

The *Garrity*

By Mark A. Porter

Round-Up, Part One: Some Hope – But Also Great Concern

“In our days, governments have frequently entrusted to courts a wide authority to make rules of procedure.”

– The Nature and Sources of the Law
John Chipman Gray (1909)

Professor Gray's observation remains true today, 102-years later, as we look at the latest nationwide round-up of *Garrity* cases.

At the request of your State Lodge, the law firm periodically conducts a legal round-up of *Garrity* cases, to see how the 1967 US Supreme Court's decision has fared.¹ The latest review covers the time period from January 01, 2010, through April 01, 2011.

Garrity is unusual in that questions about its interpretation have never returned on any level to the US Supreme Court in 44-years. That leaves all of the Federal and State Courts to come up with their own answers when law enforcement and corrections officers are charged as criminals. And over the last decade, local, State and Federal prosecutors have

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become much more aggressive in going after all officers for criminal – instead of administrative – charges.

So what did we find this year? Two State Courts – Ohio and Illinois – have now moved to endorse and strengthen *Garrity*'s protections. Other State Courts, however – including the Michigan Courts – have continued to send out signals that *Garrity* is a rule to be ignored

whenever possible. The Federal Courts of Appeals, meanwhile, remain fundamentally split on the core meaning and application of *Garrity*.

These splits are of great legal importance, given that *Garrity* is a Federal Court *rule of criminal procedure*. Our system of criminal law is based upon the principle that *even if* a violation of criminal law has occurred, the defendant maintains the absolute right to remain silent while being prosecuted.

That right to silence can be *waived* by the Defendant – and in many of the cases described below, that's exactly what the officers did. Once waived by an officer – either through bad advice or even sheer ignorance – the officer cannot run back to the safety of *Garrity*.

The right to remain silent, however, cannot be **overridden** unless the defendant is given immunity; and that's what *Garrity* does. Whereas the *Miranda* rule gives fair warning to a criminal suspect in custody, *Garrity* is "***Miranda-in-reverse.***" There is no right to remain silent, upon threats of severe job sanctions by the officer's **employer**.²

The immunity is called "***use*** and ***derivative-use*** immunity," meaning that neither the statement, nor evidence obtained directly from the statement, can be "used" against an officer who is facing trial as a criminal defendant.³

Although some form of the *Garrity* warning is often contained in many police department rules and regulations; as well as in public safety labor contracts, it has *nothing* to do with labor law. That is because the *Garrity* statement only becomes relevant if the officer is subsequently charged as a criminal for an indictment that mirrors the subject matter of the statement.

The prosecution of the officer catapults the *Garrity* statement into the *criminal* courts, and completely out of any departmental procedure or labor contract. As such, only one person can attempt to enforce the statement's immunity, and that is the ***criminal defense*** attorney representing the officer – *not* the department that obtained the *Garrity* statement; nor the officer's union attorney.

Court rules of criminal and civil procedure, on the surface, determine how cases will proceed through the legal system to some kind of a resolution. A violation of the *Garrity* rule creates a court procedure known as the "evidentiary" or "evidence suppression" hearing to see if the officer's statement was truly "compelled" or "voluntary." How that hearing turns out will, in many cases, determine the officer's ultimate fate as a criminal defendant.

Because *Garrity* is a Federal criminal rule, it has a nationwide impact on criminal cases against officers in both Federal and State Courts. For these reasons, the periodic *Garrity* roundup remains an important legal tool for surveying the legal landscape from sea-to-sea.

The latest 15-month survey hit on 33-*Garrity* cases across the country – compared to just 10-cases during the first 9-months of 2006. Bear in mind that although Federal Courts publish most trial court decisions online, most State Courts only publish cases decided in the Courts of Appeals and the Supreme Courts of their States. That means that *Garrity* may very well be turning up even more often than is apparent through various legal search engines.

Because so much *Garrity* case law is now moving through the various State and Federal Courts, this year's round-up results are being split into two separate articles for ***The Peace Officer***. This article will concern the overall highlights of the cases – and the next issue will dig deeper into several important *Garrity* cases and their impacts on all public safety officers.

Of the 18-times that an evidence suppression hearing was held for criminal cases, the various Courts upheld *Garrity* in only 6-cases. In the other 12-cases, the officer's *Garrity* statement – or evidence derived from that statement – was admitted at trial.

On the civil, non-criminal side of court hearings, the Courts overruled *Garrity* in 5-cases out of 7-cases total. The civil cases, as in the past, involved lawsuits by officers against their employers for alleged *Garrity* violations. In all cases, no legal blame or "damages" were found for abuse of the *Garrity* statement.

In one of the two lawsuits protecting *Garrity*, the *Garrity* statement taken from a West Virginia State Trooper was sealed by the Federal Court. The statement was then removed from the discovery given to the Plaintiff for his suit claiming excessive force. And in a rather unusual case, the estate of a man fatally wounded by a Michigan PD claimed damages because the Department did not order *Garrity* statements from the involved officers. A Federal Court also dismissed that claim.⁴

Here are the important take-away points from this year's review:

1. Bad Facts Still Make Very Bad Law:

In many of the surveyed cases, officers made incriminating statements that

were clearly voluntary – to the extent of one officer signing a written statement with a heading that said "CONSENT FORM." In another case, a Federal Transportation Security Officer signed a departmental statement form that stated: "*I am making this statement of my own free will, without any duress or coercion.*" A California officer agreed to consent searches of his home and automobile, and then participated in a criminal interview without any representation or protest.⁵

Folks, let's be blunt: sometimes criminal defense attorneys can help to heal the sick – but none of us can raise the dead. There is an individual responsibility to ***get help immediately*** when the officer realizes that a departmental investigation is underway. The Federal Court of Appeals for the 6th Circuit that includes Michigan, has ruled that the presence of a union steward for a compelled interview gives strong evidence that the "talk-or-else" *Garrity* protections are being invoked.⁶ But it remains incumbent upon the individual officer to "wake up and smell the coffee" before subsequent events destroy *Garrity* protections.

2. *Garrity* Protections NEVER Apply To Outside Agencies:

All Federal and State Courts are consistent on this point. The power behind *Garrity* is the power-of-the-paycheck. Only an employer with the power to suspend or terminate an officer can order an employee through *Garrity* to "talk or else."⁷

3. "There's Someone Here To Talk To You."

Along the same lines, it is not unusual for public safety departments to call an officer without notice and then lead the officer to a room where agents from an outside agency "want to talk" with the officer. This set-up is ***NOT*** protected by ***either Garrity or Miranda*** – you are on your own as a ***criminal*** suspect in a noncustodial interview. ***Get legal help immediately – and DO NOT participate in that "interview" without competent legal representation!***⁸

4. You Cannot Invoke *Garrity* By Refusing to Appear.

Refusing to Appear. *Garrity* cannot be converted into a “what if” defense. As uncomfortable as the situations can occur, employees who refuse to appear at an I-A interview cannot invoke any *Garrity* protections. The Courts have ruled that because no *Garrity* warning was invoked, none can be claimed – and discipline will be upheld.⁹

5. *Garrity* Does Not Apply to Any Administrative Hearing:

The *Garrity* rule is strictly for *criminal* trials – it does not apply to any other hearing. Testimony at police trial boards and license revocation *administrative* hearings is deemed voluntary. The officer has a right not to testify, even though the silence may be used to decide guilt. But the highest punishment that can come from an administrative hearing is termination, not incarceration. Any testimony given at the *administrative* hearing, however, will be admitted in the officer’s *criminal* trial as “voluntary.” This is a long-standing rule in Michigan.¹⁰

6. Written Memoranda and Reports are NOT covered by *Garrity*.

In criminal cases against Michigan police officers, both State and Federal Courts have been consistent on this rule. Reports and memoranda are often used by

Federal prosecutors to accuse officers of “obstruction of justice,” based upon facts that were claimed to have been omitted from the report.¹¹

Last year the Michigan Court of Appeals again applied this rule in a case where an officer was accused of excessive force. The on-site supervisor called the officer out from the scene and later ordered a memo “by tomorrow,” telling him: “This is serious, you could be fired.” The Michigan District Court, Circuit Court, and Court of Appeals all ruled that the written memo was not protected under *Garrity*. Late last year, the Michigan Supreme Court denied leave to appeal, sending the case back to the trial level with the memo admitted as evidence. There will be a more detailed analysis of this case in the next issue of *The Peace Officer*.¹²

Law enforcement and corrections officers routinely check their gear, vehicles, and weapons to make sure that they will properly perform as required at any given time.

It’s time to also review your *Garrity* protections – and download the model *Garrity* warning from the law firm’s website for your own workplace. As shown by this overview of recent cases – there is no second chance to get it right.

¹ *Garrity v New Jersey*, 385 US 493 (1967). For Federal law enforcement and corrections officers, the parallel case is *Kalkines v United States*, 473 F.2d 1391, 1395 (Ct. Cl. 1973).

² *Miranda v Arizona*, 384 US 436 (1966).

³ *Kastigar v US*, 406 US 441 (1972)

⁴ *Wolfe v Crane et al*, US Southern Dist West Virginia #2:08-01023 (12/15/2010); *Scozzari v City of Clare*, US Eastern Dist Mich #08-10997 (04/21/2010)

⁵ *US v Gray*, US Northern Dist Ohio #3:09 (04/13/2010); *Albani v US*, US East Dist Penn #09-4790 (06/09/2010); *People v Lewis*, Calf Ct of App 3rd District #C-06-1136 (02/20/2011)

⁶ *McKinley v City of Mansfield*, 404 F.3d 418 (2005), fn-16

⁷ *US v Gray*, above; *US v Hill*, US Northern Dist Ga. #1:09-CR-199 (01/13/2010); *US v Lamb*, US Northern Dist W.Va. #5:09-CR-44 (03/05/2010)

⁸ *US v Hill*; *US v Lamb*; *US v Gray*

⁹ *Wood v Summit County Ohio*, 377 Fed Appx 512 (6th Circ 2010); *Enriquez v David Douglas School District*, US Dist Ct Oregon #09-724 (10/27/2010)

¹⁰ *Local 502 v Lucas*, 79 Mich App 445 (1977); *US v Hutley*, US Northern Dist Ga. #10-CR-127 (12/01/2010); *US v McKinney*, Eastern Dist Penn #09-234 (03/12/2010)

¹¹ *People v Jobson*, 205 Mich App 708 (1994); *US v Jacquemain*, 368 F Supp 2d 800 (2005) 18 USC 1512.

¹² *People v Olson*, Mich Ct of Apps #288577 (04/08/2010) cert denied Mich Sup Ct (10/26/2010).

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A screen will appear “Pick a Benefit Bar” with a drop-down menu. Go to “MI Fraternal Order of Police” option, then hit “Continue” then follow the instructions for downloading. Once the toolbar is on your browser, check all of the links to see that they are working properly. Should you have difficulty downloading the toolbar, encounter any problems with its workability, or if there is an error in the test, please contact the FOP State Lodge at toll free 1-888-367-6424 for assistance. This process takes less than a minute.



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