



# When Are Your Reports “Routine?” — Never!

By Mark A. Porter

It is always a great honor to be invited to speak at the annual meetings of the State Lodge. During the last five years, I've set a goal of expanding the information and outlook of the Lodge's members regarding the fast-changing world of law enforcement.

The State Lodge and this law firm long-ago realized that forces from the world outside of the law enforcement and corrections communities were rapidly changing the legal landscape – and not always for the better.

We decided to set out on a new course – very different from other police association magazines that always seem to print the same old “search-and-seizure” reruns that are given out during in-service training.

Instead, we moved to concentrate on those outside forces that directly impact your everyday lives and livelihoods – and which were increasingly throwing officers headlong into the legal system. Officers who were used to be called as “witnesses” in criminal trials were now being called “defendants” in the courtrooms across the U.S. Why was this happening? And most important: what are today's officers to do?

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The *Peace Officer* magazine is the only law enforcement journal that has reported these major changes – and given you some ideas and guidance on how to respond to them.

In early 2005, for instance, *Peace Officer* articles that detailed the increasing legal attacks on the *Garrity* warnings had the result of drawing lengthy and bitter responses from other “law enforcement journals.”

But at the same time, the Federal 6th Circuit Court of Appeals – which covers Michigan, Ohio, Kentucky, and Tennessee – issued its first major *Garrity* decision since the original U.S. Supreme Court case in 1967.

In *McKinley – v – City of Mansfield Ohio*<sup>1</sup> the Federal Court of Appeals

upheld most of the *Garrity* protections. But it also ruled for the first time that officers could be criminally charged with obstruction of justice based upon the *Garrity* statement itself. In addition, if later testimony during a trial substantially varied from the original *Garrity* statement, the officer could be criminally charged with perjury – again, based upon the *Garrity* statement itself. Only *The Peace Officer* magazine brought you this information.<sup>2</sup>

The *McKinley* decision's warnings about *Garrity* protections were drawn from the decision of another Federal Court of Appeals – the 11th Circuit, which handles Federal District Court appeals from Alabama, Georgia, and Florida.

## Where's the Beef? Have Some Veal

In 1988, a Miami PD raid on a suspected drug dealer ended up with shots being fired and a suspect fatally wounded. The involved narcotics team officers were called in by the Miami PD and ordered under *Garrity* to give detailed statements. They did – but unbeknownst to them, the *Garrity* statements were turned over the FBI, which was also investigating the incident.

The Federal District Attorney subsequently indicted the officers on Federal criminal charges for violations of the dead drug dealer's civil rights – the officers, however, were acquitted by a jury. During the trial, the *Garrity* statements were not entered into evidence because the trial court properly ruled that they had been compelled under threat of discipline.

But the Federal District Attorney spotted substantial variance in the testimony given a trial, when compared to the officers' *Garrity* statements. The officers were again indicted on criminal charges – this time for obstruction of justice during the first trial – and grounded upon the conflicting statements given in the *Garrity* statements. This time, the second Federal jury convicted the officers.

The appeal and decision from the Federal 11th Circuit brought forth an extremely anti-*Garrity* decision, known as *US – v – Veal*.<sup>3</sup> The officers had been charged under Title 18 of the US Code, Section 1512, which states that, any person who compels another to:

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be fined under this title or imprisoned not more than ten years, or both. **18 USC 1512(b)(3)**

The *Veal* Court said that the 5th Amendment protections in the *Garrity* statements were overridden because “.... Neither the immunity statute nor the Fifth Amendment precludes the use of respondent's immunized testimony at a subsequent prosecution for making false statements.”<sup>4</sup>

Even more dramatic, however, was the Court's ruling about where the *Garrity* statements that were given to the officer's immediate supervisor eventually ended up – in the hands of the FBI:

It is irrelevant to that 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 that information; it is relevant only that a federal investigator or judge *received* it. (Emphasis by the Court)<sup>5</sup>

This decision was one of the main reasons that your State Lodge fought for over four years to pass **Act 563**, prohibiting the release of *Garrity* statements without a court order – or the officer's consent.<sup>6</sup>

The 13 various Federal Courts of Appeals don't necessarily follow each other's precedent-setting decisions. The *Veal* decision, for instance, was flatly rejected by its next door neighbor, the 5th Circuit Court of Appeals for Mississippi, Louisiana, and Texas.<sup>7</sup>

But other Federal Circuits around the country *did* latch on to the basic premise of *Veal* – that officers could be criminally charged for giving false statements during *Garrity* interviews – or for omitting information that was later deemed important. The Federal 6th Circuit in our area adopted and endorsed this ruling in the *McKinley* decision.<sup>8</sup>

Properly obtained *Garrity* statements are those that are: (1) ordered under direct threat of discipline; (2) by the officer's employer; and which (3) override the 5th Amendment.

But *Garrity* statements are extraordinary events during an I-A investigation – they are not routine occurrences in the everyday working lives of law enforcement and corrections officers. Now, however, the Federal prosecutors and courts have made a quantum jump beyond compelled *Garrity* statements into every report written by every officer.

### **The Michigan Criminal Case – Part One**

On a July night in 2002, several on duty officers received a call that an off duty officer from their department was being tailgated and harassed by another

driver while driving within their city.

The officers responded, stopped the car, and arrested the driver. Civilian witnesses at the scene of the arrest claimed that the officers “beat” the driver while he was on the ground. The driver's injuries, as eventually reported in the Federal courts, included “a number of abrasions and lacerations on his face; his right eye was bruised, and he received stitches.”<sup>9</sup>

The driver and his attorney also claimed to a local newspaper that the officers had “knead him in the back and legs;” had “stomped on his groin;” and “smashed his face into his vehicle.” A picture accompanying the article shows four small bruised areas on his face, and a small area above the left eye with stitches.<sup>10</sup>

The arresting officers completed reports of the arrest, and the county prosecutor issued a warrant for felonious assault with a motor vehicle; resisting arrest; and fleeing and eluding.

But several months later – in early 2003 – an I-A investigation began; and shortly after that the FBI also began a criminal investigation into the incident. Nearly two years after the incident – in May, 2004 – the Federal District Attorney in Detroit obtained numerous felony indictments on five of the officers.

Four of the officers were charged with “Deprivation of Rights Under Color of Law,” based on allegations that they assaulted the arrested driver. Because the indictment alleged injuries, the charge carried a potential 10-year potential punishment.<sup>11</sup>

Let's stop for a minute and consider this fact: each time that officers are criminally charged with on-duty offenses, prosecutors will invariably make a media announcement that the officers have to be treated “like everyone else.”

Really? In any other case where a fight ended up with bruises and minor stitches, the highest charge that would be leveled against civilians would be “aggravated assault,” which is a 1-year misdemeanor.

To quote a now-retired, old-school street cop that I know, "It's not paranoia that I'm getting – it's a heightened awareness."

### The Michigan Criminal Case – Part Two

In addition to the charges related to the use of force, the Federal indictment also charged four officers with "Obstruction of Justice" under **18 USC 1512(b)(3)** – the same charges used in Florida and upheld by the Federal Court in the Veal case.

This time, however, the charges were based upon the routine arrest reports that had been completed and filed at the time of arrest – not upon any *Garrity* statements taken during an I-A investigation.

The Federal prosecutors, in other words, had now bootstrapped the original ability to use compelled I-A statements against an officer to using any report made at any time to criminally charge and prosecute an officer for a Federal felony. And it worked.

On June 09, 2004, the Federal jury found three of the five officers guilty of Obstruction of Justice, based upon the information contained – or omitted – in their original arrest reports. Other assorted charges also resulted in convictions against four of the indicted officers. A fifth officer was acquitted of all charges.<sup>12</sup>

On appeal, one of the officers contended that because the arrest report was written more than 6-months before the Federal investigation, there could be no connection – no "nexus" – between the report and an intent to "hinder or delay" a Federal investigation.

The Federal 6th Circuit Court of Appeals wrote that "this (appeals) circuit has never considered the issue," but immediately fell back on the Veal decision from 1998 to rule that "it is sufficient if the misleading information is likely to be transferred to a federal agent." (Emphasis by the Court)<sup>13</sup>

Lest there be any remaining doubt about what officers are supposed to consider each time they write a report,

the Court also ruled that a Federal prosecutor need only show:

.... the possibility or likelihood that their false and misleading information would be transferred to federal authorities irrespective of the governmental authority represented by the initial investigators. (Emphasis by the Court)

The Court then endorsed the Federal prosecutor's evidence of Michigan law enforcement training curricula, as well as the community college transcripts from some of the defendant-officers, as proof of the officers' knowledge of their acts.

In the end, the Federal trial court sentenced the four convicted officers to punishments ranging from 6-months of home confinement and probation; to 33-months in prison. All of the sentences were upheld by the Federal Court of Appeals – although the Federal prosecutor had appealed for a harsher sentence for one of the officers given probation. The Federal Court of Appeals decision was released on March 30, 2009; and you can read the entire case at [www.ca6.uscourts.gov](http://www.ca6.uscourts.gov), case number 05-1812.

### Conclusion – "Danger, Will Robinson!"

I admit I'm dating myself by using a quote from a 1960's TV science fiction series. But I once again have the uneasy feeling that we are now in a very odd world where officers can be praised for their sacrifices and losses – yet abruptly thrown into the legal arena to have their careers dismembered for the entertainment of the masses.

As British novelist George Orwell wrote long ago, "There are some ideas so wrong that only a very intelligent person could believe in them."

No one, of course, wants any officer to go rogue – to intentionally inflict abuse and injury upon citizens with random abandon.

But "routine" law enforcement reports have now been elevated by Federal prosecutors and courts to the same status as testimony given under oath at

a trial. Take another look at the last quote taken from the Federal Court of Appeals. Each time a report is written, each officer is supposed consider the possibility – several months into the future – that a Federal investigator and prosecutor may think that the contents of that report are "misleading." If they do, then the response can be an indictment for a 10-year felony offense under **18 USC 1512**.

Officers can no longer assume that anything ever remains "in house," or "informal" in its resolution. The end result of these cases is not only the fracturing of inter-agency trust – it is also the stark realization that officers under any investigation are never treated "like anyone else."

Some in our society argue that's the way it should be – but they are the same people who angrily object to the "move over" traffic law that is meant to protect public safety personnel on the roadways. They want retribution – not fairness.

Each time I speak at the annual FOP meetings, I always emphasize that minor, "routine" events can blow up into major court cases that have long term effects upon all officers throughout the State and the country.

Consider, the next time you write a "routine" report, if the end result will be a serving of Veal – or if you'll be ground up like hamburger in the criminal justice system.

1. 404 F3d 418 (2005) – free access online at [www.ca6.uscourts.gov](http://www.ca6.uscourts.gov)
2. "Now It's Garrity-McKinley," *The Peace Officer*, Spring, 2005
3. *US – v – Veal*, 153 F3d 1233 (1998)
4. Veal, at pg-1240.
5. Veal, at pg-1252.
6. MCL 15.391-395, [www.mileg.org](http://www.mileg.org)
7. *US – v – Causey*, 185 F3d 407 (1999)
8. *McKinley*, at pg-435.
9. *US – v – Carson et al*, \_\_\_ F3d \_\_\_, 2009 WL 804169(2009), pg-\*2
10. "Officers Indicted in Beating," *The Det News*, Sept 19, 2003.
11. 18 USC 242
12. A sixth officer took an early plea and testified for the Government at the trial.
13. *Carson*, at pg-\*10.