
Donald Wm. Driscoll
University at Buffalo School of Law (Student)

Follow this and additional works at: https://digitalcommons.law.buffalo.edu/bpilj

Part of the Constitutional Law Commons, and the Law Enforcement and Corrections Commons

Recommended Citation
Available at: https://digitalcommons.law.buffalo.edu/bpilj/vol22/iss1/3

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Public Interest Law Journal by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.
I. HYPOTHETICAL SCENARIO

It is only 3:30 a.m., not quite halfway through Officer Murphy’s (Murph) midnight to eight shift. Murph rides alone in his police cruiser despite having less than five years experience under his belt. The Police Commissioner has decided this area of the city is not a “high risk” patrol area. Working alone in areas not classified as “high risk” may be required pursuant to a recent contract settlement after a longstanding intransigence by the police union over “one-officer” patrol cars. Tonight’s high volume of requests for police assistance belies the contention that this area of town is low risk. On this warm August night there have already been three domestic incidents and one report of “shots fired” in Murph’s sector alone; in the latter incident, no weapon or shooter was found.

As Murph maneuvers his patrol car into the parking lot of a closed business, the cruiser’s headlights illuminate the unmistakable image of a lone male as he stands up from alongside a motor vehicle parked in the lot. The suspicious male turns away from the patrol car and walks away from Officer Murphy. Murph exits his patrol car and requests that the man stop; the request is ignored. His vehicle’s spotlight reveals the suspect is concealing something dark, metallic and at least partly cylindrical in front of him. To assure his safety, Murph draws his service weapon and loudly orders the suspect to stop and put his hands up. Instead, the suspect looks over his shoulder and makes eye contact with the officer. He begins to turn, facing the officer head-on. He is still

---

1 University at Buffalo School of Law, Juris Doctor Candidate (2005), Canisius College of Buffalo, B.A. (1991), State of New York Certified Police Officer since 1993. The author would like to thank Lise Gelernter, Esq., for her invaluable assistance in bringing the ideas in this article to a level of intellectual clarity sufficient for publication.
holding what Murph now (reasonably?) believes is a gun. Could this be the shooter from the previous call? More desperately this time, Murph orders him to stop. His commands are completely ignored. The man continues to turn on the officer. Alone, in the dark, his voice commands ignored, and suspecting a gunman is in the area, Murph fires his own weapon three times before the suspect can spin completely around to face him. The suspect drops instantly to the ground and dies within seconds.

The radio call of “shots fired” initiates a flurry of activity. Officers respond from all over the city. Supervisors descend on the area. Initial observations of the scene have them requesting homicide and internal affairs detectives. The department’s information officer is awakened and summoned to the site. An official from the District Attorney’s office responds as well. Everyone has a job to do; there are reports to be filled out, information and evidence to be collected. Despite what is likely to be the most physically and emotionally draining moments of his life, Officer Murphy is responsible to provide information about the incident since the only other witness is dead.

The scenario, as laid out, is intentionally equivocal. With the alteration of just one or two facts, this shooting turns from a

---

2 Based on the personal experience of the author as a police officer, the individuals summoned to the scene and the paper work required to be completed will, obviously, vary from department to department. But even in a small department, a conservative estimate will mandate filing of an initial police report, a supplemental report by each detective and supervisor to respond, and a “use of force” report detailing the circumstances surrounding the discharge of the officer’s firearm.

3 Based on the personal experience of the author as a police officer, homicide detectives are there to investigate the fatal shooting of a human being, internal affairs is charged with determining whether or not all department regulations regarding the use of force have been followed and whether any violations of law have occurred and the supervisors must determine if their subordinate officer was carrying out the duties assigned at the time of the incident. Each of these must subsequently report up the chain of command. The information officer is charged with disseminating information to the media to meet the police department’s need to remain accountable to the public and the District Attorney’s representative must decide whether that office will investigate and/or file charges.
"good shoot" into a homicide; the officer can change from a good street cop into a potential criminal.

The reader must consider two circumstances in this type of situation. Under circumstance “A,” the deceased suspect was the “shooter” from the night’s earlier call. He may have turned and walked away from the officer in an attempt to conceal his handgun or confuse the situation until he could take control and possibly assault the officer. Under circumstance “B,” the “suspect” is simply little more than a stranded motorist. Having worked overtime as a janitor at the nearby university, he may have been on his way home. En route, his car suffered a mechanical breakdown. Still wearing the walkman while buffing floors at the university, he tried repairing the vehicle. The metal observed by the officer was merely a screwdriver or tire iron. Failing to make the repairs himself, he headed for a pay phone attached to the building as the officer pulled into the lot.

In either case, the potential ramifications of this brief but deadly encounter are long term and immense for the officer, the police department, the municipality that employs him, the family of the deceased, and the public at large. The immediate question, for Murph at least, is what to say, when, to whom, and even how. Depending on where he works and the attitude of his superiors to such situations, he may or may not be afforded an opportunity to collect himself or to consult an attorney before being questioned.\(^5\) This is especially important considering that a civilian in Murph’s shoes is not required to answer any questions regarding such matters. Rather, a civilian is told in plain, clear language that he or she has a right to remain silent and to contact an attorney before

---

\(^4\) A “good shoot” is one that comports with departmental guidelines and the law regarding use of force.

\(^5\) New York City police officers are not routinely interrogated in such incidents until a time period of forty-eight hours has passed owing to a departmental rule regarding such situations. See Eleanor Heard, Are New York Police Officers Safely Playing or Playing It Safe? Eliminating the Forty-Eight Hour Rule, 57 N.Y.U. ANN. SURV. AM. L. 133, 136 (2000) (citing the New York Police Department, NYPD Patrol Guide § PG118-09 (J. & B. Gould eds., Gould’s NYPD Patrol Guide, Sept. 2001)).
answering questions. The ramifications of Murph’s, or any officer’s, next step in this situation can be life-changing. What makes the state of affairs so unusually pressing for Murph is that his inquisitor is also his employer, adding an additional layer of potential consequences to this situation.

Part II of this paper discusses the presence of potentially conflicting interests in a situation analogous to that discussed in Part I. The interests considered include those of the officer, his or her department, and the political subdivision that maintains that department. These considerations include an officer’s strong desire to protect his personal interests as opposed to the external interests of the chief or department in protecting its image or financial affairs. While only briefly enumerated in Part II, these considerations indicate the depth of the problem faced by each of the entities involved.

Part III discusses the Supreme Court’s decision in Garrity, the protection the Court has afforded officers since this decision, and the foundation upon which that decision rests. Because the protection afforded officers under Garrity has been affected by subsequent decisions in Kastigar and Gardner, the impact of those decisions is also described.

Following examination of the protections established by the Court, various cases are presented in Part V, which have

---

6 See generally Miranda v. Arizona, 384 U.S. 436 (1966). Subsequent to Miranda, a civilian in similar circumstances is given a Miranda warning similar to: “You have the right to remain silent and refuse to answer any questions. Anything you do say can and will be used against you in a court of law. As we discuss this matter you have a right to stop answering my questions at any time that you desire. You have a right to a lawyer before speaking to me, to remain silent until you can talk to a lawyer, and to have that lawyer present with you when you are being questioned. If you desire a lawyer but you cannot afford one, one will be provided to you before questioning without cost to you.” New York State Police, Manual for Police in the State of New York, Part II, 9 – 3 (New York State Police) (1982).

7 Garrity v. New Jersey, 385 U.S. 493 (1967) (holding that the protection of the individual under the Fourteenth Amendment against coerced statements prohibits the use of those statements in subsequent criminal proceedings).


interpreted and applied *Garrity* and its progeny. The discussion will consider whether police officers are indeed afforded the constitutional protections against the use of coerced statements in criminal proceedings, and whether the Court intended to protect officers against termination for exercising their constitutional rights.

The paper continues in Parts VI and VII with a consideration of how these protections are weakened by police department investigations, which categorize the investigation of such officers as "routine" and thereby forces officers into choosing between their constitutional right to due process in employment situations or exercising their right to remain silent when interrogated by the police.

The paper concludes by returning to the hypothetical with a discussion of possible solutions to the dilemma many officers face when the police, their employer, investigates them for possible criminal behavior.

II. POTENTIAL RAMIFICATIONS AND VARYING INTERESTS

A police officer involved in an "on-duty" shooting, similar to Officer Murphy's, faces possible criminal and civil sanctions at both the state and federal levels. District Attorney offices routinely screen such shootings to determine whether formal charges are applicable, ranging from assault to manslaughter and even homicide. The possible terms of incarceration range from one-year of imprisonment to a life sentence.¹⁰

Police officers also face the possibility of charges by federal prosecutors. Under Title 18 of the United States Code, there are two applicable sections that an officer may be charged under for an "on-duty" shooting. Under section 241, police officers may be charged with conspiracy to deprive another person

---

¹⁰ For example, New York describes assault 3rd as the infliction of physical injury upon another by means of a deadly weapon or dangerous instrument. N.Y. PENAL LAW § 120.00(3) (McKinney 2003). This crime is classified as a Class A misdemeanor (with a maximum term of incarceration of one year). Murder is defined and characterized as an A-I felony (with a potential life sentence). N.Y. PENAL LAW § 125.25 (McKinney 2003).
of his or her civil rights. Section 242 prohibits persons acting under color of law from violating another person's civil rights. Under these provisions, an officer may face imprisonment ranging from one year to life in prison or a death sentence.

Civil liability exists for police officers involved in shooting incidents as well. It is impossible however, to determine potential tort damages in officer-involved shootings. Damages are dependent upon the particular circumstances of each situation and the intricate functioning of the tort liability system. Nonetheless, it has been estimated that damages awarded in officer-involved shootings in the District of Columbia in the 1990's alone, have reached almost eight million dollars.

What may be more immediately pressing (though less overwhelming after having so recently taken a human life) are the

11 "If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same ... They shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, they shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death." 18 U.S.C. § 241 (1997).

12 "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States ... shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death." 18 U.S.C. § 242 (1997).

13 Id.

potential employment ramifications of a decision whether to answer departmental questions regarding the shooting. As outlined above, a myriad of government agents, both coworkers and officials of the district attorney’s office, will have many questions for the officer(s) involved in a shooting. If an officer declines to answer these questions to limit potential influence on possible criminal and/or civil liability, he or she may face job-related consequences. Failure to cooperate in a department’s investigation may be considered a dereliction of duty and failure to obey a direct order to answer the questions put forth may easily be classified as insubordination.\(^5\) If discipline evolves into suspension, or even termination, economic hardship may become a reality. It is naive to think that the officers investigating a shooting will protect their own or will respect the “Thin Blue Line” or “Code of Silence,” considering the immense pressure these officers face if an investigation is hindered.\(^6\) Not only are there potential conflicts of interest among fellow officers, but there may also be conflicts of interest between the police chief (a fellow officer) and the

\(^{15}\) See Steven D. Clymer, *Compelled Statements from Police Officers and Garrity Immunity*, 76 N.Y.U. L. Rev. 1309, 1382, n.15 (2001). In People v. Gwillim, 274 Cal. Rptr. 415, 417 (Cal. Ct. App. 1990) for example, Gwillim was questioned by members of the internal affairs division and criminal division of the police department regarding allegations of undesired sexual advances towards a fellow female officer. When Gwillim refused to answer, he was advised that he could be subjected to departmental charges which could result in his dismissal from employment. Further, in Hoover v. Knight, 678 F.2d 578, 579 (5th Cir. 1982), Hoover was questioned by fellow police officers regarding possible criminal activity in reported illicit sexual activity with a fifteen-year-old female and use of narcotics. Hoover refused to answer questions related to the departmental investigation until such time as the criminal matter was resolved. She was subsequently terminated for violating the departmental rule requiring employees “to give full, complete and truthful statements” in the course of departmental investigations.

\(^{16}\) The “Code of Silence” has been well documented and generally refers to the refusal of fellow officers to engage in behavior that will subject other officers to discipline or other liability. See generally, Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering “Custom” in Section 1983 Municipal Liability*, 80 B. U. L. Rev. 17 (2000).
department, as well as the municipality and the politicians that run it.

Each individual officer involved in the shooting has interests in his or her own self-protection, continuation of employment, avoidance of incarceration, and averting liability for any monetary damage awards. The police chief has interests centered on prosecutions for wrongdoing, the maintenance of the police department's image as a whole, as well as avoidance of liability for civil damages. The municipality has these same interests in the abstract, while also carrying the potential self-serving interests of political officials. In the best case scenario, the police chief's and politicians' interests will all coincide with, and best be served by, standing by their officer and protecting his or her interests. In the case of a questionable shooting however, (consider Scenario "B" in the hypothetical in Part I) these interests may quickly and wildly diverge. The best way to obtain re-election or protect the image of the police department may be to charge the officer with violations of department regulations, state, or federal law and strongly pursue convictions for such violations.

III. \textit{Garrity v. New Jersey}

Considering the numerous potential avenues for severe financial consequences and possible incarceration, it is little wonder police officers began to exercise their individual constitutional rights; the same rights they frequently advise suspected criminals to invoke. The first such instance to be reviewed by the Supreme Court was \textit{Garrity v. New Jersey}.\textsuperscript{17}

In order to understand \textit{Garrity}, one must consider the facts as laid out in the lower court decision.\textsuperscript{18} In this case, a municipal court clerk named Helen Naglee, along with Chief Edward Garrity and police officer Edward Virtue, both of the Bellmawr New Jersey Police Department, were indicted and convicted for conspiracy to obstruct administration of the Motor Vehicle Traffic Laws. An investigation ordered by the New Jersey Supreme Court and conducted by the district attorney's office led to a grand jury

\textsuperscript{17} Garrity v. New Jersey, 385 U.S. 493 (1967).
indictment, which charged all three with conspiracy to unlawfully dispose of eight drunken driving charges. Stated briefly, certain individuals, while arrested for drunken driving, did not meet the legal requirements to support that charge or suffered from certain undisclosed "hardships." The charges were downgraded to improper passing, careless driving, and/or disorderly conduct. Notations were entered into the court records that each had appeared before the magistrate and had been fined; the magistrate's name was signed by Naglee.

Before the charges were downgraded, Chief Garrity conferred with the issuing officer and met with the accused. The Chief subsequently requested that Naglee reduce the charge and set, on his own initiative, a "fine." Interestingly, where the "fine" was less than the posted bail, the money was not returned to the accused. Testimony however, indicated the monies were not put to any personal use.

While interviewing the officers involved, the deputy district attorney advised them of their rights, saying:

[I] want to advise you anything you say must be voluntary, of your own free will, without threats or coercion or promise, or reward and anything you do say may be used against you or any person in a subsequent criminal proceeding, or proceedings, in the courts of our state. You do have under our statutes, as you may know a privilege to refuse to disclose any information which may tend to inculminate you. However, if you make such a disclosure, with knowledge of this right and without coercion, you thereby waive this right or privilege with regard to any phase of this investigation. This

19 Id. at 216. Officer Virtue's statements indicated that Dr. Cooperman examined at least some suspects on the borough's behalf. Charges on tickets were downgraded in cases where the level of intoxication did not violate the law.

20 Naglee, 44 N.J. at 209-17. Testimony indicated the money was diverted to purchase police equipment or set aside for future use. The Chief testified that this arrangement was acceptable to the parties involved, though some of the accused denied having given such permission.
right or privilege that you have is limited to the extent that you as a police officer once sworn and asked questions pertaining to your office and your conduct therein, if you refuse to answer, you may then be subject to a proceeding to have you removed from the department.21

The officers answered questions and were subsequently convicted of conspiracy to obstruct justice. In reviewing the officers' convictions and considering whether the officers' subsequent statements were involuntary or coerced under the law, the appellate court specifically considered the civil and polite tone under which the questioning took place and referenced the absence of any physical coercion, psychological persuasion, or attempts at humiliation or ridicule. The appellate court ruled that the "threat" of job loss was not an adequate degree of coercion to overwhelm the will of the officers.22

The Court focused on the warning or statement of the officers' rights when it reversed Garrity in 1967.23 The Court commented on the civil and polite manner in which the officers were questioned stating, "subtle pressures may be as telling as coarse and vulgar ones."24 Further, the Court reasoned that the manner or form of coercion, mental or physical, is not the determinative factor. Rather, the important factor is whether the accused has been deprived of his free choice to admit, deny or refuse to answer.

In this instance, the Court found the choice between self-incrimination and job forfeiture was unacceptable coercion.25 The Court stated in plain language that "[t]he 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."26

The holding in Garrity pertained specifically to whether or not statements obtained under threat of removal from office could

21 Id. at 217-18.
22 Id. at 219-21.
24 Id. at 496.
25 Id.
26 Id. at 497.
be used in subsequent criminal proceedings against the accused. The Court held that such statements were coerced, involuntarily made, and under the protections of the Fourteenth Amendment, prohibited from being used in subsequent criminal proceedings.\textsuperscript{27} Notably, in reaching its conclusion, the Court made reference to its reasoning in \textit{Slochower v. Board of Education}, stating, “a public school teacher could not be discharged merely because he had invoked the Fifth Amendment privilege against self-incrimination when questioned...”\textsuperscript{28} It is along this line of reasoning that the Court issued its oft-quoted statement that “policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights,” foreshadowing future decisions discussed below.\textsuperscript{29}

\section*{A. \textit{Garrity’s Foundation}}

\textit{Garrity} has been interpreted as resting on two possible doctrinal foundation: a due process prohibition against coerced confessions and the unconstitutional conditions doctrine, which prohibits government entities from offering a benefit conditioned on the recipient forgoing a constitutional right.\textsuperscript{30} The former interpretation seems strongest and is rooted in the plain language of the Court’s holding:

We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic.\textsuperscript{31}

\begin{footnotes}
\footnote{Id. at 500.}
\footnote{Id. (quoting Slochower v, Bd. of Educ., 350 U.S. 551, 567 (1956)).}
\footnote{Garrity, 385 U.S. at 500.}
\footnote{Clymer, \textit{supra} note 15, at 1342.}
\footnote{Garrity, 385 U.S. at 500. The Fourteenth Amendment provides, in part, All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall}
In finding the officers' statements were coerced in violation of the Fourteenth Amendment, the Court applied a voluntariness test and determined the pressure exerted on the officers; the threat of loss of employment "disable[d] [them] from making a free and rational choice." The Court strengthened its characterization of the statements as coerced and denounced the choice offered the officers by adding: "[w]here the choice is between the rock and the whirlpool, duress is inherent ... It always is for the interest of a party under duress to choose the lesser of two evils. [This] does not exclude duress."33

Based on the Court's previous coerced confession jurisprudence, one might consider this finding perplexing. The Court's previous concerns regarding coercion in the context of a confession stemmed from two major areas - fear of unreliable confessions and a desire to condemn improper police tactics.34 If these were the only two possible areas of concern, the Garrity decision would truly seem an anomaly given the civil and polite atmosphere in which the interrogations occurred and the identity of the defendants in the case. Unconstitutional coercion however, may be demonstrated by other than physical force. In fact, the court made this clear when it stated that coercion "can be mental as well as physical."35 Simply because a police officer is the subject from whom officials seek a confession does not mean he or she cannot be coerced. It simply means that coercion may take a different form, manifesting itself more subtly. In Garrity, the Court stated, "policemen ... are not relegated to a watered-down version of constitutional rights."36 A police officer's rights may

make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. AMEND. XIV.

32 Garrity, 385 U.S. at 497.
33 Id. at 498.
34 Id. at 503 (Harlan, J., dissenting); See Clymer, supra note 15, at 1345.
35 Garrity, 385 U.S. at 496 (quoting Blackburn v. Alabama, 361 U.S. 199, 206 (1960)).
36 Id. at 500.
The unconstitutional conditions doctrine may be another possible avenue for understanding *Garrity*. Essentially, this doctrine states that it is impermissible for state or federal government to offer a benefit based on the condition that the recipient engage in, or abstain from, an activity that the Constitution prohibits the government from demanding or prohibiting directly.\(^{37}\) In *Garrity*, New Jersey violated this doctrine by conditioning employment on the officers’ foregoing their Fifth Amendment right against self-incrimination.\(^{38}\)

A thorough reading of the case however, offers only minimal evidence that the Court rested its decision on this doctrinal foundation. At the conclusion of the majority opinion, the Court equated the rights violated by the methods used in the officers’ interrogations to other “rights of constitutional stature whose exercise a State may not condition by the exaction of a price.”\(^{39}\) One may interpret the Court’s narrow wording as undercutting the strength of its support for the claim under the unconstitutional conditions doctrine. Another possible interpretation however, is that the proposition is stated so succinctly because of its obvious truth. Broad wording is unnecessary to simply state that New Jersey could not condition the officers’ employment on the relinquishment of their Fifth Amendment rights.

It has been suggested that a straightforward application of the Fifth Amendment, as opposed to analysis under the Fourteenth, would better explain the outcome in *Garrity*.\(^{40}\) Under the Fifth

\(^{37}\) Perry v. Sindermann, 408 U.S. 593, 597 (1972) (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958), which held, "[I]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' Such interference with constitutional rights is impermissible."); See Clymer, *supra* note 15, at 1348.

\(^{38}\) The Fifth Amendment provides, in part, “No person shall ... be compelled in any criminal case to be a witness against himself....” U.S. CONST. AMEND. V.

\(^{39}\) *Garrity*, 385 U.S. at 500.

Amendment, one may construe the district attorney's threat of job termination as compelling the officers to incriminate themselves and thus rendering their statements immunized. To understand why the Court may have avoided such an application it is necessary to understand the state of Fifth Amendment law and immunized statements in 1967, when Garrity was decided.

In 1967, transactional immunity applied to compelled statements under the Fifth Amendment. Such application would mean that New Jersey, or any governmental administrative investigation, could compel police officers to answer questions, but the government could not prosecute them criminally in the future for what was revealed. It was not until 1972 that the Court accepted the more limited concepts of use and derivative use immunity in Kastigar v. U.S.

B. Immunity – Transactional, Use & Derivative Use

Although the parties involved in Kastigar were not police officers, but witnesses subpoenaed to testify before a federal grand jury, the outcome has had a significant effect on the subsequent application of Garrity. The government anticipated the witnesses would assert their Fifth Amendment privilege against self-incrimination and prior to their appearance, secured an order from the district court directing the witnesses to answer questions pursuant to 18 U.S.C. § 6002. Section 6002 provides immunity for compelled witness testimony and states, in relevant part, that when a witness is compelled by a district court order to testify over a claim of privilege,

---

41 Transactional immunity is defined as immunity from prosecution for any event or transaction described in the compelled testimony. BLACK'S LAW DICTIONARY 754 (7th ed. 1999).

42 Counselman v. Hitchcock, 142 U.S. 547 (1892); See Clymer, supra note 13, at 1354.

43 Kastigar v. U.S., 406 U. S. 441(1972). Use immunity is defined as immunity from the use of the compelled testimony (or any information derived from that testimony) in a future prosecution against the witness. BLACK'S LAW DICTIONARY 754 (7th ed. 1999).
the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.44

Essentially, the witnesses petitioned the Court to recognize that the immunity supplied by the statute was in fact "use" and "derivative use" immunity and that such immunity was not coextensive with the Fifth Amendment; that is, it did not offer the same scope of protection as the Fifth Amendment. They sought a ruling that only transactional immunity would equal the intended protection against self-incrimination provided by the Constitution. The Court held, "such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination" and is, in fact, sufficient to defeat a claim of privilege and compel testimony from a witness. The Court went on to state that transactional immunity is broader than the scope of the protection afforded by the Fifth Amendment in that it would "mean that the one who invokes it cannot subsequently be prosecuted."45 The true goal is to leave the witness "in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity."46

Further, the Court also set forth strong protections for individuals whose statements are offered after immunity is granted. If such person shows that a statement was given under a grant of immunity, the burden shifts to the government. This is a "heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources."47 In other words, the government has the "affirmative duty to prove that the

44 Kastigar, 406 U.S. at 448-49.
45 Id. at 453.
46 Id. at 457.
47 Id. at 461-62.
evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony."48

If the Court was reluctant to apply a transactional immunity analysis in Garrity so as not to completely preclude a state from prosecuting police officers suspected of criminal wrongdoing, one would expect to see application of "use" and "derivative use" immunity in cases involving police officers. "Use" immunity found acceptance with the Court in such situations in 1968.49

IV. Police Officer Protection After Garrity

After Garrity, protection of police officers in this context was affirmed by the Court. Gardner v. Broderick involved a New York City police officer charged with illegal gambling involving payoffs to police officers. Gardner was told the grand jury questions would center on performance of his official duties. He was advised that the United States Constitution and the New York State Constitution provided that he could not be compelled to testify against himself. However, he was also told that a public officer questioned by a grand jury is required to sign a waiver of immunity to retain his or her employment.50 Gardner refused to waive his immunity and was subsequently terminated from employment with the police department. The Court ruled that his dismissal, based solely on his refusal to waive immunity to which he was entitled under the Fifth Amendment, was not valid.51

In dicta, the Court stated that the privilege against self-incrimination applies to state as well as federal proceedings, and that a waiver of the privilege can only be done knowingly and voluntarily. Absent such waiver, answers could only be compelled "if there is immunity from [f]ederal and [s]tate use of the compelled testimony or its fruits in connection with a criminal prosecution against the person testifying."52

48 ld. at 460.
50 ld. at 274-75.
51 ld. at 278.
52 Id. at 276 (emphasis added).
This decision seems to mirror earlier indications that the Court was unwilling to preclude the government from investigating the performance of its agents (including police officers) and initiating criminal proceedings against them. The Court however, afforded the officers the same constitutional protections offered any other person accused of a crime - the right not to be compelled to testify against themselves. Further, the Court extended this protection when it prohibited the use of the compelled testimony or its fruits in a subsequent criminal prosecution of the witness.

Gardner explained the circumstances under which testimony may be compelled from a police officer despite his or her Fifth Amendment protections, what use that testimony could be put to, and under what conditions a waiver may be made (when it is "knowing" and "voluntary").

In analyzing whether the Court's intended protection of public officers in general, and police officers in particular, is receiving full effect, it is necessary to consider the circumstances present when a waiver is not made knowingly or voluntarily. A complete analysis of the circumstances under which one can be considered to have "knowingly" or "voluntarily" waived a constitutional right is beyond the scope of this paper. However, one particular area merits discussion to assess whether the Court’s intention to protect officers is being met. This area involves whether the requirement to sacrifice one’s constitutional right to assert another should be permissible and construed as a voluntary waiver.

In a related case, the Court addressed a defendant’s need to testify at a suppression hearing to meet standing requirements for advancement of a claim that his Fourth Amendment (unlawful search and seizure) rights were violated. To advance a suppression motion, the defendant witness must take the stand to explain his connection to the evidence in question. This item may be an incriminating article of evidence, such as a weapon used in

---

53 Id. at 276.
the crime or the proceeds of a robbery. To accomplish this, the
defendant must forgo his Fifth Amendment rights in order to
advance his Fourth Amendment rights.

The Court held that "when a defendant testifies in support
of a motion to suppress evidence on Fourth Amendment grounds,
his testimony may not thereafter be admitted against him at trial on
the issue of guilt unless he makes no objection." In reaching that
conclusion the Court stated it was "intolerable that one
constitutional right should have to be surrendered in order to assert
another." The Court did not use the word "involuntary" to
describe the defendant witness's testimony. In commenting on the
"undeniable tension" between both constitutional rights however,
the Court impliedly indicated that such testimony could not be
considered voluntarily given.

Notably, in a subsequent and somewhat related case, the
Court stated that the validity of the reasoning in Simmons is
questionable. To date however, Simmons has not been
overruled. In fact, in the subsequent case of Lefkowitz v.
Cunningham, the Court cited its holding in Simmons. In that
case, Cunningham was subpoenaed to testify before a grand jury
investigating his actions while he was in political office. Cunningham refused to sign a form waiving his Fifth Amendment
protections against self-incrimination. He was subsequently
terminated from his political appointment pursuant to section 22 of
New York's Election Law.

See Kate E. Bloch, Police Officer Accused of Crime; Prosecutorial and
Fifth Amendment Risks Posed by Police-Elicited "Use Immunized"

Simmons, 390 U.S. at 394.

id.

Bloch, supra note 55, at 657.

McGautha v. California, 402 U.S. 183 (1971) (ruling that a unitary trial in
which the defendant must choose between remaining silent about his guilt
or speaking out regarding punishment does not unduly burden the
defendant's Fifth Amendment rights).

Bloch, supra note 55, at 659.


"If any party officer shall, after lawful notice of process, willfully refuse or
fail to appear before any court or judge, grand jury, legislative committee,
officer, board or body authorized to conduct any hearing or inquiry
The Court upheld the lower court’s determination that such action was an unconstitutional infringement of Cunningham’s Fifth Amendment rights. The Court described section 22 as “coercive” because “it require[d] [Cunningham] to forfeit one constitutionally protected right” in order to exercise another. Further consideration of this issue is discussed in Part VII after an analysis of where the law currently stands regarding police officers’ right to remain silent.

Evidently, the holdings in Garrity, Kastigar, and Gardner suggest that the Court supports investigating police officer wrongdoing, but not at the expense of their constitutional rights, including their right to remain silent. Because police officers “are not relegated to a watered-down version of constitutional rights,” the Court mandated that use and derivative use immunity may apply to any compelled statements given by officers under investigation. Further, officers may not be terminated from employment for refusing to make statements absent such immunity.

An analysis of subsequent cases however, shows neither of these two important protections is receiving full compliance.

V. ARE COURTS FOLLOWING GARRITY?

A. Use of Immunized Statements Against Police Officers

Federal and state courts have continued to allow statements made by accused officers to be “used” tangentially, to spur investigations, prepare for prosecution, and plan trial strategy. For example, in U.S. v. Anderson, Officer Anderson was accused of deliberately kicking an arrestee while subduing him after the

---

63 Lefkowitz, 431 U.S. at 803-08.

64 Garrity, 385 U.S. at 500.
subject fled the scene of his arrest. In the course of the preliminary investigation, the police department questioned Akers (the arrestee) regarding the incident. While the truthfulness of his statement was questionable (due to a later allegation that it was prompted by Anderson's promise of a future benefit), at the time Akers was questioned he said he believed that Anderson's "kick" to his mid-section was accidental. The information obtained from the department's investigation was forwarded to, and returned by, the United States Attorney's Office with a note declining to prosecute the matter criminally as it was deemed to lack "prosecutive merit." Officer Anderson was subsequently interviewed by the department and advised that neither his statement, nor any of its fruits, would be used against him in any criminal proceedings. The department's internal affairs investigator subsequently re-interviewed Akers to "corroborate" Anderson's statement. After re-interviewing Akers, at which point he offered a statement diametrically opposed to his original version of events, criminal charges were brought against Anderson. At a Kastigar hearing, the trial court suppressed Anderson's statements made to the department during its internal affairs investigation and any evidence procured by the government resulting from these statements. The court ruled "it was obvious

---

[66] Id. at 449.
[67] The warning offered Anderson stated, in pertinent part:
[A]s no criminal charges will be preferred [sic] against you ...
I am going to require you to furnish me a statement, in addition to questioning you about the allegations made against you ... This questioning concerns administrative matters relating to the official business of the Police Department. I am not questioning you for the purpose of instituting criminal charges and prosecution against you ... even if you do 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...."
Id. at 450 n.1.
[69] A Kastigar hearing is a hearing to assure that evidence sought for introduction by the government is not derived, directly or indirectly, from the defendant's statements.
that 'knowledge gained from the statement of [Anderson] was used.'\textsuperscript{70}

Notwithstanding \textit{Garrity} and \textit{Kastigar}, the D.C. Court of Appeals overruled the trial court and admitted the evidence against the officer.\textsuperscript{71} The court reached its holding despite Anderson’s compelled statement and the heavy burden on the government to affirmatively prove its evidence used to prosecute the police officer.

It is unwarranted to consider \textit{Anderson} as an anomaly. In 1991, the Ninth Circuit, in \textit{Gwillim v. San Jose}, considered whether the use of another police officer’s compelled statement ran afoul of \textit{Garrity} and \textit{Kastigar}.	extsuperscript{72} Here, a male police officer on a stakeout with a female officer was later accused of sexual battery, assault, and false imprisonment by the female officer. During the course of the police department’s investigation, the accused officer was compelled to make a statement regarding the incident to avoid any potential adverse employment action.\textsuperscript{73} Despite assurances that his statement would not be used in the criminal proceedings, the statement was shared with the female officer in order to convince her to testify against him in the criminal matter (without whom a prosecutable case was lacking).\textsuperscript{74} Despite the state trial court’s finding that such use violated the promises made to the officer, the state appellate court reversed the trial court. The court focused on whether the victim’s testimony was based on her own knowledge and completely discounted whether the officer’s immunized statement was used by the prosecutor in convincing the witness to testify against him.\textsuperscript{75}

A civil rights action was instituted alleging that transmission of the compelled testimony violated Gwillim’s constitutional rights. The Ninth Circuit affirmed the district court’s dismissal of Gwillim’s claims, but failed to specifically address the issue of whether transmission of the officer’s

\begin{itemize}
  \item \textsuperscript{70} Anderson, 450 A.2d at 450.
  \item \textsuperscript{71} \textit{id.} at 453.
  \item \textsuperscript{72} Gwillim v. San Jose, 929 F.2d 465 (9th Cir. 1991).
  \item \textsuperscript{73} \textit{See} Clymer, \textit{supra} note 15.
  \item \textsuperscript{74} People v. Gwillim, 223 Cal. App. 3d 1254, 274 Cal. Rptr. 415, 416-20 (Cal. App. 6th Dist. 1990).
  \item \textsuperscript{75} \textit{id.} at 425.
\end{itemize}
immunized statement to the female officer was a violation of Gwillim's constitutional rights. The court stated that the only issue before it was whether transmission of the compelled testimony to the district attorney was a violation of the officer's constitutional protections; the court found that it was not a constitutional violation. In dicta however, the court indicated that passage of the substantive portion of the statement to the victim to convince her to testify might pass constitutional muster, deeming such passage was merely "close" to evidentiary use.76

State courts have faced similar issues. In People v. Corrigan, a New York case, a police officer testified voluntarily before the grand jury.77 Officer Corrigan's testimony revolved around the arrest of an individual made while off-duty, but working as a security guard at a local restaurant. It was alleged that during the arrest, while assisting the on-duty officers who took the suspect into custody, the defendant police officer grabbed the arrestee by the throat and struck him in the head with his flashlight. After the incident, but prior to his grand jury testimony, an internal investigation was conducted. The accused officer was compelled to make a statement under threat of termination.78 This statement was made available to the prosecutor while preparing for the grand jury testimony, and in fact, the statement was held in plain view by the prosecutor while questioning the defendant officer before the grand jury.79 Considering the heavy burden placed on the government in such situations, both lower courts and the dissent in the Court of Appeals decision, properly concluded that the obvious and reasonable conclusion was that the compelled, immunized statements were used in general case preparation, in formulating questions of the officer before the grand jury, and as a visual prop or "smoking gun" during the officer's grand jury testimony. This was an obvious attempt to intimidate the officer into forcing his grand jury testimony to conform to the statement made to the internal affairs investigators.80 After all, the prosecution did not

76 Id. at 468.
78 Id. at 327-28.
79 Id. at 332.
80 Id. at 332 (Bellacosa, J., dissenting).
receive and hold the statement before the grand jury by accident. Nonetheless, the court reversed and reinstated the indictment.

This decision is surprising because along with issuing a decision ordering the reinstatement, the court stated that a defendant’s guarantee of immunity should be “scrupulously protected” and made clear that it did not condone this type of government behavior. In fact, the court went on to say that the practice should be “avoided.”

Another state court has also indicated that non-evidentiary use of compelled immunized testimony does not present grounds for a dismissal of a criminal case. The facts in Commonwealth v. Marotta involved a Boston police officer investigated by his department’s internal affairs division after a motorist accused him of demanding a payoff so he would not tow his car. While the criminal division within the department declined to pursue the matter, Officer Marotta was ordered to give a statement under the standard assurance that it would not be used against him criminally. Despite a fruitless initial investigation, subsequent complaints led to an expanded investigation and a criminal indictment charging the officer with multiple counts of extortion, bribery, larceny, and attempted larceny. Officer Marotta asserted that the division’s identification of him as a suspect resulted from his prior statement to the department. Because the officer had issued, signed and indicated his identification number on summonses issued at the time these alleged incidents occurred, the court concluded that the government had sustained its burden of proving that the officer’s identity was established beyond any reasonable doubt. It was unnecessary to resort to his compelled immunized statement in which he admitted citing the motorist involved, but not demanding any payoff. While such a conclusion seems eminently reasonable, this case is concerning because in dicta, the court stated its agreement with the First

---

81 Id. at 332-34.
82 Id. at 332.
84 Id. at *1-2.
85 Id. at *3.
Circuit that "non-evidentiary or tangential use of immunized testimony" is not grounds for dismissal.\textsuperscript{86}

B. "Use" of Immunized Statements Affecting Other Law Enforcement Officers

Police officers are not the only public officers affected by non-evidentiary use of immunized compelled testimony. For example, in \textit{U.S. v. Daniels} a corrections officer (Lieutenant Sayes) in a supervisory capacity was accused of observing, but failing to terminate the beating of an inmate.\textsuperscript{87} In the course of the internal investigation, Sayes was offered immunity in exchange for making a statement to the prison's investigating officer. In this statement Sayes admitted being a witness, identified the assailants, and offered details of the attack. This statement was then put into the Sayes' personnel file, which was included in the materials offered to the F.B.I., who investigated the incident. The F.B.I. subsequently filed federal charges against Sayes and other corrections officers. The indictment against Sayes was successfully dismissed because the F.B.I. had access to Sayes' immunized statement. However, a new indictment was obtained by a second F.B.I. agent who was not given access to Sayes' first statement though he had access to the first agent's reports and summaries written with knowledge of Sayes' immunized statement.\textsuperscript{88}

The court upheld the indictment and determined that the government's heavy \textit{Kastigar} burden was met because Sayes' statement was not offered to the grand jury due to the credibility of the agents' verbal assurances that Sayes' statement was not used in the course of the investigation.\textsuperscript{89}

\textsuperscript{86} \textit{Id.} at *4.
\textsuperscript{87} \textit{U.S. v. Daniels}, 281 F.3d 168 (5\textsuperscript{th} Cir. 2002).
\textsuperscript{88} \textit{Id.} at 175.
\textsuperscript{89} \textit{Id.} at 181.
C. "Use" of Immunized Statements Outside Law Enforcement Settings

Both state and federal courts allow tangential use of immunized testimony in criminal proceedings where the statement has an influence on trial preparation or an indictment. Such use has been allowed in cases where the defendant is not employed as a public officer within the criminal justice system. For example, the Eleventh Circuit reinstated an indictment obtained against a Georgia Department of Labor employee for bribery and extortion, despite a lower court having twice dismissed the indictment on the recommendation of the magistrate. The magistrate found the indictment violated Fifth Amendment protections because an F.B.I. agent was privy to the defendant's prior compelled, immunized grand jury testimony and the assistant U.S. attorney who obtained the first (dismissed) indictment participated in the process to obtain the second. In reinstating the second indictment the court downplayed the "heavy" Kastigar burden stating, "in legal terms, the government is only required to demonstrate by a preponderance of the evidence an independent source for all evidence introduced." The court reviewed the government's evidence in camera and found the government met its requirement to show that the "evidence more likely than not was derived independently of Byrd's testimony" and was accurate. The court reasoned that while Kastigar mandates an immunized witness (and the government) must be left in substantially the same position as if the claim to his Fifth Amendment rights was not circumvented, this standard "did not explicitly mandate that the position of the parties remain absolutely identical in every conceivable and theoretical respect."

The Second Circuit came to a similar conclusion in U.S. v. Mariani. Here, the lower court vacated the conviction of Mariani.

---

91 Id. at 1526-27.
92 Id. at 1529 (emphasis added).
93 Id.
94 Id. at 1530.
95 U.S. v. Mariani, 851 F.2d 595 (2nd Cir. 1988).
for RICO violations \(^{96}\) in a scheme involving illegal payoffs to certain union representatives in exchange for the right to remain delinquent in pension fund payments and to use non-union labor.\(^{97}\) The trial court vacated Mariani’s conviction because it found the government utilized Mariani’s immunized testimony to confirm his association with an organized crime figure and in planning for trial.

The Second Circuit reversed and held the *Kastigar* burden was met because the prosecutor “established that he had prior knowledge of *substantially* all the information covered in the [defendant’s] testimony.”\(^{98}\) The court stated that this prior knowledge of *substantially* all the information in Mariani’s immunized testimony either foreclosed the possibility that the prosecutor made any direct or indirect use of it, information derived from it, or that any such use was “wholly conjectural and insubstantial.”\(^{99}\)

The First Circuit indicated its agreement in *Serrano v. U.S.*, where a complicated scheme of hiding the true ownership of assets exchanged between various financial institutions (as collateral for what were essentially short-term loans) resulted in the conviction of three defendants for mail and wire fraud.\(^{100}\) An F.B.I. agent viewed (on television) Serrano’s immunized testimony to the Puerto Rican House of Representatives when it conducted investigations into this scandal. When the agent subsequently testified to a grand jury resulting in an indictment in a related case, the agent referred to Serrano’s testimony and revealed that Serrano had admitted meeting with the other players in the scheme. The indictment obtained from the agent’s testimony was related to the indictment from which Serrano appealed in this matter; however, the First Circuit (and lower court) ruled the error was harmless in light of the other substantial evidence in the offered testimony, documentary evidence received by the grand jury and the tangential nature of the reference. Despite finding the

---


\(^{97}\) *Mariani*, 851 F.2d at 596-98.

\(^{98}\) *Id.* at 600 (emphasis added).

\(^{99}\) *Id.* at 601.

\(^{100}\) *Serrano v. U.S.*, 870 F.2d 1, 3-4 (1st Cir. 1989).
government's action clearly "improper" the court declined to take any remedial measures to protect such defendants in the future, and thus dismissed the opportunity to recognize the strong protection the Court has afforded witnesses who testify despite their Fifth Amendment protections.\(^{101}\) As to Serrano's concurrent complaints that the prosecutor utilized his immunized testimony in formulating trial planning and strategy, the court ruled that the issue was not properly preserved for their consideration, but nonetheless indicated their agreement that immunized testimony may permissibly be used to tangentially influence the prosecutor's thought processes in preparing for trial.\(^{102}\)

Similarly, in *U.S. v. Velasco*, the court allowed the prosecutor to use immunized testimony in developing trial strategy. The defendant, Garcia-Caban, made a privileged "proffer" to the government in which he recanted a large portion of his post-arrest statement. The government promised it would not use the statement, save for the possibility of impeachment.\(^{103}\) At trial however, outside the presence of the jury, the prosecutor informed the judge that Garcia-Caban had recanted his story. At trial, the government offered only the portion of Garcia-Caban's statement that he did not recant, demonstrating knowledge of the retraction. The defense argued that this did not comply with the completeness doctrine, which allows for entrance of a writing or utterance (and sometimes admissions, confessions etc.) only when a portion has been offered by the opponent.\(^{104}\) The court ruled for the government, holding that the prosecutor had merely discarded portions of the statement he deemed irrelevant.\(^{105}\) It went on to state that accepting, *arguendo*, that the prosecutor used Garcia-Caban's statement to formulate trial strategy "the mere tangential influence that privileged information may have on the prosecutor's

\(^{101}\) *Id.* at 16.

\(^{102}\) *Id.* at 17-18.

\(^{103}\) *U.S. v. Velasco*, 953 F.2d 1467, 1470 (7th Cir. 1992).

\(^{104}\) *Id.* at 1471-72. When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it. Fed. Rule Evid. 106.

\(^{105}\) *Velasco*, 953 F.2d at 1472.
thought process in preparing for trial is not an impermissible 'use' of that information."\(^{106}\)

When using immunized testimony, the Court has imposed a duty upon the government to leave the immunized witness and the government in substantially the same position had the right against self-incrimination not been circumvented. Considering this protection afforded immunized witnesses, it seems prudent to conclude that the government should be forced to proceed as if the witness had not made a statement. It seems contradictory to allow the prosecution to use immunized statements in trial preparation and strategy because it circumvents the intended purpose of the Court. Some courts have seen the logic in such reasoning.

For example, in \textit{U.S. v. McDaniel}, the Eight Circuit employed such reasoning when the defendant appealed his convictions from federal charges stemming from improprieties (embezzlement and misappropriation of funds) at the bank where he was president.\(^{107}\) Due to a concurrent state investigation during the course of the federal investigation, McDaniel was compelled to testify before a state grand jury. The law under which he testified conferred transactional immunity and realizing this, McDaniel offered three volumes of transcripts that included incriminating testimony. The U.S. attorney requested, received and read all three volumes.\(^{108}\) The state court judge quashed all the state indictments, but the federal court judge did not; McDaniel was tried in two separate trials for violations of 18 U.S.C. §§ 656 & 1005 and was convicted. McDaniel appealed and the Eighth Circuit held, "the United States Attorney’s reading of McDaniel’s state grand jury testimony ‘constitute[d] a prima facie “use” of it’..." and remanded for determination as to whether he testified under immunity and whether that testimony was the subject matter of the federal prosecution.\(^{109}\)

On remand, the trial court answered both questions in the affirmative. \textit{Kastigar} however, was decided in the interim. This change in the law meant McDaniel should have been afforded use

---

\(^{106}\) \textit{Id.} at 1474 (quoting \textit{U.S. v. Schwimmer}, 924 F.2d 443 (2d Cir. 1991)).


\(^{108}\) \textit{Id.} at 307.

\(^{109}\) \textit{Id.} at 308.
and derivative use immunity in federal court for his immunized state grand jury testimony. The court concluded however, that the U.S. Attorney’s reading of McDaniel’s testimony involved the same *prima facie* “use” of it, which essentially put the federal government in the same shoes as the state’s attorney, and thus transactional immunity still applied. The issue remained whether McDaniel testified under immunity on matters related to the federal government’s prosecution. The district court sustained McDaniel’s objection and the government appealed.\textsuperscript{110}

The Eighth Circuit held that subsequent to *Kastigar*, the question was no longer whether the testimony related to the transaction giving rise to the federal prosecution, but “whether the prosecution used the testimony in prosecuting those charges.”\textsuperscript{111} The court concluded that the government failed to satisfy its burden of not putting the defendant’s testimony to any use; uses which “could conceivably include assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy.”\textsuperscript{112} Because there was no assurance the defendant was protected from the “immeasurable subjective effect” the prosecutor’s reading of the grand jury testimony may have had in the preparation and trial of the government’s case, the convictions were vacated.\textsuperscript{113}

In *U.S. v. Pantone*,\textsuperscript{114} the Third Circuit seemed willing to accept that immunized testimony may have a tangential, non-evidentiary influence on a prosecutor’s thought processes in preparation for trial or indictment. In this matter, a state court magistrate was convicted of conspiracy to participate in a bribery scheme involving illegal kickbacks from a bail bondsman. The conviction was later overturned on other grounds. After the first trial, Pantone was compelled to testify before a grand jury. At the second trial, Pantone’s motion to dismiss the case or disqualify the government’s prosecutor was denied and Pantone was convicted.

\textsuperscript{110} *Id.* at 308-09.
\textsuperscript{111} *Id.* at 310.
\textsuperscript{112} *Id.* at 311.
\textsuperscript{113} *Id.* at 312.
\textsuperscript{114} *U.S. v. Pantone*, 634 F.2d 716 (3\textsuperscript{d} Cir. 1980).
Pantone appealed the conviction on the basis that the government’s prosecutor in the second trial was the same prosecutor that questioned Pantone before the grand jury. He therefore possessed intimate first hand knowledge of Pantone’s immunized testimony. The prosecutor assured the court it would present the identical prosecution at the second trial as the government presented at the first.\(^{115}\)

The court determined that Pantone sought a per se rule requiring the withdrawal of a prosecutor who had knowledge of such immunized, compelled testimony. Despite the government’s heavy burden under \textit{Kastigar}, the court refused to grant such a ruling.\(^{116}\) In this case, the prosecutor was privy to immunized testimony, but promised not to use it and present the same case at both trials. Post-trial analysis indicated clear compliance with that pledge; thus assuring compliance with \textit{Kastigar} that the defendant’s immunized testimony was not used to convict him.\(^{117}\)

Although at first glance the facts above may seem to indicate that the Third Circuit is willing to accept such tangential, non-evidentiary influence upon a prosecutor’s thought processes, this decision may only be applied to the specific facts of this case - where there are two complete sets of transcripts upon which to conclude the \textit{Kastigar} burden was met.

\textit{U.S. v. Semkiw} however, removed any lingering doubt whether the Third Circuit is committed to protecting the Fifth Amendment rights of witnesses compelled to testify despite their constitutional protection against self-incrimination.\(^{118}\) Here, the defendant was convicted in district court for violations of 41 U.S.C. §§ 51 and 54 (anti-kickback statutes). Prior to trial, he was granted use immunity and testified before the grand jury. He was later indicted. The defendant claimed the prosecutor used his testimony as a “discovery deposition” in violation of his Fifth Amendment rights, giving the prosecution an unfair advantage in trial preparation and plea-bargaining.\(^{119}\) Unlike \textit{Pantone}, in which

\(^{115}\) \textit{Id.} at 716-22.

\(^{116}\) \textit{Id.} at 719.

\(^{117}\) \textit{Id.} at 722-23.

\(^{118}\) \textit{U.S. v. Semkiw}, 712 F.2d 891 (3\textsuperscript{d} Cir. 1983).

\(^{119}\) \textit{Id.} at 892-93.
analysis of the two trial records (one pre-compelled testimony and one post-compelled testimony) assured that the compelled grand jury testimony was not used, in this instance there was no record to conclusively show the government did not use the testimony to its advantage in preparing the case against Semkiw.

In concluding that any possible use of Semkiw’s testimony in “refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy” would be a violation of Semkiw’s Fifth Amendment rights, the Third Circuit reversed the conviction and remanded for further proceedings. In concluding that any possible use of Semkiw’s testimony in “refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy” would be a violation of Semkiw’s Fifth Amendment rights, the Third Circuit reversed the conviction and remanded for further proceedings. Thus, the Third Circuit solidified its position that compelled testimony cannot be used by the prosecution — non-evidentiary, tangential or otherwise.

VI. CONCENTRATION ON THE “ROUTINE” & “EMPLOYER-EMPLOYEE” ASPECTS OF INVESTIGATIONS HAS LEAD TO FURTHER EROSION OF OFFICERS’ RIGHTS

Lower courts have seemingly weakened Garrity and its progeny in other ways as well. Garrity stands for the proposition that an officer’s coerced statements cannot be used against him in a criminal prosecution. In considering whether a statement is coerced, the Court specified the manner or form of coercion — mental or physical — is not the determinative factor, but whether “the accused has been deprived of his ‘free choice to admit, to deny or to refuse to answer.’” Keeping this in mind, Commonwealth v. Ziegler is difficult to rationalize, and is evidence of a further erosion of police officers’ protections.

In Commonwealth v. Ziegler, a police officer was chasing a suspect in a stolen car. After the suspect’s car struck Ziegler as he approached on foot, a physical struggle ensued that led to the suspect’s death from the officer’s gunshot. Immediately afterward, Ziegler denied shooting the suspect, stating only that there was a physical altercation where he hit the suspect on the head with his

120 Id. at 895.
121 Garrity, 385 U.S. at 496 (quoting Lisenba v. California, 314 U.S. 219, 241 (1941)).
handgun. Ziegler stated that even if he discharged the weapon, it was accidental. After examination of his weapon revealed one spent round, he was escorted to police headquarters by another police officer, his gun was confiscated, and he was prohibited from making any phone calls. He was also subjected to further questioning about the incident without being advised of his Fifth Amendment right to remain silent. While these procedures were done in accordance with departmental regulations, Ziegler cooperated and even drew diagrams regarding the incident.\(^{123}\) When the government indicated its intention to introduce his statements at trial, Ziegler sought to have them suppressed as the product of custodial interrogation, and his motion was granted.

The Pennsylvania Supreme Court reversed despite *Garrity*, which stated that subtle pressures can be as coercive and violative of constitutional rights as vulgar ones.\(^{124}\) In allowing Ziegler’s statements, the court reasoned that even though Ziegler was accompanied by officers to the station, held incommunicado and questioned regarding a homicide in which he could be the only potential suspect of illegality, this was part of a “routine” investigation; an investigation conducted more on the level of employer and employee, rather than one of police agency and suspect in a homicide investigation.\(^{125}\)

A similar outcome occurred in a Massachusetts case. In *Commonwealth v. Harvey*, Officer Harvey was accused of taking an intoxicated male (Dayton) to a “dark” area of town and stealing sixty dollars from him rather than transporting him to a shelter as instructed.\(^{126}\) Dayton complained to other officers about the incident and Harvey was questioned about what occurred. Harvey reiterated an earlier statement that no larceny occurred and that he took the man to that area of town and released him at Dayton’s own request. Later, Harvey gave another statement pursuant to the request of an internal affairs officer. All statements made by

\(^{123}\) *Id.* at 56-57.

\(^{124}\) *Garrity*, 385 U.S. at 496.

\(^{125}\) *Ziegler*, 470 A.2d at 58-59.

Harvey were materially identical and were admitted at trial, resulting in his conviction.127

Prior to trial, Harvey moved to suppress these statements. His motion was denied by the trial court, which held his statements were not the product of custodial interrogation nor obtained by coercion under threat of removal from office. The judge ruled that the "subjective fear that he would be dismissed [from office] if he refused to give the statements under consideration [did] not demonstrate that these statements were coerced."128 In affirming the trial court's admission of the statements, the Supreme Judicial Court of Massachusetts recognized that Harvey was required by department rules to obey the lawful orders of superior officers and that this "imposed upon him an obligation to answer questions regarding his duties...."129 The court also stated it was "clear that the defendant may have faced disciplinary proceedings which ultimately could have resulted in his dismissal..." if he refused to answer.130 However, the court found these facts did not "compel" the officer to answer because there was no overt threat nor any express statement that he would be discharged for failure to cooperate.131 The court ignored the knowledge every police officer possesses – that failure to obey a superior officer is the hallmark of insubordination, which carries with it discipline up to and including termination by stating "the defendant ... cited no state statute or law that would 'mandate his removal from office upon a failure to provide the requested statements.'"132

Officers' fears, despite the courts' statements in Ziegler and Harvey, that they may face termination for a refusal to provide statements requested by a superior are by no means merely an indulgence of their personal anxieties. In the cases explained above, the officer's concerns regarding adverse job action led them to provide the requested information pursuant to routine procedures. It has been recognized however, that by mere subtle

127 Id. at 609.
128 Id. at 609-10 (quoting Garrity, 385 U.S. at 500).
129 Id. at 610 (citing Silverio v. Municipal Court of the City of Boston, 247 N.E.2d 379, 382 (Mass. 1969)).
130 Id. at 610.
131 Id. at 610-11.
132 Id. at 611.
manipulation of a few words, an officer who refuses to supply such reports can be terminated.\textsuperscript{133} Though the Court has not yet confronted the situation where an officer has been terminated for a failure to prepare routine reports, the line separating routine report preparation and impermissible interrogation is difficult to assess. An officer who refuses to prepare such reports upon request could find himself or herself terminated \textit{not} for exercising a constitutional right, but for failure to discharge the duties of the job.\textsuperscript{134}

\section*{VII. Officers Are Forced to Choose Between Two Constitutionally Guaranteed Rights}

A "routine" investigation by a police department may require an officer to answer questions or face termination. Since the police department is a government agency, this practice can potentially create a conflict between an officer's Fifth Amendment rights, including the privilege against self-incrimination and property rights in employment, and his or her Fourteenth Amendment due process rights that prohibit use of coerced statements in criminal prosecutions.\textsuperscript{135} Support for the position that such conflict is impermissible is garnered from the previously quoted language in \textit{Garrity} where the Court equated the rights violated to other "rights of constitutional stature whose exercise a State may not condition by the exaction of a price."\textsuperscript{136} The position is further bolstered by the language in \textit{Simmons} that it is "intolerable that one constitutional right should have to be surrendered in order to assert another."\textsuperscript{137} To date, no Court decision has specifically addressed this issue, though numerous lower court decisions have reached a conclusion that contravenes the language in \textit{Garrity} and \textit{Simmons}.

\textsuperscript{134} \textit{Id.}
\textsuperscript{135} \textit{Garrity}, 385 U.S. at 500.
\textsuperscript{136} \textit{Id.}
\textsuperscript{137} \textit{Simmons}, 390 U.S. at 394.
Gniotek v. City of Philadelphia serves as an example of the current jurisprudence on such issues.\(^{138}\) In this case, investigators advised Philadelphia police officers that they were under internal affairs and criminal investigations for receiving bribes. After administration of Miranda warnings, each officer was asked to make a statement under threat of suspension with an "intent to dismiss" if they refused. When they refused, each officer subsequently received a notice stating the department intended to dismiss them in ten days. The notice provided the charges upon which the termination was based and gave each an opportunity to offer reasons why termination was unjustified; each officer was later terminated.\(^{139}\)

On appeal, the Third Circuit considered whether the officers' due process rights against compelled self-incrimination were violated. The court recognized that the officers had a property interest in their jobs and considered the requirement that a public employee who has a property interest in his job and faces termination must be afforded "a pre-termination opportunity to respond..."\(^{140}\) In determining that the officers received due process and suffered no violation of, or unconstitutional burden upon, their Fifth Amendment rights, the court rejected any notion that the officers were not given a meaningful opportunity to respond to the charges against them because they were compelled to choose between asserting their right to silence and responding, and thereby risking the use of any such response against them in the criminal proceedings. The court based this rejection upon the Court's decisions in Williams v. Florida\(^ {141}\) and U.S. v. Rylander.\(^ {142}\) The court stated that if there is "no constitutional violation" when a defendant in a civil contempt proceeding "is confronted with the option of offering evidence to discharge his burden of proof or of asserting his Fifth Amendment privilege," a situation in which one must choose between self-incrimination or possible incarceration, then "a fortiori, there is no defect when one must opt between

---


\(^{139}\) Id. at 242.

\(^{140}\) Id. at 243 (citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985)).


speaking at an employment termination hearing and asserting the Fifth Amendment privilege.”

In relying on the principles espoused in Rylander and Williams, the Third Circuit has set forth reasoning perfectly appropriate in one circumstance and then misapplied it in another. To understand this misapplication it is necessary to consider the context of the Rylander and Williams cases.

In Williams, the defendant filed a pre-trial motion seeking to be excused from Florida’s Rule of Criminal Procedure 1.200; the “Alibi Rule.” This rule requires that a defendant who intends to offer an alibi defense at trial must comply with the prosecutor’s written demand for notice of where the defendant will claim to have been and supply names and addresses of witnesses the defendant will offer to support his defense. Williams stated he would offer an alibi defense but claimed disclosure of further information would essentially compel him to incriminate himself in violation of the Fifth and Fourteenth Amendments. His motion was denied and he was convicted and sentenced to life in prison. The Florida appeals court affirmed the conviction and the Supreme Court granted certiorari.

In affirming the Florida courts’ decisions, the Court properly reasoned that defendants in a criminal trial, in an effort to reduce the risk of criminal conviction, are often forced to testify themselves or call other witnesses. Presentation of witnesses necessarily reveals their identities and subjects them to cross examination, all of which may prove incriminating or risks leading the prosecution to incriminating rebuttal evidence. The Court stated, “[t]hat the defendant faces such a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination.” It stated that requiring pre-trial notice of witnesses presented similar risks, but nothing in the Florida alibi rule removed the defendant’s free choice to present such a defense or not. The rule simply moved the timing of notice to the pre-trial

143 Gniotek, 808 F.2d at 245-46.
144 Williams, 399 U.S. at 78-83.
145 Id. at 80.
146 Id. at 83-84.
stage of the criminal proceeding rather than having such issues arise during trial, which would force granting continuances to deal with issues raised by assertion of an alibi defense and witnesses.\textsuperscript{147}

In \textit{Rylander}, a federal district court issued an enforcement order at the request of the I.R.S. when Rylander, as president of two companies, failed to comply with a subpoena to present records and testify with respect to the documents.\textsuperscript{148} Rylander offered no response to the district court's enforcement order nor did he appear at the hearing. Instead, he submitted an unsworn letter to the court stating he did not possess the records. He eventually appeared before the I.R.S. agent, but offered no records. The district court held a contempt hearing at which Rylander's only testimony was that he did not possess the records and refused to submit to additional questioning, asserting his Fifth Amendment rights. He was found guilty of contempt and appealed.

The Ninth Circuit reversed, ruling that a defendant cited for contempt for failure to comply with a subpoena need not meet the evidentiary requirement of showing "categorically and in detail" why he is unable to comply if "he properly claims that his testimony as to the whereabouts of the documents might be incriminating."\textsuperscript{149}

The Court granted certiorari and held that Rylander could raise a defense of a current inability to produce the records at the contempt hearing, but could not re-litigate the enforcement order at the contempt hearing. In essence, Rylander should have asserted an inability to produce the records at the time of the enforcement hearing.\textsuperscript{150} The Court held that reliance on Fifth Amendment protections did not remove a defendant's burden of producing evidence to support a claim of inability to produce; reaffirming its holding in \textit{Williams}. Despite the tendency to put a defendant in a dilemma of choosing silence or presenting a defense, the fact that a defendant is forced to testify or call witnesses to decrease the chances of conviction is not "an invasion of the privilege against

\begin{itemize}
\item[\textsuperscript{147}] \textit{Id.} at 83-86.
\item[\textsuperscript{149}] \textit{Id.} at 755 (citing \textit{U.S. v. Rylander}, 656 F.2d 1313, 1318-19 (9th Cir. 1981)).
\item[\textsuperscript{150}] \textit{Id.} at 757.
\end{itemize}
compelled self-incrimination," even though such actions may furnish the prosecution with evidence that may incriminate him.\footnote{Id. at 759.}

The Third Circuit and other courts relying on similar reasoning have ignored or misunderstood a fundamental difference between the reasoning in \textit{Rylander} and \textit{Williams} and situations where officers are forced to choose between their due process property rights in continued employment and the right to remain silent when faced with criminal charges. The difference is that in the former situation, where the Court has held that a dilemma between constitutional rights (silence and offering a defense) is acceptable, the dilemma arose within a single governmental proceeding against an individual. In the latter situation, the officer faces \textit{two} different governmental proceedings, each presenting the officer with the possibility of losing rights secured by the Constitution; one a property interest in employment and the other a liberty interest against self-incrimination. If the employment investigation were carried on by a private employer, the situation would be different because constitutional considerations prior to depriving an employee of his or her job do not apply. Since the employer in these situations is the government, a public employer, the officer faces attack on two fronts simultaneously; both initiated by the government and each possessing the potential to deprive the individual of constitutionally guaranteed rights.

When an officer faces an internal investigation and a concurrent criminal investigation, the government is, in the first proceeding, forcing the officer to forgo one constitutional right, the privilege against self-incrimination, in order to secure a second constitutional right, a property interest in continued employment. Further, the second proceeding, the criminal investigation, continues to loom in the offing. Resolution of the dilemma between silence and remaining employed, in the first proceeding, invariably alters the very existence of constitutional rights available at the second proceeding. If the officer elects to defend himself in the first government case, the right to silence no longer exists in the second because evidence of his or her prior defense, successful or not, will certainly be introduced at the criminal proceeding. The only sure means for an officer to preserve his or
her constitutional right to silence in the criminal proceeding comes at the cost of risking his or her constitutionally guaranteed right of a property interest in employment during the first proceeding.

The Third Circuit, (and lower courts employing similar reasoning) has failed to recognize that in Rylander and Williams the defendants were choosing a course of action in only one governmentally-instigated proceeding, whereas police officers facing disciplinary proceedings are facing two such governmental actions and the choice between two constitutionally-assured rights. The failure of these courts to respect the Court’s statement in Simmons that it is “intolerable that one constitutional right should have to be surrendered in order to assert another” is as obvious as the solution to the problem - stop doing so. To solve this problem, the Court should hear cases similar to Gniotek to demonstrate definitively that subjecting officers to such a constitutional dilemma in two separate, but linked, proceedings is impermissible. While this may be the most direct solution, others are presented below to address what “uses” may be made of immunized testimony.

VIII. WHERE DOES THE SOLUTION LIE?

Returning to the hypothetical in Part I, it is obvious that Officer Murphy is faced with an important dilemma. Everything explained above has an influence on his decision, not only upon what he can be forced to say, but also on when and how he should say it. Under circumstance “A”, where the suspect was armed, the criminal proceedings will most likely be minimal and resolved in his favor, although at least a presentation to the grand jury is still likely. In both circumstances, however, Murph and the police department face the possibility of civil proceedings that can take years to resolve. But, this doesn’t answer the deceivingly simple question - “What should Murph do, speak or remain silent?”

__152__ Simmons, 390 U.S. at 394.
At first glance, it seems the reasoning in *Garrity, Gardner* and *Kastigar* would prohibit an officer's compelled statement made during a department's investigation from being used against him or her in a subsequent criminal proceeding. However, under *Anderson, Corrigan,* and *Marotta* Murph's statements may be used in a criminal proceeding by the prosecutor to prepare for trial, prepare witnesses, or formulate a trial strategy. If Murph is aware of this, he may decide that it is in his best interest to simply remain silent and make no statement to his superiors investigating the shooting to preserve his constitutional rights for trial. However, this is not a viable option under *Knight* and *Ziegler.* The department need only characterize the investigation as "routine" departmental procedure to force Murph into supplying information that may be used against him in a criminal proceeding or face discharge. Characterizing the investigation as "routine" creates a situation where an officer, presumed to be innocent, who chooses to exercise his or her constitutional right to remain silent, experiences the loss of another constitutionally protected right - his or her property interest in employment.

As the discussion above illustrates, a police officer in Murph's situation, despite being in what is arguably the most stressful circumstance of his life, must choose which constitutional rights to protect; his Fifth Amendment right to remain silent or his property interest in employment. He may try to solve his dilemma by carefully wording any statement in order to keep his options open, a procedure recommended by many police officer unions that have recognized the lack of protection presently afforded police officers.\footnote{Based on personal experience of the author as a police officer and union member, a currently popular suggestion, one implemented by many police officer unions, is to advise officers to add the following preamble to any statement offered: "It is my understanding that this report is made for administrative, internal police department purposes only and will not be used against me in a criminal investigation. This report is made by me after being ordered to do so by a lawful supervisory officer. It is my understanding that by refusing to obey an order to write this report that I can be disciplined for insubordination and that the punishment for insubordination can be up to and including termination of employment. This report is made only pursuant to such orders and to obey that order. I retain the right to amend this report upon reflection to correct any
The true solution to this paradox however, lies not in police officers like Murph drafting qualifications for their statements, but in either the Court ruling on the matter or the various police departments altering their methods of investigation. The Court may choose to address the divide among the circuits and thus eliminate uncertainty regarding whether immunized testimony may be put to the tangential, non-evidentiary use of spurring investigations, preparing for trials, and formulating trial strategies.

More options however, may be available to the departments that investigate officers. One is to implement a two-team investigatory approach for situations where an officer is suspected of possible serious wrongdoing. One team can be assigned to review all of the evidence in a criminal investigation of a suspect officer and a second team used for trial presentation. In this scenario, the only evidence or witnesses the second team has contact with is evidence the first team clears for their use. In this fashion, the first team can prohibit the second team from accessing any witnesses or documents that have been tainted by the touch of an officer’s compelled statement; only evidence the first team concludes will pass the heavy burden of Kastigar is approved for consideration by the second team.\(^{154}\)

A related possibility is to maintain an office of independent investigators as a subdivision of the district attorney’s investigative bureau. The investigators from this office should be hired from outside the realm of law enforcement to minimize any tendency to compromise investigations of criminal activity spurred by identification with, or sympathy for, law enforcement personnel. Such departments would maintain completely separate files and conduct completely separate investigations from those conducted internally by departments within the police force.\(^{155}\)

Such a plan may present a problem should a grand jury subpoena the internal affairs statement. This problem can be solved however, through the creation of a “Projected Privilege.”

unintentional mistakes without subjecting myself to a charge of untruthfulness.”

\(^{154}\) Clymer, supra note 15, at 1340-41.

Under this system, the internal affairs division of the police department becomes the caretaker of any immunized statement an officer makes to investigators. When a subpoena is received for the immunized statement, the internal affairs investigators can assert the officer's Fifth Amendment right and challenge the legal appropriateness of turning over the statement.156

One final option is simple, though often overlooked. A police department could take the accused's presumption of innocence seriously and delay its internal investigation of an officer until any criminal proceedings are resolved. While departments may contend they have pressing interests in their public image and in rooting out bad officers, these concerns can be responded to without punishing an officer for unproven criminal suspicions. The officer's duties can easily be altered by having him or her assigned to in-house duties, such as desk work or paper work, to keep him out of the public eye. In addition, suggestions that the department might be covering for an officer engaged in criminal activity can easily be answered by reminding concerned citizens that everyone is entitled to the presumption of innocence and appropriate action will be taken once any criminal allegations are proven. By delaying the internal investigation until the criminal action is concluded, the department would preserve its entire array of investigatory tools, have the option of utilizing evidence obtained in the criminal investigation, and not risk the exclusion of any tainted evidence from one investigation to another, thus compromising the criminal investigation in situations of true criminal conduct by a police officer.

This approach may result in a longer period of time between the suspect behavior and the department's opportunity to obtain statements from witnesses. However, this problem is not insurmountable. Constitutionally, a defendant is entitled to a speedy trial in a criminal case. Further, the department could make use of statements obtained during the criminal investigation. As a final option, the department could question anyone involved except

156 See Andrew M. Herzig, To Serve And Yet To Be Protected, 35 Wm. & Mary L. Rev. 401, 437-38 (1993).
the officer, thus assuring no taint by any statement the officer might be compelled to offer.

IX. CONCLUSION

A thorough reading of the Court's decision in Garrity indicates its clear intention to offer strong protections to police officers compelled by their employers to give incriminating statements against their own penal interest. That decision, in combination with Kastigar and Gardner, shows that the Court wants police officers and other public officials to be afforded the same constitutional protections afforded all citizens accused of criminal behavior. It is equally apparent that many lower courts are weakening the protections the Court has promulgated. By interpreting the "heavy" burden announced in Kastigar to mean simply a preponderance of the evidence, and in allowing non-evidentiary uses of privileged statements, an officer's compelled statement may be used in focusing investigations, deciding to initiate prosecutions, eliminating plea-bargain options, interpreting evidence and planning trial strategy. When one considers that entire law school courses are taught on developing trial strategy, it is clear that such uses of otherwise privileged statements can be of substantial and unfair assistance to the prosecution. Allowing such use of compelled statements hardly leaves an officer or other public employee in "substantially" the same position as if he or she had been allowed to assert their Fifth Amendment rights.

This area of the law is ripe for Court intervention to delineate what "uses" are allowed of statements compelled from police officers despite Fifth Amendment protection. Until the Court chooses to do so, police departments across the country must reconsider their stance on investigations of police officers' activities. Departments should afford accused officers the same rights citizen arrestees are advised of daily. Police departments must take the accused's presumption of innocence seriously, even when it is another officer. Further, consideration should be given to implementing the simplest of plans, that is, to reassign officers under investigation and allow their intra-departmental investigations to take a back seat to any concurrent criminal investigations rather than disregard the protections the Court has
already established or force an officer into choosing between constitutionally guaranteed rights.