

**IN THE CIRCUIT COURT OF CITY OF ST. LOUIS
STATE OF MISSOURI**

IN RE)	
GRAND JURY)	Case No. 1622-CR02213
PROCEEDINGS,)	

**MEMORANDUM IN SUPPORT OF MOTION TO QUASH
GRAND JURY SUBPOENA DUCES TECUM**

COMES NOW Officer Brian Bianchi et al., by and through his counsel of record, and for his Memorandum in Support of the Motion to Quash Grand Jury Subpoena in the above-captioned matter, states as follows:

1. On August 3, 2016, the parties appeared for argument on the Motion to Quash the Grand Jury Subpoena which requested the St. Louis City Counselor's Office to deliver to the Grand Jury on or before June 9, 2016, a sworn and/or certified copy of the following:

a. All written or recorded statements made to any and all investigators in the St. Louis Metropolitan Police Department, including Internal Affairs Division, by all individuals except Jason Stockley related to the investigation of the fatal shooting of Anthony Smith on December 20, 2011. This is to include all written or recorded statements covered by *Garrity v. New Jersey*, 385 U.S. 493 (1967).

2. The materials sought were the Internal Affairs files of Officer Brian Bianchi and other officers related to the fatal shooting of Anthony Smith on December 20, 2011, and are documents protected by §84.344 and *Garrity v. New Jersey*, 385 U.S. 493 (1967). To reiterate, the *Garrity* Statements are confidential closed records pursuant to §84.344RSMo. §84.344 states in pertinent part that:

“If the city not within a county elects to establish a municipal police force under this section, the city shall establish a separate division for the operation of its municipal police force. The civil service commission of the city may adopt rules and regulations appropriate for the unique operation of a police department. Such rules and regulations shall reserve exclusive authority over the disciplinary process and procedures affecting commissioned officers to the civil service commission...Unless otherwise provided for, existing civil service commission rules and regulations governing the appeal of disciplinary decisions to the civil service commission shall apply to all commissioned and civilian personnel. **The civil service commission's rules and regulations shall provide that records prepared for disciplinary purposes shall be confidential, closed records available solely to the civil service commission and those who possess authority to conduct investigations regarding disciplinary matters pursuant to the civil service commission's rules and regulations.**” *Emphasis added*

3. In this case all the requested records are contained in the Internal Affairs Internal Investigation file and were specifically prepared for disciplinary purposes. The statements made by Officer Bianchi and the other officers to Internal Affairs investigators are statements given pursuant to *Garrity v. New Jersey*, 385 US 493 (1967). The *Garrity* warning advises police officer that any compelled statements or evidence obtained from such statements, which are required as a condition of their continued employment, can be used against the employee only in an investigation of the employees performance and not in a criminal proceeding. *Garner v. Missouri State Highway Patrol Superintendent*, 901 S.W. 2d 107, 110 Mo. App. W. D. 1995. This is a guarantee to the public employee that the statement they give pursuant to *Garrity* is for disciplinary reasons and not for the investigation of a crime. By their nature, *Garrity* statements must be part of an internal disciplinary process and not a criminal proceeding.

4. The documents requested relate to a police disciplinary proceeding which is not part of a police criminal investigation and are thus confidential closed records pursuant to §84.344 and *Garrity v. New Jersey*, 385 U.S. 493 (1967). The State refers us to *Chasnoff v. Mokwa*, 466 S.W. 3rd 571 regarding the closed records issue. In that Sunshine Law case the court noted that the law of Missouri is found in the statutes of and decisions of the courts and not in the

police department administrative customs. At the time that records were requested in *Chasnoff* there was not statutory provision closing the disciplinary records. At the time of the State's request the Statute cited above specifically provides that the records shall be confidential closed records. So as the case points out the *Garrity* Statements are now mandatorily closed by statute.

5. Sgt. Kirk Deeken was called to testify about his role in the Jason Stockley matter. Sgt. Deeken testified that his initial involvement was as the criminal investigator in the case. He performed in that role until the United States Attorney's Office took over the investigation. Once the United States Attorney's Office took over the criminal investigation he continued on becoming an investigator on the internal side of the Stockley investigation. In that role he was present for and participated in the taking of the *Garrity* Statements which are the subject of the subpoena. Sgt. Deeken further testified that after the Internal Investigation was concluded he again resumed his role as the criminal investigator in this matter. He participated in the location of Jason Stockley at his home in Texas and once arrested by the Texas authorities attempted to take a statement from him.

6. Counsel for the State has cited to *Chasnoff v. Mokwa*, 466 S.W. 3rd 571 which was a Sunshine Law case. In that case Lt. Scott Gardner, Commander of IAD testified that separate IAD investigators would conduct separate investigations into the alleged misconduct for internal purposes and for purposes of potential criminal prosecution. The investigator looking into potential criminal activity would share information with the IAD investigator conducting the internal investigation but the information would never flow the other way from the internal to the criminal investigation.

7. Lt. Jack Huelsman, the former Deputy Commander of IAD, similarly testified that that the investigator on the criminal side would share information with the investigator on the

internal side, but that the internal investigator would never share information learned through a Garrity Statement with the criminal investigator.

8. The obvious problem in this matter is that the criminal and internal investigators are one in the same. Sgt. Deeken testified before the Grand Jury which returned the indictment. Because Sgt. Deeken was present during the taking of the Garrity Statements of those requested in the subpoena as well as the Garrity statement of Jason Stockley the State has thus made use and derivative use of the statements to obtain the indictment. Crossing this line is so egregious that it may subject the indictment to dismissal *See State v. Jackson, 125 Ohio St. 3d 218, 2010-Ohio-621*.

9. Sgt. Deeken knows everything that was said in the Garrity statements and continues to be the criminal investigator. The knowledge of Stockley's and the other statements gives the Circuit Attorney an impermissible advantage in trial preparation. Even non-evidentiary uses could conceivably include deciding to initiate prosecution more five years after the shooting, assistance in focusing the investigation, interpreting evidence, planning cross-examination and otherwise generally planning trial strategy. *See Kastigar v. United States 406 U.S. 441, 453 (1972), State v. Jackson, 125 Ohio St. 3d 218, 2010-Ohio-621*. A strict interpretation of *Kastigar* forbids all prosecutorial use of the testimony, not merely that which results in the presentation of evidence before the jury. The mere exposure of compelled testimony to a prosecutor may have an immeasurable subjective effect that taints the prosecution's presentation at trial. *See United States v. McDaniel, 482 F.2d 305, 311, 312 (8th Cir. 1973), State v. Jackson, 125 Ohio St. 3d 218, 2010-Ohio-621*

10. Sgt. Deeken further testified that the Garrity Statements did not contain questioning about the shooting on December 20, 2011. If that is the case then the request is not reasonably calculated to lead to the discovery of admissible evidence. The State's response was that it goes to

the witness's credibility. This implies that the State intends to use the Garrity Statement against the declarant in a criminal proceeding which is specifically prohibited under Garrity. *See paragraphs 5 and 11 of the States Response to Motion to Quash Grand Jury Subpoena*. The Advice of Rights specifically states that, "These statements **may be used against you** in relation to subsequent departmental charges, **but not in any criminal proceeding**." *emphasis added* This was the nature of the contract between the department and the officer making a statement pursuant *Garrity*.

11. The State also argues that it has a duty under Missouri Supreme Court Rule 25.03(A)(1) to disclose all written or recorded statements of witnesses the State intends to call as witnesses. The State is only required to produce those written or recorded statements within its possession and these records are internal police department records used for internal disciplinary purposes and not created as part of the criminal investigative file. The State has no obligation to produce them.

12. *Garrity* statements have **never** been used in a criminal prosecution in the State of Missouri or any Federal prosecution in this circuit. Furthermore, neither the Circuit Attorney nor the United States Attorney has ever produced a *Garrity* statement in discovery in any criminal prosecution of a police officer from the St. Louis Metropolitan Police Department.

WHEREFORE, Officer Brian Bianchi et al respectfully requests that this Court quash the Grand Jury Subpoena issued in the above-captioned matter as the information sought are confidential and closed records, protected under *Garrity v. New Jersey*, 385 U.S. 493 (1967) and section 84.344 and for such other and further relief as this Court deems just and proper.

McCARTHY, LEONARD, & KAEMMERER, L.C.

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ELECTRONIC FILING CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of August, 2016, a true and accurate copy of the foregoing was filed electronically with the Clerk of Court, therefore to be served by operation of the Court's electronic filing system upon all counsel of record and via email to Michael Garvin, City Counselor at garvinm@stlouis-mo.gov and Christine Hodzic, Associate City Counselor at Christine.hodzic@slmpd.org.

/s/James P. Towey, Jr.