	Once Immunized, Officer must tell the Truth Article 6 of 6 on Garrity by Jack Ryan	

Two recent cases from the United States Supreme Court make it clear that once a public employee is granted immunity by compelling the employee to respond to questions in an administrative interview, the employee must tell the truth or face exposure to further discipline or criminal charges.[1]

LaChance v. Erickson involved the questioning of federal employees. In each of the cases consolidated in this appeal, the employees made false statements to agency investigators with respect to their alleged misconduct. The employees were subsequently disciplined for the underlying charges and the charge of giving the false statements. The employees challenged the use of their false statements to support additional disciplinary charges.

In rejecting the claims of the employees, the United States Supreme Court citing *Bryson v. U.S.,* 396 U.S. 64 (1969), asserted " Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them. A citizen may decline to answer a Government question, or can answer it honestly, but cannot with impunity knowingly and willfully answer it with a falsehood." The court concluded that if the Government's questions would have exposed the employees to criminal prosecution, they could have asserted their Fifth Amendment privilege. However, they had no right to give false statements regarding their conduct in this internal investigation.

A week later, the United States Supreme Court decided that an "exculpatory no" in response to Government questioning, would not be protected where the "no" is false.[2] In this case, James Brogan, a union official was charged criminally with making a false statement to government officials under 18 U.S.C. § 1001. This particular statute has extreme significance in the context of investigations

[1] See, *LaChance v. Erickson*, 522 U.S. 262 (1998); *Brogan v. U.S.*, 522 U.S. 398 (1998).

[2] *Brogan v. U.S.* 522 U.S. 398 (1998).

regarding police misconduct since most police actions fall within the jurisdiction of the Federal Government.

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both." 18 U.S.C. § 1001.

While serving as a union official James Brogan accepted cash and gifts from a company whose employees were represented by Brogan's union. Agent from the IRS and the Department of Labor visited Brogan's home and asked him if he had ever received gifts from this company. Brogan's response was "no". Prior to the review of this case a number of Circuit Courts had recognized an "exculpatory no" doctrine that would bar a prosecution for false statements based on an exculpatory no answer.

In rejecting the exculpatory no doctrine the Court reasoned that "neither the text nor the spirit of the Fifth Amendment confers a privilege to lie. 'Proper invocation of the Fifth Amendment privilege against compulsory self-incrimination allows a person to remain silent, but not swear falsely.'" [3]

Lying in the Context of *Garrity*

United States v. Veal exemplifies the consequences of a false statement made pursuant to *Garrity* immunity, particularly where the underlying offense falls within the jurisdiction of the Federal Government.

The facts in *Veal* surround the Street Narcotics Unit (SNU) of the Miami Police Department. On December 16th of 1988, the chief of police received a letter from an anonymous source indicating that a group of unidentified drug dealers had met at 7th Avenue and 32nd Street NW. in Miami and had contracted to kill an SNU officer, Detective Camacho. The officers of the SNU were aware that a drug dealer, Leonard Mercado lived at the location of the reported meeting. Officers Camacho, Veal, Watson and Haynes were informed of the threat.

[3] Citing, *U.S. v. Apfelbaum,* 445 U.S. 115 at 117 (1980).

While going to an unrelated sting operation, Officers Camacho, Veal, Watson and Haynes, accompanied by Officers Sinclair and Trujillo, proceeded to Mercado's house. The officers exited three vehicles and approached Mercado. Detective Camacho led Mercado into the house. In the next few moments the officers lowered the curtains and closed the door to the house. At some point Officers Camacho and Sinclair called for assistance. When Officer Mary Reed arrived, the officers on scene were standing over Mercado's body and invited to get a "kick in" which she declined. A number of witnesses observed Camacho when he returned to the station. None of the witnesses observed anything regarding Camacho's appearance that would be indicative of his being assaulted. However, when Camacho exited the Lieutenant's office the witnesses observed that his shirt was now ripped in the area of his chest and his sleeve. In addition, a freelance photographer at the scene of the incident photographed Camacho after the incident. The photograph showed that Camacho's shirt was undamaged.

In statements taken on December 17, 1988, officers Veal, Watson, and Haynes "disavowed touching Mercado, or observing any contact with him, or having any knowledge of the cause of his injuries and also denied meeting at the police department after Mercado's death to discuss the incident… Veal Watson and Haynes unequivocally avowed that when they entered Mercado's residence, the struggle was over and that the injured Mercado was lying on the floor." The statements were clearly contradicted by blood spattering evidence that was reviewed by Government experts.

In 1990, Officers Camacho, Veal, Haynes, Watson and Sinclair were charged with a criminal violation of Mercado's civil rights under 18 U.S.C. §241 and 242. The trial judge suppressed the officers' statements to investigators after finding that the statements, which were compelled, fell within the scope of *Garrity.* [4] The trial ended with a hung jury on the violation of civil rights count and an acquittal on the conspiracy to violate civil rights count.

In 1993, a federal grand jury indicted Officers Veal, Watson and Haynes with conspiring to obstruct the due administration of justice in violation of 18 U.S.C.§1503 "and engaging in misleading conduct designed to hinder, delay and prevent the communication of information relating to the possible commission of a federal offense to a federal law enforcement officer or judge in violation of 18 U.S.C. § 1512 and, in Count II with **knowingly misleading state investigators**

[4] *See United States v. Camacho*, 739 F. Supp. 1504 (S.D. Fla. 1990).

regarding the true circumstances of the death of Mercado with the intent to prevent the communication of information relating to the possible commission of a federal offense in violation of 18 U.S.C. §§ 1512 (b) (3) and 2. The remaining counts charged them with perjury…and false statements." After a ten week trial, Camacho, Veal Haynes and Watson were all convicted on Count II, **knowingly misleading state investigators regarding the true circumstances of the death of Mercado with the intent to prevent the communication of information relating to the possible commission of a federal offense in violation of 18 U.S.C. §§ 1512 (b) (3) and 2** and were acquitted of all other charges. The officers brought this appeal of their convictions. The officers argued that their statements made pursuant to *Garrity* immunity were "forever barred from use in any prosecution, including one for perjury, false statements, or obstruction of justice."

In its review of the case, the United States Court of Appeals for the 11th Circuit reviewed the Supreme Court precedent on these issues. Citing *LaChance* and *Apfelbaum*, supra, the court asserted: "When an accused has been accorded immunity to preserve his right against self-incrimination, he must choose either to relinquish his Fifth Amendment right and testify truthfully, knowing that his statements cannot be used against him in a subsequent criminal prosecution regarding the matter being investigated, or continue to assert the privilege and suffer the consequences. There is no third option for testifying falsely without incurring potential prosecution for perjury or false statements."

In applying the *Garrity* analysis the court held: "An accused may not abuse *Garrity* by committing a crime involving false statements and thereafter rely on *Garrity* to provide a safe haven by foreclosing any subsequent use of such statements in a prosecution for perjury, false statements, or obstruction of justice…. Although an accused may not be forced to choose between incriminating himself and losing his job under *Garrity,* neither *Garrity* nor the Fifth Amendment prohibits prosecution and punishment for false statements or other crimes committed during the *making* of *Garrity*-protected statements. Giving a false statement is an *independent* criminal act that occurs when the individual makes the false statement; it is separate from the events to which the statement relates, the matter being investigated."

In a collateral issue, Veal, Watson, Haynes and Camacho also contested the use of statements they gave to state investigators as falling within the scope of 18 U.S.C. §1512 (b) (3). The officers argued, "acceptance of the plain language of the statue would federally criminalize every false statement made by anyone to

any police officer. The court rejected this argument citing the statute's requirement of a connection between the statement and its likelihood of being presented to a federal agency or federal judge. The officers also argue that they would have no way of knowing that statements given to state investigators would be communicated to federal authorities "relative to a federal crime or investigation.

The court concluded that statements given to state investigators did fall within the scope to the statute. The statute is based upon the "federal interest of protecting the integrity of potential federal investigations by ensuring that transfers of information to federal law enforcement officers and judges relating to the possible commission of federal offenses be truthful and unimpeded." "All that was required for Veal, Watson and Haynes's violation of § 1512 (b) (3) was the **possibility or likelihood that their false or misleading information would be transferred to federal authorities irrespective of the government authority represented by the initial investigators."** The court went on to point out that it does not matter if the person giving the false statement is aware of the federal nature of the crime about "which he provides information because the statute criminalizes the transfer of misleading information which actually relates to a potential federal offense, regardless of whether the communicator of such information knows or believes that the crime about which he knowingly provides false or misleading information is federal.

U.S. v. Veal demonstrates the importance of truthful statements in regards to a *Garrity* interview, particularly when the investigations centers on potentially criminal conduct that may fall within the jurisdiction of the federal government. It must be recognized that many police misconduct investigations fall squarely within the scope of federal jurisdiction. For example, every investigation regarding an allegation of excessive force has the potential of a civil rights violation under 18 U.S.C. § 242, thus, an officer who chooses to lie following a grant of immunity via *Garrity,* puts him or herself directly within the scope of a federal prosecution for the lie even if the underlying constitutional violation was not sustained.