hand, disagree with the suppression remedy for a *Garrity* violation during trial preparation. Justice O'Donnell, in a separate concurrence wrote:

Because knowledge of the information contained in a *Garrity* statement may imperceptibly influence a prosecutor's view of a case, the government cannot plausibly deny *any* use of a defendant's compelled statement when the prosecutor has read it before trial. Therefore, I would hold that when a prosecutor has reviewed a defendant's *Garrity* statement before trial and fails to establish an independent source for the evidence to be used at trial, dismissal of the indictment rather than suppression of the evidence is the appropriate remedy.

*Jackson* at ¶39.

The proper remedy for a prosecutor's knowledge of a *Garrity* statement during trial preparation, , therefore, did not receive the support of four justices of this Court. Is the remedy to suppress the *Garrity* statement and any fruits thereof or is the remedy an outright dismissal of the indictment?

The fractured 3-2-2 opinion leaves the law unclear as to how knowledge by the trial prosecutor of a *Garrity* statement should be treated.

This Court did not fully address the possibility that denying prosecutors access to a *Garrity* statement might cause them to violate their constitutional obligation to reveal exculpatory evidence. This Court held that such a statement "is by definition made by the defendant, who already has knowledge of its contents."<sup>1</sup> While true, it does not address a scenario that is far more likely. Though a defendant obviously knows of exculpatory information given in his own *Garrity* statement, he would certainly not know of exculpatory evidence later gathered by investigators

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<sup>1</sup> *Id.*, at ¶28.

that derived from the statement. This Court did not address exculpatory evidence that *derives* from a *Garrity* statement. Unless clarified or reconsidered by this Court, a public employer will now refuse to give the prosecutor exculpatory evidence that derives from a *Garrity* statement, especially in light of this Court’s warning that they may incur civil liability for doing so.

Additionally, this Court did not address how its ruling can be reconciled with Ohio’s public records laws. This Court cautioned that a public employer may be liable in damages for turning over a *Garrity* statement to prosecutors. If that is so, may a public employer refuse to give a *Garrity* statement to a prosecutor who, however unlikely, requests it in accordance with Ohio’s public records law? Will the public employer be liable in damages under the public records law? Unless this Court clarifies this portion of the decision and specifically crafts an exception to Ohio’s public records law for *Garrity* statements, it appears public employers will have the Hobsen’s choice of choosing between being liable in damages under *Garrity* or under Ohio’s public records law.

In a similar vein, this Court did not address what happens if a prosecutor learns of the contents of a *Garrity* statement from the media, which obtains it through Ohio’s public records law. According to this Court’s decision, that prosecutor can no sooner discharge their *Kastigar* burden than if they had obtained the statement directly from the public employer. That is because even if they were to learn the contents of the statement from the media, that too would give them the “invaluable information, including the names of witnesses, potential defenses, and other information that could influence trial strategy” that this Court said was impermissible.<sup>2</sup>

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<sup>2</sup> Id. at ¶24.

Finally, this Court did not fully address the fact that *eight* federal district courts of appeal have refused to follow *McDaniels'* lead and have rejected the argument that mere knowledge is tantamount to "use." Many of those courts even refused to bar the prosecutors with knowledge of the immunized statement from prosecuting the defendant. Yet this Court held not even that was enough, barring the prosecution altogether.

The State of Ohio respectfully asks this Court to reconsider its opinions or, at the minimum, clarify them to offer assistance to the courts below facing a *Garrity* challenge from a public employee.

Respectfully submitted,

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**PROOF OF SERVICE**

A copy of the foregoing Motion for Reconsideration was sent by ordinary U.S. mail, postage prepaid, this 12<sup>th</sup> day of March, 2010, 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, 17<sup>th</sup> Floor, Columbus, Ohio 43215 and MARY LOU SEKULA - 122 Central Plaza, North, Canton, Ohio 44702.



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