

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

vs

Supreme Court No. 150042

NEVIN HUGHES,
Defendant-Appellant.

Lower Court No. 13-1041
Court of Appeals No. 316072

150042+

PLAINTIFF-APPELLEE'S ANSWER OPPOSING
DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

KYM WORTHY
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
Chief of Research, Training,
and Appeals

DAVID A. McCREEDY (P56540)
Lead Appellate Attorney
1441 St. Antoine, 11th Floor
Detroit, Michigan 48226
(313) 224-3836



**STATE OF MICHIGAN
IN THE SUPREME COURT**

**PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,**

vs

Supreme Court No. 150042

**NEVIN HUGHES,
Defendant-Appellant.**

**Lower Court No. 13-1041
Court of Appeals No. 316072**

**PLAINTIFF-APPELLEE'S ANSWER OPPOSING
DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL**

The People of the State of Michigan, through Kym L. Worthy, Prosecuting Attorney, County of Wayne, Timothy A. Baughman, Chief of Research, Training, and Appeals, and David A. McCreedy, Lead Appellate Attorney, ask this Court to deny defendant's application for leave to appeal.

1. Defendant's application relies on the same arguments made by co-defendants Sean Harris and William Little in their Applications to this Court, docket numbers 149872 and 149873.
2. The People's answer in Harris and Little addresses these issues, and is incorporated here. See Attachment A.
3. The Court of Appeals did not clearly err in rejecting defendant's arguments and affirming his convictions. MCR 7.302(B)(5).

4. Defendant's application does not demonstrate any of the other grounds for granting leave to appeal. MCR 7.302(B)(1)-(3).
5. In sum, defendant's application raises no issues worthy of this Court's review, and it should be denied.

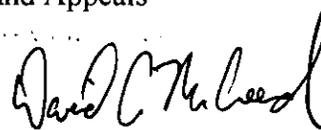
RELIEF

THEREFORE, the People request this Honorable Court to deny defendant-appellant's application for leave to appeal.

Respectfully submitted,

KYM WORTHY
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
Chief of Research, Training,
and Appeals



DAVID A. McCREEDY (P56540)
Lead Appellate Attorney
1441 St. Antoine, 11th Floor
Detroit, Michigan 48226
(313) 224-3836

Dated: October 31, 2014

**STATE OF MICHIGAN
IN THE SUPREME COURT**

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

vs

NEVIN HUGHES,
Defendant-Appellant.

Supreme Court
No. 150042

Third Circuit Court No. 13-1041
Court of Appeals No. 316072

ATTACHMENT - A

INDEX OF AUTHORITIES

FEDERAL CASES

Annunziato v Deegan, 404 F.2d 304 (CA 2, 1971)	9
Chavez v Martinez, 538 U.S. 760, 123 S. Ct. 1994 (2003)	10
FOP v City of Philadelphia, 859 F.2d 276 (CA 3, 1988)	9
Garrity v New Jersey, 385 U.S. 493 (1967)	passim
McKinley v City of Mansfield, 404 F.3d 418 (CA6, 2005)	9
US v Apfelbaum, 445 U.S. 115, 100 S. Ct. 948 (1980)	8, 11, 12
US v Devitt, 499 F.2d 135 (CA 7, 1974)	9
US v Mandujano, 425 U.S. 564, 96 S. Ct. 1768 (1976)	8
US v Veal, 153 F.3d 1233 (CA11, 1998)	8, 12
US v Wong, 431 U.S. 174, 97 S. Ct. 1823 (1977)	8

COUNTERSTATEMENT OF JURISDICTION

The People do not contest Defendants' statement of jurisdiction.

COUNTERSTATEMENT OF QUESTION PRESENTED

I.

A statement by a police officer—given under threat of disciplinary action—is not admissible to prove the underlying conduct; but if the officer lies the statement is admissible in a prosecution for obstruction of justice. Defendant-police-officers Harris and Little were ordered to answer questions about an alleged assault on a civilian by co-defendant Nevin Hughes; they denied that Hughes committed the assault, but later-discovered video evidence proved they lied. Are defendants' lies admissible in the prosecution for obstructing justice?

The district court answered, "No."

The circuit court answered, "No."

The defendants answer, "No."

The Court of Appeals answered, "Yes."

The People answer, "Yes."

Lamar then hired an attorney who obtained the video surveillance footage from the gas station; on it Hughes can be clearly seen assaulting Lamar, while neither Little nor Harris do anything to intervene.⁴ Lamar's attorney then provided the tape to the Detroit Police Department Internal Affairs Section (IA). An IA investigation was commenced in the summer of 2011, which ultimately resulted in the instant charges being filed in August 2012: as to co-defendant Hughes, Misconduct in Office⁵ and Assault and Battery⁶; as to all three defendants, Obstruction of Justice.⁷

Judge Katherine L. Hansen of the 26th District Court refused to bind over on the Obstruction of Justice count, citing *Garrity v New Jersey*, 385 US 493 (1967); *People v Allen*, 15 Mich App 387 (1968); and MCL 15.393.⁸ In other words, the court suppressed the officers' statements as being involuntary, and so ruled that insufficient evidence then existed to lead a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the defendants' guilt on the count

⁴The video was also admitted at the preliminary examination by stipulation, and has also previously been furnished to the court.

⁵MCL 750.505, a five-year common-law offense, based on "corrupt behavior in the exercise of the duties of his office or while acting under color of his office."

⁶MCL 750.81, a 93-day misdemeanor.

⁷MCL 750.505, a five-year common-law offense, based on obstruction of justice: "acting with the intent to interfere with, or attempt to interfere with, the orderly administration of justice" by lying about Hughes' conduct.

⁸2.1.13, 6.

ARGUMENT

I.

A statement by a police officer—given under threat of disciplinary action—is not admissible to prove the underlying conduct; but if the officer lies the statement is admissible in a prosecution for obstruction of justice. Defendant-police-officers Harris and Little were ordered to answer questions about an alleged assault on a civilian by co-defendant Nevin Hughes; they denied the assault, but later-discovered video evidence proved they lied. Defendants' lies are admissible in a prosecution for obstructing justice.

Standard of review:

A lower court's ruling on a motion to suppress evidence is reviewed *de novo*, although its factual findings are reviewed for clear error.¹¹ Similarly, constitutional questions are reviewed *de novo*.¹²

Discussion:

While defendants backhandedly acknowledge that Michigan and federal constitutional caselaw gives no protection to *Garrity*-interview falsehoods, they

¹¹*People v Custer*, 242 Mich App 59, 64 (2000), *rev in part on other grounds*, 465 Mich 319 (2001).

¹²*People v White*, 212 Mich App 298, 304 (1995).

... facts or data." They are the opposite. Defendant's lies do not find shelter in MCL 15.393, and the Court of Appeals did not err in so holding.

Not surprisingly, defendants rely on Judge Wilder's dissent for the proposition that MCL 15.393 protects them from prosecution, but the Court of Appeals majority rightly rejected Judge Wilder's arguments. To begin with, the Legislature's use of the indefinite article "a" rather than "the" before "criminal proceeding" has no bearing on this issue, because using "the" would have made no sense. According to the statute:

An involuntary statement made by a law enforcement officer, and any information derived from that involuntary statement, shall not be used against the law enforcement officer in a criminal proceeding.

(Emphasis added.) But a police internal investigation is not a "criminal proceeding." That is, a *Garrity* interview is not directed toward criminal prosecution, but officer discipline. Thus, state employees who truthfully respond to *Garrity* questioning cannot be prosecuted, although they may receive internal discipline. See *In re Federal Grand Jury Proceedings*, 975 F2d 1488, 1490 (CA 11, 1992). At the point of the *Garrity* interview, there is no "criminal proceeding" to definitively identify by use of the article "the."

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

vs

Docket No. 149872, 149873

SEAN HARRIS AND WILLIAM LITTLE,
Defendants-Appellants.

26th District Court No. 12-6722
3rd Circuit Court No. 13-1620
Court of Appeals Nos. 317158, 317272

PLAINTIFF-APPELLEE'S
ANSWER TO DEFENDANTS-APPELLANTS'
APPLICATION FOR LEAVE TO APPEAL

KYM WORTHY
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
Chief of Research, Training,
and Appeals

DAVID A. McCREEDY (P56540)
Lead Appellate Attorney
1441 St. Antoine, 11th Floor
Detroit, Michigan 48226
(313) 224-3836

TABLE OF CONTENTS

Index of Authorities	-ii-
Counterstatement of Jurisdiction	-1-
Counterstatement of Question Presented	-2-
Counterstatement of Facts	-3-
Argument	-6-
I. A statement by a police officer—given under threat of disciplinary action—is not admissible to prove the underlying conduct; but if the officer lies the statement is admissible in a prosecution for obstruction of justice. Defendant-police-officers Harris and Little were ordered to answer questions about an alleged assault on a civilian by co-defendant Nevin Hughes; they denied the assault, but later-discovered video evidence proved they lied. Defendants’ lies are admissible in a prosecution for obstructing justice.	-6-
Standard of review:	-6-
Discussion:	-6-
Relief	-13-

STATE CASES

People v Allen,
15 Mich. App. 387 (1968) 5, 9, 10, 12

People v Bassage,
274 Mich. App. 321 (2007) 12

People v Custer,
242 Mich. App. 59 (2000) 7

People v White,
212 Mich. App. 298 (1995) 7

COURT RULES

MCR 7.203(B)(2) 2

MCR 7.205(A) 2

COUNTERSTATEMENT OF FACTS

On November 19 2009, Detroit Police Officer Nevin Hughes physically assaulted a civilian named Dajuan Lamar in a gas-station parking lot while his partners—defendants Sean Harris and William Little—stood by.¹ Lamar filed a citizen's complaint against Hughes with the City of Detroit Board of Police Commissioners, which was forwarded to the Office of Chief Investigator. In July and August 2010 the three officers were formally interviewed about the complaint, and in the process given their *Garrity*² rights. Specifically, the officers were told that they had the right to remain silent, but that if they did not answer questions they would be subject to departmental charges which could result in dismissal.³ Co-defendant Hughes—after being advised of his rights—told investigators that he remembered the incident with Lamar, but denied that any type of physical altercation took place. Defendants Harris and Little backed up their partner's claim. Based on the three officers' denials, the complaint was closed out as unfounded.

¹1.24.13 at 10-11.

²*Garrity v New Jersey*, 385 US 493 (1967).

³The evidence against defendants at the preliminary examination was almost entirely admitted by stipulation. See 12.19.12 at 6. This included the audio recording of each defendant's *Garrity* interview, both of which have been furnished to the Court. The only testimony at the exam was from the complainant. See 1.24.13 at 6-27.

alleging that they lied to cover up Hughes' assault. Since defendants Harris and Little were only charged with Count Three, their case was dismissed; Hughes was bound over on Counts One and Two only.

The prosecution then filed a motion in the circuit court in the Hughes case to add Count Three back in (a "*Goecke* motion"), which Judge Bruce Morrow denied on May 6, 2013.⁹ On June 3 the Court of Appeals granted the People's Emergency Application for Leave to Appeal from Judge Morrow's order. As to defendants Harris and Little, the People filed a timely claim of appeal in the Third Circuit Court which was also assigned to Judge Morrow, who denied it on June 27.¹⁰ The People then filed an application for leave to appeal in the Court of Appeals, which reversed in an unpublished opinion dated July 15, 2014.

⁹5.6.13 at 9.

¹⁰6.27.13 at 6.

maintain they had a *statutory* right to lie when interviewed about the assault in this case. But that is untrue. While MCL 15.393 does preclude the use of “an involuntary statement” made by a law enforcement officer against that officer in a criminal proceeding, the term “involuntary statement” is defined by that same statute as “*information* provided by a law enforcement officer, if compelled under threat of dismissal from employment or any other employment sanction by the law enforcement agency that employs the law enforcement officer.” MCL 15.391(a) (emphasis added). Because lies are not “information,” there is no reason to believe that the Legislature intended anything by this provision other than to codify *Garrity*; an intent to confer the additional right to prevaricate could easily have been expressed, but is nowhere to be found.

But even if this is not self-evident, a close reading of the statute establishes that the defendants were not entitled to lie: neither officer provided “information” which is being used against him. Indeed, what they provided was “*misinformation*.” The American Heritage College Dictionary, Fourth Edition (2004), defines “information” as “[k]nowledge derived from study, experience or instruction; [k]nowledge of a specific event or situation; intelligence or news; or a collection of facts or data.” *Id.* at 712. In other words, known falsities are not “knowledge . . . intelligence . . . news

Second, even if the focus of such an interview were a potential criminal prosecution, it still would not be a “proceeding,” because a “proceeding” is “[t]he regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment” or a “procedural means for seeking redress from a tribunal or agency.” Black’s Law Dictionary (7th ed). The American Heritage Dictionary similarly defines the word as “legal action; litigation” or “the instituting or conduct of legal action.”¹³ Pursuant to MCL 8.3a, undefined statutory terms are to be given their plain and ordinary meaning, unless the undefined word is a term of art. *People v Thompson*, 477 Mich 146, 151 (2007). A police investigation of internal misconduct is not a “criminal proceeding,” and so it cannot follow that the Legislature meant by use of that term to express “its intention to require a more generalized application of the statute than the narrower protection the Fifth Amendment would afford.” What the Legislature meant is simply that “information” from an involuntary statement could not be used to prosecute the giver.

But that merely brings the inquiry back to the definition of “information.” Defendants attempt to wriggle out from the dictionary and common-sense definition

¹³Although it also contains broader definitions, “words and phrases used in an act should be read in context with the entire act and assigned such meanings as to harmonize with the act as a whole.” *People v Couzens*, 480 Mich 240, 249 (2008). The People contend that, in context, the narrower definition of “proceeding” must apply,

of information—*truthful* knowledge, intelligence, news, facts, or data—by noting that the definition of “misinformation” contains the word “information,” as if a dictionary definition that said “misinformation is the opposite of information” would deem the terms equivalent for purposes of this statute. When Random House Webster’s defines misinformation as “false or misleading information,” it is saying that misinformation and information are antonyms, not different categories of the same thing. While defendants claim that the Court of Appeals majority’s reading turns the English language on its head, it would be difficult to find a better illustration of that than their interpretation of “information,” which by their account denotes opposite things.

Similarly, defendants *misunderstand* (the opposite of “understand”) the language of the federal immunity statute—18 USC 6002. It is not equivalent to Michigan’s statute, and more importantly does not treat “information” as though it means “misinformation.” To the contrary, the federal statute merely specifies that “testimony or other information” compelled under an immunity order can only be used to prosecute the witness if the prosecution is for perjury, giving a false statement, or otherwise failing to comply with the order. That is, the point of the federal language in question is to ensure that, while knowledge, intelligence, news, facts, or data gained through immunized testimony may not normally be used against the witness, the protection disappears if the witness lies. Under 18 USC 6002, a

witness's prevarication overrides any immunity order, and in a prosecution arising from the falsehood the relevant portion of the statute ensures that *both* the lies *and* the truthful information given by the witness may be used to prove the charges. In other words, a lying witness opens the door for the prosecution to use not only those lies in a perjury or obstruction case, but the entire testimony or information.

The same mistake is made when trying to read into various Michigan statutes—those which use the terms “inaccurate information” or “misleading information” — an intent to make *false* knowledge, intelligence, news, facts, or data a subset of *true* knowledge, intelligence, news, facts, or data. “Information” is, by

definition, true; misinformation and inaccurate information are likewise false. Again,

just because the word “information” is used in conjunction with a preface like “mis-“

or an adjective like “inaccurate” to describe ignorance, gossip, lies, or other false

facts, that does not transform the base word into its opposite. The fact that the

Legislature used modifiers like “misleading” and “inaccurate” means, to the contrary,

that it adheres to the definition of “information” as being true. If the defense position

in this regard were correct, MCL 15.393 would have to read as follows:

An involuntary statement made by a law enforcement officer, and any information *or misinformation* derived from that involuntary statement, shall not be used against the law enforcement officer in *a* criminal proceeding.

That is, because the Legislature knows how to use terms like "misinformation" and "inaccurate information" but did not use them in MCL 15.393, this Court must conclude that our governing body did *not* mean to protect police officers from their *Garrity* lies. MCL 15.393 grants immunity to the use of involuntary, yet truthful statements obtained in internal police investigations; it does not protect falsehoods. The Court of Appeals majority did not clearly err in so holding, and so there is no reason for this Court to revisit the issue.

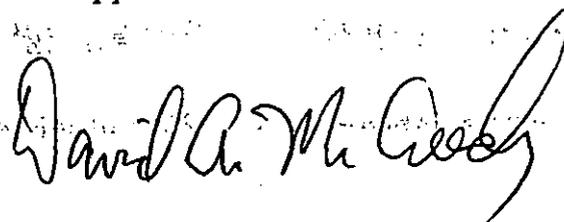
RELIEF

THEREFORE, the People request that this Honorable Court deny leave to appeal.

Respectfully submitted,

KYM WORTHY
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
Chief of Research, Training,
and Appeals

A handwritten signature in black ink, appearing to read "David A. McCreedy". The signature is written in a cursive style with a large, sweeping flourish at the end.

DAVID A. McCREEDY (P56540)
Lead Appellate Attorney
1441 St. Antoine, 11th Floor
Detroit, Michigan 48226
(313) 224-3836

Dated: September 12, 2014