IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

THE STATE OF OHIO	)	**CASE NO. CR 14 580457**
	)	
Plaintiff,	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs.	)	
	)	
MICHAEL BRELO, *et al.*	)	**JOURNAL ENTRY GRANTING THE**
	)	**STATE'S ALTERNATIVE MOTION**
Defendants.	)	**FOR A *KASTIGAR* HEARING**

John P. O'Donnell, J.:

Introduction

Defendant Michael Brelo is a Cleveland policeman accused of the on-duty voluntary manslaughter of Timothy Russell and Malissa Williams on November 29, 2012. The five co-defendants are police department supervisors, each charged with two counts of dereliction of duty.

All of the defendants were interviewed by investigators of the Cleveland police in connection with possible administrative discipline for their conduct. Defendant Brelo has now moved to dismiss the indictment, alleging that his statement was used to secure the indictment – or to prove the charges – in violation of his Fifth Amendment right against self-incrimination. The other defendants have separately moved to require the state to disclose the name of every person who took statements or knows their contents. They apparently seek this information with the aim of using it to support a motion similar to Brelo's.

The Fifth Amendment

The Fifth Amendment to the United States Constitution provides that "no person . . . shall be compelled in any criminal case to be a witness against himself." This amendment applies to

state government through the Fourteenth Amendment to the U.S. Constitution. *Malloy v. Hogan*, 378 U.S. 1 (1964). The same language is also found in Article I, Section 10 of the Ohio Constitution. These provisions prohibit government actors from requiring a person suspected of wrongdoing to give statements or answer questions, and they apply even where the person whose statement is sought is employed by a branch of government. The individual right not to be compelled to be a witness against oneself has come to be known as the right to remain silent.[1]

Garrity v. New Jersey

The six defendants in this case are public employees who are subject to disciplinary proceedings initiated by their employer, the executive branch of the city of Cleveland's government. The employment discipline is separate from this criminal case. In connection with the employment proceedings, each defendant was interviewed by an internal affairs officer of the police department. Before being interviewed, each defendant was told that he or she could exercise the constitutional right to remain silent, but that the invocation of that right and a refusal to make a statement could result in being fired from the department.[2]

---

[1] The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement -- the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence. *Malloy*, supra, 8.

[2] This is the essence of the warning given to the defendants in *Garrity*. None of the parties here has produced evidence of exactly what warning the officers were given before their internal affairs interviews. Throughout Brelo's September 12, 2014, motion to dismiss, the supervisory defendants' September 12 motion to require, *etc.*, and the state's September 19 brief in opposition, the statements and evidence provided to internal affairs are simply referred to generally as *Garrity* material. (See: Brelo's motion, page 1 (*Garrity* statement), p. 2 (*Garrity* statement, *Garrity* information, *Garrity* interviews), p. 3 (*Garrity* statement, *Garrity* protected information, *Garrity* testimony), p. 4 (*Garrity* statement), p. 5 (*Garrity* statement, *Garrity* information, *Garrity* protected information), and p. 6 (*Garrity* statement, *Garrity* information); the supervisory defendants' joint motion, p. 1 (*Garrity* evidence), p. 4 (*Garrity* evidence), and p. 5 (*Garrity* statements, *Garrity* information, *Garrity* evidence); and the state's brief in opposition, p. 1 (*Garrity* information), p. 2 (*Garrity* information, *Garrity* evidence, *Garrity* rights), p. 3 (*Garrity* information, *Garrity* materials, *Garrity* evidence), p. 4 (*Garrity* information), p. 5 (*Garrity* information, *Garrity* rights), p. 7 (*Garrity* informant, *Garrity* information), p. 13 (*Garrity* rights, *Garrity* information, *Garrity* evidence), and p. 14 (*Garrity* rights, *Garrity* information).) These references would seem to suggest that the warning given to the defendants here before their statements to an internal affairs officer was exactly the warning given in *Garrity*. Yet there is a high likelihood that the warning in *Garrity* is no longer used by any public agency, including the Cleveland police department, and has been replaced by a warning similar to the one used by the Canton police department in *State v. Jackson*, 125 Ohio St. 3d 218, 2010-Ohio-621 (2010). The Canton warning included a

A statement made by a public employee to his employer under the threat of termination for refusing to make the statement has come to be known as a *Garrity* statement, after the case of *Garrity v. New Jersey*, 385 U.S. 493 (1967). The appellants in *Garrity* were police officers suspected of fixing traffic tickets. The officers were all questioned as part of the investigation. Before being questioned, each officer was warned (1) that anything he said might be used against him in any state criminal proceeding; (2) that he had the privilege to refuse to answer if the disclosure would tend to incriminate him; but (3) that if he refused to answer he would be subject to removal from office. *Id.*, 494. No immunity from criminal prosecution was given and some of the answers in the statements were used in later criminal prosecutions for conspiracy to obstruct the administration of the traffic laws. The officers appealed on the basis that their statements were coerced in violation of the Fifth Amendment and thus should have been excluded as evidence in the subsequent prosecution.

The Supreme Court found that the officers' statements were coerced, noting that "where the choice is 'between the rock and the whirlpool,' duress is inherent in deciding to 'waive' one or the other." *Id.*, 498. Because the statements were coerced in violation of the Fifth Amendment right against self-incrimination, the court held that the exclusionary rule applicable in all other cases of compelled statements prohibited the prosecutor from using them as evidence against the defendants.

Kastigar v. United States

Garrity concerned only the government's direct use of statements compelled in violation of the Fifth Amendment. Five years after *Garrity*, the United States Supreme Court decided *Kastigar v. United States*, 406 U.S. 441 (1972).

---

promise of immunity from use of the witness' statement in any criminal prosecution. For the purposes of this motion, I assume that the warning given in this case included a promise of immunity similar to the one in *Jackson*.

The petitioners in *Kastigar* were subpoenaed for testimony before a grand jury. The government, expecting the witnesses to assert their Fifth Amendment rights and refuse to testify, obtained an order from a federal district court granting the witnesses immunity from prosecution and compelling their testimony to the grand jury. The witnesses persisted in their refusal to testify on the basis that the protection offered by the grant of immunity was less than that provided by their privilege against self-incrimination. The trial court found them in contempt for failing to obey the subpoena and the court of appeals affirmed.

The Supreme Court accepted the case to "resolve the important question whether testimony may be compelled by granting immunity from the use of compelled testimony and evidence derived therefrom ("use and derivative use" immunity), or whether it is necessary to grant immunity from prosecution for offenses to which compelled testimony relates ("transactional" immunity)." *Id.*, 443. The petitioners argued that they could not be compelled to testify under the protection of the immunity statute because that protection was less than the constitutional protection of the Fifth Amendment so that, in essence, the government could obtain coerced statements under the immunity statute that could be used against them in ways that statements obtained in violation of the constitution could not.

The immunity statute at issue in *Kastigar* prevented the government's use against the witness of "testimony or other information compelled under the [immunity] order (or any information directly or indirectly derived from such testimony or other information)." In other words, the statements could not be used directly or derivatively. The court went on to examine Fifth Amendment jurisprudence to conclude that the protection afforded by the constitution is coextensive with the protection offered by the immunity statute, i.e. the constitution does not provide full "transactional" protection against the use of coerced statements, but only prohibits

the "use and derivative use" of testimony compelled in violation of the privilege against self-incrimination.

Thus, after *Kastigar*, there was no question that the limits on the government's use in a criminal prosecution of statements coerced in violation of the Fifth Amendment were the same as the limits on the use of testimony given under a court's grant of immunity from prosecution.

But the remedies available to witnesses whose statements are coerced are not the same as those given to witnesses whose immunized testimony is used against them. The difference was noted in *Kastigar*:

> [A] defendant against whom incriminating evidence has been obtained through a grant of immunity may be in a stronger position at trial than a defendant who asserts a Fifth Amendment coerced-confession claim. One raising a claim under this statute need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources. On the other hand, a defendant raising a coerced-confession claim under the Fifth Amendment must first prevail in a voluntariness hearing before his confession and evidence derived from it become inadmissible. *Id*., 461-462.

So a witness who becomes a defendant after testimony given on a promise of immunity can use that promise to require the government to affirmatively prove that it has not directly or derivatively used the immunized statement against him, but a defendant whose statements were coerced in violation of the Fifth Amendment has recourse only through the exclusionary rule to keep the statements from being admitted as evidence at trial. As noted in footnote 2 above, I assume that the defendants here were promised that their statements to the internal affairs officer would not be used, directly or derivatively, to prosecute them.[3] Therefore, under the holding in

[3] If no such promise was made, then the defendants here are in the same position as the defendants in *Garrity*, who were not promised immunity, and the defendants' sole remedy is the same as any criminal defendant whose statement was coerced in violation of the Fifth Amendment: the exclusion of the statement from evidence. Only where a guarantee of immunity is alleged to have been violated must the state affirmatively prove that it has not directly or derivatively used the defendant's statement. As an aside, I agree with the dissent in *Jones v. Franklin Cty. Sheriff*, 520 Ohio St. 3d 40 (1990), that the internal affairs investigator's advisement to the defendant that the information she provided in her statement would not be used against her criminally is not a proper grant of

Kastigar, the defendants here have shifted to the state the burden of showing that the evidence against them was derived from independent sources.

In *State v. Jackson*, 125 Ohio St. 3d 218, 2010-Ohio-621 (2010), the Ohio Supreme Court endorsed this burden shifting for use in Ohio's state courts and made it clear that dismissal is the appropriate remedy where the state fails to prove it did not make any use of the statement to obtain the indictment. But, contrary to Brelo's assertions,[4] the Ohio Supreme Court did not say that dismissal is the remedy for the state's postindictment use of an immunized statement. A plurality of the court in *Jackson* specifically found that "when a trial court rules after a *Kastigar* hearing that a prosecutor has used the defendant's compelled statement in preparation for trial after indictment, the appropriate remedy is for the trial court to suppress that statement and all evidence derived from the statement." *Jackson*, supra, ¶32.

The pending requests in this case

Brelo's motion contains two specific requests. First, he asks that the indictment be dismissed. Second, he asks, in the alternative, for permission to review the transcripts of the grand jury proceedings or for an *in camera* inspection of the transcripts, with the aim of demonstrating the state's improper use of his statement to the internal affairs investigator.

The supervisory defendants have moved for an order "compelling the disclosure of the names of all persons who participated in, reviewed or provided information to attorneys representing the State, or to Cleveland Police personnel, in the collection or review of *Garrity* evidence."[5]

---

immunity. Nevertheless, it is clear that courts have considered such an advisement to be the equivalent of statutory immunity.

[4] Brelo's motion to dismiss, cover page and page 6.

[5] Co-defendants' motion to require, *etc.*, p. 5.

For its part, the state has asked for a *Kastigar* hearing where it will "affirmatively prove on the record that its evidence presented before the grand jury and for trial preparation was obtained independently from any *Garrity* information."[6]

Although I have reviewed the complete grand jury transcript of this case *in camera*, that transcript and the minimal record evidence are not sufficient to decide Brelo's motion to dismiss. For example, as mentioned more than twice here, I do not know for sure whether Brelo and the other defendants were promised immunity from the use of their statements so that *Kastigar* and *Jackson* even apply. Additionally, Brelo and the other defendants gave statements to an investigator from the attorney general's bureau of criminal investigation. As far as I can tell, Brelo's statement was given either on December 8 or 10, 2012, and the other defendants gave statements around the same time. I do not know whether the internal affairs statements were made before or after the statements to BCI, I do not know if the statements to BCI were immunized as in *Jackson*, and I don't know whether the information proffered by each defendant in both statements is more or less identical. All of these things would be worth knowing in deciding whether the state has improperly used statements by the defendants that were compelled by a pledge that they would not be used against them.

Therefore, the state's alternative motion to schedule a *Kastigar* hearing is granted. At that hearing, the state has the burden of presenting evidence that will affirmatively demonstrate that it has not used – directly or derivatively and either before indictment or in preparation for trial – any statement compelled from a defendant with a guarantee that the statement would not be used in a criminal prosecution against him or her.

[6] Plaintiff's brief in opposition, second page (the pages are not numbered).

Although the defendants are going to be tried separately, the reasons justifying separate trials do not pertain to the pending *Garrity* motions and this hearing will be a joint hearing involving all six defendants.

A decision on defendant Brelo's motion to dismiss the indictment is deferred until after the evidentiary hearing, and the five other co-defendants' joint motion to compel the identity of all people with knowledge of the contents of their immunized statements is moot insofar as that information is likely to be part of the state's evidentiary presentation. Finally, defendant Brelo's renewed alternative motion for an *in camera* inspection of the grand jury transcripts was already granted and the transcripts will inform my ultimate decision after evidence is presented at the *Kastigar* hearing.

The date of the hearing will be set by a separate journal entry.

IT IS SO ORDERED:

______________________________________ ________________________

Judge John P. O'Donnell Date

SERVICE

A copy of this journal entry was sent by email, this ______ day of November 2014 to the following:

Timothy J. McGinty, Esq.
Cuyahoga County Prosecutor
tmcginty@prosecutor.cuyahogacounty.us
Richard A. Bell, Esq.
rbell@prosecutor.cuyahogacounty.us
Sherrie S. Royster, Esq.
sroyster@prosecutor.cuyahogacounty.us
James A. Gutierezz, Esq.
jgutierezz@prosecutor.cuyahogacounty.us
Erica D. Barnhill, Esq.
ebarnhill@prosecutor.cuyahogacounty.us
Attorneys for plaintiff the State of Ohio

Patrick A. D'Angelo, Esq.
PDAngelo02@aol.com
Fernando O. Mack, Esq.
losmacks@msn.com
Thomas E. Shaughnessy, Esq.
teshaugh@aol.com
Attorneys for defendant Michael Brelo

Susan L. Gragel, Esq.
sgragel@ggcounsel.com
Attorney for defendant Michael Donegan

Kevin M. Spellacy, Esq.
kspell@mghslaw.com
Attorney for defendant Patricia Coleman

David L. Grant, Esq.
Lawyer4444@aol.com
Attorney for defendant Jason Edens

Mark A. Stanton, Esq.
hollie@mghslaw.com
Attorney for defendant Paul Wilson

No email addresses of counsel for defendant Randolph Dailey have been provided to the court.

____
Judge John P. O'Donnell