

**STATE OF MICHIGAN
IN THE SUPREME COURT**

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

vs

Docket Nos. 149872/149873/150042

**SEAN HARRIS, WILLIAM LITTLE,
and NEVIN HUGHES,
Defendants-Appellants.**

26th District Court No. 12-6722
3rd Circuit Court Nos. 13-1620/13-1041
Court of Appeals Docket Nos. 316072/317158/317272

**PLAINTIFF-APPELLEE'S
AMENDED BRIEF ON APPEAL
ORAL ARGUMENT REQUESTED**

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STATEMENT OF JURISDICTION

The court has jurisdiction pursuant to its February 4, 2015 order granting leave to appeal.

STATEMENT OF QUESTIONS PRESENTED

I.

The Disclosures by Law Enforcement Officers Act does no more than codify *Garrity*; it does not extend immunity to an officer's intentional falsehoods, because lies are not "information" protected by the statute but rather the opposite: *misinformation*. Defendants Harris, Little, and Hughes gave *Garrity* interviews in which all three falsely denied that Hughes had attacked a civilian while on duty. Are defendants' lies admissible in prosecuting them for obstruction of justice?

The Court of Appeals answered, "Yes."

The defendants answer, "No."

The People answer, "Yes."

II.

Police departments are not authorized to offer immunity broader than what *Garrity* provides, and a defendant who lies in response to an unauthorized grant of immunity cannot demonstrate detrimental reliance on the agreement. Here, the waivers signed by defendants did not provide immunity to lie, but even if they did they are unenforceable. Do the waivers in question shield defendants from prosecution?

The Court of Appeals did not answer this question.

The defendants answer, "Yes."

The People answer, "No."

STATEMENT 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—co-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 provided a Detroit Police Department “Certificate of Notification of Constitutional Rights—Departmental Investigation” to sign which said they were entitled to all the rights and privileges guaranteed by the US and Michigan Constitutions and the laws of the State of Michigan, and also that if they refused to answer questions they would be subject to departmental charges which could result in dismissal.³ Additionally, the Notification stated that “neither my statements or any information or evidence which

¹37b-38b.

²*Garrity v New Jersey*, 385 US 492 (1967).

³The waivers signed by the defendants are at pages 89b-93b. In general, the evidence against the defendants at the preliminary examination was almost entirely admitted by stipulation. See 6b. This included the audio recording of each defendant’s *Garrity* interview, all of which have been furnished to the Court. The only actual testimony at the exam was from the complainant. See 33b-54b.

is gained by reason of such statements can be used against my [sic] in any subsequent criminal proceeding.” They also signed a Reservation of Rights Addendum indicating that their statements would neither be released to any outside agency nor be used against them in any subsequent proceedings other than disciplinary proceedings. All three defendants (who were represented at the hearing by legal counsel) waived the reading of the forms and signed them without questions.⁴

Defendant Hughes then 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.

Lamar then hired an attorney who obtained video-surveillance footage from the gas station; on it Hughes can be clearly seen assaulting Lamar, while neither Little nor Harris does anything to intervene.⁵ Lamar’s attorney provided the tape to the Detroit Police Department Internal Affairs Section (IA), which then commenced an investigation in the summer of 2011. That investigation ultimately resulted in the

⁴Defendant Hughes’s attorney also stated on the record that Hughes “understands that should it surface during the investigation that he has made an unlawful false statement to you he could be disciplined for that.”

⁵The video was also admitted at the preliminary examination by stipulation, and has also previously been furnished to the court.

instant charges being filed in August 2012: as to defendant Hughes, Misconduct in Office⁶ and Assault and Battery⁷; as to all three defendants, Obstruction of Justice.⁸

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 492 (1967); *People v Allen*, 15 Mich App 387 (1968); and MCL 15.393.⁹ That is, 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 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 "Goetze motion"), which Judge Bruce Morrow denied on May 6, 2013.¹⁰ The Court of Appeals shortly thereafter granted the People's

⁶MCL 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."

⁷MCL 750.81, a 93-day misdemeanor.

⁸MCL 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.

⁹65b.

¹⁰79b.

Emergency Application for Leave to Appeal from Judge Morrow's order. As to *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 the appeal on June 27.¹¹ The People then filed an application for leave to appeal in the Court of Appeals, which was granted on August 15.

On July 15, 2014, the Court of Appeals reversed, holding in all three cases that (a) *Garrity* provided no protection for lies; (b) *Allen* was not binding and had been wrongly decided; and (c) the defendants' statements were not "information" protected by the Michigan statute, but rather "misinformation" subject to admission in defendants' trials for obstruction of justice. This Court granted defendant-appellants' application for leave to appeal on February 4, 2015, directing the parties to address whether either (a) the Michigan statute, MCL 15.391 et seq, or (b) the waivers signed by the officers precludes admission of the defendants' statements.

¹¹87b.

INTRODUCTION

Defendants were assured in writing that—pursuant to the United States and Michigan Constitutions and Michigan statutory law—any misconduct they divulged related to their November 19, 2009 contact with Dajuan Lamar could not be used against them in a criminal proceeding. But instead of taking advantage of that offer and admitting what happened, all three officers committed an independent crime in the presence of the investigator: they lied in an attempt to obstruct justice. And just as if they had threatened the investigator's life or attempted to bribe her to get her to drop the investigation, the officers' verbal acts which constitute obstruction of justice are admissible in court.

That is, the assurances given the defendants—through the Fifth Amendment, MCL 15.391 et seq, and the departmental waivers—pertained to past misdeeds, not independent crimes yet future. Neither the Disclosures by Law Enforcement Officers Act nor the written waivers signed by the defendants could immunize them from the crimes they were about to commit, any more than they would have been immune if they had physically assaulted the investigator or maliciously destroyed the furniture in the room. No law or fact prevents those who witnessed defendants' obstruction of justice from testifying as to these officers' crimes, and the Court of Appeals' holding in that regard must be affirmed.

THE DISCLOSURES BY LAW ENFORCEMENT OFFICERS ACT

Sec. 1. As used in this act:

(a) “Involuntary statement” means 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.

(b) “Law enforcement agency” means the department of state police, the department of natural resources, or a law enforcement agency of a county, township, city, village, airport authority, community college, or university, that is responsible for the prevention and detection of crime and enforcement of the criminal laws of this state.

(c) “Law enforcement officer” means all of the following:

(i) A person who is trained and certified under the commission on law enforcement standards act, 1965 PA 203, MCL 28.601 to 28.616.

(ii) A local corrections officer as defined in section 2 of the local corrections officers training act, 2003 PA 125, MCL 791.532.

(iii) An emergency dispatch worker employed by a law enforcement agency.

Sec. 3. 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.

Sec. 5. An involuntary statement made by a law enforcement officer is a confidential communication that is not open to public inspection. The statement may be disclosed by the law enforcement agency only under 1 or more of the following circumstances:

(a) With the written consent of the law enforcement officer who made the statement.

(b) To a prosecuting attorney or the attorney general pursuant to a search warrant, subpoena, or court order, including an investigative subpoena issued under chapter VIIA of the code of criminal procedure, 1927 PA 175, MCL 767a.1 to 767a.9. However, a prosecuting attorney or attorney general who obtains an involuntary statement under this subdivision shall not disclose the contents of the statement except to a law enforcement agency working with the prosecuting attorney or attorney general or as ordered by the court having jurisdiction over the criminal matter or, as constitutionally required, to the defendant in a criminal case.

(c) To officers of, or legal counsel for, the law enforcement agency or the collective bargaining representative of the law enforcement officer, or both, for use in an administrative or legal proceeding involving a law enforcement officer's employment status with the law enforcement agency or to defend the law enforcement agency or law enforcement officer in a criminal action. However, a person who receives an involuntary statement under this subdivision shall not disclose the statement for any reason not allowed under this subdivision, or make it available for public inspection, without the written consent of the law enforcement officer who made the statement.

(d) To legal counsel for an individual or employing agency for use in a civil action against the employing agency or the law enforcement officer. Until the close of discovery in that action, the court shall preserve by reasonable means the confidentiality of the involuntary statement, which may include granting protective orders in connection with discovery proceedings, holding in camera hearings, or ordering any person involved in the litigation not to disclose the involuntary statement without prior court approval.

2006 PA 563, MCL 15.391 - 395.

ARGUMENT

I.

The Disclosures by Law Enforcement Officers Act does no more than codify *Garrity*; it does not extend immunity to an officer’s intentional falsehoods, because lies are not “information” protected by the statute, but rather the opposite: *misinformation*. Defendant police officers Harris, Little, and Hughes gave *Garrity* interviews in which all three falsely denied that Hughes had attacked a civilian while on duty. Defendants’ lies are admissible in a prosecution for obstructing justice.

Standard of review:

This court reviews matters of statutory interpretation de novo. *People v McKinley*, 496 Mich 410, 414-15 (2014).

Discussion:

The Disclosures by Law Enforcement Officers Act, MCL 15.391 et seq, is simply a codification of *Garrity v New Jersey*, 385 US 492 (1967), and just as *Garrity* does not confer on police officers a right to lie with impunity, neither does the Michigan statute. As discussed below, there are at least three reasons to conclude that MCL 15.391 et seq is co-extensive with *Garrity*: (A) the legislative history of the statute is rather explicit in that regard; (B) were the statute to provide more protection

than *Garrity*, the term “information” used in the statute would have to include lies, which defies that word’s plain meaning; and (C) even if “misinformation” could be a subset of information, the context of the statute—which in essence confers use immunity—does not allow for such a reading. For any or all of these reasons, defendants’ claim to be able to lie without consequence in order to shield themselves from both departmental discipline and criminal responsibility must be rejected.

In general, as this Court has affirmed repeatedly, the “fundamental obligation” of the judiciary in interpreting any statute “is to ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute.” *Paige v Sterling Heights*, 476 Mich 495, 504 (2006) (citations and internal quotation marks omitted). In that regard, “a clear and unambiguous statute leaves no room for judicial construction or interpretation,” and when “the statutory language is unambiguous, the proper role of the judiciary is simply to apply the terms of the statute to the facts of the particular case.” *Smitter v Thornapple Twp*, 494 Mich 121, 129 (2013) (citations and internal quotation marks omitted). The People contend that the plain language of MCL 15.391 et seq does not protect police officers’ lies in the *Garrity* context, because the commonly accepted meaning of the word “information” does not include intentional falsehoods, and *Garrity* statements are protected only if they constitute “information.”

Additionally, even if reasonable minds could differ with respect to the statute's meaning—leading the Court to apply additional rules of statutory construction—then the history and context of MCL 15.391 demonstrate that it was not meant to protect officers who lie about police misconduct. As this Court has said in this context, it must consider the object of the statute and the harm it is designed to remedy and apply a reasonable construction that best accomplishes the statute's purpose. See *Koontz v Ameritech Services, Inc*, 466 Mich 304, 326 (2002). Here, there can be little question but that the Legislature intended to codify *Garrity*, not to immunize lies. Were the statute itself not clear enough on its face, then any reasonable judicial construction of MCL 15.391—given the Act's object and the harm it was designed to remedy—requires a ruling in favor of the People.

A. The legislative history of MCL 15.391 et seq demonstrates that the statute was meant to codify *Garrity*.

This Court has said that the legislative history of an act may be examined to determine the underlying purpose of the legislation. *In re Certified Question From the United States Court of Appeals for the Sixth Circuit*, 468 Mich 109, 115 n5 (2003). Here, according to the co-drafter of 2006 PA 563, the purpose of the Disclosures by Law Enforcement Officers Act was twofold: to codify *Garrity* and to prevent public disclosure of *Garrity* statements. Mark A. Porter, *Act 563: The FOP*

Got It First, Got It Right, The Peace Officer (Spring 2008).¹² That is, attorney and retired police officer Mark Porter—who identified his bill as “proposed *Garrity* protection legislation”—has stated that Act 563 both created a statutory backstop to *Garrity* and limited access to the statement’s use by prosecuting agencies, the courts, and the news media. Mark A. Porter, *Garrity Rights Become the Law in Michigan*.¹³ According to Porter’s own sample 2006 PA 563 warning form, police officers should be told under the Act that they have to “tell the truth at all times during this interview, and *failure to do so will subject you to administrative and/or criminal actions against you.*” Mark A. Porter, *Gambling with Garrity*, The Peace Officer (Spring 2007) (emphasis added).¹⁴

Of course, the drafter’s intent is not necessarily the Legislature’s intent, but in this instance the two appear to have coalesced. Both the House and Senate legislative analysis concluded that the bill would (a) codify *Garrity* and (b) protect *Garrity* statements from disclosure.¹⁵ According to the House Fiscal Agency, “the bill would simply codify the federal court ruling” in *Garrity*.¹⁶ Period. Similarly, the Senate

¹²94b-96b.

¹³97b-98b (Mark A. Porter & Associates, PLLC, *Garrity Rights Become The Law In Michigan*, <<http://michigancivilserviceappeals.com/News.html>> (accessed June 22, 2015).)

¹⁴99b-101b.

¹⁵102b-110b.

¹⁶104b.

Fiscal Agency analysis stated that the rationale for the bill was to codify the *Garrity* protection against self-incrimination and to protect officers' compelled statements from public disclosure. Again, the Senate analysis explicitly concluded that "the bill effectively codifies *Garrity* protections in Michigan statutory law."¹⁷ Finally, according to this same analysis, "the bill gives officers *no further protection* against prosecution" than *Garrity*. *Id.* at 109b (emphasis added). Although not a definitive measure of legislative intent, the House and Senate analyses demonstrate that legislators considering the bill were informed that it did no more—in terms of the proper use of *Garrity* statements in criminal prosecutions—than *Garrity* itself. Given that *Garrity* does not protect against the use of officers' lies in a prosecution for obstruction of justice or misconduct in office (see *McKinley v Mansfield*, 404 F3d 418, 427 (CA 6, 2005)), neither does Michigan's statute.

B. Lies are not "information" protected by MCL 15.391.

Legislative history aside, the plain language of the Act excludes lies from protection, because the Act is limited to "information" provided by an officer, and lies are not "information." That is, section 391 defines an involuntary statement as "*information* provided by a law enforcement officer, if compelled under threat of

¹⁷108b.

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). If the officer is not providing information, then the statement is not involuntary, and is not protected by the Act. Since lies are not “information,” they are not protected by the Act.

In other words, not one of the defendants here provided any “information” which is being used against him. In fact, none of the officers admitted to *anything*: Hughes denied that he assaulted Lamar, and both Harris and Little corroborated his denial. The “information” provided by the three officers was that *no assault took place*; obviously, that “information” is not being used to prosecute these defendants because it is neither an admission to criminal wrongdoing nor did it lead investigators to other incriminating evidence. Instead, what the defendants really provided was “*misinformation*” —the opposite of information.

As the Court knows, unless otherwise defined in statute, words are to be given their common and ordinary meaning,¹⁸ and “information” means knowledge or facts that—at least as far as the speaker is concerned—are true. Along these lines, the

¹⁸Where the Legislature has not expressly defined the common terms used in a statute, the Court may turn to dictionary definitions “to aid our goal of construing those terms in accordance with their ordinary and generally accepted meanings.” *People v Morey*, 461 Mich 325, 330 (1999).

Oxford English Dictionary provides several senses of the word “inform,” and all of the relevant ones imply veracity. Thus, the sixth sense is “[t]o gain knowledge, instruction, or information; to acquaint oneself with something; to get to know, to learn.” The seventh sense is “[t]o give information; to report.” The eighth sense is “[t]o impart the knowledge of (a subject, doctrine, method of action, etc.); to give instruction in, to teach.” The ninth sense is “[t]o impart the knowledge of (a fact or occurrence); to make known, report, relate, tell.” In all of these, truth is implicit.

Similarly, the OED defines “information” as the “action of informing . . . ; formation or moulding of the mind or character, training, instruction, teaching; communication of instructive knowledge.” In sense two, it is the “action of informing . . . ; communication of the knowledge or ‘news’ of some fact or occurrence; the action of telling or fact of being told of something.” Third, it is “[k]nowledge communicated concerning some particular fact, subject, or event; that of which one is apprised or told; intelligence, news.” Again, intentional falsehoods find no foothold in this area.

Further, the synonyms for “information” found in Burton’s Legal Thesaurus support this point. They include “acquired facts, acquired knowledge, available facts, book learning, collected writings, communication, communique, compilations, comprehension, education, enlightenment, erudition, experience, familiarity, grasp,

intelligence, intelligent grip, knowledge, knowledge of facts, known facts, learning, lore, mental grasp, revelation, understanding, [and] wisdom.” Suffice it to say that, given the common understanding of the word, a person would not consider themselves “informed” if the provided facts turned out to be a lie. Under a common-sense, plain language reading of the statute, deliberate falsehoods are not covered.

Moreover, section 3 of the Act provides that “any *information* derived from” an involuntary statement cannot be used against the officer in a criminal proceeding. MCL 15.393 (emphasis added). The meaning of “information” must be consistent between section 391 and 393,¹⁹ and again in section 393 it can only mean accurate or true facts; one cannot derive information useful to a prosecution from an intentional falsehood. Thus, like under *Garrity*, an officer questioned pursuant to the statute cannot be prosecuted for what he admits to in his interview, nor for any evidence that his superiors might uncover based on the information provided. But if the statement is false, then there is no derivative inculpatory information to be uncovered. Lies are, by nature, dead ends. An internal-affairs investigator might derive additional *suspicion* of wrongdoing if and when an officer’s lies come to light, but it is more

¹⁹See *McCahan v Brennan*, 492 Mich 730, 742 (2012) (subsections of a statutory enactment must be read and interpreted together).

than a stretch to term that suspicion “information.” Certainly no dictionary makes that leap.

Lies are not information and so are not protected by the statute, and defendants’ counter-arguments—based on Judge Wilder’s dissent in the Court of Appeals—are unavailing. 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 been nonsensical. 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.

MCL 15.393 (emphasis added.) But a police internal investigation is not a “criminal proceeding.” That is, a *Garrity* interview, by its very nature, is not directed toward criminal prosecution, but officer discipline. Thus, state employees such as police officers who truthfully respond to *Garrity* questioning cannot be prosecuted on the basis of their statements, 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 definite article “the.”²⁰

²⁰The Certificate of Notification provided to all three defendants states that, if there were to be a “criminal proceeding” related to the officer’s *Garrity* statement, it would be “subsequent”

Second, even if the focus of such an interview were a potential criminal prosecution, the interview 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 “proceeding” in this sense as “legal action; litigation” or “the instituting or conduct of legal action.”²¹

Again, 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. See also *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.” *People v Hughes et al*, 306 Mich App 116, 133 (2014) (Wilder, J. dissenting). What the Legislature meant is simply that “information” from an involuntary statement could not be used to prosecute the giver.

to the official departmental investigation. That is, according to the plain terms of the notice of rights, the investigation was not a criminal proceeding.

²¹Although 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).

But that merely brings the inquiry back to the definition of “information.” Defendants attempt to wriggle out from the dictionary and common-sense definition 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 explicitly stated that “misinformation is the opposite of information” would deem the terms equivalent for purposes of this statute. When Random House Webster’s Dictionary 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 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 includes “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* any 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 statement. This counter-argument also falls flat.

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. Again, simply 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 lawmaking 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.

C. Even if misinformation can be a subset of information, the word is not used that way in the context of MCL 15.391 et seq.

The *Garrity* protection is most properly viewed as a type of use immunity. Like a trial witness who refuses to testify on Fifth Amendment grounds, an officer’s right against compelled self-incrimination is rendered moot by the assurance that his “testimony” cannot be used in a prosecution against him.²² But it is absolutely clear that an immunized witness who then commits perjury loses the protection, rendering her testimony fair game in a prosecution for perjury, giving a false statement, or

²²See *Sher v US Dept of Veterans Affairs*, 488 F3d 489 (CA1, 2007); *McKinley v Mansfield*, 404 F3d 418 (CA6 2005); *US v Vangates*, 287 F3d 1315 (CA11 2002); and *Wiley v Baltimore*, 48 F3d 773 (CA4 1995) (all referring to “*Garrity* immunity” or “*Garrity* use immunity”).

otherwise failing to comply with the immunity order,²³ the theory being that the perjury is a new and independent crime not protected by the immunity grant²⁴ and that no witness is ever “compelled” to lie.²⁵

Even a cursory review of Michigan’s use-immunity statute (MCL 767.6) supports the conclusion that MCL 15.391 is meant to serve the same function in police-misconduct investigations. The use-immunity statute provides:

Truthful testimony compelled under the order granting immunity and any *information* derived directly or indirectly from that truthful testimony shall not be used against the witness in a criminal case, except for impeachment purposes or in a prosecution for perjury or otherwise failing to comply with the order.

MCL 767.6(3) (emphasis added). As noted, both statutes employ the term “information” to describe knowledge or facts discovered through the witness’s (or police officer’s) immunized testimony (or *Garrity* statement). Moreover, both

²³See 18 USC § 6002; *US v Apfelbaum*, 445 US 115, 126 (1980) (“All of the Courts of Appeals, however, have recognized that the provision in 18 USC § 6002 allowing prosecutions for perjury in answering questions following a grant of immunity does not violate the Fifth Amendment privilege against compulsory self-incrimination.”).

²⁴See *US v Tramunti*, 500 F2d 1334, 1342 (CA2 1974) (“By perjuring himself the witness commits a new crime beyond the scope of the immunity which was intended to protect him against his past indiscretions.”). See also *US v Thomas*, 612 F3d 1107, 1126 (CA 9 2010) and *People v Bassage*, 274 Mich App 321, 325 (2007) (“Perjured testimony is the committing of a current crime; it has nothing to do with a prior crime.”).

²⁵*Thomas, supra*, 612 F3d at 1128 (“Thomas was not in any way compelled to knowingly give Grand Jury testimony that was intentionally evasive, false, and misleading by virtue of her grand jury subpoena.”).

statutes protect not only the content of the testimony or statement, but any “information derived” therefrom. But misinformation is clearly not protected under use immunity, and by extension it is not protected under the Disclosures by Law Enforcement Officers Act either. Once a *Garrity*-immunized officer knowingly and intentionally tells a material falsehood in his statement, he has committed an independent crime for which he can be prosecuted, and in which his lie is admissible.

If appellees are correct, then our Legislature passed the Disclosures by Law Enforcement Officers Act not to codify *Garrity*, but to eliminate *Garrity* statements altogether. That is, if the Act means what defendants say it means, then no one (other than an exceptionally foolish or exceptionally honest police officer) will ever tell the truth when questioned about police misconduct, totally mooting the purpose of *Garrity* immunity. In other words, if an officer refuses to talk, or if they speak and tell the truth, they will face department discipline; but if they lie the odds are that nothing will happen. Only if their lie is discovered might they face internal discipline, and then it is less than clear that the punishment for the lie would outstrip sanctions for the underlying misconduct. In the end, defendants’ reading of the Act all but eliminates *Garrity* in Michigan: there will be no point to conducting a *Garrity* interview if the officer provides only falsehoods, subject to departmental punishment

only if the underlying misconduct that is the subject of the questioning is substantiated by independent means.

Thus, were defendants to prevail here, the message to police officers who engage in or witness official misconduct will be: cover it up. But comments made by the United States Supreme Court in another context are equally apt here.

Appellees' argument assumes the existence of a periphery of the Self-Incrimination Clause which protects a person against incrimination not only against past or present transgressions but which supplies insulation for a career of crime about to be launched. We cannot give the Self-Incrimination Clause such an expansive interpretation. *US v Freed*, 401 US 601, 606-07 (1971).

In the case at bar, appellees' argument assumes the existence of a periphery of the Disclosures by Law Enforcement Officers Act which protects police officers against incrimination not only against past official misconduct, but which supplies insulation for current and ongoing criminal acts such as obstruction of justice and misconduct in office. This Court should not give the Act such an expansive interpretation.

II.

Police departments are not authorized to offer immunity broader than what *Garrity* provides, and a defendant who lies in response to an unauthorized grant of immunity cannot demonstrate detrimental reliance on the agreement. Here, the waivers signed by defendants did not provide immunity to lie, but even if they did they are unenforceable. The waivers in question do not shield defendants from prosecution.

Standard of review:

Appellate courts review matters of law de novo. See *Lapeer County Clerk v Lapeer Circuit Judges*, 465 Mich 559, 566 (2002).

Discussion:

The waivers offered by the Detroit Police Department and signed by defendants do not bar the officers' prosecution for obstruction of justice because the waivers in question do not provide immunity from being prosecuted for lies, and even if they did they are not enforceable because police agencies have no authority to grant immunity. To their credit, defendants never even claimed—until invited to do so by this Court—that the waivers they signed bar prosecution, because they do no such thing.²⁶

²⁶This Court raised, on its own, the issue regarding the waivers.

First, the waivers promise nothing more than *Garrity* does. In paragraph 3 of the Notification, the waiver states that the officers are entitled to the rights and privileges guaranteed by the state and federal constitutions as well as Michigan law. By force of logic, this extended nothing to them that the law did not already provide. And Paragraph 4 deals with refusals to answer, which did not occur here.

Paragraph 5 does state that, if the officer answers and immunity has not been given, “neither my statements or any information or evidence which is gained by reason of such statements can be used against my [sic] in any subsequent criminal proceeding.” The Reservation of Rights similarly provides that the *Garrity* statement will not be used against the officer in any subsequent proceedings other than disciplinary proceedings. But neither of these sections provides broader protection than that extended by established *Garrity* law.

Again, as shown above in issue I., “information or evidence which is gained by reason of” the *Garrity* statement does not include lies. In this context, a piece of “information” is a lead arising from the statement that investigators track in order to uncover incriminating evidence. Just as in use immunity, immunized testimony cannot itself be used against the witness, nor can the police use the testimony in their investigation to gather other evidence used to prosecute the witness. But if—independent from the testimony—the police find incriminating evidence, the

witness can still be prosecuted based on that evidence, despite the immunity agreement.

Likewise here. The defendants were told via the waivers they signed that neither their statements nor any information or evidence which was gained by reason of such statements could be used against them. But their statements are *not* being used against them: no leads or evidence were gained from their lies. Instead, what happened was that the officers committed the independent crime of obstruction of justice while being interviewed pursuant to *Garrity*, just as an immunized witness commits perjury by lying on the witness stand and can be prosecuted for that crime. And so defendants are being prosecuted for that independent crime, not any inculpatory admissions contained in their statements or any derivative information garnered therefrom. Were it not so, then any threats or bribes made by the defendants during their interviews would also be off-limits for prosecution.

Second, the law is clear in Michigan that police agencies have no authority to offer immunity, and so to the degree that the waivers exceeded the protections of *Garrity* and MCL 15.391, they are not enforceable. See *People v Gallego*, 430 Mich 443, 457 (1988). In *Gallego*, the police promised in writing not to prosecute the defendant for delivering narcotics if the defendant told them the location of the \$30,000 in “buy money” the police had given him. The defendant agreed, told the

police where the money was stashed, and then got charged by the prosecutor's office with delivery of cocaine. This Court held that the police had no authority to offer immunity from prosecution, and so refused to uphold the trial court's dismissal. *Id.*

Defendants' superiors here similarly had no authority to offer immunity from prosecution; all they had was the ability to notify the defendants of their rights, not to extend additional ones. Even if the waivers could be read to immunize lies, that would exceed the authority of the Detroit Police Department which provided the forms and would be unenforceable in court.

Granted, in *Gallego*, the evidence arising from the unauthorized immunity (the defendant's indication where the money was and the money itself) was suppressed, but that was because the defendant told the truth about where he'd hidden the cash. *Id.* at 458. In this regard, the *Gallego* majority held that the defendant's detrimental reliance was a valid interest, but that it was "cured" by exclusion of the evidence that arose from the reliance. *Id.* at 456; see also *People v Wyngaard*, 462 Mich 659, 667 (2000).

But *Gallego* does not answer the question what happens when an immunized defendant *lies* in exchange for an unauthorized promise not to be prosecuted. In that case, it is *the Department* who is the victim of detrimental reliance: Department

investigators are told that no misconduct occurred and, in reliance, erroneously close the investigation as unfounded. The entire premise of *Garrity* and the DPD's waiver forms is that the officer will truthfully reveal what happened in exchange for criminal immunity. Whether through the Disclosures by Law Enforcement Officers Act or these waivers, if officers are automatically extended immunity to lie, then there is no point to interviewing them in the first place. No reasonable officer could have thought that was the intent of his waiver, and even if any one of the defendants could have believed that, the Department had no authority to make such an offer. Either way, the waivers do not provide the protection the defendants seek.

Defendants may claim that, if they were promised an illusory immunity, then their statements cannot be used against them because the ineffective promise renders the statements involuntary. But this cannot be, because there is no possible way that the promises *caused* the lies, and even if they did, lies are not self-incriminatory. That is, the Fifth Amendment only protects against *compelled self-incrimination*, and exculpatory lies are neither compelled nor do they incriminate in the constitutional sense.

As the Court knows, the test of voluntariness is whether, under all the circumstances, the confession was the product of an essentially free and unconstrained choice by its maker, or on the other hand whether the accused's will

was overborne and his capacity for self-determination critically impaired. *People v Peerenboom*, 224 Mich App 195, 198 (1997). In determining whether a statement is voluntary, the trial court should consider the totality of the circumstances, including any threats or promises made to the suspect. *People v Cipriano*, 431 Mich 315, 334 (1998). But the absence or presence of any one factor is not necessarily conclusive on the issue of voluntariness. The ultimate test is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made. *Id.* In other words, the central question is whether the governmental conduct complained of *brought about* the confession, or whether it was a product of the individual's choice. *Shotwell Mfg v US*, 371 US 341, 348 (1963).

It is nonsensical to claim that defendants' lies arose out of a false promise of immunity rather than their own desire to avoid punishment. That is, self-serving lies are never "compelled": a defendant's fabrication in the face of a false promise or threat (or some other coercion) demonstrates that his will was *not* overborne and that he has *retained* the wherewithal to defy his interrogators. Similarly, an exculpatory lie is not, by definition, self-incrimination. The Fifth Amendment protects against the use of coerced confessions and admissions, not false denials. See *Rowe v Griffin*, 676 F2d 524, 528 (CA 11 1982) (if immunized witness had perjured himself at trial then the government was under no obligation to uphold the promise of immunity.)

The Court of Appeals must be affirmed: the defendants' lies are admissible in this obstruction-of-justice prosecution.

RELIEF

THEREFORE, the People request that this Honorable Court affirm the Court of Appeals.

Respectfully submitted,

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