Garrity
&
The Administrative Interview

The Fifth Amendment provides that no person shall be compelled to give testimony against him or herself. This right against self-incrimination is not absolute. The government has the power to compel a person's testimony even when that testimony is incriminating. The government must however provide the person so testifying with protection that is similar to the Fifth Amendment privilege. The mechanism that the government may compel incriminating testimony is immunity.

Courts have recognized two types of immunity. *Transactional Immunity* is a type of immunity under which a person cannot be prosecuted for the transaction or offense for that they have been granted immunity. For example, if Officer Dibbles committed a theft while working as a police officer and was granted transactional immunity in exchange for his compelled testimony, he could not be criminally charged with the theft offense. Officer Dibble could not be charged criminally even if there was evidence, totally independent of his compelled testimony that would support a criminal conviction.

Testimonial or Use/Derivative Use Immunity is a form of immunity that protects the person giving incriminating statements from the use of his or her statements or any evidence gained directly or indirectly from the person's statement from being used against them in a criminal prosecution. Under a grant of testimonial immunity a criminal prosecution may still be brought, however the prosecution must be based upon evidence that is independent of the compelled immunized statement.

The federal courts and most state courts recognize *testimonial or use/derivative use* immunity.[1] In *U.S v. Apfelbaum* a former district attorney for Philadelphia was granted immunity in accordance with the federal immunity statute after he exercised his Fifth Amendment privilege before a federal grand jury. The grand jury was investigating a staged robbery at a car dealership where it was believed that Apfelbaum might have aided the owners of the dealership. Following the grant of immunity Apfelbaum testified. During his testimony, Apfelbaum denied trying to locate Mr. Brown, one of the dealership owners, while on a trip to Florida. Apfelbaum also denied lending money to Brown. The government charged and convicted Apfelbaum of giving false statements. At his trial, portions of his immunized testimony, including items that were not false, were introduced as evidence to prove that Apfelbaum knowingly gave false testimony following the grant of immunity.

[1] See, *U.S. v. Apfelbaum*, 445 U.S. 115 (1980).

The Third Circuit Court of Appeal agreed with Apfelbaum's argument that only the false statements should have been admitted at his trial and not the other portions of his testimony that were used by the government to establish his knowledge that the false statements were, in fact, false. The United States Supreme Court overturned the decision of the Third Circuit. A number of the Court's observations are instructive. The Court pointed out that immunity does not have to be a mirror image of the Fifth Amendment privilege. For example, a person who exercises their Fifth Amendment privilege and is not subsequently forced to testify does not risk being caught making a false statement because they have made no statement at all. Further, immunized testimony may be used in a civil trial against the person who made the statement. In some circumstances, the immunized testimony may also be used to impeach the person who gave the testimony. As the Court pointed out in *Apfelbaum,* a person who has been immunized cannot be viewed as holding the same position as a person who has remained silent and not forced to give testimony. "This Court has never held, however, that the Fifth Amendment requires immunity statutes to preclude all uses of immunized testimony. Such a requirement would be inconsistent with the principle that the privilege does not extend to consequences of a non-criminal nature, such as threats of liability in civil suits, disgrace in the community, or the loss of employment." Cite omitted.

Immunity Granted under *Garrity*

Most grants of immunity occur under the jurisdiction of a court in accordance with a statute. See E.g. 18 U.S.C. 6002. One type of immunity that developed in the context of investigations of public and government employees is that is commonly referred to in the law enforcement setting as a *"Garrity"* interview. *"Garrity"* interviews and *"Garrity"* warnings derive their label from a United States Supreme Court decision, *Garrity v. New Jersey.*[2]

The *Garrity* case involved officers who were questioned regarding a ticket-fixing scheme. The officers were informed that their answers could be used against them in a criminal case and informed that the failure to answer could result in their dismissal from the police department in accordance with an existing state statute. The officers agreed to answer and were subsequently charged criminally. In its review of the case the United States Supreme Court held that the choice between incriminating one's self and losing one's livelihood amounted to coercion which is prohibited under the Constitution. Statements taken as the result of this type of coercion cannot be used in a criminal case. In essence, the Court held that when a police officer is coerced, under threat of discipline, to give a statement, the officer is

[2] *Garrity v. New Jersey*, 385 U.S. 493 (1967).

immunized against the use of the statement in a subsequent criminal prosecution.

Shortly after the *Garrity* case, the Court reviewed a case that was the flip-scenario. In *Gardner v. Broderick*,[3] the Court was confronted with another investigation involving a police officer. In *Gardner*, a police officer was subpoenaed to appear before a grand jury investigating the bribery and corruption of police officers. An officer appearing before the grand jury exercised his Fifth Amendment privilege after being warned that his failure to sign a waiver of the privilege might lead to his dismissal from the police department. Because he refused to waive the privilege against self-incrimination, the officer was fired. In its review of the case, the Court decided that a police officer may not refuse to answer questions relating to the performance of his or her duties as long as the officer is immune from the use or derivative use of his or her answers in a subsequent criminal prosecution. However, an officer cannot be forced to waive his or her 5th Amendment privilege under the threat of dismissal from his or her position. An officer cannot be fired for failing to relinquish the 5th Amendment privilege.

A number of cases have been decided since *Garrity* and *Gardner* interpreting the scope of protection that public employees have during administrative interviews. In reviewing these cases, one must keep in mind that these cases create a form of immunity that is in the hands of investigators. There is no review by a neutral and detached magistrate to determine if the immunity granted is appropriate under the facts of the case being investigated. Some writers have criticized this agency-imposed immunity citing the possibility of abuse.[4]

Transactional Immunity

The state of Massachusetts and, according to some commentators Alaska, are the only state that requires a grant of transactional immunity before an officer can be forced to speak regarding matters that may result in departmental discipline.[5] Officer Carney was one of several officers being investigated regarding violations of the narcotics law. On two occasions, Officer Carney was called in for interviews dealing with his fitness for duty. On both occasions, he was given Miranda warnings and informed that his answers could be used against him in a criminal proceeding. When Carney refused to waive his rights, the investigating officer acknowledged this refusal and then ordered Carney to answer questions under the threat of discipline. In both instances, Carney maintained his silence after the investigating

[3] *Gardner v. Broderick*, 392 U.S. 273 (1967),
[4] See, "Code of Silence: Police Shootings and the Right to Remain Silent" Robert Myers, 26 Golden Gate U. L. Rev. 497 (1996).
[5] *See, Baglioni v. Chief of Police of Salem, 656 N.E. 2d 1223 (1995), Carney v. Springfield*, 532 N.E. 2d 631 (Mass. 1988).

officer failed to adequately explain the consequences of Carney's refusal. During the second interview, Carney's attorney sought a clarification of the threat of discipline and asked what steps had been taken to grant Carney immunity. Carney was suspended for his refusal to answer questions.

The Supreme Judicial Court of Massachusetts dealt with two issues in this case. First, whether the informal immunity offered in an administrative interview with a public employee is valid. The SJC acknowledged that absent a valid grant of immunity an officer could continue to exercise his or her constitutional privilege and refuse to answer questions. In resolving this initial question, the court acknowledged that informal grants of immunity "under the Fifth Amendment to the United States Constitution can also arise where public employees are compelled to answer questions narrowly and specifically related to their job performance."

In reviewing the warnings giving to Carney, the SJC concluded: "Where public employers compel answers in an investigation, however, the employer, at the time of the interrogation, must specify to the employee, the precise repercussions (i.e., suspension, discharge or the exact form of discipline) that will result if the employee fails to respond." The court found that the investigating officer failed to give Carney sufficient warnings.

On the second and more significant issue, the SJC found that in order to comport with the Massachusetts Declaration of Rights, an officer who is forced to answer incriminating questions under threat of job action, must be granted transactional immunity.

In a more recent case, the Supreme Judicial Court re-affirmed the requirement of transactional immunity under the Massachusetts Declaration of Rights, but further explained that such a grant would only translated to use/derivative use immunity in a federal prosecution.[6]

In *Baglioni,* union officials for the Salem Police Department sought to enjoin the police department from ordering two officers to take a polygraph examination unless the officers were first granted transactional immunity. The officers were subjects of an investigation of malicious damage to another officer's locker and filing a false police report. The district attorney for the Eastern District of Massachusetts had written a letter to the chief of police declining criminal prosecution on these matters; however the officers believed that the letter was insufficient to provide them with transactional immunity.

The Supreme Judicial Court reviewed the power of the district attorney to grant immunity outside of the immunity statute. The court asserted: "We shall assume, without deciding, that a district attorney has authority to grant

[6] Baglioni v. Chief of Police of Salem, 656 N.E. 2d 1223 (Mass. 1995).

immunity to a person with respect to events as to which that person is obliged to make statements at the risk of loss of employment. The district attorney's authority extends, however, only to the limits of his district. Immunity from prosecution by a district attorney in another district, by the Attorney General, or by a United States attorney does not automatically flow from such a grant of immunity… One who persists in the assertion that the promise does not fully protect his or her rights against self-incrimination must be assured that the purported immunity (a) is effective Statewide and (b) protects against the use of any statements in the prosecution of any Federal crime… The fact that an effective State grant of transactional immunity only translates into use and derivative use immunity for Federal purposes presents no obstacle to compelling a person to answer questions… The plaintiff officers have no right to insist on transactional immunity from Federal prosecution.

Officers from Burlington Vermont sought a similar interpretation of the Vermont Constitution when they sought a declaratory judgment that the department's promise of use/derivative use immunity was insufficient to protect officers against self-incrimination.[7] In BPOA, an officer, charged with violating department rules on domestic abuse, was ordered to attend an interview and answer questions. He was informed that his refusal of the order would lead to his dismissal.

The Supreme Court of Vermont reviewed the options available with respect to grants of immunity. The court noted that the city has no power of prosecution "and certainly no power to offer immunity from prosecution by the State of Vermont." The court went on to express concern "about the prospect of police officers immunizing each other through disciplinary investigations, making decisions without the involvement of prosecutors. Even if we assume everyone will act in good faith, a very real risk exists that officers who commit criminal acts will escape criminal responsibility because of acts taken in disciplinary investigations." The court rejected the union's request for a declaratory judgment and went on to make the following suggestion: "Ideally, the Legislature should require that a prosecutor be informed of pending disciplinary investigations, and the prosecutor should have the power to prevent coerced interrogation that would lead to immunity claims that would defeat a criminal prosecution."

Compulsion as the Triggering Mechanism
Employees have Rights against Compelled, Incriminating Statements but No Right to *Garrity* Immunity

The right of government employees against self-incrimination requires compulsion as a triggering mechanism for immunity against the

[7] . *See, Burlington Police Officers' Association (BPOA) v. City of Burlington,* 689 A.2d 1071 (Vt. 1996).

use/derivative use of their statements in a criminal prosecution.[8] As with any statement implicating the Fifth Amendment privilege against self-incrimination, statements must also be incriminating and testimonial.

In *Harrison,* the plaintiff, a deputy who had been terminated sued the county sheriff's department from which he had been fired. Deputy Michael Harrison had become the subject of an investigation into property that had been missing from the sheriff's department property room. The internal investigation ran concurrently with a criminal investigation into the missing items. On three occasions, Deputy Harrison and other officers were called in to give statements to the deputies investigating the thefts. Prior to each statement Deputy Harrison was afforded his "*Garrity* rights."

After the three statements, Deputy Harrison was notified that a pre-disciplinary conference would take place. "At this conference, Plaintiff was given a form explaining his *Garrity* rights but was informed that no statements were being compelled—he need not say anything." Harrison's attorney informed him that since no statements were being compelled, *Garrity* immunity did not exist. Deputy Harrison exercised his Fifth Amendment privilege and remained silent. Following the conference, Deputy Harrison was suspended without pay. A second conference was held at which time Deputy Harrison again remained silent due to a lack of *Garrity* protection. Although the criminal investigation concluded with no criminal charges brought against Harrison, he was terminated.

On appeal, Deputy Harrison claimed that his Fifth Amendment right against self-incrimination had been violated by the department's refusal to provide *Garrity* protection at every stage of the administrative process. In its review of the cases, the United States Court of Appeals for the 11th Circuit concluded, *"Garrity* only prohibits the compulsion of testimony that has not been immunized… In other words, the employee may not be both compelled to testify (or make a statement) and be required to waive his Fifth Amendment privilege…. An 'employee's rights are imperiled only by the combined risks of both compelling the employee to answer incriminating questions and compelling the employee to waive immunity from the use of those answers,'" in a criminal prosecution. "The result of these prohibitions is that a public employee cannot be terminated solely for the exercise of his Fifth Amendment privilege." Conversely, a public employee's statement, compelled under the threat of the loss of their job, cannot be used against that employee in a subsequent criminal trial.

Not Every Consequence of Invoking the Fifth Amendment Privilege is Sufficiently Severe to Amount to Coercion

[8] *See e.g., Harrison v. Wille,* 132 F.3d 679 (11th Cir. 1998).

A disciplinary action, short of termination may not be viewed as coercion to waive the Fifth Amendment privilege against self-incrimination.[9] In the *Chan* case, an officer won a judgment against the Chicago Police Department after he was transferred from a prestigious assignment following his refusal to answer questions before a grand jury based upon his Fifth Amendment privilege against self-incrimination. Prior to his transfer Officer Chan was assigned to the Intelligence Division of the Chicago Police Department and was detailed to a multi-jurisdictional task force on terrorists. In that assignment, Officer Chan had a take-home car and received significant overtime pay. He lost these two benefits after his transfer.

In overturning the judgment for Officer Chan the United States Court of Appeals for the 7th Circuit concluded that the "jurisprudence of the Supreme Court and this court also makes clear that not every consequence of invoking the Fifth Amendment is considered sufficiently severe to amount to coercion to waive the right. Rather, the effect must be sufficiently severe to be 'capable of forcing the self-incrimination which the amendment forbids' (cite omitted)." The court noted that Chan only lost the two incidental benefits, overtime and take-home car that went with his previous position and concluded that Deputy Superintendent Wodnicki was entitled to qualified immunity with respect to his transfer of Chan.

Refusing To Answer Following a Grant of Immunity

***"If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, Garrity v. New Jersey, supra, the privilege against self-incrimination would not have been a bar to his dismissal." Gardner v. Broderick,* 392 U.S. 273 (1968).**

In an administrative interview, where an officer has been afforded use immunity under *Garrity*, the officer has no right to refuse to answer questions related to his or her duties as a police officer and may be subject to discipline for the failure to answer.[10] The *Hill* case provides a good example. *Hill* revolved around a photograph of a beaten detainee that disappeared after being placed on the desk of supervising officer, J.D. Hill. A fellow officer reported that he had placed the photograph on Hill's desk in Hill's presence. During the investigation Hill refused to answer questions about the incident and refused to take a polygraph exam. Hill was subsequently terminated from his position. Hill sued the Sheriff alleging, among other things, that his

[9] *See Chan v. Wodnicki*, 123 F.3d 1005 (7th Cir. 1997); cert. denied 522 U.S. 1117 (1998).
[10] *See, E.G., Hill v. Johnson*, 160 F. 3d 469 (8th Cir. 1998).

Fifth Amendment rights had been violated. In its review of the case the United States Court of Appeal for the 11th Circuit observed: "As long as a public employer does not demand that the public employee relinquish the employee's constitutional immunity from prosecution, however, the employee can be required to testify about performance of official duties or to forfeit employment. (Cites omitted.) Given 'the important public interest in securing from public employees an accounting of their public trust, public employees may be constitutionally discharged for refusing to answer potentially incriminating questions concerning their official duties if they have not been required to surrender their constitutional immunity' The Fifth Amendment is violated only by the combined risks of both compelling the employee to answer incriminating questions and compelling the employee to waive immunity from the use of those answers."[11]

After reviewing a transcript of Hill's last interview, the court concluded that it was made clear that the matter was administrative. As a result, the court dismissed the lawsuit.

Is *Garrity* Immunity Self-Executing?

When does the protection under the *Garrity* case apply? Some courts have found that immunity under *Garrity* is self-executing any time an officer is asked to answer questions that may be incriminating.[12] Yet the determination as to whether immunity attaches may very well depend on who is asking the questions.[13] In *Benjamin v. Montgomery,* two officers were terminated following their refusal to testify in court after being subpoenaed by the defendants in a case involving the shooting of a police officer. Upon being called to the witness stand, the two officers refused to testify concerning their investigation, citing their Fifth Amendment privilege against self-incrimination. Following this refusal, the mayor ordered the officers to return to court and "divulge all information relevant to the case." The officers were subsequently recalled to the stand at which time they agreed to testify, but only because the mayor had ordered them to do so. The court refused to take the officers' testimony.

On appeal, the United States Court of Appeal for the 11th Circuit distinguished this case from their previous decisions in *Hester v. City of Midgeville*, and *Erwin v. Price.*[14] The *Erwin* case involved an officer who was terminated following his refusal to answer questions about an off-duty gun-pointing incident. When Erwin was called in for questioning, he was informed that his answers would be used for departmental purposes only and would

[11] See Also, *Jones v. Franklin County Sheriff*, 555 N.E. 2d 940 (Ohio 1990) (Deputy's discharge upheld after she refused to answer questions during internal investigation); *Martinez v. Safir*, 251 A.D. 2d 62 (S.Ct. N.Y. 1998).
[12] *See, Hester v. City of Midgeville,* 777 F. 2d 1492 (11th Cir. 1985).
[13] *See, Benjamin v. Montgomery*, 785 F.2d 959 (11th Cir. 1986).
[14] *Erwin v. Price,* 778 F.2d 668 (11th Cir. 1985).

not be used in any criminal proceeding. Erwin demanded that he be read his Miranda warnings. The investigating officer responded that Miranda did not apply and assured Erwin at least three times that his answers could not be used in a criminal prosecution. Erwin refused to answer questions and was terminated. On appeal, he argued that he never received a statutory grant of immunity and thus was entitled to refuse to answer. The court, citing their previous decision *in Hester* asserted: "We have held that the privilege against self-incrimination thus 'affords a form of use immunity which, absent a waiver, automatically attaches to compelled incriminating statements *as a matter of law.*'"

In the *Benjamin* case, the officers were being questioned by defense counsel not by public authorities conducting an internal investigation. Following their termination for refusing to testify, the officers filed suit alleging a deprivation of rights. The city of Memphis defended the suit arguing that the officers had no right to refuse to testify because the officers would have automatically obtained immunity since they were in the same situation as the officer in *Erwin.* The United States Court of Appeal for the 11th Circuit rejected the City's argument concluding that agreement with the city's position would shift the ability to grant immunity to defendants anytime they called a police officer as a witness. Thus, the first time the two officers were called to testify, they were not subjects of an investigation, they had not been directed to answer by a police authority, and therefore their answers could have been used against them in a criminal proceeding. As a result, the officers had a privilege to refuse to give testimony. The court went on to hold that once the "mayor ordered the officers to testify, the situation changed." The court concluded that the officers were terminated "solely because they conditioned their testimony on retention of their Fifth Amendment privilege" in violation of their Constitutional rights.

Civilian Review Boards and *Garrity*

As civilian oversight of police has become more common-place, the issue has arisen as to whether a civilian review board can compel statements from officers. The Court of Appeals of Colorado, ruled recently that a civilian review board could not compel an officer's statement regarding the use of excessive force.[15] *Denver v. Powell* involved two use of force incidents. In the first, the officer was accused of pushing a drunk-driving suspect's head into a wall. In the second, the officer had fatally shot a suspect. In both cases, the department and the state attorney had reviewed the officers' actions and had declined to take further action.

The civilian oversight commission that was set up by ordinance and had subpoena power subpoenaed the two officers to give testimony after the family members asked the commission to review the officers' conduct. Both

[15] See, *Denver v. Powell*, 969 P.2d 776 (1998).

officers appeared before the commission and asserted their 5th Amendment privilege against self-incrimination. The commission then sought a court order compelling the officers to speak. The district court issued the order compelling the officers to give testimony leading to the appeal in this case. In its review of the case the court of appeals ruled that the officers could not be compelled to give testimony before the review commission. The court agreed with the position of the officers that since the commission was not there employer and could not discipline the officers for not speaking, the officers would not be immune from their testimony since there would be no threat of discipline. The court rejected the commission's argument that the subpoena was sufficient state compulsion to meet the requirements of *Garrity* and *Gardner.*

Are Off-Duty Incidents within the Scope of *Garrity?*

In accordance with the ruling in *Gardner v. Broderick, supra,* a police officer may be compelled to answer questions specifically, directly, and narrowly relating to the performance of his official duties as long as he or she has not been required to waive his or her privilege against self-incrimination.

This raises the question as to how a department may deal with off-duty conduct within the context of official duties.

In *Duran v. Safir*,[16] the federal district court reviewed the dismissal of a New York City police officer who had been terminated following his refusal to testify before a grand jury. The facts of the case revolve around a business establishment, "Tropical Travel" that was being investigated by DEA and the IRS. While conducting a surveillance of Tropical Travel, agents observed Officer Duran who was visiting his sister. When Officer Duran observed a person watching the business through binoculars he approached one of the agents and questioned him. Officer Duran wrote down the license plate of one of the surveillance vehicles and returned to Tropical Travel to call the police. The agents, believing the surveillance was compromised decided to enter the business. Officer Duran was arrested but subsequently released. Some time after the incident Officer Duran was subpoenaed to the Grand Jury where he exercised is Fifth Amendment privilege. He was terminated from the New York City Police Department. After being fired, Officer Duran filed a lawsuit against the police department and federal agents involved in his arrest.

In its review of the case, the federal district court refused to grant the City of New York summary judgment. The court pointed out that the subject of the grand jury did not relate to the officer's official duties rejecting the City's argument that the officer's involvement in a money laundering scheme was relevant to his law enforcement duties. The court did not address the fact

[16] *Duran v. Safir,* 1998 U.S. Dist. Lexis 14370 (S.D. Dist. New York 1998),

that to the point of this appeal, all of the questioning was related to criminal acts and the officer, under the facts outlined in the appeal, was never offered any type of immunity.

In dealing with off-duty conduct, the United States Court of Appeals for the 6th Circuit has concluded that off-duty incidents are a proper subject for *Garrity* interviews.[17] In *Michigan State Police Troopers Association v. Hough,* the troopers association sought injunctive relief from the use of statements made by two troopers, regarding distinct off-duty incidents, from being used for any purpose. One of the troopers had given a compelled statement admitting that he had stabbed a man outside of a bar. The second trooper admitted to firing his gun in the air after drinking 10-12 beers. In both instances the troopers were off-duty. In reviewing the case, the court focused on the language from *Gardner v. Broderick*, that indicated that an officer who has been given immunity from the use of any statement in a subsequent criminal case, could be compelled to answer questions "specifically, directly, and narrowly relating to the performance of official duties." The court held that the questions in these two instances fit the criteria set out in *Gardner v. Broderick*. The court concluded that the officers' off-duty conduct was related to their official duties asserting: "We reject the notion that a policeman can fight crime by day and commit crime by night with no cost to his effectiveness as a policeman. As the district court's opinion correctly points out, criminal conduct by police officers—whenever it occurs—tends to reduce public trust in the police. It draws their judgment into serious question, and it opens up the officers to the possibility of impeachment when they appear in court as witnesses. The state has an obvious and legitimate interest in a law-abiding police force, and the questioning of the troopers here was in furtherance of that interest."

Once Immunized, Officer must tell the Truth

Two recent cases from the United States Supreme Court make it clear that once a public employee is granted immunity by compelling the employee to respond to questions in an administrative interview, the employee must tell the truth or face exposure to further discipline or criminal charges.[18]

LaChance v. Erickson involved the questioning of federal employees. In each of the cases consolidated in this appeal, the employees made false statements to agency investigators with respect to their alleged misconduct. The employees were subsequently disciplined for the underlying charges and the charge of giving the false statements. The employees challenged the use of their false statements to support additional disciplinary charges.

[17] *See*, *Michigan State Police Troopers Association v. Hough*, 872 F.2d 1026 (1989).

[18] See, *LaChance v. Erickson*, 522 U.S. 262 (1998); *Brogan v. U.S.*, 522 U.S. 398 (1998).

In rejecting the claims of the employees, the United States Supreme Court citing *Bryson v. U.S.,* 396 U.S. 64 (1969), asserted " Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them. A citizen may decline to answer a Government question, or can answer it honestly, but cannot with impunity knowingly and willfully answer it with a falsehood." The court concluded that if the Government's questions would have exposed the employees to criminal prosecution, they could have asserted their Fifth Amendment privilege. However, they had no right to give false statements regarding their conduct in this internal investigation.

A week later, the United States Supreme Court decided that an "exculpatory no" in response to Government questioning, would not be protected where the "no" is false.[19] In this case, James Brogan, a union official was charged criminally with making a false statement to government officials under 18 U.S.C. § 1001. This particular statute has extreme significance in the context of investigations regarding police misconduct since most police actions fall within the jurisdiction of the Federal Government.

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both." 18 U.S.C. § 1001.

While serving as a union official James Brogan accepted cash and gifts from a company whose employees were represented by Brogan's union. Agent from the IRS and the Department of Labor visited Brogan's home and asked him if he had ever received gifts from this company. Brogan's response was "no". Prior to the review of this case a number of Circuit Courts had recognized an "exculpatory no" doctrine that would bar a prosecution for false statements based on an exculpatory no answer.

In rejecting the exculpatory no doctrine the Court reasoned that "neither the text nor the spirit of the Fifth Amendment confers a privilege to lie. 'Proper invocation of the Fifth Amendment privilege against compulsory self-incrimination allows a person to remain silent, but not swear falsely.'" [20]

[19] *Brogan v. U.S.* 522 U.S. 398 (1998).
[20] Citing, *U.S. v. Apfelbaum*, 445 U.S. 115 at 117 (1980).

Lying in the Context of *Garrity*

United States v. Veal exemplifies the consequences of a false statement made pursuant to *Garrity* immunity, particularly where the underlying offense falls within the jurisdiction of the Federal Government.

The facts in *Veal* surround the Street Narcotics Unit (SNU) of the Miami Police Department. On December 16th of 1988, the chief of police received a letter from an anonymous source indicating that a group of unidentified drug dealers had met at 7th Avenue and 32nd Street NW. in Miami and had contracted to kill an SNU officer, Detective Camacho. The officers of the SNU were aware that a drug dealer, Leonard Mercado lived at the location of the reported meeting. Officers Camacho, Veal, Watson and Haynes were informed of the threat.

While going to an unrelated sting operation, Officers Camacho, Veal, Watson and Haynes, accompanied by Officers Sinclair and Trujillo, proceeded to Mercado's house. The officers exited three vehicles and approached Mercado. Detective Camacho led Mercado into the house. In the next few moments the officers lowered the curtains and closed the door to the house. At some point Officers Camacho and Sinclair called for assistance. When Officer Mary Reed arrived, the officers on scene were standing over Mercado's body and invited to get a "kick in" which she declined. A number of witnesses observed Camacho when he returned to the station. None of the witnesses observed anything regarding Camacho's appearance that would be indicative of his being assaulted. However, when Camacho exited the Lieutenant's office the witnesses observed that his shirt was now ripped in the area of his chest and his sleeve. In addition, a freelance photographer at the scene of the incident photographed Camacho after the incident. The photograph showed that Camacho's shirt was undamaged.

In statements taken on December 17, 1988, officers Veal, Watson, and Haynes "disavowed touching Mercado, or observing any contact with him, or having any knowledge of the cause of his injuries and also denied meeting at the police department after Mercado's death to discuss the incident… Veal Watson and Haynes unequivocally avowed that when they entered Mercado's residence, the struggle was over and that the injured Mercado was lying on the floor." The statements were clearly contradicted by blood spattering evidence that was reviewed by Government experts.

In 1990, Officers Camacho, Veal, Haynes, Watson and Sinclair were charged with a criminal violation of Mercado's civil rights under 18 U.S.C.

§241 and 242. The trial judge suppressed the officers' statements to investigators after finding that the statements, which were compelled, fell within the scope of *Garrity.* [21] The trial ended with a hung jury on the violation of civil rights count and an acquittal on the conspiracy to violate civil rights count.

In 1993, a federal grand jury indicted Officers Veal, Watson and Haynes with conspiring to obstruct the due administration of justice in violation of 18 U.S.C.§1503 "and engaging in misleading conduct designed to hinder, delay and prevent the communication of information relating to the possible commission of a federal offense to a federal law enforcement officer or judge in violation of 18 U.S.C. § 1512 and, in Count II with **knowingly misleading state investigators regarding the true circumstances of the death of Mercado with the intent to prevent the communication of information relating to the possible commission of a federal offense in violation of 18 U.S.C. §§ 1512 (b) (3) and 2.** The remaining counts charged them with perjury…and false statements." After a ten week trial, Camacho, Veal Haynes and Watson were all convicted on Count II, **knowingly misleading state investigators regarding the true circumstances of the death of Mercado with the intent to prevent the communication of information relating to the possible commission of a federal offense in violation of 18 U.S.C. §§ 1512 (b) (3) and 2** and were acquitted of all other charges. The officers brought this appeal of their convictions. The officers argued that their statements made pursuant to *Garrity* immunity were "forever barred from use in any prosecution, including one for perjury, false statements, or obstruction of justice."

In its review of the case, the United States Court of Appeals for the 11th Circuit reviewed the Supreme Court precedent on these issues. Citing *LaChance* and *Apfelbaum*, supra, the court asserted: "When an accused has been accorded immunity to preserve his right against self-incrimination, he must choose either to relinquish his Fifth Amendment right and testify truthfully, knowing that his statements cannot be used against him in a subsequent criminal prosecution regarding the matter being investigated, or continue to assert the privilege and suffer the consequences. There is no third option for testifying falsely without incurring potential prosecution for perjury or false statements."

In applying the *Garrity* analysis the court held: "An accused may not abuse *Garrity* by committing a crime involving false statements and thereafter rely on *Garrity* to provide a safe haven by foreclosing any subsequent use of such statements in a prosecution for perjury, false statements, or obstruction of justice…. Although an accused may not be forced to choose between incriminating himself and losing his job under *Garrity,* neither *Garrity* nor the Fifth Amendment prohibits prosecution and punishment for false statements or other crimes committed during the *making* of *Garrity*-protected statements.

[21] *See United States v. Camacho,* 739 F. Supp. 1504 (S.D. Fla. 1990).

Giving a false statement is an *independent* criminal act that occurs when the individual makes the false statement; it is separate from the events to which the statement relates, the matter being investigated."

In a collateral issue, Veal, Watson, Haynes and Camacho also contested the use of statements they gave to state investigators as falling within the scope of 18 U.S.C. §1512 (b) (3). The officers argued, "acceptance of the plain language of the statue would federally criminalize every false statement made by anyone to any police officer. The court rejected this argument citing the statute's requirement of a connection between the statement and its likelihood of being presented to a federal agency or federal judge. The officers also argue that they would have no way of knowing that statements given to state investigators would be communicated to federal authorities "relative to a federal crime or investigation.

The court concluded that statements given to state investigators did fall within the scope to the statute. The statute is based upon the "federal interest of protecting the integrity of potential federal investigations by ensuring that transfers of information to federal law enforcement officers and judges relating to the possible commission of federal offenses be truthful and unimpeded." "All that was required for Veal, Watson and Haynes's violation of § 1512 (b) (3) was the **possibility or likelihood that their false or misleading information would be transferred to federal authorities irrespective of the government authority represented by the initial investigators."** The court went on to point out that it does not matter if the person giving the false statement is aware of the federal nature of the crime about "which he provides information because the statute criminalizes the transfer of misleading information which actually relates to a potential federal offense, regardless of whether the communicator of such information knows or believes that the crime about which he knowingly provides false or misleading information is federal.

U.S. v. Veal demonstrates the importance of truthful statements in regards to a *Garrity* interview, particularly when the investigations centers on potentially criminal conduct that may fall within the jurisdiction of the federal government. It must be recognized that many police misconduct investigations fall squarely within the scope of federal jurisdiction. For example, every investigation regarding an allegation of excessive force has the potential of a civil rights violation under 18 U.S.C. § 242, thus, an officer who chooses to lie following a grant of immunity via *Garrity,* puts him or herself directly within the scope of a federal prosecution for the lie even if the underlying constitutional violation was not sustained.

John "Jack" Ryan retired from his position as a police captain with the Providence Police Department in Providence, Rhode Island in June of 2002. He had served that department for twenty years. In his last assignment, Captain Ryan was responsible for the department's research and policy as well as taking an active role in training.

During his tenure as a police officer, Jack Ryan pursued his education. He attained a Bachelor's degree in Criminal Justice from Roger Williams University in Bristol, R.I.; a Masters Degree in Administration of Justice from Salve Regina University in Newport, R.I. and his Juris Doctorate from Suffolk University Law School. He is a member of both the Rhode Island and Federal Bar.

Since retiring, Jack has conducted numerous training sessions around the country for the Public Agency Training Council. Among the programs, he is responsible for a course on "Policy Development for Public Safety Agencies"";Advanced Internal Affairs"; "Liability and Risk Management for Law Enforcement Agencies" and "Legal and Liability Issues in the Public Schools." Jack is also a co-director of the Legal and Liability Risk Management Institute, which provides services relating to risk management for law enforcement agencies nationwide. These services include training, high risk/critical task policy review, policy development, improved supervision, audits, risk assessments, legal support and expert witness services.

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