No. 07-1547

IN THE
SUPREME COURT OF THE UNITED STATES

ELIZABETH AGUILERA, *et al.*,

Petitioners,

v.

LEROY BACA, *et al.*,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITION OF WRIT OF CERTIORARI

Professor Byron L. Warnken
University of Baltimore School of Law
1420 North Charles Street
Baltimore, Maryland 21201
(410) 837-4640

QUESTION PRESENTED

Does a public employer violate its employees' Fifth Amendment rights by punishing them for their refusal to provide potentially incriminating testimony in an internal investigation when it did not provide notice that the testimony could not be used against them in criminal proceedings and that they would therefore be subject to administrative discipline if they did not testify?

PARTIES TO THE PROCEEDINGS

Petitioners Elizabeth Aguilera, Phillip Arellano, Benjamin Bardon, and Hector Ramirez were plaintiffs in the district court and appellants in the court of appeals.

Respondents Leroy Baca, individually and as Sheriff of the County of Los Angeles; Williams Stonich, individually and as Under Sheriff of the Los Angeles County Sheriff's Department; Larry Waldie, individually and as Assistant Sheriff of the Los Angeles County Sheriff's Department; William McSweeny, individually and as Commander of the Los Angeles County Sheriff's Department; Neil Tyler, individually and as Commander of the Los Angeles County Sheriff's Department; Thomas Angel, individually and as Commander of the Los Angeles County Sheriff's Department; Arthur Ng, individually and as Captain of the Los Angeles County Sheriff's Department; Alan Smith, individually and as Lieutenant of the Los Angeles County Sheriff's Department; Margaret Wagner, individually and as Lieutenant of the Los Angeles

County Sheriff's Department; Russell Kagy, individually and as Sergeant of the Los Angeles County Sheriff's Department; Brian Proctor, individually and as Sergeant of the Los Angeles County Sheriff's Department; the Los Angeles County Sheriff's Department; and the County of Los Angeles, a municipal corporation, were the defendants in the district court and the appellees in the court of appeals.

Respondent Gustavo Carrillo was a plaintiff in the district court and an appellant in the court of appeals, but is not participating in the petition. Pursuant to Supreme Court Rule 12.6, Mr. Carillo is considered a respondent in this Court.

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Professor Byron L. Warnken, of the University of Baltimore School of Law, respectfully files this Brief of Amicus Curiae in support of the Petition for Writ of Certiorari filed by Elizabeth Aguilera, Phillip Arellano, Benjamin Bardon, and Hector Ramirez.[1]

INTRODUCTION

Although the perfect "cert worthy" case is rare, this is such a case. According to the Bureau of Justice Statistics of the Department of Justice, in 2004, there were 836,787 full-time federal, state, and local sworn law enforcement officers in 17,876 law enforcement agencies in this country.[2]

Every day, agencies and officers confront allegations from a superior officer, a citizen, or another agency, triggering both a criminal investigation and an administrative investigation. If, for example, there is an allegation of brutality or excessive force, if evidence is missing, or if corruption or bribery is alleged, such allegation

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least ten days prior to the due date of the *amicus curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] U.S. Dept. of Justice, Bureau of Statistics, Law Enforcement Statistics Summary Findings, (Aug. 8, 2007). http://www.ojp.usdoj.gov/bjs/lawenf.htm#summary

could result in a criminal prosecution and/or administrative discipline, including termination.

For a police officer, there is nothing worse than being simultaneously confronted by criminal investigators and by internal affairs personnel who may or may not have coordinated or may have coordinated, but are pretending not to have coordinated.

Whether or not the agency is acting as one, there is a problem when neither the agency nor the officer knows where the constitutional lines drawn. No one knows where the lines are drawn because courts cannot agree on the meaning of *Garrity* and its progeny 41 years after *Garrity* was decided.

LEGAL BACKGROUND

A. The Law for Citizens under Investigation: From *Bram* Through *Miranda*

More than a century ago, in *Bram v. United States*, 168 U.S. 532 (1897), this Court established the "voluntariness" test for determining whether the police complied with the prohibition against compelled self-incrimination. In *Malloy v. Hogan*, 378 U.S. 1 (1964), the Court incorporated the Fifth Amendment against the states through the Due Process Clause of the Fourteenth Amendment.

A year after *Malloy*, in *Griffin v. California*, 380 U.S. 609, *reh'g denied*, 381 U.S. 957 (1965), the Court held that a "chilling effect" on the exercise of the Fifth Amendment privilege is as much a

constitutional violation as actually compelling witnesses to incriminate themselves.

The police have not always complied with the Fifth Amendment. In *Miranda v. Arizona*, 384 U.S. 436 (1966), this Court found that, notwithstanding its prior holdings, police science literature and police manuals were still instructing police interrogators how to coerce confessions. In response, the Court mandated the now famous *Miranda* warnings for every interrogation conducted when a suspect is in custody. Thus, when voluntary police compliance proved insufficient, it took this Court to protect citizens from police coercion.

In *United States v. Dickerson*, 530 U.S. 428 (2000), this Court held that the dictates of *Miranda* are of constitutional dimension and not merely a court-invented prophylactic rule.

B. The Law for Police under Investigation: From *Garrity* to Confusion

Although this Court mandated that the police not trample on the Fifth Amendment rights of the rest of us, there was nothing to protect police officers from having their Fifth Amendment rights trampled by their own agencies. In some jurisdictions, the law required police officers to waive their Fifth Amendment privilege as a condition of being a law enforcement officer.

In *Garrity v. New Jersey*, 385 U.S. 493 (1967), this Court struck down a state law that mandated

police officers to waive their Fifth Amendment privilege. In so doing, this Court made clear that a police officer has no greater – but also no lesser – Fifth Amendment protection than any other citizen.

The year after *Garrity*, the Court decided *Gardner v. Broderick*, 392 U.S. 273 (1968), in which a police office, subpoenaed to testify before a grand jury, was informed that if he did not waive his right to remain silent, and did not waive immunity from prosecution, he would be discharged, pursuant to state law. He refused to waive his rights and was terminated.

This Court, applying *Garrity* to the chilling effect on the officer's Fifth Amendment rights, as in *Griffin*, held that the unsuccessful attempt to coerce a statement was just as unconstitutional as the successful attempt. In dicta, the Court stated that, if the officer is provided immunity, the officer's failure to answer questions narrowly tailored to official duties could result in termination.

Considering the holdings and dicta of *Garrity* and *Gardner*, the law appeared to be as follows:

(1) if a police agency does not provide immunity to a police officer, a statement given under threat of adverse personnel action is unconstitutionally coerced;

(2) if a police agency does not provide immunity to a police officer, the agency's taking, or threatening to take, adverse personnel action, in

response to the assertion of Fifth Amendment rights, has an unconstitutional chilling effect on the Fifth Amendment;

(3) if a police agency grants immunity to a police officer, but the officer still refuses to answer questions narrowly related to official duties, the officer may be terminated; and

(4) if a police agency grants immunity to a police officer, and the officer answers questions narrowly related to official duties, the officer may be terminated if the answers provide cause for termination.

Four years after *Gardner*, this Court decided the seminal immunity case. In *Kastigar v. United States*, 406 U.S. 441 (1972), this Court established the constitutional immunity standard of "use and derivative use" immunity. Because *Garrity* and *Gardner* were pre-*Kastigar*, they did not have occasion to decide how immunity would work for police officers under investigation.

REASONS FOR GRANTING CERTIORARI

Forty-one years after this Court decided *Garrity*, the only thing that is certain is the uncertainty as to the meaning and application of *Garrity* and its progeny. Courts and law enforcement agencies continue to use multiple interpretations of this body of law. In the meantime, more than 800,000 sworn law enforcement officers in more than 17,000 law enforcement agencies get a sick feeling whenever the agency launches a criminal/internal

investigation.

As a law enforcement officer, it is nerve wracking enough to be under investigation, with both your freedom and your career on the line. It is worse when you do not know whether you can be fired for asserting your Fifth Amendment privilege against compelled self-incrimination.

To this day, the promises of *Garrity* and *Gardner* have, in large measure, remained unfulfilled. At a minimum, those promises are fulfilled in an uneven manner throughout the nation. There are multiple understandings of the meaning of what is referred to as *Garrity* rights. Imagine where law enforcement would be today if, four decades after *Miranda*, among the federal circuits and state supreme courts, there were multiple understandings of the meaning of *Miranda*, with this Court having not weighed in to resolve the confusion.

A. Inconsistency among Police Agencies and Courts in Their Treatment of Immunity and Officer Rights under *Garrity/Gardner*

Most police agencies do not give a formal grant of immunity. They simply inform the officer that the officer must answer questions. If the officer refuses to answer questions, the officer is terminated. A claim by the officer that he or she is not required to answer questions because the agency did not give immunity is met with either (1) the position that no formal grant of immunity is

required under *Garrity/Gardner*, or (2) if immunity is required to be given, it was automatically afforded when the agency made the officer give a statement under "duress."

Some agencies do not provide a formal grant of immunity, but they provide, by statute, regulation, or custom and usage, *Miranda*-like warnings. *Miranda*-like warnings inform the officer that, under *Garrity*, the agency may neither use the officer's statements in a criminal proceeding, nor any evidence that is derived from such statements. The warnings would include the fact that, because such evidence may not be used in a criminal proceeding, the officer may be terminated for failing to answer questions narrowly related to official duties.

Many agencies neither give a formal grant of immunity, nor give *Miranda*-like warnings. Instead, they take the position that they are required to do nothing because, under *Garrity*, the agency cannot use any statement, or the derivative of any statement, in a criminal proceeding, As such, they argue that the officer is deemed to know that law, and that law automatically grants self-executing "use and derivative use" immunity. As such, if the officer, immunized as a matter of law, refuses to answer questions, the officer may be immediately terminated.

B. There Are Multiple Areas of *Garrity* Confusion

1. Confusion #1

Does *Garrity* even apply? *Garrity* does not apply solely because a higher ranking police officer says something to a lower ranking officer that ends with a question mark. Most agencies believe that *Garrity* is only triggered when the lower ranking officer is required to answer, i.e., the incriminating statement is made under "duress."

Police officers live in a paramilitary work environment. When dealing with a higher ranking officer, there is always the fear of a charge of insubordination or failure to obey an order. Therefore, lower ranking officers are hesitant to force the issue. Let's assume that a lower ranking officer answers a question, provides incriminating information, and is terminated. The agency may argue that *Garrity* was never triggered.

By analogy to *Miranda*, the suspect argues that he was interrogated without the benefit of *Miranda*, and the police argue that the suspect made a "blurt out" not implicating *Miranda*. This scenario becomes more confusing in a jurisdiction that takes the position that there is no requirement to provide *Garrity* warnings because *Garrity* immunity is self-executing. Even if *Garrity* is self-executing, and even if every officer is deemed to know that, when factually is *Garrity* triggered?

2. Confusion #2

Some cases still imply that, of all people, police officers should not be "standing on a technicality." Moreover, this attitude exists in law enforcement agencies. If there is an allegation of police

brutality or excessive force, or if drugs are missing from the evidence room, or if there is an allegation of corruption or bribery, the last thing that a police agency wants to tolerate is an officer who wants to assert his or her constitutional rights.

The accused police officer is usually more difficult to represent than an accused non-officer. A non-officer has no internal conflict on whether to assert constitutional rights. However, police officers have spent a career believing that only "bad people" stand on their constitutional rights. Thus, an accused officer is frequently reluctant to assert his or her constitutional rights. This dilemma is more complicated when both the law enforcement agency and the law enforcement officer are unsure which of multiple understandings of *Garrity* is the real *Garrity*.

3. Confusion #3

Under the rules of evidence in almost all situations in almost all jurisdictions, polygraph evidence is inadmissible. Nonetheless, by custom and usage and, in many states, by statute, police agencies may, for any reason or no reason, subject their officers to polygraph examinations and make employment decisions based on the results.

Thus, if an officer wishes to assert his constitutional privilege against compelled self-incrimination, the officer is often required to submit to a lie detector test, with the results of the test dictating the results of the personnel action. Thus, the officer who is not compelled to answer

questions orally or in writing may be compelled to answer questions by producing a polygraph printout. In effect, police agencies may do to their own officers what the rules of evidence forbid them to do to citizens – give them a polygraph test and punish them for failing.

4. Confusion #4

Let's assume that a police officer, under an internal affairs investigation, is not given immunity, is asked questions, refuses to answer, and is terminated. Is the case controlled by the *Gardner* holding or the *Gardner* dicta? Under the *Gardner* holding, it is unconstitutional for the police agency to take, or threaten to take, adverse personnel action to punish an assertion of the Fifth Amendment privilege against compelled self-incrimination.

Alternatively, under the *Gardner* dicta, the officer could be terminated for failing to answer questions, if provided immunity. Of course, the problem is to determine (1) whether immunity is automatic and self-executing, (2) whether immunity requires *Miranda*-like warnings, or (3) whether immunity requires a formal grant of immunity.

C. Professor Warnken's Background and Experience in This Area Enable Him to Offer Excellent Assessment as to Whether This Court Should Provide a "Once-and-for–All" *Garrity* Resolution

I know that the issue presented in this case is truly an issue that this Court should address. I have been a law professor since 1977 at the University of Baltimore School of Law. I have argued before this Court. Since 1979, I have taught the Fifth Amendment privilege against compelled self-incrimination, voluntariness, *Miranda* rights, *Garrity/Gardner* rights, and *Kastigar* immunity. This case begs this Court to grant certiorari.

There are more than 800,000 sworn law enforcement officers. *Garrity* issues arise every day. Law enforcement agencies are unsure of the law, and law enforcement officers are unsure of the law, yet officers are fired daily over *Garrity* issues.

Because there are multiple legitimate interpretations of the meaning of *Garrity* and *Gardne*r, particular post-*Kastigar*, this case is ripe for this Court to provide a much needed answer.

My perspective on the importance of the case now before this Court goes even deeper. I have significant involvement in the law enforcement community. In 1987, one of my former law students (a police officer turned attorney) asked for my assistance on a *Garrity* issue. We obtained an injunction against the agency.

Based on my work in that case, I published an 86-page law review article, titled "Law Enforcement Officers' Privilege Against Compelled Self-Incrimination, 16 U. Balt. L. Rev. 452 (1987). The article demonstrated -- 21 years ago and 20 years after *Garrity* – why this Court should address

and resolve the *Garrity* dilemma. The article has been cited in five cases, two law review articles, and three filings in this Court.

In 1992, as a result of the article, I was invited to testify in Congress before the Crime & Criminal Justice Subcommittee of the House Judiciary Committee during hearings on the "Rights of Police Officers During Internal Investigations." The Subcommittee reprinted my article in full in House Report 102-112. *Garrity* was an important, yet unresolved, issue in 1987, just as it is today.

Unlike most full-time law professors, I practice law. I have represented law enforcement officers in 33 law enforcement agencies in my career (five federal, six state, 11 county, and 11 municipal). For more than a decade, I have served as general counsel to the Maryland Troopers Association, which represents 2,600 sworn, retired, and civilian members of the Maryland State Police.

I have advised or lectured to 22 law enforcement or pro-law enforcement organizations. This has included advising law enforcement management on *Garrity* and other issues. My "management side" lectures have been presented to the International Association of Chiefs of Police, the Maryland State Police, the Greater Chesapeake Law Enforcement Executive Development, and the Mid-Atlantic Regional Center for Public Safety Innovation & Division of Public Safety Leadership at Hopkins.

I have lectured for police officers and/or police agencies in eight states on numerous issues,

including *Garrity* rights. I know from the requests that I receive, both management and labor are desperate to know their rights and responsibilities under *Garrity* and its progeny.

For seven years, I served as Director of Legal Programs for the National Law Enforcement Officers Rights Center, which was the advocacy and educational arm of the Police Research & Education Project of the National Association of Police Organizations (NAPO). In 1996, I received the "Pete Lauer Memorial Award," which is presented annually, by NAPO, to a "non-cop" who has made the greatest contribution to the nation's law enforcement community.

In addition to two cases on the merits, I was before this Court, in an Amicus Brief, in *Koon & Powell v. United States*, 518 U.S. 81 (1996) (the Rodney King case).

My experiences do not make me any more knowledgeable on these issues, but they do provide me with first-hand experience on how *Garrity* works and does not work and how agencies and officers alike struggle to understand *Garrity*. This Court can – and should – eliminate that struggle.

CONCLUSION

It is respectfully urged that this Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

Professor Byron L. Warnken
University of Baltimore
School of Law
1420 North Charles Street
Baltimore, Maryland 21201

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