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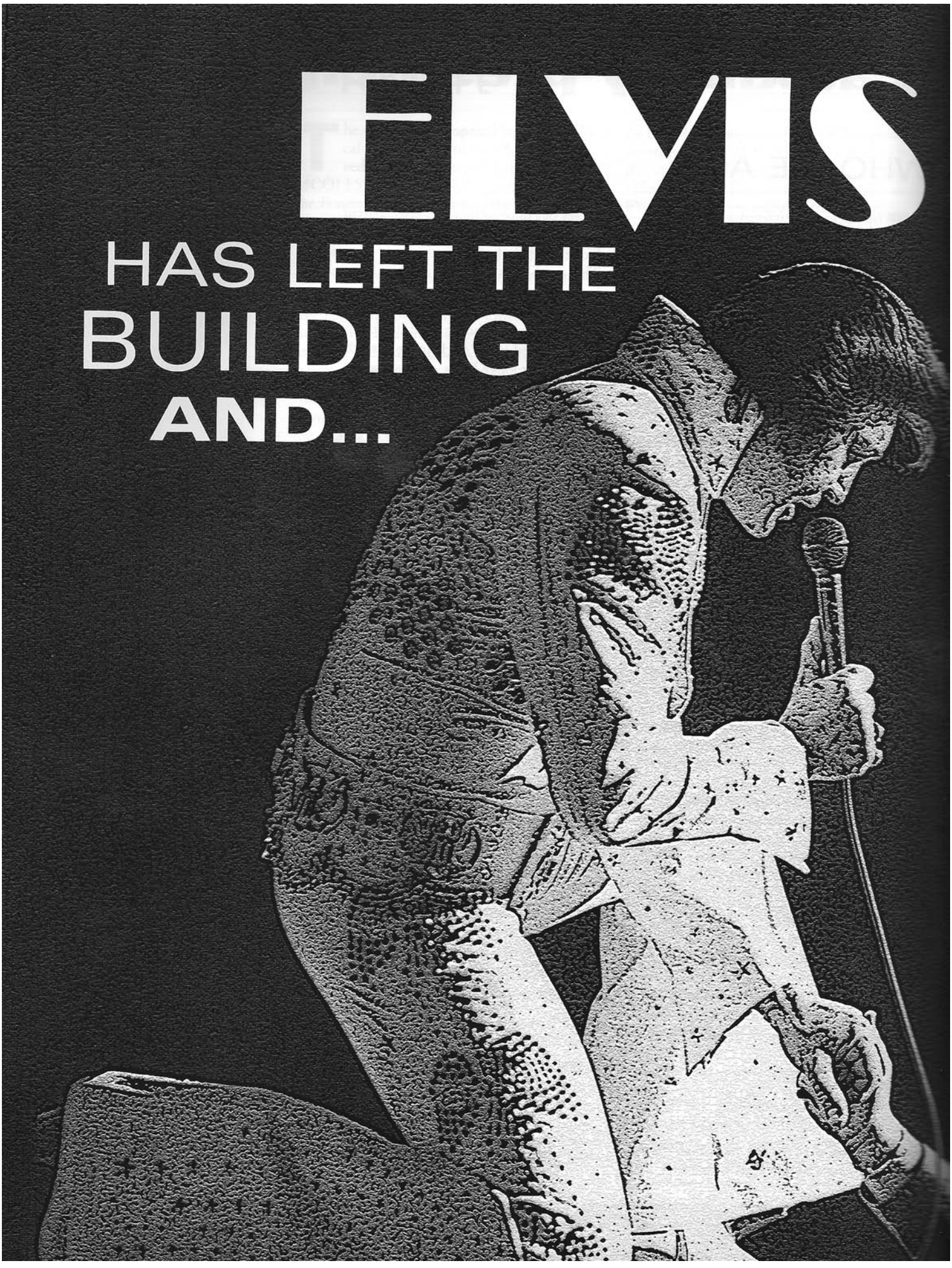

GARRITY IS NOT FAR BEHIND

By Mark Porter

In the last two issues of *The Peace Officer,* we reviewed the latest changes in *Garrity* warnings and protections that will seriously affect all Michigan law enforcement officers. The most disturbing development came from the Federal 6th Circuit Court of Appeals, which covers Michigan, Ohio, Kentucky and Tennessee.

In its first major review of *Garrity,* the Federal Court of Appeals confirmed that *Garrity* is grounded in the 5th Amendment of the U.S. Constitution. But it also announced that officers could face charge criminal charges based upon the *Garrity* statement itself – for charges such as filing false statements with public officials and obstruction of justice.[1]

In this article, we cast a wary eye towards two other *Garrity* questions, yet to be resolved by Federal and Michigan Courts. *Garrity* has become a hot topic in Michigan this year, and with good reason.

But the *Garrity* concept has also crossed the international border into the Province of Ontario, Canada. An excellent law review article by a criminal lawyer in the Ministry of Attorney General has listed the three major reasons why *Garrity* is important to command and line officers alike:[2]

1. Many acts committed by police officers may be justified in law, but criminal if committed by a private citizen – such as forcible misdemeanor arrests.

2. Unlike many other members of society, police officers may be internally disciplined for off-duty criminal allegations which do not affect the officer's job performance, but reflect upon the reputation of the police force.

3. Many allegations of misconduct against police officers may be technically criminal in nature, but should not lead to criminal charges – such as when an officer runs his own driving record in the LEIN system. In such cases, an internal review and action is a faster, and more appropriate method of correcting the officer's actions.

As detailed in the Spring issue of *The Peace Officer,* the Federal 6th Circuit has now adopted the anti-*Garrity* view of the Federal Courts in Florida.[3] In the Federal cases, an outside agency – without the knowledge of the officer who made the *Garrity* statement – took the statement and used it as a basis for criminal prosecution against the officer. In Michigan, the Court of Appeals ruled in the Garden City Police Department case that any law enforcement agency that demands a *Garrity* statement from the officer's department can get it.[4] After these decisions, two serious questions are left hanging as of today for Michigan peace officers:

1. **Who owns the *Garrity* statement?** The Courts have side-stepped this question as it relates to peace officers. The Michigan Court of Appeals in the Garden City case claimed that the *Garrity* statements belonged to the officers who made them – saying that 5th Amendment rights "are personal to the declaring officers."

   But on the opposite side of the State, a different Michigan Court of Appeals has ruled that the Kent County Sheriff's Department must release an officer's *Garrity* statement through the Michigan Freedom of Information Act [FOIA].

   Thus, the Michigan Courts are claiming that even if the department's command staff doesn't "own" the *Garrity* statement for criminal purposes, it *does* "own" the statement for FOIA demands – over which the individual officer has very little input.

   The FOIA allows police departments to exempt investigative records "compiled for law enforcement purposes." MCL 15.243(1)(b). But this second Court of Appeals has ruled that simply because the internal review looks at conduct that *may* be criminal, that alone does not transform it into an investigation for "law enforcement purposes."[5] The *Garrity* statements and reports are subject to release under FOIA.

   It is not the first time – nor will it be the last – that the Courts walk on both sides of the road when it comes to *Garrity.* As detailed in the FOP's *Garrity* conference this year, the State Lodge has been working in the Michigan Legislature to pass a law that clearly places ownership of *Garrity* statement with the officer who's been ordered to make it. There has been fierce opposition to this proposal from the various news media, but your State Lodge is determined to stay the course on this issue.

2. **Where Does Liability for *Garrity* Statements Stop?** Suppose you are ordered by your department to give a *Garrity* statement, and comply with the order. Several weeks later, you are subpoenaed by a Federal grand jury, based upon the *Garrity* statement you made at your department. Can you be indicted under a *Federal* crime for "obstruction of justice," even if a *Federal* officer never interrogated you? Several Miami, Florida, police officers learned the hard way that the answer is: "YES!"

The Federal 6th Circuit in Cincinnati has not yet specifically ruled on this question for officers in Michigan, Ohio, Kentucky and Tennessee. But as of April, it has adopted large parts of *US – v – Veal* from the Florida Federal Circuit. And the judges on the *Veal* panel ruled that obstruction of justice under 18 USC 1512(b)(3) – a ten year felony – includes *Garrity* statements:

> It is irrelevant to the inquiry whether the person who provides false or misleading information that ultimately

> becomes relevant to a federal investigation intended that a federal investigator or judge receive the information; it is only relevant that the federal investigator or judge received it. (Emphasis in original)

Let's go back to our Crown Attorney from Ontario, Canada. He argued that if there is a *prima facie* indication of serious criminal misconduct, then a straight-forward criminal investigation should be pursued without *Garrity* interrogations. *Garrity* protections, on the other hand, are necessary in a majority of internal investigations because the officer must be afforded the same protections as any other citizen:

> In the end, the [*Garrity*] protocol protects the constitutional rights of police officers suspected of criminal misconduct, and also facilitates public confidence in the internal investigations by compelling statements...

What seems perfectly clear in Toronto, however, has been lost in many jurisdictions in this U.S., where the *Garrity* rule was created. Outside agencies and prosecutors who demand *Garrity* statements from police departments are taking an easy way out – looking for the "silver platter case." But in the 1960's movie "The Fortune Cookie," the offer of a "silver platter case," was demonstrated by holding a bed pan.

Police command officers who cannot guarantee their officers that *Garrity* statements will be immune are seriously crippled in their ability to gain timely and critical information regarding allegations of misconduct. In addition police unions must be able to assure the officers that their statements will retain some cloak of privacy within the four walls of the department. But like Elvis, *Garrity* may soon be leaving the building – towards destinations unknown.

In our next article, we'll provide both command and line officers with a "Do" and "Don't" check list for *Garrity* statements. Until then, be safe – and call upon the FOP.

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1. *McKinley – v – City of Mansfield (Ohio),* 2005 US App Lexis 5875 (2005)
2. "Taking Statements From Police Officers Suspected of Criminal Misconduct – A Proposed Protocol." 49 Criminal Law Quarterly 166 (2004)
3. "Now It's *Garrity-McKinley," US – v – Veal,* 153 F3d 1233 (11th Circ 1998).
4. *In re Homicide of Lance Morton,* 258 Mich App 507 (2003)
5. *Herald Co Inc – v – Kent County Sheriffs Dept,* 261 Mich App 32, 39-40 (2004)