

## **Garrity Returns to Chicago – Surprise! He Never Left .....**

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*Does anybody really know what time it is?  
Does anybody really care?  
If so I can't imagine why,  
We've all got time enough to die.*

– Chicago, "The Chicago Transit Authority," (1969)

Each year, on behalf of the Michigan Lodge of the Fraternal Order of Police, I run a nationwide survey on *Garrity* cases, to determine how Chief Garrity's legacy has held up after 42-years. As readers of FOP's Peace Officer magazine already know, *Garrity – v – New Jersey* has been under increasing attack from prosecuting agencies at all levels. <sup>1</sup>

It was for that reason that your State Lodge was in the forefront of a 4-year effort to incorporate the *Garrity* court decision into Michigan law, to protect public safety and corrections officers. <sup>2</sup>

It was also the reason that The Peace Officer was the first – and only – law enforcement magazine to detail the important *Garrity* decision in 2005 by the U.S. Court of Appeals for the 6<sup>th</sup> Circuit. That decision – which is now the guiding law for Michigan, Ohio, Kentucky, and Tennessee – confirmed that officers can be charged with perjury and obstruction of justice based upon the *Garrity* statement itself. <sup>3</sup>

The results of the 2009 survey will be detailed in the next edition of The Peace Officer. But one ongoing *Garrity* case is so astounding that it needs to be explored in detail. And for that, we must travel to the City of Chicago – where a

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<sup>1</sup> *Garrity v New Jersey*, 385 US 493 (1967).

<sup>2</sup> MCL 15.391-395 at [www.mileg.org](http://www.mileg.org)

<sup>3</sup> *McKinley v City of Mansfield Ohio*, 404 F3d 418 (2005)

*Garrity* statement compelled in 1991 has now led to criminal indictment in 2008 against the officer who was ordered to make it.

### **The Background**

The story begins in the early 1980s, and involves Chicago PD Commander Jon Burge. To many in Chicago (inside and outside of the news media), Jon Burge is a lightning rod for controversy – as will become clear below.

So let me paraphrase Shakespeare to say that I do not come to praise Commander Burge, nor to bury him. My specific interest – and great concern – is the ongoing role of *Garrity* statements that were suddenly resurrected from their graves 17-years later.

To reach that story – which is still ongoing as 2009 comes to a close – we must start with the murders of two Chicago Police Officers in February, 1982. Here is the timeline of our story:

**February 9, 1982:** CPD officers William P. Fahey and Richard James J. O'Brien are on duty and driving back from the funeral of another CPD officer, James Doyle. Officer Doyle had been shot and killed 4-days earlier by an armed robbery suspect.

Officers Fahey and O'Brien observe a car run a red light, and pull it over for investigation. A struggle with an occupant ensues, and Officer Fahey's weapon is taken and used against him and Officer O'Brien, fatally wounding both.<sup>4</sup>

**February 14, 1982:** Andrew Wilson is arrested as the lead suspect in the officers' murders, along with his brother Jackie Wilson. During his trial, Andrew Wilson alleges that he was physically assaulted by officers of CPD during his interrogation. He is convicted and sentenced to death – but that verdict is overturned by Illinois Supreme Court in 1987. The Supreme Court has concerns about the dispute over the assaults and injuries alleged by Wilson, and orders a retrial.

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<sup>4</sup> All information from The Officer Down Memorial Page, [www.odmp.org](http://www.odmp.org).

**June 20, 1988:** Andrew Wilson is retried, re-convicted, and sentenced to life imprisonment. His appeals are denied, and the murder cases close for good in September, 1993, after the last appeal.

**May 08, 1991:** Media reports of “systematic” assaults on CPD prisoners by Commander Burge and his officers have led to investigations by the Chicago Office of Professional Standards (“OPS”) in the late 1980s. After Andrew Wilson’s second conviction, the OPS opens a second investigation against Commander Burge and two other officers.

The officers are given a written, detailed and solid *Garrity* warning, and ordered to respond to numerous charges. The *Garrity* warning specifically states:

7. You are further advised that by law any admission or statement made by you during the course of this hearing, interrogation, or examination and the fruits thereof cannot be used against you in a subsequent criminal proceeding.<sup>5</sup>

All of the officers decline oral testimony, and – with the help of legal counsel – they submit a joint, 113-page response denying the allegations.

**November 12, 1991:** Police Superintendent Leroy Martin files charges with the Chicago Police Board against all three officers. Commander Burge is suspended pending the hearings, which are held in early 1992.

During the hearings, Commander Burge is again ordered to testify, under threat of discharge if he refuses the order.

**February 11, 1993:** The Police Board issues its factual and legal conclusions, and discharges Commander Burge. The other two officers are given lengthy suspensions. Appeals through the Illinois State Courts are denied.

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<sup>5</sup> This information is taken from decisions and orders of the Federal District Court hearing the current criminal proceedings at <http://pacer.uscourts.gov>.

**October 4, 1993:** Andrew Wilson, who has filed Federal lawsuits against the City of Chicago and Commander Burge in the late 1980s, gets a decision from the Federal Courts of Appeals for the 7<sup>th</sup> Circuit. Wilson’s first lawsuit in the U.S. District Court ended in a hung jury. His second lawsuit ended in a verdict against the City for having “a *de facto* policy authorizing its police officers physically to abuse persons suspected of having killed or injured a police officer.”

The individual officers, however, are held not responsible in the 2<sup>nd</sup> trial. Wilson’s appeal to the 7<sup>th</sup> Circuit results in the case being sent back for a re-trial against the individual officers, including former Commander Burge.<sup>6</sup>

**January 31, 2000:** Multiple articles in the Chicago newspapers have questioned the validity of some convictions brought by CPD. Based in part on the accusations of prisoners against CPD and subsequent investigations, Illinois Governor George Ryan, Sr., puts a moratorium on prisoner executions.

**September 27, 2001:** During the late 1980s and throughout the 1990s, numerous Illinois prison inmates – including several on death row – begin filing complaints and lawsuits alleging physical abuse by the Chicago PD and against Commander Burge’s officers in specific. The Chicago Tribune reports that State’s Attorney Richard Devine is negotiating deals with some of the prisoners to reduce sentences in return for signing off all claims of abuse.<sup>7</sup>

**April, 2002:** The Cook County Circuit Court appoints a special State’s Attorney to investigate the public allegations against former Commander Burge and his officers. The State’s Attorney uses the 1991 *Garrity* statements and the Police Board testimony in its investigations.

**January 11, 2003:** Illinois Governor George Ryan, Sr. commutes the sentences of 167 Illinois inmates on death row – and he pardons four convicted prisoners, including Madison Hobley. Hobley was arrested and charged in 1987

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<sup>6</sup> *Wilson v City of Chicago*, 6 F3d 1233 (1993). The Chief Judge of the 7<sup>th</sup> Circuit who wrote the decision to remand the case for trial against the individual officers was appointed by President Reagan in 1981.

<sup>7</sup> “Devine Offers Death Row Deal: Inmates Who Drop Torture Claims May Gain Freedom,” The Chicago Tribune, September 27, 2001.

for setting fire to a residence in Chicago that killed members of his own family. He has alleged that his confession was the result of assaults by CPD, and officers who were under Commander Burge. Following his release, Hobley files a lawsuit in Federal Court against the City of Chicago and numerous officers, including former Commander Burge.

Governor Ryan soon leaves office under a cloud of scandal – he is indicted, tried, and found guilty of Federal racketeering statutes (RICO). He is currently at a Federal medium security prison in Indiana, with a release date in July, 2013.

**November 12, 2003:** After most lawsuits are filed, a period of “discovery” begins, which can last up to 2-years. During that time, written “*Interrogatories*,” or questions to be answered under oath, are issued by both sides. The returned answers – although prepared with the assistance of legal counsel – must be sworn to by the individual who submits them.

On November 12, 2003, former Commander Burge files sworn interrogatory answers to Madison Hobley’s attorneys, denying any:

.... improper coercion of suspects while  
in detention or during interrogation.

**July 19, 2006:** The report of the Special State’s Attorney is issued on its investigation of charges of prisoner assaults. It announces that the charges are “credible” – but that all statutes of limitation for prosecution have expired. A political uproar ensues over the delay of the report – and the reported \$7-Million that funded it. Stories begin to spread that the Federal Government is beginning its own criminal investigation of the allegations.

**January 09, 2008:** The Chicago City Council approves settlement payments to four former prison inmates who were part of the ongoing CPD investigations – including Madison Hobley. Hobley’s settlement is unique, in that he receives a \$1-Million settlement from the City. *But* – if the ongoing Federal

investigation does not indict anyone related to the allegations, he will receive an additional \$6.5-Million payment.<sup>8</sup>

**June 11, 2008:** It is reported in The Chicago Tribune that “a group of retired Chicago police officers have been subpoenaed to appear before a Federal grand jury” related to the CPD investigations – now passing the 20-year mark.

**October 16, 2008:** The Federal statute of limitations for most crimes is 5-years [**18 USC 3282**]. Just 27-days before the Statute of Limitations expires, the U.S. Attorneys obtain and file a 3-Count Federal indictment against former Commander Burge for lying in his answers to the interrogatories in the Madison Hobley lawsuit.

During a press conference announcing the indictments, the U.S. District Attorney is asked why the basis for the criminal charge is a non-criminal civil lawsuit. In his answer, the District Attorney compares former Commander Burge’s case to Federal indictments of mobster Al Capone in the 1930s:

"If people commit multiple crimes, and you can't prosecute them for one, there's nothing wrong with prosecuting them for another ... If Al Capone went down for taxes, that was better than him going down for nothing."<sup>9</sup>

The indicted charges are for obstruction of justice (20-years); and perjury (5-years).<sup>10</sup> As detailed in previous Peace Officer articles, these charges are the generic, standard allegations that are often used to indict public employees.

The indictments also save the City of Chicago from paying an additional \$6.5-Million to Madison Hobley.

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<sup>8</sup> “Aldermen Approve Payouts Totaling Almost \$20-Million,” The Chicago Tribune, Jan 10, 2008

<sup>9</sup> “Feds Catch Up With Burge – Notorious Ex-Chicago Commander Charged With Lying About Torture,” The Chicago Tribune, October 22, 2008

<sup>10</sup> 18 USC 1512 and 1621

## The *Garrity* Resurrection:

As the saying goes, “I couldn’t have made up this story.” Here is what has happened since then – in the extremely important, pre-trial legal battles between the Federal Government and defense attorneys:

Defense attorneys for former Commander Burge have asserted that the Federal indictment is based, in large part, upon the compelled *Garrity* statements taken from him in 1991 – as well as the compelled testimony at the Chicago Police Board hearings in 1992.

So the defense attorneys begin filing numerous Motions at the Federal District Court to contest various aspects of the indictment.

They file a Motion to change the venue from Chicago, based upon twenty years of publicity – but that Motion is denied by the Court on July 29, 2009.

The Government, meanwhile, files Motion at the Court to admit the prior testimony given by the original subject of this story, Andrew Wilson – who died in 2007. Commander Burge’s attorneys object, noting that Wilson had taken the 5<sup>th</sup> Amendment numerous times during his testimony at his two criminal trials; his three civil trials; and during the Police Board hearings. They argue that since effective cross-examination is not possible, the “unavailability” of Wilson to be cross-examined at Commander Burge’s trial should exclude all previous testimony.

On April 23, 2009, the Court grants the Government’s Motion to admit Wilson’s testimony at Burge’s trial.

The defense attorneys then file a Motion to exclude all compelled statements from the 1991 and 1992 investigations and hearings against Commander Burge, citing *Garrity*.

In its response, the Federal Government submits a 12-page affidavit by an Assistant U.S. Attorney [“AUSA”]. The affidavit states that “between 1982 and 2001,” the FBI and U.S. District Attorneys had opened “a number of preliminary inquiries” into the allegations against CPD – but all had been closed without indictments.

The AUSAs met with the CPD's legal counsel for the 1992 Police Board hearings, as well as members of the State's Special Attorney from 2002-2006. All of them claimed that "they could not recall" any *Garrity* statement that admitted illegal acts.

The AUSAs sent materials to another AUSA in the Civil Rights Division of the Department of Justice in Washington, D.C., to "screen a portion of the materials" for *Garrity* statements of admission. It is claimed that the screening did not locate any *Garrity* problems "in the materials she reviewed."

The affidavit also states that no *Garrity* statement given to the OPS in 1991 was read by the AUSAs in 2006-2007.

Nonetheless, if the current Court rules that the *Garrity* statements are admissible, the AUSAs intend to go through them to find evidence to use against former Commander Burge.

The AUSAs also argue that *Garrity* statements cannot protect the officer who makes them against criminal charges of perjury and obstruction of justice.<sup>11</sup>

The District Court agrees – and on September 11, 2009, it rules that all *Garrity* statements made in 1991 and 1992 can be admitted in the upcoming trial of former Commander Burge.

### **Lessons to be Learned**

*Garrity* is an extremely important legal issue that affects every public safety and corrections officer – no matter who their employer may be. It is long-past the time for some groups – who like to take the easy way out and claim that *Garrity* is a bullet-proof piece of paper – to acknowledge that the assaults on its protections are increasing each year. Here are some points to consider:

First – despite the honest intentions of any public safety employer, no *Garrity* statement can be said to be truly secure from the motivations and actions of any outside, prosecuting agency. In Michigan, the *Garrity* statute requires a

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<sup>11</sup> That is also the rule in Michigan – see *McKinley v City of Mansfield*, at fn-3, above.

Court Order to release the statement – but the Burge case shows that prosecutors will try numerous tactics to obtain the Order.

The ultimate destination, therefore, of the *Garrity* statement will be in hands of the legal community and the Courts – not the employer who issued the original order to give a statement. It is one more reason that Michigan’s *Garrity* statute must be carefully and strictly followed each time the *Garrity* order is given.

Second – the language of well-written *Garrity* warning is more important than ever. The *Garrity* warning drafted and recommended by this law firm includes the warning that the statements may be used in prosecutions for perjury and obstruction of justice – to fully alert the officer to the trap-door that attaches to every one of the compelled statements.

Third – the Chicago indictment brings home the point that *Garrity* statements are never truly dead and filed – even years after the officer separates from the department. The District Court in Chicago has endorsed the rulings of other Federal Courts that officers cannot assert 5<sup>th</sup> Amendment rights for any crime except for the investigation at the time that the *Garrity* statement is made.

That ruling parallels a recent, similar ruling by the Federal 6<sup>th</sup> Circuit Court of Appeals involving convicted Michigan peace officers.<sup>12</sup>

Fourth – We can certainly detect the odors of political posturing at various points of this story. Bear in mind, however, that these investigations were begun and prosecuted under State and Federal administrations of both political parties. As the saying goes, “The faces change – but the stories are always the same.”

Fifth – This story – now running in its 25<sup>th</sup> year – points out how any officer can end up in the cross-hairs of three separate adverse actions: administrative hearings; civil lawsuits; and criminal indictments.

Of special concern is the distinct possibility that the officer may be represented by numerous attorneys over time, each handling separate cases – and not knowing or reviewing what has happened in the other legal arenas.

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<sup>12</sup> *US v Carson*, 560 F.3d 566 (2009)

However, everything – **everything** – that the officer says – writes in report – is compelled to say – testifies to – or swears to on an affidavit – remains quietly in repose for the rest of the officer’s life.

Prosecuting agencies may try and find any allegation to criminally charge an officer – no matter how tangential or distant from the original investigation. To succinctly paraphrase the flip remark of the U.S. District Attorney during the Burge press conference: “*You are all Al Capone.*”

Now, in addition to marking off the day of retirement, each officer will have to carefully mark the calendar for each Statute of Limitation.

Consistent, thorough, and careful legal counsel is not only advisable – it is an absolute necessity.

### **Epilogue**

The funeral mass and celebration of the life of Chicago Police Officer William P. Fahey was held at 10:00-am on Saturday, February 13, 1982, at the Queen of the Universe Catholic Church in Chicago.

The funeral mass and celebration of the life of Chicago Police Officer Richard J. O’Brien was held on Friday, February 12, 1982, in St. Denis Catholic Church in Chicago – the same church where 3-days before, services had been held for slain Chicago Police Officer James E. Doyle.

*Everyday he suffers  
'Cause he sees all kinds of pain  
Sometimes he feels helpless  
In a world that's gone insane...  
It's only human kindness he is after*

*He is a policeman, you know,  
All the years and nothing to show*

– Chicago, The Chicago Album XI (1977)