

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
BROWN COUNTY

STATE OF OHIO,	:	
	:	CASE NOS. CA2010-10-016
Plaintiff-Appellant,	:	CA2010-10-017
	:	CA2010-10-018
- vs -	:	CA2010-10-019
	:	CA2010-10-020
	:	
DAVID GRAHAM, et al.,	:	<u>OPINION</u>
	:	1/17/2012
Defendants-Appellees.	:	

CRIMINAL APPEAL FROM BROWN COUNTY COURT OF COMMON PLEAS  
Case No. 2010-2049

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**PIPER, J.**

{¶1} Plaintiff-appellant, the state of Ohio, appeals the decision of the Brown County Court of Common Pleas to suppress the statements of employees of the Ohio Department of Natural Resources pursuant to *Garrity v. New Jersey* in relation to charges of obstructing justice and complicity to obstructing justice.

**Statement of Facts**

{¶2} In 2009, a confidential informant contacted the Office of the Inspector General (OIG) to report an allegation of improper activity by Ohio Wildlife Officer Allan Wright. The informant alleged that Wright assisted South Carolina Wildlife Officer Eric Vaughn in obtaining an Ohio resident hunting license by using Wright's home address.<sup>1</sup> Although Vaughn is not now, nor has ever been, an Ohio resident, he received an Ohio resident hunting license for \$19 instead of the nonresident license fee of \$125 by using Wright's Ohio address to demonstrate residency. The OIG began an investigation into the allegations.

{¶3} According to a report from the OIG, it "strives to eliminate the fraud, waste, and abuse that is sometimes associated with government bureaucracies. The Inspector General also shines a light on corruption that would cause citizens to lose faith in state government." According to R.C. 121.41 through 121.50, the OIG is authorized to investigate alleged wrongful acts or omissions committed by state officers and employees involved in the management and operation of state agencies. The OIG solely investigates issues on behalf of the Inspector General in the performance of his duties, and does not investigate on behalf of other agencies.

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1. Neither Vaughn nor Wright are named defendants in this case.

{¶4} R.C. 121.43 states that "in performing any investigation, the inspector general and any deputy inspector general may administer oaths, examine witnesses under oath, and issue subpoenas and subpoenas duces tecum to compel the attendance of witnesses and the production of all kinds of books, records, papers, and tangible things." The OIG is limited in its investigatory interview process because a state employee is free to not answer questions or otherwise terminate an interview at any time.

{¶5} The interview ceases if the witness refuses to cooperate. The OIG's only recourse when a witness chooses not to cooperate is to institute legal proceedings, requesting that the court find the employee in contempt. According to R.C. 121.43, "upon the refusal of a witness to be sworn or to answer any question put to him, or if a person disobeys a subpoena, the inspector general shall apply to the court of common pleas for a contempt order, as in the case of disobedience to the requirements of a subpoena issued from the court of common pleas, or a refusal to testify in the court."

{¶6} Absent a contempt order, however, the OIG has no authority, statutory or otherwise, to compel a witness to waive the Fifth Amendment right against self-incrimination. Nor does the OIG have any arrest powers, or authority to terminate or discipline employees who choose not to cooperate in the investigation.

{¶7} Once an OIG investigation is completed, a report is given to the Governor of Ohio and to the director of the agency subject to investigation. The OIG may also deliver the report to law enforcement agencies, or to other state agencies that investigate, audit, review or evaluate the management and operation of state agencies. However, the OIG has no role in requesting that certain employees be prosecuted. Being a statutory agency, OIG investigators have no authority to take people into custody, initiate prosecutions, or

conduct criminal investigations.

{¶8} The OIG's preliminary investigation into Wright's activities revealed that he facilitated the falsification of the hunting license paperwork by providing his address to Vaughn to procure an Ohio resident hunting license, knowing that Vaughn was not a resident of Ohio. The OIG sent a letter to the Ohio Department of Natural Resources (ODNR) asking that it conduct an investigation into Wright's activities. In December 2009, the OIG received a letter from the ODNR stating that it had already performed an internal investigation in 2008 because it had received information that Wright may have violated policies in South Carolina.

{¶9} In February 2007, the South Carolina Department of Natural Resources began an investigation into Wright regarding trapping violations in its state. Wright became aware of the investigation in South Carolina, and asked his ODNR district manager why South Carolina was investigating him. At that point, ODNR inquired of South Carolina the nature of its investigation. Wright was soon interviewed by a South Carolina wildlife officer, and in the course of the discussions admitted to allowing Vaughn to fraudulently use his address to obtain an Ohio resident hunting license. Wright admitted the same thing to the ODNR when it conducted its own internal investigation into Wright's falsification of the hunting license. After ODNR's investigation was completed, Wright was given a verbal reprimand for actions the ODNR classified as "failure of good behavior."

{¶10} Once the ODNR informed the OIG that it had already completed an administrative investigation and shared the results of the investigation, the OIG began to investigate why Wright's actions were subject to an administrative investigation and

punishment rather than a criminal investigation for providing fraudulent information in violation of R.C. 2921.13, a misdemeanor of the first degree. Deputy Inspector General Ron Nichols began an investigation into Wright's conduct, as well as how the ODNR went about its determination that the matter only warranted an administrative investigation.

{¶11} Nichols interviewed the Chief of the Division of Wildlife David Graham, Ohio Wildlife Assistant Chief Randy Miller, Human Resource Manager Michele Ward-Tackett, Law Enforcement Executive Administrator Jim Lehman, and District Manager Todd Haines. Nichols did not suspect these employees of any criminal conduct, and they were not the focus of the OIG investigation, as Nichols was simply conducting a "fact-finding" interview. Prior to the interviews, the employees read and signed the following oath: "Pursuant to O.R.C. 121.43, you are being administered the following oath to affirm your truthfulness about all information you are providing to the Office of the Inspector General. I swear to tell the whole truth and nothing but the truth in all matters we discuss today. I understand that by affirming my truthfulness under oath, I am subject to criminal sanctions if I provide false information."

{¶12} All of these ODNR employees stated in their interviews that they collectively decided that Wright's conduct was a failure of good behavior, and agreed that he would be subjected to a verbal reprimand. In general, the employees indicated that they proceeded with the administrative investigation because they interpreted Wright's actions as not criminal in nature and that the practice of assisting out-of-state officers had been done in the past. They also acknowledged that the ODNR did not approve of such practices and had issued directives and policies to eradicate such inappropriate conduct.

{¶13} At the conclusion of Nichols' investigation, the OIG issued a report indicating

that it found reasonable cause to believe an act of omission occurred once the ODNR employees treated Wright's actions as requiring an administrative investigation rather than a criminal one. The OIG also found that the Director of the ODNR should have been informed of Wright's criminal activity. The OIG forwarded its report to the Brown County Prosecutor's Office for review. Upon review and the presentation of grand jury testimony, the state indicted Graham, Miller, Ward-Tackett, Lehman, and Haines (Defendants) on single counts of obstructing justice and complicity to obstructing justice, felonies of the fifth degree.

{¶14} Subsequently, Defendants moved the trial court to suppress their statements given to Nichols during the interviews. The trial court held a pretrial hearing during which the trial court informed the parties that a hearing was necessary in order to decide if *Garrity* applied to Defendants. During that pretrial, the trial court informed the parties that it did not "know what the evidence is gonna say, but, obviously, *Garrity* would be triggered if the Court's impression – if there is an administrative investigation that is conducted that [sic] during the course of that administrative discussion – or interrogation there is basically the *Garrity* rights read to the individual saying that basically you must respond do my questioning or forfeit your job, which then impugns the voluntariness and triggers *Garrity*. But, if there's just a straight interrogation and not an administrative process there, then we don't get to *Garrity*." Having correctly framed the issue at hand, the trial court set an evidentiary hearing.

{¶15} During the hearing, the trial court heard testimony from (1) Arnold Schropp, OIG's First Assistant Inspector General; (2) Bret Benack, the Labor Relations Administrator for the ODNR; and (3) Nichols, Deputy Inspector General. None of the

Defendants testified, although transcripts of their recorded interviews with Nichols were offered into evidence. The trial court issued a judgment entry in which it suppressed the statements, relying on *Garrity*. The state now appeals that decision, raising the following assignments of error. For ease of discussion, we will discuss the assignments of error out of order.

{¶16} Assignment of Error No. 2:

{¶17} "THE TRIAL COURT'S FINDING OF FACTS [SIC] WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶18} The state argues in its second assignment of error that the trial court's findings of fact were not supported by the manifest weight of the evidence.

{¶19} Appellate review of a ruling on a motion to suppress presents a mixed question of law and fact. *State v. Cochran*, Preble App. No. CA2006-10-023, 2007-Ohio-3353. Acting as the trier of fact, the trial court is in the best position to resolve factual questions and evaluate witness credibility. *Id.* Therefore, when reviewing a trial court's decision regarding a motion to suppress, a reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Oatis*, Butler App. No. CA2005-03-074, 2005-Ohio-6038. "An appellate court, however, independently reviews the trial court's legal conclusions based on those facts and determines, without deference to the trial court's decision, whether as a matter of law, the facts satisfy the appropriate legal standard." *Cochran* at ¶12.

### **Findings Unsupported by the Record**

{¶20} The state first challenges the trial court's finding that Defendants received a "Notice of Investigatory Interview" before they were interviewed by Nichols. Offered as

state's Exhibit 20, the Notice of Investigatory Interview is a document created by the ODNR by which it notifies employees that they are a part of an administrative investigation, and that failure to answer questions could lead to disciplinary action up to and including termination. The trial court found that Defendants had been given this form before they met with Nichols. However, the record does not support the trial court's finding.

{¶21} Defendants' interviews with Nichols occurred between December 22, 2009, and February 1, 2010. However, Bret Benack, the Labor Relations Administrator for the ODNR, was unable to testify as to when, or if, this document was actually given to the Defendants. It is undisputed that the record does not contain any executed forms, or any documents indicating Defendants were witnesses subject to the notice. During Benack's testimony, the following exchange occurred.

{¶22} "[State] Mr. Benack, are – are you aware that on March 15, 2010, the Inspector General issued a report to Mr. Logan concerning an individual named Allan Wright?

{¶23} "[Benack] I'm aware of the report. I – I can't be sure of the date, but I'll take your – obviously, it's on the letter, so I'm sure it's –

{¶24} "[State] Okay. At the time that that report was issued, did the Ohio Department of Natural Resources have any investigation – administrative or internal investigation initiated against the Defendants?

{¶25} "[Benack] I believe that prior to the issuance of the report, we had given the Defendants, each, a copy of Exhibit 20, the "Notice of the Interview." I can't swear to that, but I believe that's the case. They all have those copies.



{¶26} " \* \* \*

{¶27} "[Trial Court] Do you know that to be the case or not?"

{¶28} "[Benack] I do not.

{¶29} "[Trial Court] We're not in the game of guessing.

{¶30} "[Benack] I do not, sir.

{¶31} "[Trial Court] That answer will be stricken."

{¶32} Although Benack had every Defendants' personnel file with him during his hearing testimony, he was unable to produce any notation, letter, or other document to demonstrate that Exhibit 20 was ever issued to, or reviewed by, Defendants. Exhibit 20 itself is an undated, unsigned, blank form not executed or filled-in in any way. Therefore, the trial court must have relied on testimony that it had stricken from the record when reaching its conclusion that Defendants received Exhibit 20. This finding is not supported by the record, and this court cannot consider Benack's testimony that Defendants received Exhibit 20 as we progress through our remaining analysis.

### **Defendants' Knowledge Regarding ONDR Policies**

{¶33} The state next asserts that the trial court erred in finding that Defendants knew that ODNR policies existed regarding termination for not cooperating with an investigation and that not cooperating pursuant to state law could result in their termination. This finding is also unsupported by the record.

{¶34} As will be discussed under the state's third assignment of error, an applicable legal standard used in deciding whether to suppress Defendants' statements includes the objectively reasonable belief that they would face significant job-related sanctions if they did not cooperate in Nichols' investigation. During Benack's testimony on

cross-examination, he stated that Defendants would know and be familiar with ODNR policies pertaining to cooperation with an investigation. When asked if it would be "reasonable for each [Defendant] to expect that they would face removal [for] a direct violation of state law," Benack replied, "I think it would be reasonable to expect that they would think that."

{¶35} Beyond Benack's testimony regarding his supposition of what all five Defendants individually and collectively believed, the record is void of any indication that Defendants were familiar with ODNR policies, had read them, or had remembered and relied upon what they read. The record is void of any evidence of what Defendants' understanding or interpretation of the policies were. Moreover, and most importantly, there is nothing on the record to suggest that Defendants only cooperated because of their knowledge of statutes and/or policies that provided for termination if they did not cooperate with Nichols. We note that Benack's testimony contains several inconsistencies and was, on at least one occasion, declared by the court to be pure speculation. Benack's testimony also contained many qualifiers, such as "I can't swear to that," "if I remember correctly," "I can't remember," "I believe," and "I think." Benack's testimony was frequently not founded on any personal knowledge or direct contact with any of the Defendants, and was very general in nature. His testimony never addressed any of Defendants individually and as such, the testimony contributed little substance to help resolve the issues at hand.

{¶36} Benack's testimony cannot and does not provide a competent, credible basis for the trial court's finding that "the defendants knew by law they had to cooperate" or that "defendants knew ODNR Policies and that not cooperating or following state law

could result in the defendants' dismissal." At best, Benack's testimony establishes that ODNR employees receive ODNR policies upon hiring, and that *in his opinion*, all Defendants *should have* been aware of the policies and procedures. However, Benack's testimony does not establish that Defendants, in fact, *knew* by law that they had to cooperate or that Defendants *knew* that violating ODNR policies requiring cooperation could result in their dismissal. The trial court's ruling is not supported by competent, credible evidence, and we cannot consider this finding of fact as we move forward in our analysis.

{¶37} The state's second assignment of error is sustained.

{¶38} Assignment of Error No. 3:

{¶39} "THE TRIAL COURT ERRED WHEN IT GRANTED THE APPELLEES' MOTION TO SUPPRESS."

{¶40} The state argues in its third assignment of error that the trial court erred as a matter of law in suppressing Defendants' statements made to Nichols during their interviews.

{¶41} As previously noted, an appellate court independently reviews the trial court's legal conclusions and determines, without deference to the trial court's decision, whether as a matter of law, the facts satisfy the appropriate legal standard. *Cochran* at ¶12. As alluded to previously, the trial court granted Defendants' motions to suppress, finding that Defendants were protected by rights recognized in *Garrity v. New Jersey* (1967), 385 U.S. 493, 87 S.Ct. 616.

### ***Garrity* and Voluntary Statements**

{¶42} In *Garrity*, the Supreme Court determined that the state cannot use for

criminal purposes statements that were taken from employees during an internal investigation after the employee was assured that if he refused to answer the questions, he would be terminated from employment. The Supreme Court held that once employees were threatened as such, "the choice imposed on [employees is] one between self-incrimination or job forfeiture," and such statements are therefore coerced. *Id.* at 496.

{¶43} This court has specifically stated that "the precipitating event that triggers the Fifth Amendment privilege against self-incrimination recognized in *Garrity* is an internal investigation wherein an employee is actually coerced into giving a statement by threat of removal from office." *State v. Yacchari*, Clermont App. No. CA2010-12-098, 2011-Ohio-3911, ¶21, jurisdiction declined, 2011-Ohio-6124. It is undisputed in the case at bar that Defendants were neither given their *Garrity* rights, nor did Nichols, or any ODNR representative, individually threaten Defendants with removal from office. In the absence of express *Garrity* rights or express threats of job loss, a defendant "must have *in fact* believed [his] statements to be compelled on threat of loss of job *and* this belief must have been *objectively reasonable*." *United States v. Friedrich* (D.C.Cir.1988), 842 F.2d 382, 395. (Emphasis added.) However, where a defendant's statements are voluntarily given, free of the threat of substantial job-related sanctions, *Garrity* is not implicated and the Fifth Amendment is not violated.

{¶44} It is well-established law that the Fifth Amendment prohibits the use of involuntary statements. In order for the state to use a defendant's incriminating statement in a criminal proceeding, such statement must be voluntary. Therefore, whether Defendants' statements were voluntarily given is a key factor to be determined when ruling on Defendants' motion to suppress. Defendants assert that their statements were

rendered involuntary because they were *impliedly* coerced into giving their statements based on *implied* threats flowing from ODNR's general guidelines that outline potential penalties for unapproved conduct. However, Defendants' assertions are untenable.

{¶45} The Fifth Amendment right against self-incrimination applies only to criminal conduct, although it can be invoked prior to the occurrence of criminal proceedings. Thus, *Garrity* eliminated any constitutional violation by immunizing the potential defendant from use of his self-incriminating statement if it was expressly coerced by the threat of job loss during an internal investigation. The immunization meant that a statement forced from a defendant could not be used in any criminal investigation, even if the use is derivative. *State v. Jackson*, 125 Ohio St.3d 218, 2010-Ohio-621.

{¶46} "The test for voluntariness under a Fifth Amendment analysis is whether or not the accused's statement was the product of police overreaching." *State v. Winterbotham*, Greene App. No. 05CA100, 2006-Ohio-3989, ¶30. A suspect makes a voluntary statement absent evidence "that his will was overborne and his capacity for self-determination critically impaired because of coercive police conduct." *Colorado v. Spring* (1987), 479 U.S. 564, 574, 107 S.Ct. 851, 857.

{¶47} This court recently addressed at length the concept of voluntary statements. *Yacchari*, 2011-Ohio-3911. Therein, we discussed the fact that should a person choose to participate in a situation where he could otherwise assert his Fifth Amendment rights, that person has made a choice that is considered voluntary, "since he was free to claim the privilege and would suffer no penalty as the result of his decision to do so. \* \* \*

[A]pplication of this general rule is inappropriate in certain well-defined situations. In each of those situations, however, an identifiable factor 'was held to deny the individual a free

choice to admit, to deny, or to refuse to answer.'" *Minnesota v. Murphy* (1984), 465 U.S. 420, 429, 104 S.Ct. 1136, quoting *Garner v. United States* (1976), 424 U.S. 648, 657, 96 S.Ct. 1178.

{¶48} One such well-defined situation where some identifiable factor denies an individual's free choice could be custodial interrogation. Even then, a court must determine whether the coercion of custody was in play before finding that the individual's free choice was overwhelmed. Without the factor of "custody," the Fifth Amendment does not prohibit using a defendant's statement given to law enforcement. For instance, just because an individual is asked to come to a police station to answer questions does not create a per se custodial interrogation. Instead, there must be an objectively reasonable belief by the defendant that he is in custody. However, that belief may not be objectively reasonable where the individual is free to cease questioning and leave the station at any time.<sup>2</sup> In many such examples, absent the well-defined situation with the identifiable factor of "custody" when questioned, the Fifth Amendment is not implicated.

### **Garrity is Not Implicated**

{¶49} Similarly, *Garrity* immunity is not implied unless an employee is presented the type of coercion that requires a statement. The coercion forcing a decision must be a threat of termination or at the very least, substantial job-related sanctions. This court in *Yacchari* discussed at length the *Garrity* jurisprudence from the time of its release forward, and how other courts have applied the legal principles involved in *Garrity*. We specifically identified the well-defined situation that implicates *Garrity* as the threat of

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2. For example, this court has held that a defendant's belief that he is in custody simply because he was held in the back of a police cruiser while an investigation occurred is not reasonable. *State v. Kelly*, 188 Ohio App.3d 842, 2010-Ohio-3560. Additionally, for purpose of this example, we do not analyze Sixth Amendment rights that may exist depending on the facts.

substantial job-related sanctions should the employee refuse to give up his Fifth Amendment right against self-incrimination. Inherent in this well-defined situation is the moment of confrontation where the employee is undeniably and unavoidably faced with an "or" choice. Give up your right against self-incrimination *or* lose your job. The Supreme Court has described this "or" choice as "a choice between the rock and the whirlpool." 385 U.S. at 496.<sup>3</sup>

{¶50} It is undeniable that when confronted with this well-defined situation, incriminate yourself or lose your job, an employee may find himself in *Garrity* circumstances and be coerced into giving up his Fifth Amendment protection. Therefore the employer's promise not to use the statements against the employee in criminal proceedings becomes imperative so that an employee does not forfeit the right against self-incrimination in a future criminal proceeding. However, when the threat of losing one's job is not present, the statement is otherwise voluntary and *Garrity* is not implicated because the individual has not been forced or coerced into waiving his Fifth Amendment right not to self-incriminate.

{¶51} Just as asking an individual to come to a police station to answer questions does not constitute custodial interrogation absent other identifiable factors, asking an employee to answer job-related questions for which criminal charges are a possibility does not constitute coercion that deprives an individual of the free choice to admit, to deny, or to refuse to answer. The Ohio Supreme Court has specifically stated, "public employees can be required to answer potentially incriminating questions, so long as they

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3. This idiom makes reference to Greek mythology in which sailors who navigated the Strait of Messina were confronted with the choice between two sea monsters, Scylla (a dangerous rock formation) and Charybdis (a whirlpool). The two sea monsters, the rock and the whirlpool, posed an inescapable threat to the sailor because avoiding the rocks meant passing too close to the whirlpool and vice versa.

are not asked to surrender their constitutional privilege against self-incrimination." *Jones v. Franklin County Sheriff* (1990), 52 Ohio St.3d 40, 44. Therefore, *Garrity* rights do not become applicable unless the employee no longer retains his or her free choice to invoke Fifth Amendment protections.

{¶52} At what point is an individual deprived of free choice so that the Fifth Amendment is implicated? The United States Supreme Court has addressed various scenarios over the years that give us guidance in answering when Fifth Amendment rights are executed.

{¶53} In *McKune v. Lile* (2002), 536 U.S. 24, 122 S.Ct. 2017, an inmate claimed that his free choice was deprived when the prison's sex offender program in which he was required to participate if he hoped for privileges and possibly early release, "coerced" him to admit to his prior sex offenses as part of treatment. In finding that Lile's free choice was not denied, the Supreme Court noted that Lile was required to participate in his rehabilitation, and noted that admitting to past crimes was the first step in the treatment process. However, the Court concluded that Lile was not compelled to incriminate himself by those with authority over him, as he possessed the free choice not to discuss his past crimes if he so desired.

{¶54} In *Minnesota v. Murphy* (1984), 465 U.S. 420, 104 S.Ct. 1136, the Supreme Court was asked to decide whether a probationer's free choice was denied when he was required to be truthful to his probation officer. Murphy, who had been under suspicion of a rape and murder, admitted to committing the crimes during a treatment program and meeting with his probation officer. In holding that Murphy was not denied his free choice in admitting to the previous crimes, the Court stated, "we note first that the general



obligation to appear and answer questions truthfully did not in itself convert Murphy's otherwise voluntary statements into compelled ones. In that respect, Murphy was in no better position than the ordinary witness at a trial or before a grand jury who is subpoenaed, sworn to tell the truth, and obligated to answer on the pain of contempt, unless he invokes the privilege and shows that he faces a realistic threat of self-incrimination." *Id.* at 427.

{¶55} In holding that Murphy's statement was voluntary, the Court determined that "the factors that the probation officer could compel [Murphy's] attendance and truthful answers and consciously sought incriminating evidence, that [Murphy] did not expect questions about prior criminal conduct and could not seek counsel before attending the meeting, and there were no observers to guard against abuse or trickery, neither alone nor in combination, are sufficient to excuse [Murphy's] failure to claim the privilege in a timely manner." *Id.* at paragraph four of the syllabus. The Supreme Court declined to imply a threat that Murphy's probation would be revoked if he did not cooperate, despite his testimony regarding that belief.

{¶56} These cases demonstrate that free choice is not deprived unless and until individuals are forced to give up their Fifth Amendment right because of some coercive act by the state. However, even in these instances, whether it is a requirement to admit past crimes in order to seek treatment or an order from a probation officer to answer questions truthfully, the Supreme Court was unwilling to imply coercion.

{¶57} Thus, we observe that compelling attendance and the duty to cooperate, as well as the obligation to be truthful, is not sufficient in and of itself to constitute coercion. Before Defendants in this case can claim that their free choice was effectively denied, or

that their free will was overcome such that their capacity for self-determination was critically impaired, they must have been presented with specific governmental pressure that forbid them the opportunity to assert their right against self-incrimination. Absent that pressure, Defendants' statements were voluntarily given.

{¶58} This court has examined *Garrity* and looked to the "totality of the circumstances" when asked to determine whether a police officer's incriminating statements were voluntary. *State v. Kelley*, Warren App. No. CA2001-12-104, 2002-Ohio-5886, ¶17. In *Kelley*, a police officer was told he was a part of a criminal investigation and was given his *Miranda* rights. This court rejected Kelley's *Garrity* argument, finding instead, that "appellant was not threatened with removal from office. Therefore, the *Garrity* rule is not applicable to this case." *Id.* at ¶19. This court did not rely on the reading of *Miranda*, but rather on the lack of coercion because no threat of substantial job-related sanctions was expressed. While there is limited case law in Ohio on the subject of *Garrity*, several cases from outside Ohio prove instructive.

{¶59} In *McKinley v. Mansfield* (C.A.6, 2005), 404 F.3d 418, 436, the Sixth Circuit determined that the defendant had an objectively reasonable belief that he was protected by *Garrity* based on the circumstances. This rationale was premised on the fact that the defendant had multiple interviews, was in fact given *Garrity* warnings in the first interview, and was told in a later interview that he needed to tell the truth and "was still under *Garrity*." *Id.* at 424. The defendants herein were never given such *Garrity* assurances.

{¶60} As referenced above, the court in *United States v. Friedrich* (D.C.Cir.1988), 842 F.2d 382, 395, found the defendant's belief that he would be terminated if he did not participate in an interview was reasonable under the circumstances. Significantly,

Friedrick had also been subjected to several interviews and had in fact been given *Garrity* warnings in the first interview. The two FBI agents who later interviewed Friedrick purposely avoided Friedrick's questions regarding whether he was still protected by *Garrity* because, by design, they planned to pursue criminal charges against him. The court found that Friedrick possessed an objectively reasonable belief that he would lose his job if he did not give a statement because of the prior *Garrity* warning that in fact was previously given earlier in the investigation (telling him he would lose his employment if he did not answer their questions). However, the analysis used by the courts in *McKinley* and *Friedrick* is not applicable to the case at bar in that Defendants herein were never given any *Garrity* rights during any previous interview.

{¶61} Thus, these cases that have "implied" the threat of job loss are cases where the threat was directly expressed to the declarant earlier in the investigation, but remained the nexus producing the self-incriminating statement. However, the case at bar is not the first time a defendant has tried to "imply" *Garrity* protections when faced with the lack of expressed threats of termination. While arguments of implied threats with uncertain penalties are not new, courts consistently find that *Garrity* does not apply when the defendant's belief that his will was overcome such that his capacity for self-determination was critically impaired is not objectively reasonable within the circumstances presented.

### **Courts Reject "Implied" *Garrity* Arguments**

{¶62} In *United States v. Lamb* (N.D.W.V.2010), 2010 WL 816751, the court determined that *Garrity* was not implicated where Lamb's statements were not made in the context of a disciplinary investigation. As part of an ongoing international child pornographic crime investigation, Italian authorities seized thousands of email addresses

associated with a child pornography website. They turned over the email addresses that originated in the United States to the Department of Homeland Security, including fire22driver@hotmail.com. Eventually, Immigration and Customs Enforcement agents tracked the email IP address to Raymond McKenzie. When agents went to McKenzie's home, they learned from McKenzie's son that McKenzie was working at the local fire department.

{¶63} Agents then went to the fire department where McKenzie was a Captain, and learned from him that the email address belonged to Christopher Lamb. McKenzie's own name appeared as the IP address because the fire station used his home's dial-up internet connection. McKenzie offered to locate Lamb for the agents, and found him in the upstairs living quarters of the fire station. McKenzie informed Lamb that agents were in the fire station, and that they were there to inquire about a possible connection to child pornography. Lamb followed McKenzie downstairs and spoke with the agents. During this time, Lamb admitted that the email address belonged to him and that he had a computer at home that had "some stuff on there that could be bad." *Id.* at \*2. Agents seized the computer, and Lamb was eventually charged with possession of child pornography in violation of 18 U.S.C. 2252A(a)(5)(B) and (b)(2). Lamb moved to suppress the seizure of his computer on several grounds, one of which included reliance upon *Garrity*.

{¶64} The court concluded that *Garrity* did not apply because Lamb's statements were "not obtained under the threat of removal from his position at the fire department." *Id.* at \*6. The court considered Lamb's assertion that he was compelled to answer the agents' questions once McKenzie led him downstairs. Lamb also argued he felt

compelled and had no choice because McKenzie was his Captain. He also argued that job-related sanctions were implied once McKenzie informed him that agents were there to talk to him because McKenzie was his ranking superior. However, the court reasoned that while McKenzie told Lamb that the agents wanted to ask him questions and led him downstairs, neither McKenzie nor the agents "ever mentioned to the defendant that his refusal to answer would result in removal from his employment. Thus, the defendant's rights pursuant to *Garrity* were not violated." *Id.*

{¶65} In *State v. Brockdorf* (2006), 717 N.W.2d 657, 2006 WI 76, the Wisconsin Supreme Court found that a police officer's statements were not the product of coercion pursuant to *Garrity* where the officer was not threatened with employment consequences, but was threatened with prosecution. Officer Vanessa Brockdorf and her partner were investigating a department store theft, and held the suspect in custody. After securing the suspect in the police cruiser, Brockdorf and her partner stopped at a restaurant to order carry out, and she went inside. During that time, several witnesses saw Brockdorf's partner take the suspect out of the police cruiser, punch him several times, and return him to the cruiser. Upon Brockdorf's return, her partner told her that the suspect had tried to kick the windows out of the cruiser. One of the civilian witnesses reported the incident, and the police department began an internal investigation.

{¶66} During an initial interview, Brockdorf stated that she and her partner took the suspect into custody at the department store, and that a scuffle immediately occurred, which led to the suspect's injuries. However, during subsequent interviews, Brockdorf admitted that she and her partner had stopped at the restaurant and that was when the abuse occurred. Brockdorf filed a motion to suppress her statements after a criminal

complaint was filed, claiming *Garrity* protection.

{¶67} Brockdorf testified during the motion to suppress hearing that the only reason she answered the questions during the second interview was because the internal affairs officers told her that if she did not talk, she would be charged with obstructing. During her testimony at the motion to suppress hearing, the following exchange occurred.

{¶68} "[Q] Did you think what would happen to you if you were charged with obstructing?

{¶69} "[A] Well, they always say in the academy that you get fired for lying, that it's a grave disqualification.

{¶70} "\* \* \*

{¶71} "[Q] Other than being charged, did you fear for your job at that point?

{¶72} "[A] Yes, because I didn't – first I wasn't the target, and then all of a sudden I became the target of this investigation.

{¶73} "[Q] What did you think was going to happen to you if you didn't talk to them, other than being charged with obstructing?

{¶74} "[A] I figured I'd later be fired."

{¶75} Later, the state asked Brockdorf if the officers ever told her that she would be fired if she did not talk to them. Brockdorf replied, "no, they just said I'd be charged with obstructing."

{¶76} The trial court granted Brockdorf's motion to suppress, finding that her testimony indicated that she had a reasonable belief that a failure to answer questions would have resulted in termination. The court of appeals reversed, and the Supreme Court of Wisconsin affirmed the reversal. When analyzing whether *Garrity* applied, the

court recognized the lack of a threat that Brockdorf would be dismissed if she failed to cooperate. It then addressed Brockdorf's contention that she was coerced into answering because 1) she was ordered to report to internal affairs by her supervisor; 2) she was a target of the investigation; and 3) she was threatened with a charge of obstructing an officer if she failed to cooperate by providing a statement. The court found Brockdorf's belief that she would be fired was not objectively reasonable despite her testimony.

{¶77} The *Brockdorf* court concluded that the only possible coercive act was the threat of being charged with obstruction. However, even then, the court determined that, "without an express threat of termination, \* \* \* we conclude that this admonishment did not deprive Brockdorf of her right to make a free and reasonable decision to remain silent. \*\*\* Subjectively believing that a charge of obstructing an officer might lead to an eventual dismissal somewhere down the line does not mean that it was objectively reasonable to conclude that the right to remain silent \* \* \* was effectively eradicated. \* \* \* When we objectively analyze the circumstances before Brockdorf, we conclude that Brockdorf was not forced to choose between 'the rock and whirlpool.' \* \* \* Her statement was, as a matter of law, voluntary." Id. at ¶43, quoting *Garrity* at 496.

{¶78} Also applicable to the case at bar, and as will be discussed shortly, the court considered whether Brockdorf was coerced into answering based on the "General Rules and Regulations" of her police department's Policies and Procedures Manual. According to the court, the rules generally spoke to an officer's duty to obey a lawful order of a superior officer. However, the court found that such rules were not "sufficiently coercive as to render Brockdorf's statement involuntary." Id. at ¶40. The court then cited, *Colorado v. Sapp* (Colo.1997), 934 P.2d 1367, 1372, for the proposition that "courts

applying *Garrity* in non-automatic penalty situations have emphasized that ordinary job pressures, such as the possibility of discipline or discharge for insubordination, are not sufficient to support an objectively reasonable expectation of discharge."

{¶79} In *Sapp*, the Colorado Supreme Court also reversed the decision of the lower court suppressing statements made during an investigation of two police officers who freed a suspect even though the suspect had several outstanding warrants. The court concluded that, "the state must have played a significant role in creating the impression that [the officers] might be discharged for asserting the privilege for their beliefs to be considered objectively reasonable. To be significant, the state's role in creating such beliefs must have been more coercive than just the requirement that a witness testify truthfully." *Id.* at 1374.

{¶80} The Supreme Court of New Hampshire decided *State v. Litvin* (N.H.2002), 794 A.2d 806, in which a city clerk was terminated when an investigation revealed that she stole \$40,000 from city funds. During the internal investigation, Litvin signed a form, which stated, "I am not questioning you for the purpose of instituting a criminal prosecution against you. During the course of this investigation, 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. Since this is an administrative matter and any self-incriminating information you may disclose will not be used against you in a criminal case, you are required to answer my questions fully and truthfully. If you refuse to answer my questions, *you will be in violation of City policy and shall be subject to disciplinary penalties.*" (Emphasis added.) *Id.* at 807.



{¶81} After Litvin's interview, she was discharged and later charged with one count of theft by unauthorized taking or transfer. Litvin moved to suppress her statements based on *Garrity*. Despite the warning above, the New Hampshire Supreme Court found that Litvin was never expressly threatened with termination if she failed to answer the city's questions, and instead, the department rules that provided dismissal of any officer for refusing to obey the lawful order of a superior was insufficient to create coercion because such policy did not require dismissal, it only permitted it. Being "subject to" employment penalties had no certainty of a penalty.

{¶82} In its analysis, the *Litvin* court cited *Singer v. State of Maine* (C.A.1, 1995), 49 F.3d 837, in which Singer was a state tax examiner who was questioned by her supervisors regarding work-related misconduct. The supervisors told Singer that it would be "to her advantage" to answer their questions, but did not advise her that she would be fired if she refused to answer. Although Singer was later fired, the court concluded that her statements were not compelled because unlike the *Garrity* defendants, she "was not put between the rock and the whirlpool" but was instead "standing safely on the bank of the stream." *Id.* at 847. In other words, she stood firmly on the footing of free choice, as there was no well-defined situation producing a threat or a penalty that equated to coercion. Also standing safely on the bank of the proverbial stream were Defendants in the case at bar.

### **Defendants' Self-Determination Maintained, Not Critically Impaired**

{¶83} Defendants were neither given express *Garrity* rights, nor were they told that if they failed to answer questions, they would lose their jobs. Instead, they assert through

arguments of their respective attorneys that they believed they would be subject to termination if they did not cooperate. However, when applying the test pronounced in *Friedrick*, we must determine if Defendants in fact believed their statements to be compelled on threat of loss of job, as well as whether their belief was objectively reasonable. 842 F.2d at 395.

{¶84} Regarding whether Defendants in fact believed their statements were compelled, there is nothing on the record that indicates that Defendants knew they would, in fact, be terminated if they did not cooperate with Nichols. The record does not establish that any of the Defendants were in fact informed they had a duty to cooperate with the OIG's investigation. There also was no testimony that anyone informed any of the Defendants they would suffer any consequences should they choose not to cooperate. The Defendants' statements to Nichols do not reveal any threats or coercion being applied. In essence, Defendants are asking us to assume what their belief *would be* based on general policies, directives, and statutes that oblige state employees to cooperate and be truthful. Yet, these policies, directives, and statutes do not contain any definite and substantial job-related sanctions for failure to comply with an OIG investigation. Neither the law, nor the facts in this case, warrant the assumptions Defendants want us to make.

{¶85} The importance of whether Defendants believed that they would face termination is severely diminished when considering whether that belief is objectively reasonable. Without any credible evidence defining the situation, Defendants' argument on appeal clings to a belief that they would be fired if they breached a duty to cooperate. Despite no testimony to this effect, Defendants argue that they were coerced into talking

with Nichols. As discussed, the OIG does not threaten job-related sanctions to secure cooperation. As part of an investigation, OIG investigators are permitted to interview state employees, but are not required to follow the employee's specific agency policies or procedures because the OIG is *not* an agent of the employee's department/agency.

{¶86} Specific to the interview process itself, Schropp testified that the OIG cannot make any lawful threat to compel an employee to waive Fifth Amendment rights, and that if the employee chose to invoke the right to remain silent, "the interview would be done." Nichols' testimony demonstrates that the OIG's office was investigating the severity of Wright's activities, specific to falsifying the hunting license paperwork, and that Defendants were witnesses at the time they were interviewed. The record contains the six interviews Nichols conducted, and within each, Defendants were asked questions specific to Wright's activity and whether or not Wright's conduct was criminal.<sup>4</sup>

{¶87} According to the ODNR, Defendants were not a part of an administrative or internal investigation, prior to, or at the time Nichols interviewed them. As the ODNR Labor Relations Administrator, Benack's direct testimony demonstrates that Defendants had *not* been interviewed in the course of an ODNR internal investigation. During Benack's testimony, the following exchange occurred.

{¶88} "[Q] Okay. Isn't it true that as of – up until this point in time today, that the Defendants, to your knowledge, have not been interviewed in the course of an ODNR internal or administrative investigation."

{¶89} "[A] That's correct."

{¶90} Nothing in Defendants' statements challenges or contradicts the accuracy of

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4. Jim Lehman was interviewed twice.

Benack's testimony that no internal investigation ever occurred involving these Defendants.

{¶91} Furthermore, Benack indicated that the ODNR is not subordinate to the OIG. He also testified that in his experience, the OIG has *never* conducted an administrative or internal investigation on behalf of the ODNR. Benack also stated that to his knowledge, no one in the OIG's office has the authority to terminate or discipline ODNR employees. It is patently obvious that in light of the OIG's independent statutory authority, it is unreasonable that Defendants could objectively consider Nichols' involvement as an internal employer/employee investigation or that he would have the ability to punish those who failed to cooperate.

{¶92} In fact, the final act of compulsion to cooperate in an OIG investigation comes not from the OIG, but from a court. According to R.C. 121.43, "upon the refusal of a witness to be sworn or to answer any question put to him, or if a person disobeys a subpoena, the inspector general shall apply to the court of common pleas for a contempt order, as in the case of disobedience to the requirements of a subpoena issued from the court of common pleas, or a refusal to testify in the court." Not only can the OIG not threaten job-related sanctions, but it must first seek a judicial declaration by way of a contempt order before an unwilling employee can be ordered to testify. The statutory scheme itself anticipates there may be public employees who choose not to cooperate, and judicial involvement decides whether or not that cooperation must be forthcoming. Neither R.C. 121.43 nor Nichols' request that Defendants speak to him contain a threat of termination or substantial job-related sanction that would objectively create implied coercion.

### **Ohio's Revised Code Does Not Contain a Threat of Termination**

{¶93} Defendants also cite R.C. 121.45 in an attempt to demonstrate that they were coerced into speaking with Nichols. R.C. 121.45 states that "each state agency, and every state officer and state employee, shall cooperate with, and provide assistance to, the inspector general and any deputy inspector general in the performance of any investigation." While it is true that the statute requires an employee to cooperate with and provide assistance to the OIG during an investigation, the statute is void of any reference to job-related sanctions for the failure to cooperate or provide assistance. Moreover, the United States Supreme Court has held that "the general obligation to appear and answer questions truthfully [does] not in itself convert \* \* \* otherwise voluntary statements into compelled ones." *Minnesota v. Murphy* (1984), 465 U.S. 420, 427, 104 S.Ct. 1136.

{¶94} As stated by the court in *Sapp*, 934 P.2d 1367, the state must have played a substantial role in creating an objectively reasonable belief that Defendants will be discharged or face substantial job-related sanctions for asserting the Fifth Amendment. And, in order to be substantial, the state's role in creating such beliefs must be more than the requirement that a witness appear and testify truthfully. Here, the statute simply states that employees shall cooperate and assist during an OIG investigation. However, that requirement does not in any way strip an employee's ability to assert the privilege against self-incrimination, nor does the statute set forth any job-related sanctions for failure to comply. Even if it did, however, there is no evidence in the record that Defendants knew of the statute, or that they discussed it with Nichols prior to their interviews. We are asked to factually assume or otherwise impute this knowledge to Defendants. Defendants' reliance on statutes to create an objectively reasonable belief

that by operation of law, they were coerced into answering questions is unprecedented.

### **ODNR General Policies/Procedures Were Not the Cause of Defendants' Statements**

{¶95} Defendants also rely on ODNR's department policies and procedures to imply coercion. The court in *United States v. Vangates* (C.A.11, 2002), 287 F.3d 1315, 1324, followed *Murphy*, and determined that a "directive to cooperate" and receipt of a subpoena "was not sufficiently coercive to create an objectively reasonable belief" that the officer would be sanctioned if she exercised her Fifth Amendment rights. Nonetheless, Defendants herein argue that the spirit of cooperation reflected in the general ODNR policies somehow coerced them into driving to Columbus and answering Nichols' questions.

{¶96} The disciplinary policy in place during the investigation process was effective as of February 1, 2008, and was offered as state's Exhibit 5. While the policy does state that employees are subject to several forms of discipline for violation of department policies, failure to comply with an OIG investigation (or any investigation for that matter) is not among the list of policy violations. While it is not reasonable to expect agency disciplinary policies to list every single possible offense and its punishment, it is unreasonable for Defendants to cite an indefinite and general disciplinary policy as creating coercion where the policy does not list as a violation the conduct Defendants are now claiming would result in termination or substantial job-related sanctions.

{¶97} Although Benack testified that in general everyone including Defendants receive the policies when they are hired, as well as updates, the record does not contain any evidence that Defendants in fact received the policy, read the policy, or relied upon what it said at the time they were interviewed. Inferences upon inferences must be made

just to advance Defendants' arguments. Even if Defendants were to rely on the policy as creating some sort of inherent duty to cooperate with the OIG, no one can reasonably believe that failure to waive Fifth Amendment protections against self-incrimination would result in termination or substantial job-related sanctions pursuant to any language expressed in the policy.

{¶98} Benack testified that a failure to comply with the OIG investigation would fall under failure of good behavior, which according to the policy in place, would result in sanctions ranging from oral reprimand through removal. Removal is not a definitive result for a first offense. In fact, Wright was cited for failure of good behavior when he committed an actual crime by falsifying documents so that the South Carolina officer could get a hunting license in Ohio at the resident price. For this criminal activity, Wright was merely reprimanded for his "failure of good behavior."

{¶99} We are essentially being asked to speculate about things that *could possibly* happen. However, the policy statement indicates that even a felony conviction does not automatically, or with certainty, require removal from office. There was no certainty in place that Defendants faced termination for failing to answer Nichols' questions. Also, glaringly absent from the record is any evidence that any ODNR employee has ever been terminated or received substantial job-related sanctions for failing to cooperate with any type of investigation.

{¶100} Without a clearly-expressed offense/rule violation with substantial punishment, it is objectively unreasonable for Defendants to rely on the department's disciplinary policy as creating a substantial job-related sanction for the failure to cooperate with an OIG investigation. We are asked to compound inferences not reasonably

supported by the facts, nor warranted by application of law.

{¶101} Defendants offered as their Exhibit C the Division of Wildlife Procedure 71, entitled, Complaint Against Division Employee Procedure. According to the document, "this procedure is intended to serve as a guideline for employees of the Division of Wildlife and to clarify ground rules for the investigation of complaints made against Division employees. It also sets forth the steps that supervisors will take in order to see that such complaints are dealt with in a fair and equitable manner."

{¶102} Defendants point to the second paragraph on the last page of the procedure, which states, "refusal by involved employee(s) to answer questions completely and accurately during an administrative investigation, will subject the involved employee(s) to disciplinary action, up to and including dismissal." However, the document is a self-proclaimed "guideline", and therefore does not set forth any concrete rules or regulations, and furthermore, only sets forth general guidelines specific to the Division of Wildlife, not the OIG. Next, the document deals specifically with instances where complaints are made against Division employees. Here, there were no complaints made against Defendants until the prosecutor reviewed the OIG's investigation and independently sought criminal charges against them. Lastly, even if the other circumstances were not applicable, the general penalty for not cooperating was disciplinary action that *may* include dismissal. It is unreasonable to infer what the penalty, if any, would be, particularly when there was no evidence establishing that any of the Defendants had ever been disciplined previously. We are essentially being asked to imply the degree of coercion that was never a certainty. This speculation is not a "well-defined situation" with an "identifiable factor" causing the deprivation of a free choice



according to *Murphy*.

{¶103} *Garrity* jurisprudence requires that the threats of substantial job-related sanctions must be threatened by an agency equipped with the authority to actually administer those sanctions. Moreover, Nichols did not imply any threats and no one in this case has claimed that Defendants were investigated internally or by an agency that had the power or authority to remove them from office or subject them to substantial penalties. Assumed threats from an interviewer who has neither the power nor authority to follow through on job-related sanctions cannot form the basis for an objectively reasonable belief of coercion.

#### **Defendants' Voluntary Interviews**

{¶104} The circumstantial evidence of what the Defendants themselves knew is contained within the interviews conducted by Nichols. These interviews reveal that four of five Defendants expressed their familiarity with *Garrity* due to their job duties. These four Defendants knew that Wright had been given his *Garrity* warnings during the internal investigation into the hunting license incident. Despite the Defendants' knowledge of *Garrity* and how to invoke the *Garrity* warnings, none of the Defendants discussed whether they were protected under *Garrity*, and none refused to cooperate unless their statements were immunized.

{¶105} Once more, "the test for voluntariness under a Fifth Amendment analysis is whether or not the accused's statement was the product of police overreaching." *State v. Winterbotham*, Greene App. No. 05CA100, 2006-Ohio-3989, ¶30. In *United States v. Trevino* (C.A.5 2007), 215 Fed.Appx 319, 322, the court affirmed the district court's decision that *Garrity* was not implicated, and emphasized the need to examine the

objective circumstances surrounding the questioning, "specifically focusing on whether the questioning was coercive."

{¶106} The interviews demonstrate that none of the Defendants were coerced into cooperating with Nichols. Each of the Defendants, who were not suspects at the time of the interviews, voluntarily went to Columbus to be interviewed by Nichols. Each was very familiar with the details surrounding the investigation into Wright's actions, and each is intelligent and educated, with years of experience. Throughout the interviews, Defendants provided detailed answers to Nichols' questions, laughed with him, and repeatedly volunteered additional information. Moreover, all but one of the Defendants specifically spoke of *Garrity*, and confirmed that Wright (who is not one of the five defendants herein) had been expressly given his *Garrity* rights. However, none of the four Defendants who spoke of *Garrity* ever stated that they too were given the rights, or even hinted that they believed *Garrity* applied to them during their OIG interview. All circumstances make it reasonable to believe that each of these Defendants knew how to decline to discuss the matter if each had desired to do so. None, even vaguely, hinted at a desire to invoke any constitutional protection for themselves, or for that matter, presented any reluctance to voluntarily talk to Nichols.

{¶107} Jim Lehman, the Executive Administrator of Law Enforcement for the Ohio Division of Wildlife, was the first to be interviewed. Lehman, a 28 and one-half year veteran of the Department, stated that he was well-aware of the circumstances surrounding Wright's activities and the investigation into Wright's falsification of the hunting license.

{¶108} Throughout the interview, Lehman admitted that Wright's falsification was

a criminal act, and answered Nichols' questions specific to the criminal activity. Later in the interview, Nichols expressly asked whether obtaining an Ohio license with false information is a violation of Ohio law. Lehman responded that it is.

{¶109} At one point, Nichols asked Lehman if he directed that Wright receive a *Garrity* warning during the ODNR internal investigation. After Lehman said that he had, Nichols asked, "knowing that this is a criminal offense, why was *Garrity* used or issued?" Lehman then responded, "well, I guess because we were proceeding with it as an administrative investigation. Sometimes we have investigations where you have parallel investigations, a criminal and an administrative one, and we've had to follow those practices. Now obviously a lot of time when that happens a separate agency will work with State Patrol or something like that on one of those issues and they exhaust the criminal side and we still proceed through with the administrative side. As long as the two don't..." (Ellipses in original.) The following exchange then occurred.

{¶110} "[Nichols] That's what I'm getting at is because once you offer him – or provide him with the *Garrity* warning, basically you're telling him that anything that he says.

{¶111} "[Lehman] He'd have to be re-interviewed, correct.

{¶112} "[Nichols] Well, yes. Anything that he says cannot be used criminally against him so it's...

{¶113} "[Lehman] That's correct.

{¶114} "[Nichols] ...it gives him the –basically it eliminates the criminal side of that. At least using that interview \* \* \*.

{¶115} "[Lehman] We've had some when the State Patrol wanted us to go ahead

and do the interview. I remember one. Do the administrative interview just like that and then they'd come in and do the criminal one right afterwards. Which usually the person – I mean obviously when they're under the *Garrity* they'd have to give that answer \* \* \*."

{¶116} These exchanges demonstrate that Lehman was well-aware of the process of having dual investigations; an internal one where *Garrity* is appropriate and a criminal one where *Garrity* is not applicable. The interview also demonstrates that Lehman and his department treated the ODNR's investigation into Wright's actions as administrative instead of criminal, and that *Garrity* rights were expressly given to Wright to facilitate the internal investigation. However, at no time during the interview did Lehman personalize *Garrity* to himself, or even hint that he believed he was under *Garrity's* protection during his interview with Nichols. Also absent from the interview was any threat, express or implied, that if Lehman did not speak to Nichols, he would face job-related penalties. Again, speculation is required to advance the Defendants' assertions.

{¶117} Three other interviews were very similar to Lehman's in that each Defendant was asked about Wright's criminal activities, each admitted that falsification of the hunting license was criminal in nature, and that each had some familiarity with Wright being given *Garrity*. Even assuming Defendants were unclear as to what type of investigation OIG was conducting – administrative, criminal, or some other nature of investigation – they all knew they were not threatened with employment sanctions or given any *Garrity* immunity.

{¶118} Randy Miller, the Assistant Chief of the Ohio Division of Wildlife and a 30-year employee, admitted that Wright's activities were criminal in nature, and discussed Wright receiving *Garrity* rights.

{¶119} "[Nichols] And you're aware that by issuing the Garrity, that eliminates the criminal – any criminal proceedings, at least as far as that interview?

{¶120} "[Miller] On—yes, yes. But criminally and administratively they can go --- it's parallel tracks. You just have to...

{¶121} "[Nichols] You gotta keep them separate.

{¶122} "[Miller] Separate. Right."

{¶123} Again, at no time during this exchange, or any time during the interview, were *Garrity* rights offered, or even discussed as it related to Miller. Nor did Miller insinuate that he was proceeding with the belief that his statements were immunized, or that he was speaking involuntarily.

{¶124} Michele Ward-Tackett, the Executive Administrator of Human Resources for the Division of Wildlife, stated that she had 21 years of state service prior to joining ODNR three and one-half years prior to her interview. After she too answered questions regarding the criminal aspect of Wright's activities, Ward-Tackett stated that she does "the training for the Office of Collective Bargaining on how to do investigations, when Garrity is appropriate." The following exchange then occurred.

{¶125} "[Nichols] And is part of [Procedure] 71 is that also the issuance of Garrity?

{¶126} "[Ward-Tackett] Probably is. Our FOP contract requires Garrity so for any commissioned officer getting [interviewed], their contract requires Garrity so we don't automatically give Garrity to OCSEA<sup>5</sup> or exempt employees.

{¶127} "[Nichols] Okay. So if you're handling an administrative investigation you

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5. Ohio Civil Service Employees Association.

always issue Garrity to FOP employees?

{¶128} "[Ward-Tackett] To commissioned --- yes. Under their contract we have to. It's a flaw.

{¶129} "[Nichols] And do you know what Garrity does?

{¶130} "[Ward-Tackett] Um, hum, It's a New Jersey ticket fixing case, Garrity v. the State of New Jersey. It's a U.S. Supreme Court case that gives employees the right to –basically saying your employer can't take away your U.S. --- your Fifth Amendment right to not self-incriminate. So it's basically – I look at it, there's two sides to Garrity. The employee can invoke Garrity and that's what the U.S. Supreme Court case is more about. 'Cause we have it in the FOP contract, we use it more as a management tool to put you on notice that you –that this is administrative, that you have to be honest and truthful; that we're promising you that we're not going to share that with the criminal side, so that way we can move forward administratively. So."

{¶131} At no time during Ward-Tackett's interview did she "invoke" *Garrity* rights as she understood that right, ask if she was proceeding under *Garrity*, discuss a desire to not cooperate, refuse to answer questions, or say anything implying that Nichols was conducting an internal investigation for which *Garrity* would apply. Nor did Nichols discuss *Garrity* as it might apply to Ward-Tackett, offer any protections or immunity, or mention any job-related sanctions for failure to cooperate.

{¶132} Todd Haines, District Manager for southwest Ohio who had been with ODNR for 23 years, also participated in an interview during which time he discussed the criminal aspect of Wright's actions. At one point in the interview, Haines stated that Wright had union representation during the internal investigation, and Nichols broached

the subject of Wright getting *Garrity* rights read to him. At no time, however, did Haines discuss whether *Garrity* applied to him, state that he was proceeding under the belief that *Garrity* applied to him, or express his unwillingness to cooperate. Nor did Nichols threaten any job-related sanctions if Haines did not cooperate, or offer *Garrity* warnings, express or implied.

{¶133} While David Graham, Chief of the Division of Wildlife who had been with ODNR for 33 years, did not specifically discuss his familiarity with *Garrity*, his interview demonstrates that he was familiar with the investigation into Wright's activities as well as the way in which the internal investigation was performed.

{¶134} When analyzing these interviews, both separately and collectively, several themes emerge. First, Defendants were well-experienced and all had been state employees for over 20 years. They were all familiar with the way ODNR conducts an internal investigation, and were very knowledgeable about the circumstances surrounding Wright's investigation. All Defendants were asked questions specific to criminal law, were confronted with the Ohio Revised Code's prohibition against falsifying information, and spoke to the criminal aspect of Wright's activities. They could not have reasonably believed that they were being interviewed as part of their agency's internal investigation or that Nichols was acting as a representative of the ODNR during his questioning.

{¶135} Another commonality among the interviews is that at no time during any of the interviews did any of the Defendants express an unwillingness to participate. Nor were Defendants told by Nichols that they had to waive their Fifth Amendment rights or warned of any job-related sanctions if they chose not to participate. During the *Garrity* hearing, Nichols testified that he has had interviews in the past where a witness has

declined to answer the question. In those instances, he simply "move[d] on with another question." There is nothing on the record to indicate that had Defendants been reluctant to answer during their interviews that Nichols would have deviated from his past practice of simply moving on. However, we will never know with certainty because Defendants never wavered in their willingness to talk with Nichols.

{¶136} Furthermore, save Graham, the other Defendants knew that Wright was specifically given his *Garrity* rights, yet never stated or implied that they too were acting under *Garrity*. None of these Defendants were ever presented with an "or" choice, and none spoke under the threat of job-related sanctions.

{¶137} When Defendants appeared for their interviews, each was given an oath from the OIG, which stated, "pursuant to O.R.C. 121.43, you are being administered the following oath to affirm your truthfulness about all information you are providing to the Office of the Inspector General. \* \* \* I understand that by affirming my truthfulness under oath, I am subject to criminal sanctions if I provide false information." Each Defendant signed this form. A form absent of any mention of *Garrity*, absent any discussion of job-related penalties, and absent any threat except *criminal* sanctions for providing false information.

{¶138} There is no evidence that allows an objectively reasonable person to conclude that an independent investigation pursuant to the statutory power of the OIG is the same as an internal investigation within a division of government. With the absence of facts, it is not objectively reasonable to believe that Defendants suffered a threat of termination, which produced their statements.

{¶139} Throughout their interviews with Nichols, Defendants justified their lack of



action regarding Wright's criminal conduct, and willingly discussed why the ODNR handled the matter the way it did. Talking to the OIG was perhaps in each Defendant's best interest in order to dispel the notion of any potential inappropriate conduct on their part regarding the investigation into Wright. Explaining circumstances to Nichols was their free choice, and thus Defendants' statements were voluntary. The protection of the Fifth Amendment was not pried from the Defendants, rather, Defendants' statements were delivered freely without thought of crimination.

### **Conclusion**

{¶140} As set forth in *Garrity*, the precipitating event that triggers the Fifth Amendment privilege against self-incrimination is an internal investigation wherein an employee is actually coerced into giving a statement by threat of removal from office. *Yacchari*, 2011-Ohio-3911 at ¶21. Where, as in the case at bar, there is no administrative/internal investigation, *Garrity* is inapplicable.

{¶141} Furthermore, a mere duty to cooperate and be truthful, whether from a statute, policy, or contract, does not alone create a need to immunize statements from later use in a criminal proceeding. *Murphy*, 465 U.S. 420. While Defendants were asked to cooperate with the OIG's investigation, cooperation is highly distinguishable from coercion. *Lile*, 536 U.S. 24. Work policies that favor cooperation in an official investigation come nowhere close to the same standards and circumstances inherent in *Garrity* cases where the employee is forced to incriminate himself to prevent job loss. *Garrity* is inapplicable because Defendants were never placed between the rock of job loss and the whirlpool of self-incrimination.

{¶142} While governmental overreaching will not be permitted in the securing of

statements, neither can we imply coercion where none took place. Defendants were never deprived of their free choice to admit, deny, or refuse to answer Nichols' questions. Defendants' capacity for self-determination was never critically impaired because of state overreaching. Their statements were given voluntarily.

{¶143} While the following dissent desires a reversal so that Defendants can strategize a different approach to re-cast their assertions, such a new hearing is unnecessary and impermissible. We cannot ignore the facts and evidence, including the defendants' statements, already in the record. The defendants had their day in court on the issues and had the opportunity to offer as much testimony as they desired in order to advance their arguments. Nothing in the criminal proceedings exercised below would render affidavits and/or depositions admissible for consideration as the dissent suggests.

{¶144} Furthermore, the dissent inadvertently misinterprets much of our previous analysis, also shifting the importance given the various points as discussed earlier. *All* of the facts and circumstances must support an objectively reasonable belief there was "no choice." A second "flushing" of the issues, as the dissent describes, cannot change the overwhelming facts in place and the law as rightfully applied.

{¶145} After considering the totality of the circumstances, we find that the principles established in *Garrity* and its progeny of cases, are not applicable to Defendants herein. The trial court erred in suppressing Defendants' statements because Defendants were never coerced into answering Nichols' questions. The state's third assignment of error is sustained.

{¶146} Assignment of Error No. 1:

{¶147} "THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT PLACED

ON THE STATE THE BURDEN OF PROVING WHETHER OR NOT THE APPELLEES SUBJECTIVELY BELIEVED THEIR STATEMENTS TO DEPUTY INSPECTOR GENERAL NICHOLS WERE COMPELLED BY THREAT OF JOB LOSS."

{¶148} The state argues in its first assignment of error that the trial court erred in placing the burden of proof on the state during the *Garrity* hearing.

### **Burden of Proof**

{¶149} The state argues that the burden of proof was on Defendants to prove that they "in fact" believed that they would be subject to termination if they did not cooperate with Nichols. As discussed above, a defendant's statement is coerced when he in fact believed his statements to be compelled on threat of loss of job and the belief was objectively reasonable. *Friedrick* at 395. While there is a subjective aspect to the test, the main focus is whether the defendant's belief was objectively reasonable. In doing so, the question becomes whether the defendant has been coerced into cooperating based on the threat of termination. When determining whether a person's statement is voluntary or coerced, the prosecution must prove that the statement is voluntary by a preponderance of the evidence. *Lego v. Twomey* (1972), 404 U.S. 477, 92 S.Ct. 619; and *State v. Melchior* (1978), 56 Ohio St.2d 15, 25.

{¶150} The state argues that the subjective aspect of the *Friedrick* test is similar to an affirmative defense. R.C. 2901.05 defines affirmative defense as "a defense involving an excuse or justification peculiarly within the knowledge of the accused, on which the accused can fairly be required to adduce supporting evidence." While Defendants' belief is peculiarly within their own individual knowledge, Defendants are not offering an excuse or justification for any crime or offense. Instead, they are arguing that they were coerced

into answering Nichols' questions. The state is therefore held to the burden any prosecutor must meet in order to demonstrate that a statement was voluntarily given rather than being coerced. Once the state establishes that no coercion was applied in order to obtain Defendants' statements, Defendants may, or may not, come forward with evidence to the contrary. However, the ultimate burden of proof remains with the state.

{¶151} As discussed in the state's third assignment of error, the trial court erred by suppressing Defendants' statements pursuant to *Garrity*. Regardless of the state's argument that it did not hold the burden of proof, it has nonetheless met that burden by proving that Defendants' beliefs were not objectively reasonable based on the totality of the circumstances. While our decision regarding the state's third assignment of error may seem to make moot the current assignment of error, establishing who holds the burden of proof in a *Garrity* setting is of great public interest. "Although a case may be moot with respect to one of the litigants, this court may hear the appeal where there remains a debatable constitutional question to resolve, or where the matter appealed is one of great public or general interest." *Franchise Developers, Inc. v. Cincinnati* (1987), 30 Ohio St.3d 28, paragraph one of the syllabus.

{¶152} Having found that the trial court did not err in placing the burden of proof on the state, the state's first assignment of error is overruled.

{¶153} The trial court's judgment suppressing Defendants' statements on the basis of *Garrity* is hereby reversed and vacated and this matter is remanded for further proceedings consistent with this opinion.

POWELL, P.J., concurs.

HUTZEL, J., concurs in part and dissents in part.

**HUTZEL, J., concurring in part and dissenting in part.**

{¶154} Although I agree with this court's decision to reverse the trial court's suppression order, because the impact of OIG's investigative authority is not as "toothless" as the majority opinion suggests, and because Defendants are penalized for complying with the oath they signed prior to their interviews with Nichols, I respectfully dissent from the majority's order of remand under the state's third assignment of error.

{¶155} Defendants were separately interviewed by Nichols after OIG decided to conduct its own investigation into the Ohio hunting license issue. At the time of their interviews, Defendants were not the focus of the OIG investigation, nor were they suspected of wrongdoing. At the beginning of their interviews, each of them read and signed the following oath: "Pursuant to [R.C.] 121.43, you are being administered the following oath to affirm your truthfulness about all information you are providing to the [OIG]. I swear to tell the whole truth and nothing but the truth in all matters we discuss today. I understand that by affirming my truthfulness under oath, *I am subject to criminal sanctions if I provide false information.*" (Emphasis added.)

{¶156} The majority opinion sustains the state's third assignment of error on the ground the trial court erred in suppressing Defendants' statements because those statements were not coerced but rather "were delivered freely without thought of crimination." The holding is based in part on the fact OIG is an independent investigative agency without power to arrest, prosecute, terminate, or discipline the state employees subject to its investigation.

{¶157} OIG is an independent statutory agency whose primary duty is to

investigate the management and operation of state agencies for the purpose of determining whether wrongful acts or omissions have been or are being committed by state officers or state employees. R.C. 121.42(A); *Rothschild v. Humility of Mary Health Partners*, 163 Ohio App.3d 751, 2005-Ohio-5481.

{¶158} It is true that OIG investigates solely on behalf of the inspector general and does not investigate on behalf of other agencies. It is also true that OIG cannot arrest, prosecute, terminate, or discipline state officers or state employees either during or after its investigations. Yet, following its investigations, OIG is statutorily required to report wrongful acts or omissions committed by state agencies, officers, or employees to several authorities or agencies.

{¶159} Indeed, under R.C. 121.42(C), the inspector general has the duty to "contemporaneously report suspected crimes and wrongful acts or omissions that were or are being committed by state officers or state employees to the governor *and to the appropriate state or federal prosecuting authority with jurisdiction over the matter* if there is reasonable cause to believe that a crime has occurred or is occurring." (Emphasis added.) In addition, the inspector general must also report the wrongful acts or omissions to the appropriate ethics commission, the appropriate licensing agency for possible disciplinary action, or the state officer's or state employee's appointing authority for possible disciplinary action. R.C. 121.42(C). Finally, the inspector must also prepare a detailed report of each investigation that states the basis for the investigation, the action taken in furtherance of the investigation, and whether the investigation revealed that there was reasonable cause to believe that a wrongful act or omission had occurred. If a wrongful act or omission was identified during the investigation, the report must identify

the person who committed the wrongful act or omission, describe the wrongful act or omission, explain how it was detected, indicate to whom it was reported, and describe what the state agency under investigation is doing to change its policies or procedures to prevent recurrences of similar wrongful acts or omissions. R.C. 121.42(E). As noted above, that report is given to the appropriate prosecuting authority.

{¶160} As the foregoing statutory language clearly shows, OIG is not the powerless agency the majority opinion submits it is. While its powers are admittedly limited during its investigations, such is not the case once an investigation is over and there is reasonable cause to believe a crime has occurred or is occurring. Given OIG's obligation to notify the appropriate prosecuting authority and to provide a detailed report, the impact of an OIG investigation is clearly great, lasting, and serious. Thus, under R.C. Chapter 121, OIG clearly has an indirect role in the prosecution of state officers and state employees. Because state employees are required under R.C. 121.45 to cooperate with OIG in the performance of any of its investigations, the employees, especially long term employees, are necessarily aware of the serious and lasting repercussions of an OIG investigation "whether they are the subject of, or a mere witness, in the investigation" and likely cooperate accordingly.

{¶161} The majority opinion also reversed the trial court's suppression of Defendants' statements on the ground that in light of Defendants' interviews and the trial court's improper findings of fact, Defendants did not meet the two-prong test of *Friedrick*, 842 F.2d 382. Under that test, in the absence of express *Garrity* rights or express threats of job loss, a public employee must have subjectively believed he was compelled to give a statement upon threat of job loss. In addition, this belief must have been objectively

reasonable at the time the statement was made. It is undisputed that Defendants were not given express *Garrity* rights, nor were they expressly told that they would lose their jobs if they failed to answer Nichols' questions.

{¶162} The majority opinion asserts that Defendants did not meet the *Friedrick* test in part because "the interviews demonstrate that none of [them] were coerced into cooperating with Nichols." The majority opinion bases its conclusion on the fact Defendants "provided detailed answers to Nichols' questions, laughed with him, and repeatedly volunteered additional information." Further, "at no time during the interviews did any of the Defendants express an unwillingness to participate," or "personalize *Garrity*" to themselves. The majority opinion equates Defendants' behavior during the interviews with cooperation.

{¶163} However, Defendants knew they were interviewed by OIG. R.C. 121.45 requires state employees to cooperate with an OIG investigation. In addition, and more importantly, Defendants read and signed an oath before their interviews with Nichols. The oath explicitly warned them that they would be subject to criminal sanctions if they provided false information. During the interviews, in compliance with the oath, Defendants candidly and openly talked to Nichols. In other words, Defendants did exactly what they were asked to do pursuant to the oath, R.C. 121.45, and the ODNR policies: they fully cooperated and told the truth. Yet, Defendants were then penalized for being truthful and for cooperating with the OIG investigation.

{¶164} The problematic conclusion of the majority opinion is further compounded by the fact the record is devoid of any testimony from Defendants as to whether they believed their statements to Nichols were compelled. Defendants did not testify at the



suppression hearing. There are no affidavits or depositions from Defendants in the record.

{¶165} Given the lack of evidence as to whether Defendants believed they were coerced to answer Nichols' questions, and given the trial court's erroneous findings of facts which supported its decision to suppress Defendants' statement (see the state's second assignment of error), I would reverse the trial court's decision granting Defendants' motions to suppress and remand the matter to the trial court for an evidentiary hearing. Such hearing would "flush out" whether Defendants believed they would be terminated if they refused to answer Nichols' questions, and whether they would have cooperated had they understood the consequences of truthfully answering Nichols' questions.

{¶166} For the foregoing reasons, I respectfully dissent from the court's remand order.