

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Criminal Case No. 07-CR-00462-JLK

UNITED STATES OF AMERICA,

Plaintiff,

v.

CORY VOORHIS,

Defendant.

**GOVERNMENT'S RESPONSE TO DEFENDANT'S
MOTION TO SUPPRESS STATEMENTS AND EVIDENCE**

COMES NOW the United States of America, by and through its attorneys, Gregory A. Phillips and James C. Anderson, the assigned Special Prosecutors in this matter, who now respond as follows to the Defendant's Motion to Suppress Statements and Evidence:

I. Introduction

On December 20, 2007, Cory Voorhis (the Defendant) filed a motion to suppress statements and evidence. Unfortunately he identifies no specific statements that he wants suppressed. In addition, while arguing that "fruits" of the statements also be suppressed, he again fails to identify what specific evidence is derived from

the unidentified statements. In reviewing the motion, the government notes that the only statements (whose content is unmentioned) referred to are those that the Defendant made on October 16, 2006, to his superiors at the Bureau of Immigration and Customs Enforcement, namely, the Special Agent in Charge (SAC) Jeff Copp and the Assistant Special Agent in Charge (ASAC) Paul Maldonado. *See* Motion to Suppress at ¶¶ 3-6, 15-18.

From this, the government believes that the Defendant seeks to suppress those statements. Nothing in the motion suggests that he seeks to suppress other statements on the same subject made to other persons. The government cannot divine what evidence the Defendant contends is alleged to be derivative of his statements to his supervisors on October 16, 2007. Accordingly, it will briefly refer to the some of the other sources of information it now relies upon to establish the elements of the charged offenses.¹

II. Background

On October 16, 2006, ICE Special Agent in Charge (SAC) Jeff Copp received

¹While the testimony at the suppression hearing controls, the government recites below some of the evidence it intends to introduce. By Federal Rule of Evidence 1101, the rules of evidence, except that governing privileges, do not apply at a suppression hearing. *See United States v. Jackson*, 213 F.3d 1269, 1281-82 (10th Cir. 2000).

a telephone call from Robert Cantwell, the Director of the Colorado Bureau of Investigation (CBI). The telephone call concerned information contained in a television advertisement that had begun running on October 10, 2006, in Colorado, in connection with the gubernatorial race between former District Attorney William Ritter and incumbent Congressman Robert Beauprez.² The ad was run by the Beauprez campaign and related to Ritter's record on immigration cases while he served as the Denver district attorney. Included in the ad was information as to plea dispositions for various individuals prosecuted by DA Ritter's office, including a defendant named Walter Ramo, aka Carlos Estrada-Medina. As to Ramo, the ad provided his alias name and information about a sexual assault that he committed after his Colorado conviction (pleaded from drug charge to felony trespassing on agricultural lands) in San Francisco, California. Among other information provided in the ad was the SID number given Ramo in the California system.

CBI Director Cantwell told SAC Copp that he had recently learned that various named persons had run the name "Walter Ramo" through the NCIC/CCIC system. Among these persons was ICE Agent Cory Voorhis (the Defendant). Director

²A separate television ad was run beginning on September 29, 2006, from which the government contends that the Defendant had used his access to NCIC/CCIC to run certain names contained in that ad as well.

Cantwell asked SAC Copp to find out from Voorhis why he had accessed NICI/CCIC for the name Walter Ramo. SAC Jeff Copp called his ASAC, Paul Maldonado, and asked that he speak with Agent Voorhis to learn the reason for the access so that he could respond to Cantwell's inquiry. SAC Copp thought he was essentially helping cross names off a list.

Voorhis surprised both supervisors by saying that he had an attorney and would not talk about that NCIC/CCIC inquiry. After doing so, he then *voluntarily* said that he had run the inquiry on Walter Ramo while checking information received from an anonymous source to determine whether a file should be opened in the office. During this informal meeting, SAC Copp was not conducting any sort of formal inquiry but instead had thought he was simply going to be quickly learning the valid basis for Voorhis's NCIC/CCIC inquiry so that he could in turn respond to CBI Director Cantwell.

In addition to making the above statements, the Defendant also has spoken with his former direct supervisor, Supervisory Special Agent Anthony Rouco. During the conversation, the Defendant told Rouco that he was the source of the information. The Defendant wrongly denied having turned over any information ("stuff" or paper)

and said that he had called from home. The Defendant told Rouco that his contact had been an aide with the Beauprez campaign, John Marshall.

On October 17, 2006, Senior Special ICE Agent Judith Jordan, while on the way to the break room, encountered the Defendant as he also made his way to the break room. The two knew each other from having worked together on many investigations. In the break room, the two sat at the same table. Agent Jordan, who was familiar with the Defendant's mannerisms, noted that he seemed very nervous. She saw that he was moving his leg back and forth, which she had previously seen him do during stressful work-related situations. The Defendant told Agent Jordan that he was the person who had "ran that guy." Jordan immediately knew that the Defendant was referring to the television ad. The ad had been a topic of conversation among agents wondering who had been the law enforcement source. Agent Jordan asked the Defendant, "Have you banged the guy in?", meaning have you reported it to supervisors? The Defendant said that he had discussed the matter with supervisors and that there was an investigation. The Defendant told her that he wished that he had put more thought into the matter. The Defendant said that he had conversed with John Marshall about the "trespass case."

On October 19, 2007, Agent Jorden called the Defendant on the telephone to check on his status. She learned from him that he was at home on administrative leave. Agent Jorden told the Defendant that it was against the law to use CCIC for personal use, and the Defendant replied, "Yes."

On October 17, 2006, as part of the ensuing ICE investigation (begun after the Defendant's informal meeting with his supervisors the day before), the Defendant's computer, laptop, and cell phone were seized. From the computer, law enforcement has found that it had been used to access some of the names used in the television ad including that of Walter Ramo. Further investigation has revealed that the only way the name Walter Ramo could be connected to the alias Carlos Estrada-Medina was by accessing NCIC/CCIC.

During the relevant time period, the Defendant was actively involved in assisting the Beauprez campaign with information, including that obtained from NCIC/CCIC. This involvement included personal meetings, review and comment upon listed defendants previously prosecuted by DA Ritter's office, participation in a telephone conference call with persons involved with the campaign, and other telephone calls with persons working on the campaign.

III. The Fifth Amendment and Compelled Self-Incrimination

The Fifth Amendment to the Constitution provides in relevant part that “[n]o person shall be . . . compelled in any criminal case to be a witness against himself.” In his suppression motion, the Defendant contends that he was in fact somehow compelled to make the statements to his supervisors on October 16, 2006.³ Although acknowledging that he was never expressly threatened with loss of his job for refusing to waive his Fifth Amendment privilege (which subject was never broached or even available under ICE policy), he contends that he was impliedly so threatened. Under the facts and law, this claim is wholly lacking merit.

A. Express Threats of Loss of Employment or Position

Although the Defendant makes no claim that he was expressly threatened with a loss of his job unless he waived his Fifth Amendment rights and gave the statements

³The Defendant does not contend that he was in custody (as he was not) when he spoke with SAC Copp and ASAC Maldonado on October 16, 2006. Accordingly, there is no issue of “custodial interrogation” under *Miranda v. Arizona*. Yet the bulk of the “Argument” portion of his motion (paragraph 17) is based on a supposedly “inherently coercive” environment during the informal, momentary meeting with his supervisors on October 16, 2006. This amounts to an effort to shoehorn *Miranda* into a *Garrity* “implied threat” claim. The two distinct lines of authority do not blur together in this fashion. Whatever the “environment,” the Defendant was not in custody. Whatever the “environment,” he must establish a compelled waiver of his Fifth Amendment rights by threat of termination from employment.

he gave, it is still instructive to look for guidance to United States Supreme Court cases involving such circumstances. Importantly, when the Court has found coercion to waive Fifth Amendment rights by a threatened penalty of loss of employment or position, such penalty has been required by statute or municipal ordinance. *See Lefkowitz v. Cunningham*, 431 U.S. 801, 803-04 (1977) (officer of political party refusing to answer questions or waiving immunity divested of party offices and banned for five years from holding any public or party office); *Lefkowitz v. Turley*, 414 U.S. 70, 71-74 (1973) (public contractor's contracts subject to cancellation under New York ordinance and statute upon his refusal to waive immunity when called to testify about his transactions with the State or its subdivisions); *Uniformed Sanitation Men Association v. Commissioner of Sanitation of the City of New York*, 392 U.S. 280, 282-83 (1968) (employees fired pursuant to New York City Charter § 1123 for invoking and refusing waive their right against self-incrimination before testifying before the grand jury); *Spevack v. Klein*, 385 U.S. 511, 512-13 (1967) (attorney disbarred for failing to waive Fifth Amendment rights against self-incrimination by testifying and providing financial records); *Garrity v. State of New Jersey*, 385 U.S. 493, 494-96 (1967) (police officer refusing to waive immunity under Fifth Amendment in investigation of fixing traffic tickets fired from employment by New Jersey statute).

The above cases stand as an exception to the general rule that the Fifth Amendment is not self-executing. “[I]n the ordinary case, if a witness under compulsion to testify makes disclosures instead of claiming the privilege, the government has not ‘compelled’ him to incriminate himself.” *Garner v. United States*, 424 U.S. 648, 654 (1976). The Supreme Court has clarified that “an individual may lose the benefit of the privilege without making a knowing and intelligent waiver.” *Id.* at 654, n.9.

On the other hand, the Supreme Court has affirmed cases in which a person has been forced to provide information relating to a public office when no waiver of Fifth Amendment rights is required, or has voluntarily provided self-incriminating information. *See Minnesota v. Murphy*, 465 U.S. 420, 434-38 (1984) (statement of a probationer to his probation officer about committing a previous rape and murder was properly admitted at the later criminal trial for those crimes as there was no coercion to waive Fifth Amendment rights despite the probation officer’s ability to compel the probationer’s attendance at the routine interview and to require truthful answers); *Gardner v. Broderick*, 392 U.S. 273, 278 (1968) (if the policeman “had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use

of his answers or the fruits thereof in a criminal prosecution of himself . . . the privilege against self-incrimination would not have been a bar to dismissal”).

B. Implied Threat of Loss of Employment or Position

Because no express threat of firing was made against the Defendant before he made his voluntary statements to his supervisors on October 16, 2006, he is left to argue he received such an implied threat. He cites the court to two cases that have been willing to broaden the *Garrity* rule in certain narrow circumstances to include implied threats of loss of employment. While citing the cases for certain general rules, he fails to address how those rules were applied to the facts of the cases. There, as here, the defendants failed to show any such implied threat. Because this seems the centerpiece of the Defendant’s motion to suppress,⁴ the government now addresses in detail each of the “implied threat” cases.

1. *United States v. Vangates*, 287 F.3d 1315 (11th Cir. 2002)

In *Vangates*, three female corrections officers were accused of beating a female arrestee. *Id.* at 1317. As part of an official internal affairs investigation, each officer was required to sign documents advising her that she could be disciplined or terminated

⁴The Defendant cites *United States v. Vangates*, 287 F.3d 1315 (11th Cir. 2002), throughout the “Legal Standard” portion of his brief. Motion to Suppress at ¶¶ 10, 12-15.

for failing to answer questions about the work performance; that her statements to internal affairs could not be used against her in a later criminal proceeding, except one for perjury; and that such statements could be used against her as to departmental charges. *Id.* Each then interviewed.

Months later, the complainant filed a federal lawsuit under 42 U.S.C. § 1983. As defendants she named the three correction officers as well as the county employing them. *Id.* at 1318. At the civil trial, the complainant introduced evidence of the internal affairs investigative file, which included transcripts and tape recordings of the interviews of the three correction officers. Upon being subpoenaed to testify, the three correction officers appeared in uniform, denied assaulting the complainant, and failed to claim a Fifth Amendment privilege or any immunity. *Id.*

While the civil suit was pending, the complainant's attorney filed a complaint with the FBI, which opened an investigation. Ultimately, the three correction officers were charged under 18 U.S.C. § 242 with beating the arrestee and thereby depriving her of constitutional rights. The district judge barred the prosecution from using "any civil trial testimony concerning the Internal Affairs investigation or the officer's statements during that investigation. . . ." *Id.* at 1319. At the same time, the district judge allowed the government to use in its case in chief other civil trial testimony. *Id.*

The jury acquitted two of the corrections officers but convicted Vangates. Vangates appealed, contending that the district court erred in allowing use of the other civil trial testimony, which she said kept her from testifying in her own behalf. *Id.*

On review, the Eleventh Circuit examined *de novo* whether Vangates's "statements and testimony in the civil trial were 'coerced' within the meaning of *Garrity*." *Id.* at 1319-20. The court began by noting the general rule that the Fifth Amendment privilege against self-incrimination is not self-executing but instead must be asserted. The court further noted that "a witness's answers 'are not compelled within the meaning of the Fifth Amendment unless the witness is required to answer over his valid claim of privilege.'" *Id.*, quoting *Minnesota v. Murphy*, 465 U.S. 420.

While acknowledging that *Garrity* is more easily applied when there is a direct threat of loss of employment tied to a refusal to waive Fifth Amendment rights, the court found *Garrity*'s rule can extend beyond that circumstance. Relying in part upon *United States v. Friedrich*, 842 F.2d 382, 395 (D.C.Cir. 1988), the court allowed *Garrity* protection even absent such a direct threat provided that two separate showings were met: "First, the defendant must have subjectively believed that he was compelled to give a statement upon threat of loss of a job. Second, this belief must have been *objectively reasonable* at the time the statement was made." *Id.*, citing *United States*

v. Comacho, 739 F. Supp. 1504, 1515 (S.D.Fla. 1990), in turn citing *Frederick*, 842 F.2d at 395.

The court found that Vangates could meet the subjective prong of the test. Specifically, it relied upon her earlier testimony before the district court that she believed she could have been disciplined had she refused to cooperate during the civil trial and also that the terms of the documents she signed before the internal affairs investigation covered her civil testimony. *Id.* at 1322. Finding that the government had offered no contrary evidence, the court deemed that her statements were sufficient to “evince a subjective belief that she was ‘compelled to give a statement upon threat of loss of job.’” *Id.*

Even so, the court found she failed the second objective prong, basing this upon its “find[ing] no statute, regulation, or policy requiring her to forgo her Fifth Amendment rights in such a proceeding. . . .” *Id.* This, together with the corrections department’s not having issued an order requiring her testimony backed by sanctions for failing to do so, led the court to conclude that “there simply is no basis upon which Vangates could have formed an objectively reasonable belief that some *state* action compelled her to forgo her Fifth Amendment rights during the trial.” *Id.* at 1324 (emphasis in original).

Likewise, in the present case, no such sanctions existed by which the Defendant could have an objectively reasonable belief that he would be fired for invoking his Fifth Amendment rights. In fact, the Defendant's case is far weaker than presented in any "implied threat" case including Vangates's. He plainly knew that he could invoke his Fifth Amendment rights. In the same brief minute of the encounter with his supervisors on October 16, 2006, he told them that he had an attorney and would not answer questions about the matter. Unlike Ms. Vangates, he was not compelled to answer any question even with a Fifth Amendment protection. Unlike Ms. Vangates, his statements were not forced in a formal, official internal affairs investigation conducted by an internal affairs investigator. Instead, he was merely approached through his supervisors with a question from another law enforcement officer on a matter for which they did not suspect he had done anything wrong. An informal setting as occurred here, is far from the structured, warned setting in which Ms. Vangates found herself.

The Defendant attaches to his motion as Exhibit 1 the "Interim ICE Table of Offenses and Penalties for non-bargaining unit employees." He notes that he could be fired for "failing to provide honest and complete information to investigators or displaying lack of candor in any official inquiry or proceeding, including background

investigations, failure to provide material fact of pertinent information.” Motion to Suppress at 3, ¶ 6. He glosses over the lack in his case of any “official inquiry or proceeding.” He fails to explain how this language overrides—or even is meant to override—an employee’s assertion of Fifth Amendment rights.

He also attaches to his motion as Exhibit 2 a *Garrity*-type warning signed by him on February 21, 2001, concerning “warning and assurances to employees required to provide information.” He fails to note that no such document was presented to him as part of the momentary informal encounter with his supervisors on October 16, 2006. His knowledge obtained from his previous experience with this form also works against his present motion to suppress. The form itself makes clear that he could not be forced to waive his Fifth Amendment rights. As such, it expressly protects employees such as himself against any employment threats running afoul of *Garrity*.

2. *United States v. Trevino*, 215 Fed.Appx. 319 (5th Cir. 2007)

In *Trevino*, two police officers responded to a call regarding five intoxicated young women at a service station. *Id.* at 320. The women were handcuffed and taken to police headquarters. Soon after this episode, the five women filed a lawsuit accusing the two officers of sexual misconduct. State investigators had the city’s police chief direct the two officers to come to the police station for questioning about

their conduct following the arrests. Trevino initially claimed memory loss but after persistent questioning and viewing a photograph he allegedly had taken he admitted various sexual contacts with the young women. After obtaining Trevino's statements, the state investigator read Trevino his *Miranda* rights. The city police chief fired Trevino upon seeing the statement. Ultimately, Trevino was indicted for conspiring to violate the civil rights of the young women, pursuant to 18 U.S.C. § 241. *Id.*

At his criminal trial, Trevino moved to suppress his statements under *Garrity*. The district judge denied the motion, holding that the police department had not explicitly threatened him with loss of employment. The Defendant was convicted and appealed. *Id.*

The Fifth Circuit, in an unpublished opinion, determined that neither *Garrity* nor *United States v. Indorato*, 628 F.2d 711 (1st Cir. 1980)⁵ “rules out the possibility that implied threats could violate a defendant’s *Garrity* rights.” 215 Fed.Appx. at 321. The court looked to the test stated by the D.C. Circuit in *Friedrick*, 842 F.2d at 395,

⁵Although *Indorato* was discussed both in *Vangates* and *Trevino*, each of which is cited in the Defendant’s motion to suppress, the Defendant fails in his motion even to mention *Indorato*. Because of *Indorato*’s importance to the issue of “implied threat” of termination absent a waiver of Fifth Amendment rights—the heart of the motion to suppress—the government also reviews *Indorato* in detail in the next portion of this brief.

that “an officer claiming the protection of *Garrity* ‘must have in fact believed [his] statements to be compelled on threat of loss of job, and this belief must have been objectively reasonable.’” *Id.* The court then cited *Vangates* for the proposition that “In the absence of a direct threat, we determine whether the officer’s statements were compelled by examining her belief and, more importantly, the objective circumstances surrounding it.” 215 Fed.Appx. at 321-22, quoting *Vangates*, 287 F.3d at 1321-22.

The Fifth Circuit rejected Trevino’s *Garrity* argument. In evaluating whether the questioning was coercive,⁶ the court looked to various factors including that Trevino’s “supervisors were not present during his questioning and never indicated to him that his job would be in any greater jeopardy if he failed to cooperate.” 215 Fed.Appx. at 322. Similarly, in the present case the Defendant was never told such a thing by his supervisors, and he was free to leave as he in fact did. His informal and brief visit with SAC Copp and ASAC Maldonado pales in comparison to the official, structured interview of Trevino by state investigators.

⁶The court earlier cited *Indorato* for rule that coercion exists when failure to waive Fifth Amendment rights will result in firing from employment. 215 Fed.Appx. at 321.

3. *United States v. Indorato*, 628 F.2d 711 (1st Cir. 1980)

In *Indorato*, a policeman, who was a shift commander on the Massachusetts Turnpike, was accused of conspiring with others in the theft of an interstate shipment (two semi-tractor truck trailers) in violation of 18 U.S.C. § 659. Relying on *Garrity* and the Fifth Amendment, Indorato sought to exclude from his criminal trial statements made during interviews with an FBI agent as well as with his immediate supervisor. *Id.* at 714-15. Indorato acknowledged that he had suffered no overt threat of dismissal for failing to answer questions and waive his Fifth Amendment privilege. *Id.* at 715-16. He instead based his claim on his view that the state police department rules contained an implied threat of such dismissal of officers refusing to obey lawful orders of supervisors. *Id.* at 715.

The court declared this a “very shaky premise.” *Id.* at 715. It found that “[t]here is nothing in the record to suggest that the rules have been interpreted to mean that a state police officer who refuses on fifth amendment grounds to comply with an order to provide self-incriminating statements would be dismissed.” *Id.* at 716. Analyzing the *Garrity* line of cases, the court stated as follows:

In all the cases flowing from *Garrity*, there are two common features: (1) the person being investigated is explicitly told that failure to waive his constitutional right against self-incrimination will result in his

discharge from public employment (or a similarly severe sanction in the case of private citizens); and (2) there is a statute or municipal ordinance mandating such a procedure.

Id. The court rejected Indorato's *Garrity* claim, finding that he had not asserted the Fifth Amendment privilege; that he was not told he would be dismissed if he failed to answer the questions asked; that he was not asked to sign a waive of immunity; and that there was not "hanging over his head" any statute mandating dismissal for refusal to answer. *Id.* at 717.

In view of these objective circumstances, the court found insufficient the Defendant's subjective fears of what might happen for failing to answer his superior officers. *Id.* at 716. *See also United States v. Stein*, 233 F.3d 6 (1st Cir. 2000) (attorney later charged with bankruptcy fraud had testified at bar investigation of her professional conduct, and later sought to suppress those statements at her criminal trial; court distinguished *Garrity* since attorney "was not subject to automatic loss of her position if she refused to testify. While refusal to waive the Fifth Amendment might increase the risk that she would be disbarred, disbarment would not result automatically and without more").

III. Conclusion

The motion to suppress the Defendant's statements to his supervisors on October 16, 2006, must be denied. The voluntary statements were made in a momentary informal meeting at which the supervisors were simply trying to determine the valid reason for the Defendant's access of NCIC/CCIC for the name in the political ad, Walter Ramo. SAC Copp had not suspected illegal use of NCIC/CCIC by the Defendant. No express threats were given as to loss of employment for refusing to waive his Fifth Amendment rights. Further, the Defendant's alleged subjective belief that he would be fired for not waiving his Fifth Amendment privilege (which makes no sense since he in fact stated that he had an attorney and would not answer questions about the NCIC/CCIC inquiry) is groundless and not objectively reasonable. ICE's own one-page *Garrity* advisement, which the Defendant had signed in 2001, makes clear that an employee may assert Fifth Amendment rights and not be fired for doing so.

The Defendant has failed even to allege how his statements to his supervisors on October 16, 2006, led the government to obtain derivative evidence that might be subject to suppression. The Defendant's use of NCIC/CCIC to run the name of Walter Ramo was known even before his informal meeting with his supervisors that day. In

addition, he had admitted his conduct to other persons. The investigators had numerous independent sources, including information obtained from his computer and telephone records, by which to learn all evidence to be introduced against the Defendant in this case.

DATED this 4th day of January, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2008, I have caused to be electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following via email:

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