No. 16-1495

IN THE

Supreme Court of the United States

CITY OF HAYS, KANSAS,
Petitioner,

vs.

MATTHEW JACK DWIGHT VOGT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

When a person is required by his employer to make statements about possible criminal activity, which, if any, of the following uses of the statements constitute being a witness against himself in a criminal case within the meaning of the Fifth Amendment:

1. Use of the statements to investigate and locate additional evidence.

2. Initiating a prosecution based on the statements and additional evidence.

3. Introducing the additional evidence in a probable cause hearing.

4. Introducing the defendant's own statements in a probable cause hearing.

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This case involves an interpretation of the Fifth Amendment Self-Incrimination Clause that is more

1. Both parties have filed blanket consents to *amicus* briefs.

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* CJLF made a monetary contribution to its preparation or submission.

expansive than its words allow. Such an interpretation is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Respondent, a police officer, was employed by the City of Hays Police Department ("Hays"). *Vogt* v. *City of Hays*, 844 F. 3d 1235, 1238 (CA10 2017). In late 2013, respondent interviewed for a new job with the City of Haysville Police Department ("Haysville") while still employed by Hays. *Ibid.* During the screening process, respondent divulged that he had kept a knife he acquired while working as a Hays officer. *Ibid.*

Haysville offered respondent a job on the condition that he inform Hays about the knife. Respondent subsequently satisfied the condition when he apprised the Hays Police Chief of the knife in his possession. *Ibid.* The Hays Police Chief instructed respondent to write down facts relating to how he came into possession of the knife. In response, respondent tendered a vague one-sentence statement. *Ibid.* Intending to accept the new job with Haysville, he notified Hays that he was resigning his position. *Ibid.*

Hays opened an internal investigation and respondent gave a more detailed statement about how the knife came into his possession. *Ibid.* Additional evidence was then located by Hays. *Ibid.* The internal investigation was then suspended, and a criminal investigation was commenced by the Kansas Bureau of Investigation ("KBI"). *Ibid.* All evidence collected by Hays was turned over to the KBI. *Ibid.*

Notice of the KBI's criminal investigation led Haysville to withdraw its job offer. *Ibid.* Respondent was then subsequently charged with two felony counts relating to the knife. *Ibid.*

At a probable cause hearing, the statements respondent made to the Hays Police Chief and the evidence collected during the internal investigation were submitted as evidence against respondent. *Ibid.* The two felony counts were ultimately dismissed by the trial court because of a lack of probable cause to support the charges. *Ibid.*

Respondent filed a civil suit against his former employer pursuant to 42 U. S. C. § 1983, alleging that his Fifth Amendment right to be free from self-incrimination was violated.[2] *Vogt*, 844 F. 3d, at 1238. The District Court granted petitioner's motion to dismiss, concluding that because the incriminating statements were not utilized against respondent at trial, he did not establish a valid claim under the Fifth Amendment. *Id.*, at 1239. The Tenth Circuit reversed in part holding that because a probable cause hearing is part of a "criminal case," as that term is used in the Fifth Amendment, respondent stated a valid claim against petitioner. *Id.*, at 1246.

SUMMARY OF ARGUMENT

The Fifth Amendment privilege against self-incrimination has traditionally been interpreted more broadly than the words of the Amendment provide. The broad interpretation began near the end of the nineteenth century with *Counselman* v. *Hitchcock*, a decision that

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2. The respondent also filed suit against Haysville and four individual officers. The Tenth Circuit affirmed the dismissal of the claims against the four officers based on qualified immunity. *Id.*, at 1247. The dismissal of the claim against Haysville was also affirmed because the Court of Appeals found it did not compel respondent to incriminate himself. *Id.*, at 1249.

brushed aside early American precedent to establish a sweeping privilege. In the mid-twentieth century, the federal constitutional privilege was extended to the states but also trimmed back somewhat in scope. It remains broader than its language, however.

In *Crawford* v. *Washington*, this Court overruled decades-old precedent on the Confrontation Clause to reconsider what it means to be a "witness" for the purpose of the Sixth Amendment. Unless the word "witness" means two very different things in two amendments that were proposed and ratified as part of the same package, this also requires reconsideration of the Self-Incrimination Clause.

Physical evidence is not a "witness," and a person who merely informs the authorities where physical evidence is located is also not a "witness." Use of a compelled statement to locate physical evidence is therefore not a violation of the Fifth Amendment, although other legal rights may be implicated depending on the circumstances.

In this case, neither the use of respondent's statement to locate additional evidence, the use of the statement and evidence to initiate a prosecution, nor the introduction of the additional evidence in the probable cause hearing violated the Fifth Amendment.

ARGUMENT

I. The Fifth Amendment's privilege against self-incrimination has been interpreted more broadly than the protection against compelling a person in a criminal case to testify or provide testimonial evidence against himself.

A. Development of use and derivative use immunity under the Fifth Amendment.

The Self-Incrimination Clause of the Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U. S. Const., Amend. V. *Lefkowitz* v. *Turley*, 414 U. S. 70, 77 (1973), states the broad interpretation given to these words in the late nineteenth and twentieth century:

> "The Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings."

The historical development of the privilege prior to being firmly embedded into our country's Bill of Rights is extensive. See generally Wigmore, The Privilege Against Self-Crimination; Its History, 15 Harv. L. Rev. 610 (1902). "Those who framed our Constitution and the Bill of Rights were ever aware of subtle encroachments on individual liberty . . . ." *Miranda* v. *Arizona*, 384 U. S. 436, 459 (1966). Thus, the privilege "registers an important advance in the development of our liberty — 'one of the great landmarks in man's struggle to make himself civilized.' " *Murphy* v. *Waterfront Comm'n of N. Y. Harbor*, 378 U. S. 52, 55 (1964)

(quoting *Ullmann* v. *United States*, 350 U. S. 422 (1956)).

However, the government also needs, and has always had, broad power to compel people to disclose what they know about crime. This includes the power of the government to compel the attendance of witnesses in an accused's favor and to compel the testimony of witnesses against him. *Kastigar* v. *United States*, 406 U. S. 441, 443-444 (1972) ("The power to compel testimony, and the corresponding duty to testify, are recognized in the Sixth Amendment . . . "). Recognizing that the prosecution of some crimes requires the testimony of witnesses whose answers have the potential to be self-incriminating, immunity rules that "seek a rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify" emerged. *Id*., at 445-446, and n. 13. "The existence of these statutes reflects the importance of testimony, and the fact that many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime." *Id*., at 446.

The scope of these immunity rules, however, has been a topic of conflict since Congress passed its first immunity statute in 1857. McMahon, *Kastigar v. United States*: The Immunity Standard Redefined, 18 Cath. Law. 314, 318, and n. 21 (1972). This first Act granted immunity from prosecution to anyone who testified before a Congressional Committee as to any act whether or not it was related to the subject under investigation. *Id.*, at 318. As a result of these witness "immunity baths," in 1862 Congress amended the statute to permit witness immunity only to the *use* of the testimony actually given. *Id.*, at 318, and n. 23. Thus, the witness was no longer completely immune

from prosecution, but rather only the use of his statements were to be excluded.[3]

The constitutionality of the Immunity Act of 1868 was first examined in *Counselman* v. *Hitchcock*, 142 U. S. 547 (1892). As noted, the statute at issue permitted only the exclusion of the compelled statements themselves (*i.e.,* use immunity), but not the exclusion of evidence that may have been discovered as a result of those statements (*i.e.,* derivative use). The witness in *Counselman* was granted immunity under the Act, but he still refused to testify before a federal grand jury and was held in contempt of court. *Kastigar*, 406 U. S., at 450. The *Counselman* Court approved of immunity as a valid means of supplanting the privilege, but because the statute in question "would permit the use against the immunized witness of evidence derived from his compelled testimony, it did not protect the witness to the same extent that a claim of the privilege would protect him," this Court held the statute unconstitutional. *Ibid*. ("the scope of the grant of immunity [must be] coextensive with the scope of the privilege").

The *Counselman* decision led to a new Congressional immunity statute — the Compulsory Testimony Act of 1893. *Id*., at 451. The new Act granted "transactional" immunity upon which many federal immunity statutes were later based. *Id.*, at 452. Brushing aside precedents, "*Counselman* established an extraordinarily sweeping form of immunity that . . . [i]n effect . . . prevented a suspect who had been made to sing pretrial from being a witness against himself 'in any criminal case' by preventing him from being a defendant . . . ." Amar & Lettow, Fifth Amendment First Principles:

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3. Congress amended the Immunity Act again in 1868 to extend the Congressional hearings immunity to witnesses testifying at judicial proceedings. McMahon, *supra*, at 318, and n. 24.

The Self-Incrimination Clause, 93 Mich. L. Rev. 857, 875-876 (1995).

Even though this broad form of transactional immunity prevented witnesses from being federally prosecuted, dual sovereignty did not prevent prosecution under state law because the Self-Incrimination Clause did not yet apply to the states. *Id.*, at 876, and n. 70. Furthermore, not only could a witness be subject to state prosecution, but the federally compelled statements could be utilized against the defendant in the state case. See *United States* v. *Murdock*, 284 U. S. 141, 149 (1931).

In 1964, this Court decided two cases on the same day that set in motion the current state of the use and derivative use immunity doctrine. *Malloy* v. *Hogan*, 378 U. S. 1 (1964), held that the Self-Incrimination Clause is binding on the states through the Due Process Clause of the Fourteenth Amendment. Because it was held to be binding, *Murphy*, 378 U. S., at 79, held that "a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him." Thus, the *Murphy* Court narrowed the scope of immunity in the dual sovereignty context. However, by continuing to exclude "fruits," the interpretation of the Fifth Amendment remained broader than protection against compulsion "to be a witness."

Congress again followed suit, and in 1970 it enacted the Organized Crime Control Act which rejected full transactional immunity from prosecution and instead only prohibited the use of compelled testimony and any evidence derived from that testimony. *Kastigar*, 406 U. S., at 452; McMahon, 18 Cath. Law., at 324. The petitioners in *Kastigar* challenged the constitutionality

of the newly enacted federal statute. The question presented was whether the federal government could compel testimony from an unwilling witness if the government was prohibited from using the compelled statement and its "fruit" (evidence derived from those statements) in an ensuing criminal case. *Kastigar*, *supra*, at 442.

The *Kastigar* Court answered this question in the affirmative, holding that the use and derivative use immunity standard "leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege. The immunity therefore is coextensive with the privilege and suffices to supplant it." *Id.*, at 462. In so holding, this Court renewed the heavy burden of proof on the government that it set forth in *Murphy*. *Id.*, at 460. Specifically, the government has an affirmative duty to prove that its evidence against the defendant comes from "legitimate independent sources." *Id.*, at 461; *Murphy*, 378 U. S., at 79, n. 18.

B. Compelled incriminating statements made by government employees.

In the interval between *Malloy*/*Murphy* and *Kastigar*, this Court decided a series of cases involving incriminating statements made by public employees under the threat of job termination in response to questions by their employers regarding their job performance.

In *Garrity* v. *New Jersey*, 385 U. S. 493, 500 (1967), this Court held that incriminating statements made by public employees under threat of losing their job if they refuse to answer are "compelled" for purposes of the Self-Incrimination Clause and cannot be used against that employee in a subsequent prosecution. In *Gardner* v. *Broderick*, 392 U. S. 273 (1968), and *Uniformed*

Sanitation Men Assn., Inc. v. *Commissioner of Sanitation of City of New York*, 392 U. S. 280 (1968), this Court held that although public employees can be terminated for refusing to answer questions relating to their job performance, they cannot be terminated for refusing to waive their Fifth Amendment right against compulsory self-incrimination. These three cases together dictate

> "that answers elicited upon the threat of the loss of employment are compelled and inadmissible in evidence. Hence, if answers are to be required in such circumstances States must offer to the witness whatever immunity is required to supplant the privilege and may not insist that the employee or contractor waive such immunity." *Lefkowitz*, 414 U. S., at 85.

The *Garrity* line of cases operate in tandem with *Kastigar* in that they immunize statements made by a public employee and place a significant burden on the prosecutorial use of those statements if a criminal case is subsequently commenced. Clymer, Compelled Statements From Police Officers and Garrity Immunity, 76 N. Y. U. L. Rev. 1309, 1320-1321 (2001).

II. Excluding the reliable non-testimonial physical "fruit" of a compelled statement is inconsistent with this Court's recent interpretation of "witness" as that term is used in the Bill of Rights.

In *Crawford* v. *Washington*, 541 U. S. 36 (2004), this Court overruled decades-old precedent on the Confrontation Clause of the Sixth Amendment, focusing on the word "witness" in that amendment and the historical background. Unless the word "witness" means very different things in two amendments to the Constitution

proposed and ratified as part of the same package, a reexamination of what it means "to be a witness" under the Fifth Amendment is also in order.

Kastigar enunciated the standard that a person need not be totally immune from prosecution to comply with the Self-Incrimination Clause, but rather only the compelled statements and any "fruit" obtained via those compelled statements cannot be introduced as evidence against the accused. If the accused is prosecuted, the government has the burden to prove that the evidence against him or her came from a legitimate independent source. This standard places a nearly insurmountable barrier for the government to hurdle in some cases.

The rationale behind excluding the statements and their fruit is to place the witness in the position as if he had claimed the privilege, and the exclusion of the statements and its fruit was held to be coextensive with that right. See *Kastigar* v. *United States*, 406 U. S. 441, 462 (1972). An incriminating statement made by a public employee under threat of job termination regarding his job performance is arguably testimonial because it may be " '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' " *Crawford*, 541 U. S., at 51 (quoting 1 N. Webster, An American Dictionary of the English Language (1828)). However, use of any incriminating non-testimonial physical evidence collected out of court as a result of those compelled statements does not make the defendant a "witness" as that term is now understood. "A witness testifies but physical evidence does not. A thing is not a witness." Amar & Lettow, Fifth Amendment First Principles: The Self-Incrimination Clause, 93 Mich. L. Rev. 857, 900 (1995).

If a public employee invokes the privilege and chooses not to respond to questioning, under *Garrity* v.

New Jersey, 385 U. S. 493 (1967), he could be terminated without running afoul of privilege against self-incrimination. In that situation, there would be no compelled statements and thus none would exist to be used "against" him later on. However, the "fruit" would exist because it grew independent of the statements given or not given by the accused. Forcing the prosecution to prove that the "fruit" was picked from a totally independent tree is a heavy burden and is inconsistent with what it means to be a "witness."

In *Schmerber* v. *California*, 384 U. S. 757, 761 (1966), this Court was asked to decide if the results of a blood alcohol test that was drawn over the defendant's objection and admitted into evidence against him violated his privilege against self-incrimination. *Id.*, at 760-761. There was no question that the blood test was "compelled" for purposes of the privilege. *Id.*, at 761. The question this Court addressed was whether the defendant was "compelled 'to be a witness against himself.' " *Ibid.* This Court answered that question in the negative. The privilege prohibits compelling "communications" or "testimony." *Id.*, at 765. Because "the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds." *Ibid.*

The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U. S. Const., Amend. VI. In *Crawford* v. *Washington*, this Court addressed what a "witness against" means for purposes of the Confrontation Clause. A "witness" is someone who "bears testimony." 541 U. S., at 51. This applies to both in-court witnesses who take the stand and to out-

of-court statements made or gathered out of court with a "testimonial purpose" and introduced at trial.

No precedent of this Court suggests that a defendant has a constitutional right under the Confrontation Clause to confront and cross-examine a person who gave a statement, testimonial or not, that is not introduced at trial but merely led police to discover the location of physical evidence or the identity of a witness who does testify. Thus, if a "witness" is someone who provides testimony, then excluding a defendant's compelled statements is permissible, but the suppression or exclusion of any nontestimonial physical fruit obtained as a result of those statements is broader than the privilege requires.

III. Neither investigation, initiation of prosecution, nor introduction of "fruits" violates the Fifth Amendment.

Respondent complains that his statements were used "to locate additional evidence." Brief in Opposition 3. The Fifth Amendment right is a trial right, and nothing that happens before there is a criminal case can be a violation of that right, though of course other constitutional protections may be involved. See *Chavez* v. *Martinez*, 538 U. S. 760, 772-774 (2003). He further complains that his statements and the additional evidence resulted in the initiation of criminal proceedings. Brief in Opposition 3-4. Again, there is no Fifth Amendment violation as he had not at that point been "compelled in any criminal case to be a witness . . . ."

To the extent that respondent complains that the additional evidence was introduced in the probable cause hearing, Brief in Opposition 4, this is not a Fifth Amendment violation regardless of whether that hearing is part of a "criminal case." For the reasons

explained in Part II, *supra*, that evidence is not a "witness," and a person who merely gives information that enables authorities to locate evidence is not a "witness."

That leaves only the introduction of respondent's own allegedly compelled statements in evidence at the probable cause hearing. Petitioner argues that this was not a violation because the Self-Incrimination Clause applies only to trial, not to pretrial proceedings. See Brief for Petitioner 20. If this Court agrees, that resolves the case. Even if it does not, however, respondent's damages are no more than nominal. He prevailed in the hearing, so the introduction of this evidence caused him no harm.

CONCLUSION

The decision of the Court of Appeals for the Tenth Circuit should be reversed.

November, 2017

Respectfully submitted,

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