No. 01-12967-II

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

LEVETTE VANGATES,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES AS APPELLEE

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United States v. *Vangates*, No. 01-12967-II

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, counsel of record for the United States as Appellee hereby certify that the following persons and parties may have an interest in the outcome of this case:

1. Ralph F. Boyd, Counsel for the United States, Appellee
2. Fabienne E. Leconte, Counsel for Vangates, Appellant
3. Teresa Kwong, Counsel for the United States, Appellee
4. John H. Pelzer, Counsel for Vangates, Appellant
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6. Jessica Dunsay Silver, Counsel for the United States, Appellee
7. Bruce Udolf, Counsel for Vangates, Appellant
8. United States of America, Appellee
9. United States Department of Justice, Counsel for the United States, Appellee
10. Levette Vangates, Appellant

_____

Teresa Kwong
Attorney

STATEMENT REGARDING ORAL ARGUMENT

The United States does not believe that oral argument is necessary for the Court to resolve this appeal.

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STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction under 18 U.S.C. 3231. The defendant timely filed a notice of appeal. This Court has jurisdiction under 28 U.S.C. 1291 and 18 U.S.C. 3742(a).

STATEMENT OF ISSUES

Whether defendant Levette Vangates' testimony in a civil trial prior to her criminal trial was "compelled" within the meaning of *Garrity* v. *New Jersey*, 385 U.S. 493 (1967).

STATEMENT OF THE CASE

A. *Proceedings Below And The Civil Trial*

This case arises from a July 21, 1995, incident at the Pretrial Detention

Center in Miami, Florida, where Novelette Hamilton, an inmate, was assaulted as she was being released from the detention center. After her release, Hamilton immediately reported the incident, asserting that three correctional officers had assaulted her, and the Miami-Dade Department of Corrections (Department of Corrections) commenced an Internal Affairs investigation (Tr. 215, 443-444, 768-772, 784-788, 907-908, 946).[1] Hamilton then identified Levette Vangates, Brigetta Mas, and Rena Symonette (collectively, defendants or officers) in two separate photograph line-ups on September 21, 1995, and October 11, 1995, as the correctional officers who assaulted her (Tr. 413, 416, 420).

Subsequently, Mary Williams, the Internal Affairs investigator assigned to this case, interviewed each officer individually concerning Hamilton's allegations (12/7/00 Hrg. 112-113, 130-131, 141-142). At the beginning of the interviews, she gave each individual three forms: a Subject Employee Notification, Subject Employee Statement, and Rights of Subject Officers in Internal Affairs Investigation (Addendum, Tab 1 (Vangates' forms)). By signing these forms, each officer acknowledged that she understood her rights in the interview, that she understood that she would be subject to discipline and dismissal if she refused to

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[1] "Br. __" refers to the page numbers of Vangates' opening brief. "Tr. __" indicates the relevant pages of the criminal trial transcript. "__ Hrg. __" refers to the dates and pages numbers of the relevant pretrial hearings. "R-__ at __" indicates the tab number of Vangates' Record Excerpts and the relevant page numbers of the document. For the convenience of the Court, record items cited herein and not contained in Vangates' Record Excerpts are reproduced in the Addendum to this brief.

answer the investigator's questions about her work performance, and that her statements in the Internal Affairs investigation would not be used against her in any subsequent criminal proceeding, except for perjury (12/7/00 Hrg. 115, 134-135, 147-148). Williams completed her report in September 1996 (12/7/00 Hrg. 79), but the officers' administrative challenges to the report's findings did not conclude until November 1999 (Tr. 599; 12/7/00 Hrg. 10).

In addition to the complaint with the Department of Corrections, Hamilton filed a civil lawsuit against Metropolitan Dade County and the three correctional officers in their official and individual capacities. That trial commenced in December 1996 (12/7/00 Hrg. 21). The defendants were represented by two attorneys from the County Attorney's Office (12/7/00 Hrg. 18-19). At trial, Hamilton's counsel introduced the Internal Affairs report into evidence (12/7/00 Hrg. 90-91). The three officers did not assert their Fifth Amendment privilege when each was called by Hamilton's attorney to take the stand and each testified that she did not assault Hamilton (12/7/00 Hrg. 95-96; 1/11/01 Hrg. 30; 1/12/01 Hrg. 4). The case settled in January 1997 (12/7/00 Hrg. 9).

While the civil suit was pending, Hamilton's attorney filed a civil rights complaint with the Federal Bureau of Investigation (Tr. 585). The FBI, in response, opened its own investigation into Hamilton's allegations in 1995 (Tr. 607). Pursuant to its policy of allowing the department at issue to complete its internal investigations before stepping in, the FBI monitored the Department of Corrections' Internal Affairs investigation as well as the civil lawsuit until the

Internal Affairs investigation concluded in 1999 (Tr. 577-579, 582, 599). During that time, the FBI agent assigned to this matter, Patricia Kavanaugh, periodically called Mary Williams to ask if the Department of Corrections' investigation had concluded (Tr. 583; see also Tr. 438); Kavanaugh also read portions of Williams' September 1996 report after the Department of Justice had redacted all references in the report to the three officers' statements given in the Internal Affairs investigation, and listened to tapes of Williams' interviews with witnesses (Tr. 594). After the Department of Corrections' investigation concluded, the FBI conducted its independent investigation of this matter (Tr. 606-607).

On July 13, 2000, a federal grand jury returned a two-count indictment charging Levette Vangates, Brigetta Mas, and Rena Symonette with acting under color of law to willfully deprive Novelette Hamilton of her civil rights, in violation of 18 U.S.C. 242 and 18 U.S.C. 2 (R-1 at 2). Count 1 of the indictment charged that the three of them willfully, and while aiding and abetting one another, assaulted and beat Hamilton and thereby willfully deprived Hamilton of her right not to be deprived of liberty without due process (R-1 at 2). Count 2 charged Vangates with providing a false and misleading statement to another person regarding the unlawful assault of Hamilton, thereby hindering, delaying, and preventing the other person from informing a law enforcement officer of the assault, in violation of 18 U.S.C. 1512(b)(3) (R-1 at 2-3).

Prior to the criminal trial, the magistrate judge conducted a hearing on the parties' respective motions concerning admission of the officers' statements in the

Internal Affairs investigation and other testimony in the civil trial. Defendants argued that under *Garrity* v. *New Jersey*, 385 U.S. 493 (1967), which held that statements obtained under the threat of removal from office may not be used in subsequent criminal proceedings, their statements and testimony were "compelled" by the County and, therefore, may not be used in the criminal trial (12/7/00 Hrg. 139, 157, 161; R54-5-7). Vangates, Mas, and Symonette, however, all testified at the hearing that even though they were required to attend the civil trial as part of their official duties, no County employee had told them that the Statement of Rights from the Internal Affairs investigation applied to their statements in the civil trial (12/7/00 Hrg. 111, 118-119, 126-127, 138-139, 145, 149). Nor did any County employee tell the officers that they had to forgo their Fifth Amendment privilege against self-incrimination and answer any specific question posed by Hamilton's counsel or be subject to disciplinary action (12/7/00 Hrg. 97-98, 135-137, 139-140, 149, 152).

The government, represented by a separate Department of Justice attorney who dealt solely with the *Garrity* issue in this case, argued that the officers had no reasonable basis to believe that their statements and testimony were protected under *Garrity* where, *inter alia*, a private attorney, not a state actor, directed them to testify in the civil trial (R48-4-7; 12/7/00 Hrg. 55). In other words, because the officers were not faced with having to choose between testifying or risking losing their jobs, their statements in the civil trial were not "compelled" within the meaning of *Garrity* (12/7/00 Hrg. 168-169). The magistrate judge concluded that

the *Garrity* protection that applied to the officers' statements in the Internal Affairs investigation did not extend to their later testimony in the civil trial (Addendum, Tab 2 at 6).

The district court adopted and modified the magistrate judge's recommendation concerning the *Garrity* issue (Tr. 5-6). It held that the Internal Affairs investigation and any testimony in the civil trial concerning the defendants' statements in that investigation could not be used in the criminal trial (Tr. 6, 1043). The court ruled that the government may nonetheless refer to the Internal Affairs investigation in describing how Hamilton filed her complaint of excessive force with the Department of Corrections, how the Internal Affairs investigation commenced, and how Hamilton identified the defendants in the two photograph line-ups (Tr. 141-143). Any other portion of the civil trial transcript, the court stated, could be used in the criminal trial (Tr. 16). At that time, the government stated that it would use the civil trial transcript solely for impeachment (Tr. 16). In the end, although Mas' counsel opened the door to evidence from the civil trial (Tr. 598), the government did not rely on any civil trial evidence in the criminal trial.

Over the course of the six-day trial, the government presented the testimony of Hamilton, eleven correctional officers, and three medical officers concerning either the defendants' actions on the day of the assault or Hamilton's appearance after the beating.[2] In addition, Mary Williams testified about the photograph line-

[2] The magistrate judge also conducted a hearing, pursuant to *Kastigar* v. *United States*, 406 U.S. 441 (1972), to determine if Hamilton should be precluded

ups (Tr. 410-428), and Patricia Kavanaugh testified about the FBI's investigation (Tr. 539-544, 571-583, 593-596). The defendants did not testify. On January 23, 2001, a jury found Vangates guilty on Counts 1 and 2 (Tr. 1265-1266), while Mas and Symonette were acquitted on Count 1 (Tr. 1266). Vangates was sentenced to 17 months of imprisonment on May 17, 2001, and is presently incarcerated (R-157 at 2; Br. 2).

B. *Statement Of Facts*

On July 20, 1995, Novelette Hamilton was in the police precinct to give a statement concerning an unrelated incident when the police officer discovered that there was a bench warrant for her arrest for failing to complete community service for shoplifting (Tr. 747-749, 829). She was immediately arrested and, as matter of policy, transported to the Women's Detention Center for a medical examination and to spend the night before her bond hearing the next day (Tr. 750-751). In the morning, she was transported to the Pretrial Detention Center ("detention center") in Miami, Florida and placed in a holding cell with other female inmates (Tr. 752).

According to Wanda Presley, a correctional officer at the detention center who together with Levette Vangates escorted the female inmates from the holding

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from testifying in the criminal trial because she was exposed to the defendants' statements and the Internal Affairs report during the civil trial. After reviewing the record, the magistrate judge concluded that there was no basis for finding that Hamilton's testimony had been tainted by such exposure, especially in light of the fact that defendants' have always maintained their innocence throughout the Internal Affairs investigation and civil trial (1/12/01 Hrg. 4-6). The district court adopted the magistrate judge's recommendation to deny the defendants' motion to suppress (Tr. 7-9).

cell upstairs to the courtroom for their bond hearings, Hamilton kept "rambling" and was loud as they walked to courtroom and before the hearings started (Tr. 636-638; see also Tr. 736). Her behavior was not, however, aggressive (Tr. 638). Vangates repeatedly told Hamilton to be quiet and argued with Hamilton in the courtroom (Tr. 639-641). Another correctional officer, Raymond Teal, heard Vangates tell Hamilton, "Bitch, you don't be quiet, I'm going to take you back downstairs" (Tr. 484).

The court sentenced Hamilton to time served (Tr. 639). Because she did not understand what that meant, she asked Vangates about the court's ruling (Tr. 756-757). Vangates responded something to the effect of "didn't you see me talking?" and "why did you interrupt me?" (Tr. 757-758). Vangates continued to tell Hamilton to be quiet when Hamilton started talking to another inmate, and told Hamilton that she was "going to show [her] something when they get downstairs" (Tr. 759-760). After the hearings ended, Presley offered to take the female inmates back downstairs for further processing. Vangates "grabbed" the jail cards, which contained information about each inmate, from Presley's hand and said she was going to take the inmates downstairs. Presley decided not to accompany Vangates because "she didn't feel comfortable" (Tr. 642-643). Presley also heard Vangates say to Hamilton, "Baby, I got you" (Tr. 647).

Vangates proceeded to take the female inmates downstairs to the holding cell with another correctional officer, Catherine Jones (Tr. 676). When they got downstairs, Jones went over to the release desk (Tr. 677-678). Defendants Brigetta

Mas and Rena Symonette were working in the holding cell area that day (Tr. 763). Vangates, Mas, and Symonette placed the inmates into the holding cell and then, according to Hamilton, prevented her from entering the holding cell (Tr. 765-766). Vangates asked Hamilton several times to apologize, but Hamilton refused (Tr. 761-762, 767, 769). Hamilton testified that the three officers then surrounded her in a part of hallway away from the inmates and other officers; Mas and Symonette held her head and hit her neck, back, and shoulder, while Vangates punched her face over and over for two to three minutes (Tr. 768-772, 901-902, 938). Hamilton was crying and screaming during the beating (Tr. 770, 775); her cries were also captured on a videotape of the holding cell area (Tr. 619, 624). When the beating ended, Hamilton noticed acrylic fingernails on the floor and Vangates looking at her finger (Tr. 773-774); later in the day, Vangates, while "shaking" her finger, told another correctional officer, Gene Mason, that "she had an altercation with an inmate" (Tr. 738; see also 1037). Hamilton's face was bruised and swollen, and her left eye was virtually shut (Tr. 260-261, 388, 783, 922, 976).

The officers placed Hamilton in her own cell (Tr. 773). In the meantime, Vangates and Mas approached Darlene Brown, a correctional officer, and Vangates asked her not to send any inmates into the holding cell area until they release a "violent inmate" (Tr. 965-967). Brown decided to help them remove the inmate (Tr. 969) and attempted to get Hamilton to step out of the cell (Tr. 778-779, 974), but Hamilton was afraid to leave the cell and struggled with Brown (Tr. 780, 985). When Hamilton told Brown that "the officers back here had beat me up," Brown

asked Vangates and Mas about this and Vangates said that Hamilton arrived at the detention center looking like that and that she had been screaming all day (Tr. 975, 1015). Contrary to Vangates' statement to Brown, Hamilton was not injured when she appeared at the bond hearing (Tr. 308, 482-483, 527-529, 645, 675). Brown asked Hamilton about Vangates' statement and when she did not respond, she took Hamilton to the release desk (Tr. 976; see also 989-990).

After Hamilton was released, she immediately walked back into the detention center to report the beating (Tr. 784-787), at which time she filed a statement with the Department of Corrections, had her photograph taken, spoke to an investigator with the department, and received medical attention (Tr. 788-793). Lois Spears, then the Assistant Director for Jail Operations, saw Hamilton and ordered an investigation (Tr. 197, 215-216). The shift commander, Earnest Parish, spoke with Hamilton and filed an incident report (Tr. 1062-1063, 1066-1067); none of the defendants had filed an incident report (Tr. 1063).

C. *Standard Of Review*

Whether Vangates' statements and testimony in the civil trial were "coerced" within the meaning of *Garrity* is a legal question reviewed de novo. See *Taylor* v. *Singletary*, 148 F.3d 1276, 1282-1283 (11th Cir. 1998), cert. denied, 525 U.S. 1109 (1999). In determining whether Vangates' statements were made voluntarily or were the product of coercion, courts examine the totality of the circumstances surrounding the statements. See *Blackburn* v. *Alabama*, 361 U.S. 199, 206 (1960); *Sullivan* v. *Alabama*, 666 F.2d 478, 482-483 (11th Cir. 1982).

SUMMARY OF ARGUMENT

This Court should affirm Levette Vangates' conviction. Under *Garrity* v. *New Jersey*, 385 U.S. 493 (1967), a State may not compel an individual to waive the Fifth Amendment privilege or risk termination from employment and then use that "compelled" statement against the individual in a criminal proceeding. The district court did not err in finding that *Garrity*'s prohibition against using Vangates' statements in the Department of Corrections' Internal Affairs investigation did not, as a matter of law, extend to her statements in the civil trial. This result is mandated by the Supreme Court's decision in *Pillsbury Co.* v. *Conboy*, 459 U.S. 248 (1983), which provides that *Garrity* protection of statements made in one proceeding does not automatically apply to that individual's statements about the same subject matter in a separate proceeding. The court's decision, moreover, is supported by the terms of the statement of rights given to Vangates at the beginning of the Internal Affairs investigation. On its face, the statement only compels Vangates to "give a statement for Administrative purposes" as part of the internal investigation and to answer the questions by "the designated Department authority."

The district court also did not err in concluding that the circumstances of the civil trial did not independently trigger *Garrity* protection because her testimony in the civil case was not made subject to the risk of termination and was, therefore, not "compelled" under *Garrity*. Accordingly, no basis exists for reversal and Vangates' conviction should be affirmed.

ARGUMENT

VANGATES' TESTIMONY IN THE CIVIL TRIAL WAS NOT "COMPELLED" UNDER *GARRITY*

At the outset, it is important to clarify the scope of Vangates' challenge to the district court's ruling on the civil trial evidence. The district court had held that Vangates' civil trial testimony concerning the Department of Corrections' Internal Affairs investigation was "compelled" within the meaning of *Garrity* v. *New Jersey*, 385 U.S. 493 (1967), and that precluded the government from introducing that evidence in the criminal trial except for the limited purpose of stating that the Department of Corrections investigated Novelette Hamilton's allegations and that she had identified the defendants in the investigation (Tr. 6, 141-143, 1043). Indeed, the district court denied the government's requests to raise the Internal Affairs investigation even after defense counsel repeatedly brought up the investigation with witnesses during the criminal trial (Tr. 217, 454, 597-600, 1039-1043). Thus, the only civil trial testimony by Vangates at issue on appeal is that which did not pertain to the Internal Affairs investigation (Tr. 16). The government ultimately did not introduce any evidence from the civil trial.[3]

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[3] To the extent that Vangates may be arguing that she feared that the government would introduce her statements regarding the Internal Affairs investigation from the civil trial, this concern would be unfounded due to the district court's prohibition against using such evidence (Tr. 6, 1043). The two instances, cited by Vangates, where the Internal Affairs investigation was raised in the criminal trial are equally benign. Br. 5-6. First, the government's questions in voir dire that Vangates challenges did not reveal any statements by her from the Internal Affairs investigation. The government simply asked, in general terms, if a juror had "ever heard of a code of silence among police officers" (Tr. 100) and if a

On appeal, Vangates argues (Br. 15) that based on the district court's ruling on the civil trial evidence unrelated to her statements in the Internal Affairs investigation, "she was prohibited from taking the stand in her defense under the threat that the Government would use her testimony from the Civil Trial against her." That portion of her testimony, however, is not protected by *Garrity*. Under *Garrity*, 385 U.S. at 494, an individual who gives a statement, when presented with the choice between exercising his right to remain silent and risking termination of his employment, may not have those statements used against him in a criminal prosecution. The Supreme Court held that, when public employees are given the choice of either forfeiting their jobs or incriminating themselves, the Fifth Amendment has been violated because a forced decision of that kind is "likely to exert such pressure upon an individual as to disable him from making a free and rational choice." *Id*. at 497. The Court further held that the Fourteenth

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juror would be affected if he heard that an internal investigation had been conducted (Tr. 105); although these were neutral questions and did not implicate any statements by Vangates, defendants' objections were upheld. Second, contrary to Vangates' assertion that the "Government solicited testimony from FBI Agent Patricia Kavanaugh regarding Vangates' *Garrity* statements" (Br. 6), it was Brigetta Mas' attorney – not the government – who questioned Kavanaugh about whether the FBI merely adopted the findings of the internal investigation conducted by the Department of Corrections and why the defendants were not indicted before 2000 (Tr. 576-583). Vangates' own counsel continued this line of questions in his cross-examination of Kavanaugh (Tr. 601-606). Only in response to defense counsel's questions did the government (1) request during a sidebar discussion permission to recall Mary Williams to discuss the nature of the Internal Affairs' investigation to show that the government was not dilatory in prosecuting this action, which request was denied (Tr. 597-600); and (2) ask Kavanaugh on redirect if she knew when the County investigation concluded (Tr. 608).

Amendment's due process protection against coerced statements prohibits a State from using statements obtained under threat of dismissal in subsequent criminal proceedings. *Id*. at 500.

Here, Vangates was required to answer questions in the Internal Affairs investigation or risk termination (Addendum, Tab 1); consequently, her statements in the Internal Affairs investigation were protected under *Garrity* (12/7/00 Hrg. 60-61). The fact that she was compelled to waive her Fifth Amendment right in the internal investigation did not, however, preclude her from invoking her Fifth Amendment privilege in the civil trial. As the Supreme Court held in *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 254 (1983), immunity granted to an individual under 18 U.S.C. 6002 that would compel him to testify in a specific proceeding, such as a grand jury proceeding, does not apply to a separate civil lawsuit. Thus, the court in the civil action may not compel that individual "to answer deposition questions, over a valid assertion of his Fifth Amendment right, absent a duly authorized assurance of immunity *at the time*." *Id*. at 256-257 (emphasis added). To do otherwise, according to the Court, would impermissibly "invest the deponent with transactional immunity on matters about which he testified at the immunized proceedings." *Id*. To be sure, this Court has stated that the protection afforded by *Garrity* "is tantamount to use immunity," not transactional immunity. *United States* v. *Veal*, 153 F.3d 1233, 1241 n.7 (11th Cir. 1998), cert. denied, 526 U.S. 1147 (1999). Vangates' brief does not address this crucial issue.

The terms of the Subject Employee Statement that Vangates signed at the

beginning of her interview with Mary Williams confirm even more clearly that only her statements made in the Internal Affairs investigation would be protected by *Garrity* and would not be used against her in any subsequent criminal proceeding. In particular, the statement only "required" Vangates "to give a statement for Administrative purposes." Addendum, Tab 1; see also 12/7/00 Hrg. 134. It also stated that, pursuant to the Department Manual for internal investigations, Vangates "shall answer or render material and relevant statements to the designated *Departmental authority* when so directed." Addendum, Tab 1 (emphasis added). Moreover, it expressly provided that the "interview [was] being conducted at the Internal Affairs Unit." *Ibid*. Lastly, the statement stated that "neither [Vangates'] statement nor any information or evidence which [was] gained by reason of such statements[] can be used against [her] in any subsequent criminal proceeding, except perjury." *Ibid*. No Department of Corrections officials made any representations that would have misled Vangates into thinking that she would be subject to discipline if she refused to answer questions about the July 21, 1995 incident from non-departmental employees and outside of the investigation. Nor was there reason to believe that this right not to have her Internal Affairs investigation statements used against her in a criminal proceeding would extend to her testimony at the civil trial. She just "assumed" – incorrectly – that this statement of rights from the investigation would apply to the civil proceeding (12/7/00 Hrg. 137-138). This Court has held, however, that such a mistaken belief does not afford otherwise unprotected statements a Fifth Amendment shield. See

Taylor v. *Singletary*, 148 F.3d 1276, 1283 n.7 (11th Cir. 1998) (testimony by a defendant, who mistakenly believed that he could not claim Fifth Amendment privilege subject to an informal immunity agreement, was not "compelled" and could be used in the subsequent criminal prosecution), cert. denied, 525 U.S. 1109 (1999).

Vangates attempts to circumvent *Pillsbury* by arguing that the circumstances at the civil trial provide a basis for finding that her testimony was "compelled" under *Garrity* and cannot be used in the criminal trial. Br. 10-12. Fatal to this argument is the fact that it was Hamilton's private counsel, not a County employee or another state actor, who called her to testify in the civil trial (12/7/00 Hrg. 135-136). As recognized by the Second Circuit, in determining whether a statement is "compelled," thereby bringing it under *Garrity* protection, "[t]he controlling factor is * * * the fact that the state had involved itself in the use of substantial economic threat to coerce a person into furnishing an incriminating statement." *United States* v. *Montayne*, 500 F.2d 411, 415 (2d Cir.), cert. denied, 419 U.S. 1027 (1974); see also *United States* v. *Solomon*, 509 F.2d 863, 871-872 (2d Cir. 1975) (interrogation by the New York Stock Exchange on behalf of brokerage firm was not equivalent to interrogation by the government and is distinguishable from *Garrity*); *United States* v. *Camacho*, 739 F. Supp. 1504, 1515 (S.D. Fla. 1990) ("A subjective belief that *Garrity* applies will not be considered objectively reasonable if the state has played no role in creating the impression that the refusal to give a statement will be met with termination of employment."). Because a private individual, not the

State, was the reason for her testimony, Vangates had no objective basis to believe that she would lose her job if she refused to answer questions posed by Hamilton's attorney. As a result, she was not presented with a Hobson's choice and *Garrity* does not apply. See *United States* v. *Indorato*, 628 F.2d 711, 716 (1st Cir.) (*Garrity* does not protect police officer's statements where policy did not support officer's belief that he would have been subject to termination if he refused to answer his superiors' questions), cert. denied, 449 U.S. 1016 (1980).

Vangates nonetheless tries to implicate the State by arguing (Br. 10-11) that she was "ordered to appear at trial, in her uniform, and was compensated for her appearance," and she was instructed to "cooperate with the County Attorney['s] Office" in the civil trial. From this, she inferred that she was obligated to answer every question posed by Hamilton's counsel even though she knew that he did not work for the County. Although Vangates testified at the hearing that her attorneys told her to answer the questions by Hamilton's attorney (12/7/00 Hrg. 139-140), she stated that no one, including her attorneys, told her that she would be subject to disciplinary action if she refused to answer any specific question in the civil proceeding (12/7/00 Hrg. 136-140; see *id*. at 97-98). At most, her attorneys told her to cooperate with the County's defense of the civil suit (12/07/00 Hrg. 97-98, 126-127). This Court has stated, however, that a police officer's general duty to testify as a witness in a trial "does not rise to the level of coercion." *Benjamin* v. *City of Montgomery*, 785 F.2d 959, 962 (11th Cir.), cert. denied, 479 U.S. 984 (1986). Coercion was found in that case only after the Mayor threatened to

terminate them if they did not testify. *Ibid.*

By contrast, the record shows that Vangates' belief that she would have been subject to discipline if she asserted her Fifth Amendment privilege was unreasonable. For instance, she did not receive at the beginning of the civil trial a statement of rights, directing her to respond to questions or risk discipline, similar to the forms that she got at the commencement of the Internal Affairs investigation (12/7/00 Hrg. 138-139). Nor did anyone tell her that she would be subject to discipline if she invoked her Fifth Amendment privilege in the civil trial (12/7/00 Hrg. 98, 136-140). In addition, Rhea Grossman, her attorney from the civil trial, testified before the magistrate judge that she never told the defendants that they would be terminated if they did not testify in the civil trial (12/7/00 Hrg. 97-98). Moreover, Kevin Hickey, the Deputy Director of the Department of Corrections, testified that the County may order officers to testify in civil lawsuits when needed, but no such order was issued in this case (12/7/00 Hrg. 104). He further emphasized that cooperation in defending a civil action does not include requiring officers to waive their constitutional rights (12/7/00 Hrg. 106). Based on the foregoing, the instruction for Vangates to cooperate in the civil trial was not an order to testify and answer every question asked of her by Hamilton's attorney or risk dismissal. This situation is similar to the one presented in *Minnesota* v. *Murphy*, 465 U.S. 420 (1984). In that case, the Supreme Court held that *Garrity* did not apply where the individual's "probation conditions merely required him to appear and give testimony about matters relevant to his probationary status," as

opposed to requiring him "to choose between making incriminating statements and jeopardizing his conditional liberty by remaining silent." *Id*. at 436.

Lastly, contrary to Vangates' assertion (Br. 11), there is no constitutional obligation to advise witnesses of the Fifth Amendment privilege in civil matters. In fact, the former Fifth Circuit found in *United States* v. *White*, 589 F.2d 1283, 1285 (5th Cir. 1979), that counsel's failure to inform a defendant of his Fifth Amendment privilege in a civil case does not render even inculpatory testimony from that proceeding involuntary and that that testimony may be used in subsequent criminal prosecution.[4] No one misled Vangates at the civil trial. Where, as here, Vangates merely "assumed" or just "knew," without more, that she would be disciplined if she refused to answer Hamilton's attorney's questions on Fifth Amendment grounds (12/7/00 Hrg. 136-138), *Garrity* does not protect her civil trial testimony at issue.[5]

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[4] See *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (decisions of the former Fifth Circuit rendered prior to October 1, 1981, are binding precedent in the Eleventh Circuit).

[5] Because Vangates' civil trial testimony was not "compelled," the Court need not address the waiver issue discussed in Vangates' brief.

CONCLUSION

The district court's judgment against Vangates should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7)(B). The brief was prepared using WordPerfect 9.0 and contains 5079 words in Times New Roman, 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2001, two copies of the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE were served by first-class mail, postage prepaid, on:

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