No.

IN THE SUPREME COURT OF THE UNITED STATES

JAMES A. GIDEON,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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SLIP OPINION NO. 2020-OHIO-6961

THE STATE OF OHIO, APPELLANT AND CROSS-APPELLEE, *v.* JAMES A. GIDEON, APPELLEE AND CROSS-APPELLANT.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *State v. Gideon*, Slip Opinion No. 2020-Ohio-6961.]

Medical license is a property right and threatened loss of the license is a form of coercion—R.C. 4731.22(B)—Coercion is not sufficient to warrant the suppression of statements made during a medical-board investigative interview unless defendant's belief that he would lose his license if he failed to participate in the medical-board interview and answer questions truthfully is both subjectively believed and objectively reasonable—Court of appeals erred by finding that assignment of error relating to the sufficiency-of-the-evidence claim was moot under App.R. 12(A)(1)(c)—Court of appeals' judgment reversed and cause remanded.

(No. 2019-1104—Submitted August 4, 2020—Decided December 15, 2020—Reconsideration Granted and Slip Opinion Reissued December 31, 2020.[1])

APPEAL and CROSS-APPEAL from the Court of Appeals for Allen County, Nos. 1-18-27, 1-18-28, and 1-18-29, 2019-Ohio-2482.

STEWART, J.

{¶ 1} In Ohio, a medical doctor has a statutory duty to answer truthfully questions posed by an investigator of the state medical board. The question presented in this appeal is whether the state may use incriminating answers given by a doctor during a medical-board investigation in a subsequent criminal prosecution of that doctor. We conclude that a medical license is a property right and that the threatened loss of the license is a form of coercion that can compromise the United States Constitution's Fifth Amendment privilege against self-incrimination. That said, in order for coercion to be sufficient to warrant the suppression of statements made during a medical-board investigative interview, first, the person making the statements must subjectively believe that asserting the privilege against self-incrimination could cause the loss of the person's medical

1. On December 15, 2020, this court issued its judgment and original opinion in this case. Appellee and cross-appellant, James Gideon, filed a motion for reconsideration asserting as follows:

(1) This court incorrectly deferred to the trial court's legal conclusion regarding both prongs of the *Graham* test (for adjudicating *Garrity* claims), *see State v. Graham*, 136 Ohio St.3d 125, 2013-Ohio-2114, 991 N.E.2d 1116; *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967); and

(2) This court should clarify its remand order to require the Third District Court of Appeals to adjudicate Gideon's other assignments of error because this court's decision "un mooted" his remaining assignments of error.

We grant Gideon's motion to reconsider. This reissued opinion clarifies that this court conducted an independent review when we reached the conclusion that Gideon did not satisfy the *Graham* test. In addition, the opinion clarifies our previous remand language to instruct the court of appeals to consider Gideon's other assignments of error that were deemed moot.

license, and second, that belief must be objectively reasonable. In this case, the doctor's belief that he could lose his medical license if he refused to answer truthfully questions posed by the medical-board investigator was not objectively reasonable. Because the court of appeals reached a contrary conclusion and held that statements made by the doctor were inadmissible at trial, we reverse.

{¶ 2} We also conclude that the court of appeals erred by determining that its remand order mooted an assignment of error relating to the sufficiency of the evidence. An assignment of error challenging the sufficiency of the evidence is potentially dispositive of a defendant's conviction and may not be rendered moot by a remand on any other assignment of error.

Factual Background

{¶ 3} Appellee and cross-appellant, James Gideon, was licensed as a physician by the State Medical Board of Ohio and maintained a practice in rheumatology. In 2017, three of his patients accused him of inappropriately touching them during office visits. Two investigations were opened: one by the local police and one by an investigator working for the state medical board. Although Gideon told the police that he did not inappropriately touch any patients, the investigator told the police that Gideon admitted to misconduct. The investigator shared that information with the police as the medical board is authorized to do under R.C. 4731.22(F)(5).

{¶ 4} The state charged Gideon with three third-degree misdemeanor counts of sexual imposition in three separate cases that were consolidated for trial. Gideon moved to suppress the statements that he had made to the investigator as having been illegally compelled in violation of the Fifth Amendment to the United States Constitution. He argued that because he believed he was required to submit to the interview by the medical board and answer the investigator's questions or risk losing his medical license, the medical-board investigator coerced his admissions with the threat of losing his medical license. The trial judge denied the

motion to suppress, concluding that Gideon "made voluntary statements during a noncustodial interview." A jury found Gideon guilty in all three cases. The trial court imposed a jail term of 60 days in each case and ordered the sentences to run consecutively to each other.

{¶ 5} On appeal, the Third District Court of Appeals reversed the convictions. The court of appeals determined that the trial court should have granted Gideon's motion to suppress consistent with *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967), which held that statements obtained from a public employee under threat of job loss are unconstitutionally coerced and inadmissible in subsequent criminal proceedings. The court noted that Gideon had a statutory duty to answer truthfully all questions posed by the medical-board investigator and that the investigator "created an impression that Gideon's refusal to cooperate with his investigation would result in the type of penalty prohibited under *Garrity*," 2019-Ohio-2482, 130 N.E.3d 357, ¶ 51.

{¶ 6} Both the state and Gideon appealed the appellate court's judgment. The state offers this proposition of law:

> When a non-government employee gives a statement to an administrative board/licensing agency governed by the state, and when there is no threat of loss of employment or removal from office, that statement is not subject to *Garrity v. New Jersey*, 385 U.S. 493 (1967).

{¶ 7} Gideon offers two cross-propositions of law:

> (1) A licensing board investigator's intent to assist law enforcement in obtaining a criminal conviction for the purpose of influencing the outcome of an administrative-sanction proceeding

against a licensee is a factor strongly weighing in favor of a finding that the licensee had an objectively reasonable belief that assertion of his Fifth Amendment Privilege Against Self-Incrimination would expose him to revocation of his license and loss of his livelihood.

(2) Under App.R. 12(A)(C), a court of appeals has a duty to adjudicate any assignment of error that raises a claim of insufficiency of the evidence to support a criminal conviction or that involves a claim of error that is likely to again become an issue during proceedings upon remand.

The Privilege Against Self-Incrimination

{¶ 8} We will first address the state's proposition of law together with Gideon's first cross-proposition of law. The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." Article I, Section 10 of the Ohio Constitution provides the same protection: "No person shall be compelled, in any criminal case, to be a witness against himself * * *." "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." *Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S.Ct. 316, 38 L.Ed.2d 274 (1973).

{¶ 9} Because a witness may voluntarily testify to matters which may be incriminating, the privilege against self-incrimination is not self-executing. The witness seeking the privilege must "claim it." *United States v. Monia*, 317 U.S. 424, 427, 63 S.Ct. 409, 87 L.Ed. 376 (1943). If the witness answers a question, the answer will be considered voluntary. *See Minnesota v. Murphy*, 465 U.S. 420, 427,

104 S.Ct. 1136, 79 L.Ed.2d 409 (1984). Gideon did not assert the privilege against self-incrimination during his interview with the medical-board investigator.

{¶ 10} At times, when it is necessary to "safeguard the core constitutional right protected by the Self-incrimination Clause," an assertion of the privilege against self-incrimination is not required. *Chavez v. Martinez*, 538 U.S. 760, 770, 123 S.Ct. 1994, 155 L.Ed.2d 984 (2003) (plurality opinion). An exception to asserting the privilege exists for statements made during custodial interrogations in which the state undermines the privilege by physically or psychologically coercing a suspect. *See Miranda v. Arizona*, 384 U.S. 436, 448-450, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

{¶ 11} The right to remain silent can also be infringed by coercion when there is a penalty for asserting the right. In *Garrity*, the attorney general investigated police officers for fixing traffic tickets. Although advised of their right to remain silent, the officers also were told that refusing to answer questions would lead to the termination of their employment. The officers answered questions and the state used some of their answers against them in a subsequent criminal case. The U.S. Supreme Court observed that "[t]he option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent." *Garrity*, 385 U.S. at 497, 87 S.Ct. 616, 17 L.Ed.2d 562. The court thus held that the confessions were not voluntary but coerced and that the Fourteenth Amendment prohibited the use of the statements in subsequent criminal proceedings. *Id*. at 497-498, 500.

{¶ 12} Unlike the officers in *Garrity*, Gideon is not a public employee. He was a medical doctor in private practice. As a practicing physician, he was subject to licensure by the state medical board. *See* R.C. 4731.17(B) (state medical board shall issue licenses to practice medicine). Gideon's medical license constitutes a liberty and property interest subject to due-process protections. *Watts v. Burkhart*, 854 F.2d 839, 842 (6th Cir.1988) ("the freedom to pursue a career is a protected

liberty interest, and * * * state regulation of occupations through a licensing process gives rise to protected property interests"); *see also Flynn v. State Med. Bd.*, 2016-Ohio-5903, 62 N.E.3d 212, ¶ 45 (10th Dist.).

{¶ 13} The medical board has disciplinary authority over medical doctors and may "limit, revoke, or suspend a license or certificate to practice or certificate to recommend, refuse to issue a license or certificate, refuse to renew a license or certificate, refuse to reinstate a license or certificate, or reprimand or place on probation the holder of a license or certificate * * *." R.C. 4731.22(B). Among the reasons listed for exercising the authority to impose such sanctions is the "[f]ailure to cooperate in an investigation" and the "failure to answer truthfully a question presented by the board in an investigative interview * * *." R.C. 4731.22(B)(34).

{¶ 14} The state's threat to impose a legal penalty for the failure to give truthful responses in a state-medical-board investigation is coercive. This threat puts a medical doctor in the position of having to choose between two rights: the property right in the medical license or the privilege against self-incrimination. *See Spevack v. Klein*, 385 U.S. 511, 512, 87 S.Ct. 625, 17 L.Ed.2d 574 (1967) (private-practice lawyer could not be disbarred for refusing to testify at a judicial inquiry into professional misconduct).

{¶ 15} A different approach is required when, as here, the person under investigation has not been "expressly confronted * * * with the inescapable choice of either making an incriminatory statement or being fired," *State v. Graham*, 136 Ohio St.3d 125, 2013-Ohio-2114, 991 N.E.2d 1116, ¶ 23. When incriminating statements are not coerced by the direct threat of job termination, we apply an "objectively reasonable" "subjective belief" test. *Id*. Under that test, statements are compelled by threat of discharge if (1) a person subjectively believed that asserting the privilege would lead to discharge and (2) that belief was objectively reasonable under the circumstances. *Id*.

{¶ 16} Applying the *Graham* test, the trial court found that while Gideon testified that he *subjectively* believed that he would "be penalized" with the loss of his medical license if he did not answer questions posed by the medical-board investigator, his belief was not *objectively* reasonable.

{¶ 17} In *Graham,* we explained that the objective reasonableness of a defendant's belief that disciplinary action will result unless the defendant cooperates requires a showing of "some demonstrable coercive action by the state beyond '[t]he general directive to cooperate.' " (Brackets sic.) *Graham* at ¶ 23, quoting *United States v. Vangates*, 287 F.3d 1315, 1324 (11th Cir.2002). We further explained that " 'ordinary job pressures, such as the possibility of discipline or discharge for insubordination, are not sufficient to support an objectively reasonable expectation of discharge.' " *Id*., quoting *People v. Sapp*, 934 P.2d 1367, 1372 (Colo.1997).

{¶ 18} Gideon did not establish through evidence that coercive action by the medical-board investigator had occurred. The trial court found no evidence that the medical-board investigator informed Gideon that "he must waive his rights against self-incrimination or subject himself to discharge or revocation of his license." And neither Gideon nor the investigator mentioned during the interview anything that suggested Gideon could lose his medical license if he refused to comply with the investigator's questioning.

{¶ 19} Besides the lack of evidence showing that Gideon had an objectively reasonable basis for believing that he could lose his medical license, the trial court correctly found that R.C. 4731.22(B), which requires a doctor's cooperation in an investigation, does not subject that doctor "to an automatic suspension or revocation" of a license should the doctor exercise the right to remain silent. Although that section speaks in mandatory terms about discipline for certain violations (the board "shall" impose one of the listed sanctions), discipline is not automatic. It requires the affirmative vote of "not fewer than six" medical-board

members to impose discipline for one of the reasons listed in R.C. 4731.22(B). And even when the medical board determines that a doctor has committed a violation, revocation of a medical license is not a required sanction—it is one of several sanctions available to the board. *See* R.C. 4731.22(B). In Gideon's case, there was no direct threat of discipline for failure to cooperate; he faced only the possibility of discipline.

{¶ 20} The Third District disagreed: "the trial court did not capture the concept of [R.C. 4731.22] and, more importantly, failed to consider the *totality* of the circumstances surrounding Gideon's interview * * *." (Emphasis sic.) 2019-Ohio-2482, 130 N.E.3d 357, at ¶ 31.

{¶ 21} Yet the trial court *did* consider the circumstances surrounding the interview. In its findings of fact, the trial court observed that Gideon sounded "eager to speak" with the investigator despite having no notice of the investigator's visit. Gideon declined the investigator's offer to reschedule the interview. Because the interview occurred in Gideon's office, the investigator told Gideon that he would pause the interview so that Gideon could see waiting patients. The trial court found that Gideon "took the lead initially in the interview and described his techniques with his patients prior to any substantive questions being posed by the investigator." Although Gideon testified during the suppression hearing that the surprise nature of the interview denied him the ability to refresh his memory of the specific patients, the trial court determined that Gideon "was able to give a very detailed account of the treatments provided" and that only 18 minutes into the interview, Gideon "admitted to touching certain areas on the patients and succumbing to temptation."

{¶ 22} Appellate review of a suppression ruling involves a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. "An appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence." *State v. Hawkins*, 158 Ohio

St.3d 94, 2019-Ohio-4210, 140 N.E.3d 577, ¶ 16. "[T]he appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." *Burnside* at ¶ 8, citing *State v. McNamara*, 124 Ohio App.3d 706, 707 N.E.2d 539 (4th Dist.1997).

{¶ 23} The court of appeals did not dispute the trial court's factual findings. It believed, however, that the investigator acted as a "straw man" for the state. 2019-Ohio-2482, 130 N.E.3d 357, at ¶ 42. While the board may share with law-enforcement agencies any information it receives in an investigation, *see* R.C. 4731.22(F)(5), cooperation with law-enforcement officials does not necessarily convert a medical-board investigation into a law-enforcement mission. *See State v. Jackson*, 154 Ohio St. 3d 542, 2018-Ohio-2169, 116 N.E.3d 1240, ¶ 21, citing *Ohio v. Clark*, 576 U.S. 237, 249, 135 S.Ct. 2173, 192 L.Ed.2d 306 (2015). The investigator admitted that he agreed to share information with the police, but that does not mean that he acted for the primary purpose of furthering a criminal prosecution by the state. The investigator interviewed Gideon for the primary purpose of determining whether Gideon was subject to disciplinary action by the medical board for engaging in the misconduct alleged by his patients.

{¶ 24} We conclude that Gideon's medical license is a property right and that the threatened loss of the license is a form of coercion that can compromise the United States Constitution's Fifth Amendment privilege against self-incrimination. That said, in order for coercion to be sufficient to warrant the suppression of statements Gideon made during a medical-board investigative interview, his belief that he would lose his license if he failed to participate in the medical-board interview and answer questions truthfully must be both subjectively believed and objectively reasonable. In this case, based on our independent, de novo review of the facts and circumstances under which the investigator interviewed Gideon, we conclude that Gideon's belief that a refusal to answer truthfully questions posed by the medical-board investigator could lead to the loss of his medical license was not

objectively reasonable. We find, therefore, that Gideon has failed to satisfy the legal standard established in *Graham.*

Duty to Adjudicate Assignments of Error

{¶ 25} In his second cross-proposition of law, Gideon claims that the court of appeals erred by finding that his assignment of error relating to the sufficiency of the evidence on one count of sexual imposition was moot. He argues that the appellate court's remand on the suppression issue did not moot this assignment of error. We agree.

{¶ 26} App.R. 12(A)(1)(c) states that "[u]nless an assignment of error is made moot by a ruling on another assignment of error," a court of appeals shall "decide each assignment of error and give reasons in writing for its decision." An assignment of error is moot when it cannot have " 'any practical legal effect upon a then-existing controversy.' " *Culver v. Warren*, 84 Ohio App. 373, 393, 83 N.E.2d 82 (7th Dist.1948), quoting *Ex parte Steele*, 162 F. 694, 701 (N.D.Ala.1908). Put differently, an assignment of error is moot when an appellant presents issues that are no longer live as a result of some other decision rendered by the appellate court.

{¶ 27} An assignment of error going to the sufficiency of the evidence supporting a criminal count is always potentially dispositive of that count. While a reversal based on weight of the evidence does not preclude a retrial, a reversal based on insufficient evidence leads to an acquittal that bars a retrial. *See State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), citing *Tibbs v. Florida*, 457 U.S. 31, 47, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). "Because 'the state is not entitled to retry a criminal defendant after reversal for trial court error if the state failed in the first instance to present sufficient evidence * * * a defendant's assigned error that the conviction is based on insufficient evidence is not moot under these circumstances.' " (Ellipsis added in *Mathis.*) *State v. Mathis*, 6th Dist. Lucas No. L-18-1192, 2020-Ohio-3068, ¶ 78, quoting *State v. Vanni*, 182 Ohio App.3d 505,

2009-Ohio-2295, 913 N.E.2d 985, ¶ 15 (9th Dist.); *see also State v. Croskey*, 8th Dist. Cuyahoga No. 107772, 2019-Ohio-2444, ¶ 9 (errors which could result in an acquittal must be separately addressed).

{¶ 28} In *State v. Brewer*, 113 Ohio St.3d 375, 2007-Ohio-2079, 865 N.E.2d 900, we determined that the court of appeals erred by refusing to consider an assignment of error challenging the sufficiency of the evidence after it had determined trial error warranted reversal of the defendant's conviction. A jury had found Brewer guilty of gross sexual imposition. On direct appeal, he raised nine assignments of error, including that hearsay testimony was improperly allowed by the court and that the state failed to offer sufficient evidence. *State v. Brewer*, 8th Dist. Cuyahoga No. 87701, 2006-Ohio-6029, ¶ 1. The court of appeals determined that the trial court erred by allowing hearsay testimony into evidence and ordered a new trial. *Id*. at ¶ 13. That finding led it to conclude that the remaining assignments of error were moot. *Id*. We summarily reversed that decision: "[t]he judgment of the court of appeals holding that the assignment of error in which appellant challenged the sufficiency of the evidence was moot is reversed, and the cause is remanded to the court of appeals for consideration of that assignment of error." *Brewer*, 113 Ohio St.3d 375, 2007-Ohio-2079, 865 N.E.2d 900, at ¶ 2.

{¶ 29} When a conviction is based on evidence that does not establish a defendant's guilt beyond a reasonable doubt, the court of appeals must vacate the conviction and double-jeopardy protection bars the defendant's retrial for the same offense. An assignment of error raising the sufficiency of the evidence is thus potentially dispositive of a particular count and cannot be moot. When evaluating an assignment of error challenging the sufficiency of the evidence, a reviewing court must consider all evidence admitted at trial, including the improperly admitted evidence that was the source of the reversal for trial error. *See State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593, 903 N.E.2d 284, ¶ 24-26. The court

of appeals erred by finding that Gideon's assignment of error relating to the sufficiency-of-the-evidence claim was moot under App.R. 12(A)(1)(c).

Conclusion

{¶ 30} For the reasons stated above, we reverse the judgment of the Third District Court of Appeals. We also remand the cause to that court to consider Gideon's assignment of error relating to the sufficiency of the evidence, and because we reverse its judgment on the motion to suppress, the appellate court will now need to consider Gideon's other assignments of error that were deemed moot.

Judgment reversed
and cause remanded.

O'CONNOR, C.J., and KENNEDY, FRENCH, FISCHER, and DEWINE, JJ., concur.

DONNELLY, J., dissents, with an opinion.

DONNELLY, J., dissenting.

{¶ 31} The majority opinion states that the medical board can " 'limit, revoke, or suspend' " a license to practice medicine if the licensee fails to " 'cooperate in an investigation' " or " 'answer truthfully a question presented by the board in an investigative interview.' " Majority opinion at ¶ 13, quoting R.C. 4731.22(B). The majority opinion concludes that appellee and cross-appellant, James Gideon, subjectively believed that he could lose his license if he failed to cooperate or to answer questions truthfully. I agree. *See* R.C. 4731.22(B)(34). Based on the language of R.C. 4731.22(B), Gideon's subjective belief that he could lose his license was well-founded. But the majority opinion further concludes that Gideon's subjective belief was not objectively reasonable because he did not demonstrate " 'coercive action by the state beyond "[t]he general directive to cooperate." ' (Brackets sic.) [*State v. Graham*, 136 Ohio St.3d 125, 2013-Ohio-

2114, 991 N.E.2d 1116,] ¶ 23, quoting *United States v. Vangates*, 287 F.3d 1315, 1324 (11th Cir.2002)." Majority opinion at ¶ 17. I disagree.

{¶ 32} The majority concludes that the "investigator interviewed Gideon for the primary purpose of determining whether Gideon was subject to disciplinary action by the medical board for engaging in the misconduct alleged by his patients," majority opinion at ¶ 23. The well-written and unanimous opinion of the court of appeals thoroughly explicates why the majority's characterization of the investigator's interview of Gideon is untenable:

> The evidence in the record reflects that the circumstances surrounding the administrative investigation at issue in this case show some demonstrable, coercive action by the state beyond the general directive to cooperate. Indeed, the combination of Gideon's duty to cooperate under R.C. 4731.22(B)(34) and Investigator Yoakam's process in this case exceeded an *ordinary* job pressure to cooperate. As we have noted, R.C. 4731.22(B)(34) requires licensees to cooperate with investigations of the board.[2 (originally fn.8)]

2. The following language appears as footnote 8 in the court of appeals' opinion:

> It appears that the State contends that R.C. 4731.22(B)(34)'s duty to cooperate requires *only* that a subject answer truthfully questions posed by an investigator of the board during an interview. *Compare United States v. Goodpaster*, 65 F.Supp.3d 1016, 1029 (D.Or.2014) (noting that "[a]n order to 'cooperate' demands more of the reasonable employee than an order merely to be 'truthful' "), citing *Minnesota v. Murphy*, 465 U.S. 420, 434, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984) (observing that "Murphy's probation condition [to be truthful] proscribed only false statements"). That is, the State argues that "[t]elling falsehoods * * * is different than remaining silent, and the Fifth Amendment is not implicated." (Appellee's Brief at 6). However, the text of that subsection of the statute states that a subject must *cooperate* in investigations of the board. R.C. 4731.22(B)(34) proceeds to provide a non-exhaustive list of ways in which a subject must cooperate with an investigation of the board—only one of which is to provide truthful answers to questions presented by the board in an investigative interview. *See In re Hartman*, 2 Ohio St.3d 154, 155-156, 443 N.E.2d 516 (1983) (noting that the word " 'including' implies that that which follows is a partial, not

Compare [*United States v. Goodpaster*, 65 F.Supp.3d 1016, 1029 (D.Or.2014)] (noting that "Goodpaster was subject to a regulation * * * requiring that he 'cooperate with all audits, reviews, and investigations conducted by the Office of Inspector General' "), quoting 39 C.F.R. 230.3(a). R.C. 4731.22(B) puts licensees on notice that their failure to cooperate, amongst other reasons, will penalize their license (by a vote of no fewer than six members of the board). *Compare id.* ("The same regulation provides that 'failing to cooperate [* * *] may be grounds for disciplinary or other legal action.' "), quoting 39 C.F.R. 230.3(a).

Further, in addition to R.C. 4731.22(B)(34)'s directive to cooperate with the board's investigation, the record reflects "some demonstrable action of the state" supporting Gideon's subjective belief. *See* [*People v.*]*Sapp*[, 934 P.2d 1367, 1372 (Colo.1997)]; [*United States v.*]*Camacho*[, 739 F.Supp 1504, 1518 (S.D.Fla.)]. In this case, the demonstrable action of the State lies with Investigator Yoakam's conduct and his intent underlying that conduct. *Compare Camacho*, 739 F.Supp. at 1518-1519 (construing the evidence in the record reflecting the "actions of the investigators" to determine whether there was "demonstrable state conduct" and, thus, whether the defendants' beliefs that they would penalized for asserting their Fifth Amendment rights were objectively reasonable).

At the suppression hearing, Investigator Yoakam testified to the extent that he collaborated with law enforcement as part of his

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an exhaustive listing of all that is subsumed within the stated category. 'Including' is a word of expansion rather than one of limitation or restriction.").

(Emphases, brackets, and ellipses sic.)

investigation—that is, he specifically stated that the investigation of Gideon "turned into a joint investigation." (Aug. 22, 2017 Tr. at 4); (Oct. 13, 2017 Tr. at 7, 20-21). Indeed, Sergeant Hochstetler concurred that he and Investigator Yoakam agreed "to cooperate with each other" during the course of their investigations. (Oct. 13, 2017 Tr. at 51-52). By cooperating, Sergeant Hochstetler clarified that meant that he and Investigator Yoakam would share information. Investigator Yoakam elaborated that the Revised Code permits him to share information obtained as part of his investigations with law enforcement and that he will share such information if there is "a shared interest." (*Id.* at 19-20). Investigator Yoakam further testified that he shared the information he collected (regarding Gideon) with the Bluffton Police Department.

Undeniably, R.C. 4731.22(F) provides, in relevant part, the following:

"(3) In investigating a possible violation of this chapter or any rule adopted under this chapter, * * * the board may question witnesses, conduct interviews, administer oaths, order the taking of depositions, inspect and copy any books, accounts, papers, records, or documents, issue subpoenas, and compel the attendance of witnesses and production of books, accounts, papers, records, documents, and testimony, except that a subpoena for patient record information shall not be issued without consultation with the attorney general's office and approval of the secretary and supervising member of the board.

"* * *

"(4) All * * * investigations * * * of the board shall be considered civil actions for the purposes of section 2305.252 of the Revised Code.

"(5) * * *

The board may share any information it receives pursuant to an investigation * * * with law enforcement agencies, other licensing boards, and other governmental agencies that are prosecuting, adjudicating, or investigating alleged violations of statutes or administrative rules."

R.C. 4731.22(F)(3)-(5) (Apr. 6, 2017) (current version at R.C. 4731.22(F)(3)-(5) (Mar. 20, 2019)).[3 (originally fn.9)]

Thus, while there is nothing inherently wrong with Investigator Yoakam and law enforcement's agreement to share information, the evidence in the record reveals that Investigator Yoakam exceeded statutorily permissible collaboration by taking demonstrable steps to coerce Gideon to provide him an incriminating, oral and written statement in reliance on Gideon's duty to cooperate. In other words, Investigator Yoakam was posing

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3. The following language appears as footnote 9 in the court of appeals' opinion:

> R.C. 2305.252 applies to peer-review privilege. *See, e.g.*, *Cousino v. Mercy St. Vincent Med. Ctr.*, 6th Dist. Lucas, 2018-Ohio-1550, 111 N.E.3d 529, ¶ 15 ("The purpose of this statute is to protect the integrity and confidentiality of the peer review process so that health care entities have the freedom to meaningfully review and critique—and thereby improve—the overall quality of the healthcare services they provide."). The statute also applies the peer-review privilege to *only* the Bureau of Workers' Compensation ("BWC"); however, the statute excepts the BWC to "share proceedings and records within the scope of the peer review committee * * * with law enforcement agencies, licensing boards, and other governmental agencies that are prosecuting, adjudicating, or investigating alleged violations of applicable statutes or administrative rules." R.C. 2305.252(B).

(Emphasis and ellipsis sic.)

as a "straw man" to effectuate law enforcement's criminal investigation. *See State v. Gradisher*, 9th Dist. Summit No. 24716, 2009-Ohio-6433, 2009 WL 4647378, ¶ 23 (Belfance, J., dissenting) (approving the "concern that government agents should not pose as 'straw men' in order to effectuate police investigations"). Specifically, Investigator Yoakam contacted Sergeant Hochstetler prior to interviewing Gideon, and "discussed that [he] was going to hold off on the administrative investigation until [law enforcement determined] that [Investigator Yoakam] could interview [Gideon]." (Oct. 13, 2017 Tr. at 7-8). Investigator Yoakam's intention for sharing his investigative plan with law enforcement was to "determine how [law enforcement] was going to proceed with the criminal case" because proving an administrative-sanction case is easier "from a criminal conviction" as opposed to "through witness testimony." (*Id.* at 15-16). That is, he elaborated that his method is "what they call a bootstrap on a criminal case that's where a physician * * * is criminally charged, and the Board takes action on that criminal disposition, and the other [is] based on information gathered in the course of an investigation. Action that's taken based on that." (*Id.* at 15).

Prior to Investigator Yoakam's interview of Gideon, Sergeant Hochstetler told Investigator Yoakam that Gideon "denied any improprieties during [law enforcement's] interview" of Gideon. (Oct. 13, 2017 Tr. at 21, 55). And, after discussing Gideon's denials to law enforcement with Sergeant Hochstetler, Investigator Yoakam informed Sergeant Hochstetler that it would not be "appropriate" for law enforcement to jointly interview Gideon with Investigator

Yoakam. (*Id.* at 28, 55-56). Specifically, Investigator Yoakam testified that

"doctor's [sic] are obligated to cooperate in our investigation. So [he] did not want that to * * * impede in * * * any of the criminal proceedings...And [he] didn't want * * * there to be an issue that the doctor provided a statement with law enforcement present because the provider is *obligated to cooperate in our investigations.*"

(Emphasis added.) (*Id.* at 29). (*See also* Oct. 13, 2017 Tr. at 55); (Defendant's Ex. 4). In other words, Investigator Yoakam's method was to avoid a scenario in which his interview (of Gideon) could not be used as part of the criminal case because (as indicated by Investigator Yoakam) the lack of a criminal conviction would make his administrative-sanction case more cumbersome. *Compare Gradisher* at ¶ 23 (Belfance, J., dissenting) (expressing concern that "government overreaching could easily occur by pushing off criminal investigations to state agents so as to bypass protection against the abridgement of an individual's Fifth Amendment rights"); *Camacho*, 739 F.Supp. at 1519 (noting that the investigator's action in purposely omitting "his preamble regarding voluntariness and compulsion * * * in order to avoid flagging the issue of voluntariness" "speaks louder" than any belief that the statements were voluntary and concluding that "the investigators' central aim was to take a statement first and litigate its admissibility later").

Moreover, based on our review of the record, Investigator Yoakam's intent for the investigation reflects the demonstrable state action necessary to support Gideon's subjective belief that his medical license would be penalized if he failed to cooperate with

> Investigator Yoakam's investigation. Specifically, Investigator Yoakam's interview of Gideon reflects his intent to assist law enforcement in obtaining a criminal conviction of Gideon for purposes of influencing the outcome the administrative-sanction case against Gideon.
>
> Even though he is not a law enforcement officer, Investigator Yoakam testified that he had law enforcement training and is familiar with the elements of offenses under the Revised Code, including sexual imposition. Keeping his training in mind, Investigator Yoakam arrived unannounced to Gideon's medical office to conduct his interview to catch him "off guard" "to get the truth out of [him]." (Oct. 13, 2017 Tr. at 5, 32-33). Despite Gideon having patient appointments at the time of the visit, Investigator Yoakam did not advise Gideon that he did not have to speak with him that day or otherwise offer to reschedule—he merely asked Gideon "if he would have a few minutes to chat with" him. (*Id.* at 5). (*See also* State's Ex. A). In other words, Investigator Yoakam did nothing to dissuade Gideon's belief that he was statutorily obligated to cooperate with his investigation, which included consenting to Investigator Yoakam's request to "chat." *Compare Camacho* at 1511 ("At no time during the interview or after did either Sergeant Green or Assistant State Attorney DiGregory make any effort to dissuade Sinclair of his view that he was compelled to give a statement or answer his question.").

(Emphases and ellipses sic; brackets added in citations and footnote numbers; remaining brackets sic.) 2019-Ohio-2482, 130 N.E.3d 357, at ¶ 38-45.

{¶ 33} This analysis amply supports a conclusion that Yoakam's investigation was improperly coercive under *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967). Although there is nothing wrong with Yoakam and the Bluffton Police Department sharing information, their approach suggests that Yoakam was strategically attempting to elicit information to benefit the Bluffton Police Department investigation. This is tantamount to collaborating—not merely sharing information that was collected independently. If Yoakam had appeared at Gideon's office with an officer from the Bluffton Police Department, the coercive nature of the investigation would have been manifest. It is no less so here. Yoakam was all but deputized to act for the benefit of the Bluffton Police Department. Moreover, the court of appeals examined another way in which the interview demonstrates that Gideon had an objectively reasonable belief that his medical license was at risk if he did not cooperate:

> Investigator Yoakam advised Gideon at multiple points to "to go back to [law enforcement] and change his statement" to avoid facing possible falsification charges. (Oct. 13, 2017 Tr. at 22). Investigator Yoakam's insistence that Gideon return to law enforcement to change his statement is also evidence supporting Gideon's belief that a refusal to give a statement will be met with a licensure penalty. That is, Investigator Yoakam's insistence that Gideon provide law enforcement with a statement reflects an intent to coerce Gideon to cooperate with the investigation. Indeed, (as raised during cross-examination) if Investigator Yoakam was "just concerned about [the] medical investigation there would be no need to tell [Gideon] to go back to the police department and change his statement * * *." (*Id.* at 22).

(Brackets and ellipsis sic.) 2019-Ohio-2482, 130 N.E.3d 357, at ¶ 48.

{¶ 34} The court of appeals also had appropriate concern that Yoakam's conduct after the interview reflects his understanding that he and the Bluffton Police were engaged in a joint investigation, not a mere sharing of information:

> At the conclusion of the interview, instead of reporting back to the board, Investigator Yoakam immediately went to the Bluffton Police Department to report Gideon's confessions to law enforcement. (*See* Defendant's Ex. 2). Despite his employment responsibilities with the State Medical Board, Investigator Yoakam chose to *immediately share* Gideon's confessions with law enforcement "because the doctor had [ ] an interview with [law enforcement] where he denied any impropriety so [he] wanted to tell [law enforcement] what happened during [his] interview." (Oct. 13, 2017 Tr. at 26-27). Moreover, Investigator Yoakam agreed that he "wanted to assist [law enforcement] in that criminal investigation by providing [law enforcement] with statements made by Dr. Gideon during an interview that same day * * *[.]" (*Id.* at 27).

(Emphasis, brackets, and ellipsis sic.) 2019-Ohio-2482, 130 N.E.3d 357, at ¶ 50.

{¶ 35} I agree with the court of appeals' conclusion that

> based on the facts and circumstances presented by this case, Investigator Yoakam's actions created an impression that Gideon's refusal to cooperate with his investigation would result in the type of penalty prohibited under *Garrity*. *See Camacho* at 1520 (concluding "that the actions of the State were directly implicated in creating [the] belief" that the defendants' subjective belief "that

> failure to answer would result in termination"). Therefore, Gideon's belief that his medical license would be penalized if he did not cooperate with Investigator Yoakam's investigation was objectively reasonable. *See id.* Thus, Gideon's statements were not voluntary within the meaning of *Garrity*. *Accord Graham*, 136 Ohio St.3d 125, 2013-Ohio-2114, 991 N.E.2d 1116, at ¶ 30 ("Statements extracted under these circumstances cannot be considered voluntary within the meaning of *Garrity*.")

2019-Ohio-2482, 130 N.E.3d 357, at ¶ 51.

{¶ 36} The circumstances of Yoakum's interview demonstrate that it was coercive and therefore that Gideon's subjective belief that he could lose his medical license if he did not answer was objectively reasonable. Accordingly, I conclude that the trial court erred when it denied Gideon's motion to suppress statements he made to Yoakam. I would affirm the well-reasoned decision of the court of appeals. I dissent.

Nicole M. Smith, Lima Assistant City Prosecuting Attorney, and Anthony M. DiPietro, Deputy Law Director, for appellant and cross-appellee.

Dennis C. Belli, for appellee and cross-appellant.

SLIP OPINION NO. 2020-OHIO-5635

THE STATE OF OHIO, APPELLANT AND CROSS-APPELLEE, *v.* JAMES A. GIDEON, APPELLEE AND CROSS-APPELLANT.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *State v. Gideon*, Slip Opinion No. 2020-Ohio-5635.]

Medical license is a property right and threatened loss of the license is a form of coercion—R.C. 4731.22(B)—Coercion is not sufficient to warrant the suppression of statements made during a medical-board investigative interview unless defendant's belief that he would lose his license if he failed to participate in the medical-board interview and answer questions truthfully is both subjectively believed and objectively reasonable—Court of appeals erred by finding that assignment of error relating to the sufficiency-of-the-evidence claim was moot under App.R. 12(A)(1)(c)—Court of appeals' judgment reversed and cause remanded in part.

(No. 2019-1104—Submitted August 4, 2020—Decided December 15, 2020.)

APPEAL and CROSS-APPEAL from the Court of Appeals for Allen County, Nos. 1-18-27, 1-18-28, and 1-18-29, 2019-Ohio-2482.

STEWART, J.

{¶ 1} In Ohio, a medical doctor has a statutory duty to answer truthfully questions posed by an investigator of the state medical board. The question presented in this appeal is whether the state may use incriminating answers given by a doctor during a medical-board investigation in a subsequent criminal prosecution of that doctor. We conclude that a medical license is a property right and that the threatened loss of the license is a form of coercion that can compromise the United States Constitution's Fifth Amendment privilege against self-incrimination. That said, in order for coercion to be sufficient to warrant the suppression of statements made during a medical-board investigative interview, it must be both subjectively believed and objectively reasonable. In this case, competent, credible evidence supported the trial court's factual finding that the doctor did not objectively believe that a refusal to answer truthfully questions posed by the medical-board investigator could lead to the loss of his medical license. Because the court of appeals reached a contrary conclusion and held that statements made by the doctor were inadmissible at trial, we reverse.

{¶ 2} We also conclude that the court of appeals erred by determining that its remand order mooted an assignment of error relating to the sufficiency of the evidence. An assignment of error challenging the sufficiency of the evidence is potentially dispositive of a defendant's conviction and may not be rendered moot by a remand on any other assignment of error.

Factual Background

{¶ 3} Appellee and cross-appellant, James Gideon, was licensed as a physician by the State Medical Board of Ohio and maintained a practice in rheumatology. In 2017, three of his patients accused him of inappropriately touching them during office visits. Two investigations were opened: one by the local police and one by an investigator working for the state medical board.

Although Gideon told the police that he did not inappropriately touch any patients, the investigator told the police that Gideon admitted to misconduct. The investigator shared that information with the police as the medical board is authorized to do under R.C. 4731.22(F)(5).

{¶ 4} The state charged Gideon with three third-degree misdemeanor counts of sexual imposition in three separate cases that were consolidated for trial. Gideon moved to suppress the statements that he had made to the investigator as having been illegally compelled in violation of the Fifth Amendment to the United States Constitution. He argued that because he believed he was required to submit to the interview by the medical board and answer the investigator's questions or risk losing his medical license, the medical-board investigator coerced his admissions with the threat of losing his medical license. The trial judge denied the motion to suppress, concluding that Gideon "made voluntary statements during a noncustodial interview." A jury found Gideon guilty in all three cases. The trial court imposed a jail term of 60 days in each case and ordered the sentences to run consecutively to each other.

{¶ 5} On appeal, the Third District Court of Appeals reversed the convictions. The court of appeals determined that the trial court should have granted Gideon's motion to suppress consistent with *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967), which held that statements obtained from a public employee under threat of job loss are unconstitutionally coerced and inadmissible in subsequent criminal proceedings. The court noted that Gideon had a statutory duty to answer truthfully all questions posed by the medical-board investigator and that the investigator "created an impression that Gideon's refusal to cooperate with his investigation would result in the type of penalty prohibited under *Garrity*," 2019-Ohio-2482, 130 N.E.3d 357, ¶ 51.

{¶ 6} Both the state and Gideon appealed the appellate court's judgment. The state offers this proposition of law:

When a non-government employee gives a statement to an administrative board/licensing agency governed by the state, and when there is no threat of loss of employment or removal from office, that statement is not subject to *Garrity v. New Jersey*, 385 U.S. 493 (1967).

{¶ 7} Gideon offers two cross-propositions of law:

(1) A licensing board investigator's intent to assist law enforcement in obtaining a criminal conviction for the purpose of influencing the outcome of an administrative-sanction proceeding against a licensee is a factor strongly weighing in favor of a finding that the licensee had an objectively reasonable belief that assertion of his Fifth Amendment Privilege Against Self-Incrimination would expose him to revocation of his license and loss of his livelihood.

(2) Under App.R. 12(A)(C), a court of appeals has a duty to adjudicate any assignment of error that raises a claim of insufficiency of the evidence to support a criminal conviction or that involves a claim of error that is likely to again become an issue during proceedings upon remand.

The Privilege Against Self-Incrimination

{¶ 8} We will first address the state's proposition of law together with Gideon's first cross-proposition of law. The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." Article I, Section 10 of the Ohio Constitution provides the same protection: "No person shall be compelled, in any criminal case, to be a

witness against himself * * *." "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." *Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S.Ct. 316, 38 L.Ed.2d 274 (1973).

{¶ 9} Because a witness may voluntarily testify to matters which may be incriminating, the privilege against self-incrimination is not self-executing. The witness seeking the privilege must "claim it." *United States v. Monia*, 317 U.S. 424, 427, 63 S.Ct. 409, 87 L.Ed. 376 (1943). If the witness answers a question, the answer will be considered voluntary. *See Minnesota v. Murphy*, 465 U.S. 420, 427, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984). Gideon did not assert the privilege against self-incrimination during his interview with the medical-board investigator.

{¶ 10} At times, when it is necessary to "safeguard the core constitutional right protected by the Self-incrimination Clause," an assertion of the privilege against self-incrimination is not required. *Chavez v. Martinez*, 538 U.S. 760, 770, 123 S.Ct. 1994, 155 L.Ed.2d 984 (2003) (plurality opinion). An exception to asserting the privilege exists for statements made during custodial interrogations in which the state undermines the privilege by physically or psychologically coercing a suspect. *See Miranda v. Arizona*, 384 U.S. 436, 448-450, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

{¶ 11} The right to remain silent can also be infringed by coercion when there is a penalty for asserting the right. In *Garrity*, the attorney general investigated police officers for fixing traffic tickets. Although advised of their right to remain silent, the officers also were told that refusing to answer questions would lead to the termination of their employment. The officers answered questions and the state used some of their answers against them in a subsequent criminal case. The U.S. Supreme Court observed that "[t]he option to lose their means of

livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent." *Garrity*, 385 U.S. at 497, 87 S.Ct. 616, 17 L.Ed.2d 562. The court thus held that the confessions were not voluntary but coerced and that the Fourteenth Amendment prohibited the use of the statements in subsequent criminal proceedings. *Id*. at 497-498, 500.

{¶ 12} Unlike the officers in *Garrity*, Gideon is not a public employee. He was a medical doctor in private practice. As a practicing physician, he was subject to licensure by the state medical board. *See* R.C. 4731.17(B) (state medical board shall issue licenses to practice medicine). Gideon's medical license constitutes a liberty and property interest subject to due-process protections. *Watts v. Burkhart*, 854 F.2d 839, 842 (6th Cir.1988) ("the freedom to pursue a career is a protected liberty interest, and * * * state regulation of occupations through a licensing process gives rise to protected property interests"); *see also Flynn v. State Med. Bd.*, 2016-Ohio-5903, 62 N.E.3d 212, ¶ 45 (10th Dist.).

{¶ 13} The medical board has disciplinary authority over medical doctors and may "limit, revoke, or suspend a license or certificate to practice or certificate to recommend, refuse to issue a license or certificate, refuse to renew a license or certificate, refuse to reinstate a license or certificate, or reprimand or place on probation the holder of a license or certificate * * *." R.C. 4731.22(B). Among the reasons listed for exercising the authority to impose such sanctions is the "[f]ailure to cooperate in an investigation" and the "failure to answer truthfully a question presented by the board in an investigative interview * * *." R.C. 4731.22(B)(34).

{¶ 14} The state's threat to impose a legal penalty for the failure to give truthful responses in a state-medical-board investigation is coercive. This threat puts a medical doctor in the position of having to choose between two rights: the property right in the medical license or the privilege against self-incrimination. *See Spevack v. Klein*, 385 U.S. 511, 512, 87 S.Ct. 625, 17 L.Ed.2d 574 (1967) (private-

practice lawyer could not be disbarred for refusing to testify at a judicial inquiry into professional misconduct).

{¶ 15} A different approach is required when, as here, the person under investigation has not been "expressly confronted * * * with the inescapable choice of either making an incriminatory statement or being fired," *State v. Graham*, 136 Ohio St.3d 125, 2013-Ohio-2114, 991 N.E.2d 1116, ¶ 23. When incriminating statements are not coerced by the direct threat of job termination, we apply an "objectively reasonable" "subjective belief" test. *Id*. Under that test, statements are compelled by threat of discharge if (1) a person subjectively believed that asserting the privilege would lead to discharge and (2) that belief was objectively reasonable under the circumstances. *Id*.

{¶ 16} Applying the *Graham* test, the trial court found that while Gideon testified that he *subjectively* believed that he would "be penalized" with the loss of his medical license if he did not answer questions posed by the medical-board investigator, his belief was not *objectively* reasonable.

{¶ 17} In *Graham,* we explained that the objective reasonableness of a defendant's belief that disciplinary action will result unless the defendant cooperates requires a showing of "some demonstrable coercive action by the state beyond '[t]he general directive to cooperate.' " (Brackets sic.) *Graham* at ¶ 23, quoting *United States v. Vangates*, 287 F.3d 1315, 1324 (11th Cir.2002). We further explained that " 'ordinary job pressures, such as the possibility of discipline or discharge for insubordination, are not sufficient to support an objectively reasonable expectation of discharge.' " *Id*., quoting *People v. Sapp*, 934 P.2d 1367, 1372 (Colo.1997).

{¶ 18} Gideon did not establish through evidence that coercive action by the medical-board investigator had occurred. The trial court found no evidence that the medical-board investigator informed Gideon that "he must waive his rights against self-incrimination or subject himself to discharge or revocation of his

license." And neither Gideon nor the investigator mentioned during the interview anything that suggested Gideon could lose his medical license if he refused to comply with the investigator's questioning.

{¶ 19} Besides the lack of evidence showing that Gideon had an objectively reasonable basis for believing that he could lose his medical license, the trial court correctly found that R.C. 4731.22(B), which requires a doctor's cooperation in an investigation, does not subject that doctor "to an automatic suspension or revocation" of a license should the doctor exercise the right to remain silent. Although that section speaks in mandatory terms about discipline for certain violations (the board "shall" impose one of the listed sanctions), discipline is not automatic. It requires the affirmative vote of "not fewer than six" medical-board members to impose discipline for one of the reasons listed in R.C. 4731.22(B). And even when the medical board determines that a doctor has committed a violation, revocation of a medical license is not a required sanction—it is one of several sanctions available to the board. *See* R.C. 4731.22(B). In Gideon's case, there was no direct threat of discipline for failure to cooperate; he faced only the possibility of discipline.

{¶ 20} The Third District disagreed: "the trial court did not capture the concept of [R.C. 4731.22] and, more importantly, failed to consider the *totality* of the circumstances surrounding Gideon's interview * * *." (Emphasis sic.) 2019-Ohio-2482, 130 N.E.3d 357, at ¶ 31.

{¶ 21} Yet the trial court *did* consider the circumstances surrounding the interview. In its findings of fact, the trial court observed that Gideon sounded "eager to speak" with the investigator despite having no notice of the investigator's visit. Gideon declined the investigator's offer to reschedule the interview. Because the interview occurred in Gideon's office, the investigator told Gideon that he would pause the interview so that Gideon could see waiting patients. The trial court found that Gideon "took the lead initially in the interview and described his

techniques with his patients prior to any substantive questions being posed by the investigator." Although Gideon testified during the suppression hearing that the surprise nature of the interview denied him the ability to refresh his memory of the specific patients, the trial court determined that Gideon "was able to give a very detailed account of the treatments provided" and that only 18 minutes into the interview, Gideon "admitted to touching certain areas on the patients and succumbing to temptation."

{¶ 22} Appellate review of a suppression ruling involves a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. "An appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence." *State v. Hawkins*, 158 Ohio St.3d 94, 2019-Ohio-4210, 140 N.E.3d 577, ¶ 16. "[T]he appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." *Burnside* at ¶ 8, citing *State v. McNamara*, 124 Ohio App.3d 706, 707 N.E.2d 539 (4th Dist.1997).

{¶ 23} The court of appeals did not dispute the trial court's factual findings. It believed, however, that the investigator acted as a "straw man" for the state. 2019-Ohio-2482, 130 N.E.3d 357, at ¶ 42. While the board may share with law-enforcement agencies any information it receives in an investigation, *see* R.C. 4731.22(F)(5), cooperation with law-enforcement officials does not necessarily convert a medical-board investigation into a law-enforcement mission. *See State v. Jackson*, 154 Ohio St. 3d 542, 2018-Ohio-2169, 116 N.E.3d 1240, ¶ 21, citing *Ohio v. Clark*, 576 U.S. 237, 249, 135 S.Ct. 2173, 192 L.Ed.2d 306 (2015). The investigator admitted that he agreed to share information with the police, but that does not mean that he acted for the primary purpose of furthering a criminal prosecution by the state. The investigator interviewed Gideon for the primary purpose of determining whether Gideon was subject to disciplinary action by the medical board for engaging in the misconduct alleged by his patients.

{¶ 24} We conclude that Gideon's medical license is a property right and that the threatened loss of the license is a form of coercion that can compromise the United States Constitution's Fifth Amendment privilege against self-incrimination. That said, in order for coercion to be sufficient to warrant the suppression of statements Gideon made during a medical-board investigative interview, his belief that he would lose his license if he failed to participate in the medical-board interview and answer questions truthfully must be both subjectively believed and objectively reasonable. In this case, competent, credible evidence supported the trial court's factual finding that Gideon's belief that a refusal to answer truthfully questions posed by the medical-board investigator could lead to the loss of his medical license was not objectively reasonable.

Duty to Adjudicate Assignments of Error

{¶ 25} In his second cross-proposition of law, Gideon claims that the court of appeals erred by finding that his assignment of error relating to the sufficiency of the evidence on one count of sexual imposition was moot. He argues that the appellate court's remand on the suppression issue did not moot this assignment of error. We agree.

{¶ 26} App.R. 12(A)(1)(c) states that "[u]nless an assignment of error is made moot by a ruling on another assignment of error," a court of appeals shall "decide each assignment of error and give reasons in writing for its decision." An assignment of error is moot when it cannot have " 'any practical legal effect upon a then-existing controversy.' " *Culver v. Warren*, 84 Ohio App. 373, 393, 83 N.E.2d 82 (7th Dist.1948), quoting *Ex parte Steele*, 162 F. 694, 701 (N.D.Ala.1908). Put differently, an assignment of error is moot when an appellant presents issues that are no longer live as a result of some other decision rendered by the appellate court.

{¶ 27} An assignment of error going to the sufficiency of the evidence supporting a criminal count is always potentially dispositive of that count. While

a reversal based on weight of the evidence does not preclude a retrial, a reversal based on insufficient evidence leads to an acquittal that bars a retrial. *See State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), citing *Tibbs v. Florida*, 457 U.S. 31, 47, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). "Because 'the state is not entitled to retry a criminal defendant after reversal for trial court error if the state failed in the first instance to present sufficient evidence * * * a defendant's assigned error that the conviction is based on insufficient evidence is not moot under these circumstances.' " (Ellipsis added in *Mathis*.) *State v. Mathis*, 6th Dist. Lucas No. L-18-1192, 2020-Ohio-3068, ¶ 78, quoting *State v. Vanni*, 182 Ohio App.3d 505, 2009-Ohio-2295, 913 N.E.2d 985, ¶ 15 (9th Dist.); *see also State v. Croskey*, 8th Dist. Cuyahoga No. 107772, 2019-Ohio-2444, ¶ 9 (errors which could result in an acquittal must be separately addressed).

{¶ 28} In *State v. Brewer*, 113 Ohio St.3d 375, 2007-Ohio-2079, 865 N.E.2d 900, we determined that the court of appeals erred by refusing to consider an assignment of error challenging the sufficiency of the evidence after it had determined trial error warranted reversal of the defendant's conviction. A jury had found Brewer guilty of gross sexual imposition. On direct appeal, he raised nine assignments of error, including that hearsay testimony was improperly allowed by the court and that the state failed to offer sufficient evidence. *State v. Brewer*, 8th Dist. Cuyahoga No. 87701, 2006-Ohio-6029, ¶ 1. The court of appeals determined that the trial court erred by allowing hearsay testimony into evidence and ordered a new trial. *Id*. at ¶ 13. That finding led it to conclude that the remaining assignments of error were moot. *Id*. We summarily reversed that decision: "[t]he judgment of the court of appeals holding that the assignment of error in which appellant challenged the sufficiency of the evidence was moot is reversed, and the cause is remanded to the court of appeals for consideration of that assignment of error." *Brewer*, 113 Ohio St.3d 375, 2007-Ohio-2079, 865 N.E.2d 900, at ¶ 2.

{¶ 29} When a conviction is based on evidence that does not establish a defendant's guilt beyond a reasonable doubt, the court of appeals must vacate the conviction and double-jeopardy protection bars the defendant's retrial for the same offense. An assignment of error raising the sufficiency of the evidence is thus potentially dispositive of a particular count and cannot be moot. When evaluating an assignment of error challenging the sufficiency of the evidence, a reviewing court must consider all evidence admitted at trial, including the improperly admitted evidence that was the source of the reversal for trial error. *See State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593, 903 N.E.2d 284, ¶ 24-26. The court of appeals erred by finding that Gideon's assignment of error relating to the sufficiency-of-the-evidence claim was moot under App.R. 12(A)(1)(c).

Conclusion

{¶ 30} For the reasons stated above, we reverse the judgment of the Third District Court of Appeals. We also remand to that court to consider Gideon's assignment of error relating to the sufficiency of the evidence.

Judgment reversed
and cause remanded in part.

O'CONNOR, C.J., and KENNEDY, FRENCH, FISCHER, and DEWINE, JJ., concur.

DONNELLY, J., dissents, with an opinion.

DONNELLY, J., dissenting.

{¶ 31} The majority opinion states that the medical board can " 'limit, revoke, or suspend' " a license to practice medicine if the licensee fails to " 'cooperate in an investigation' " or " 'answer truthfully a question presented by the board in an investigative interview.' " Majority opinion at ¶ 13, quoting R.C. 4731.22(B). The majority opinion concludes that appellee and cross-appellant, James Gideon, subjectively believed that he could lose his license if he failed to

cooperate or to answer questions truthfully. I agree. *See* R.C. 4731.22(B)(34). Based on the language of R.C. 4731.22(B), Gideon's subjective belief that he could lose his license was well-founded. But the majority opinion further concludes that Gideon's subjective belief was not objectively reasonable because he did not demonstrate " 'coercive action by the state beyond "[t]he general directive to cooperate." ' (Brackets sic.) [*State v. Graham*, 136 Ohio St.3d 125, 2013-Ohio-2114, 991 N.E.2d 1116,] ¶ 23, quoting *United States v. Vangates*, 287 F.3d 1315, 1324 (11th Cir.2002)." Majority opinion at ¶ 17. I disagree.

{¶ 32} The majority concludes that the "investigator interviewed Gideon for the primary purpose of determining whether Gideon was subject to disciplinary action by the medical board for engaging in the misconduct alleged by his patients," majority opinion at ¶ 23. The well-written and unanimous opinion of the court of appeals thoroughly explicates why the majority's characterization of the investigator's interview of Gideon is untenable:

> The evidence in the record reflects that the circumstances surrounding the administrative investigation at issue in this case show some demonstrable, coercive action by the state beyond the general directive to cooperate. Indeed, the combination of Gideon's duty to cooperate under R.C. 4731.22(B)(34) and Investigator Yoakam's process in this case exceeded an *ordinary* job pressure to cooperate. As we have noted, R.C. 4731.22(B)(34) requires licensees to cooperate with investigations of the board.[1 (originally fn.8)]

1. The following language appears as footnote 8 in the court of appeals' opinion:

> It appears that the State contends that R.C. 4731.22(B)(34)'s duty to cooperate requires *only* that a subject answer truthfully questions posed by an investigator of the board during an interview. *Compare United States v. Goodpaster*, 65 F.Supp.3d 1016, 1029 (D.Or.2014) (noting that "[a]n order to 'cooperate' demands more of the reasonable employee than an order merely to be

Compare [*United States v. Goodpaster*, 65 F.Supp.3d 1016, 1029 (D.Or.2014)] (noting that "Goodpaster was subject to a regulation * * * requiring that he 'cooperate with all audits, reviews, and investigations conducted by the Office of Inspector General' "), quoting 39 C.F.R. 230.3(a). R.C. 4731.22(B) puts licensees on notice that their failure to cooperate, amongst other reasons, will penalize their license (by a vote of no fewer than six members of the board). *Compare id.* ("The same regulation provides that 'failing to cooperate [* * *] may be grounds for disciplinary or other legal action.' "), quoting 39 C.F.R. 230.3(a).

Further, in addition to R.C. 4731.22(B)(34)'s directive to cooperate with the board's investigation, the record reflects "some demonstrable action of the state" supporting Gideon's subjective belief. *See* [*People v.*]*Sapp*[, 934 P.2d 1367, 1372 (Colo.1997)]; [*United States v.*]*Camacho*[, 739 F.Supp 1504, 1518 (S.D.Fla.)]. In this case, the demonstrable action of the State lies with Investigator Yoakam's conduct and his intent underlying that conduct. *Compare Camacho*, 739 F.Supp. at 1518-1519 (construing the evidence in the

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'truthful' "), citing *Minnesota v. Murphy*, 465 U.S. 420, 434, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984) (observing that "Murphy's probation condition [to be truthful] proscribed only false statements"). That is, the State argues that "[t]elling falsehoods * * * is different than remaining silent, and the Fifth Amendment is not implicated." (Appellee's Brief at 6). However, the text of that subsection of the statute states that a subject must *cooperate* in investigations of the board. R.C. 4731.22(B)(34) proceeds to provide a non-exhaustive list of ways in which a subject must cooperate with an investigation of the board—only one of which is to provide truthful answers to questions presented by the board in an investigative interview. *See In re Hartman*, 2 Ohio St.3d 154, 155-156, 443 N.E.2d 516 (1983) (noting that the word " 'including' implies that that which follows is a partial, not an exhaustive listing of all that is subsumed within the stated category. 'Including' is a word of expansion rather than one of limitation or restriction.").

(Emphases, brackets, and ellipses sic.)

record reflecting the "actions of the investigators" to determine whether there was "demonstrable state conduct" and, thus, whether the defendants' beliefs that they would penalized for asserting their Fifth Amendment rights were objectively reasonable).

At the suppression hearing, Investigator Yoakam testified to the extent that he collaborated with law enforcement as part of his investigation—that is, he specifically stated that the investigation of Gideon "turned into a joint investigation." (Aug. 22, 2017 Tr. at 4); (Oct. 13, 2017 Tr. at 7, 20-21). Indeed, Sergeant Hochstetler concurred that he and Investigator Yoakam agreed "to cooperate with each other" during the course of their investigations. (Oct. 13, 2017 Tr. at 51-52). By cooperating, Sergeant Hochstetler clarified that meant that he and Investigator Yoakam would share information. Investigator Yoakam elaborated that the Revised Code permits him to share information obtained as part of his investigations with law enforcement and that he will share such information if there is "a shared interest." (*Id.* at 19-20). Investigator Yoakam further testified that he shared the information he collected (regarding Gideon) with the Bluffton Police Department.

Undeniably, R.C. 4731.22(F) provides, in relevant part, the following:

"(3) In investigating a possible violation of this chapter or any rule adopted under this chapter, * * * the board may question witnesses, conduct interviews, administer oaths, order the taking of depositions, inspect and copy any books, accounts, papers, records, or documents, issue subpoenas, and compel the attendance of witnesses and production of books, accounts, papers, records,

documents, and testimony, except that a subpoena for patient record information shall not be issued without consultation with the attorney general's office and approval of the secretary and supervising member of the board.

"* * *

"(4) All * * * investigations * * * of the board shall be considered civil actions for the purposes of section 2305.252 of the Revised Code.

"(5) * * *

The board may share any information it receives pursuant to an investigation * * * with law enforcement agencies, other licensing boards, and other governmental agencies that are prosecuting, adjudicating, or investigating alleged violations of statutes or administrative rules."

R.C. 4731.22(F)(3)-(5) (Apr. 6, 2017) (current version at R.C. 4731.22(F)(3)-(5) (Mar. 20, 2019)).[2 (originally fn.9)]

Thus, while there is nothing inherently wrong with Investigator Yoakam and law enforcement's agreement to share

2. The following language appears as footnote 9 in the court of appeals' opinion:

> R.C. 2305.252 applies to peer-review privilege. *See, e.g.*, *Cousino v. Mercy St. Vincent Med. Ctr.*, 6th Dist. Lucas, 2018-Ohio-1550, 111 N.E.3d 529, ¶ 15 ("The purpose of this statute is to protect the integrity and confidentiality of the peer review process so that health care entities have the freedom to meaningfully review and critique—and thereby improve—the overall quality of the healthcare services they provide."). The statute also applies the peer-review privilege to *only* the Bureau of Workers' Compensation ("BWC"); however, the statute excepts the BWC to "share proceedings and records within the scope of the peer review committee * * * with law enforcement agencies, licensing boards, and other governmental agencies that are prosecuting, adjudicating, or investigating alleged violations of applicable statutes or administrative rules." R.C. 2305.252(B).

(Emphasis and ellipsis sic.)

information, the evidence in the record reveals that Investigator Yoakam exceeded statutorily permissible collaboration by taking demonstrable steps to coerce Gideon to provide him an incriminating, oral and written statement in reliance on Gideon's duty to cooperate. In other words, Investigator Yoakam was posing as a "straw man" to effectuate law enforcement's criminal investigation. *See State v. Gradisher*, 9th Dist. Summit No. 24716, 2009-Ohio-6433, 2009 WL 4647378, ¶ 23 (Belfance, J., dissenting) (approving the "concern that government agents should not pose as 'straw men' in order to effectuate police investigations"). Specifically, Investigator Yoakam contacted Sergeant Hochstetler prior to interviewing Gideon, and "discussed that [he] was going to hold off on the administrative investigation until [law enforcement determined] that [Investigator Yoakam] could interview [Gideon]." (Oct. 13, 2017 Tr. at 7-8). Investigator Yoakam's intention for sharing his investigative plan with law enforcement was to "determine how [law enforcement] was going to proceed with the criminal case" because proving an administrative-sanction case is easier "from a criminal conviction" as opposed to "through witness testimony." (*Id.* at 15-16). That is, he elaborated that his method is "what they call a bootstrap on a criminal case that's where a physician * * * is criminally charged, and the Board takes action on that criminal disposition, and the other [is] based on information gathered in the course of an investigation. Action that's taken based on that." (*Id.* at 15).

Prior to Investigator Yoakam's interview of Gideon, Sergeant Hochstetler told Investigator Yoakam that Gideon "denied any improprieties during [law enforcement's] interview" of Gideon.

(Oct. 13, 2017 Tr. at 21, 55). And, after discussing Gideon's denials to law enforcement with Sergeant Hochstetler, Investigator Yoakam informed Sergeant Hochstetler that it would not be "appropriate" for law enforcement to jointly interview Gideon with Investigator Yoakam. (*Id.* at 28, 55-56). Specifically, Investigator Yoakam testified that

"doctor's [sic] are obligated to cooperate in our investigation. So [he] did not want that to * * * impede in * * * any of the criminal proceedings...And [he] didn't want * * * there to be an issue that the doctor provided a statement with law enforcement present because the provider is *obligated to cooperate in our investigations.*"

(Emphasis added.) (*Id.* at 29). (*See also* Oct. 13, 2017 Tr. at 55); (Defendant's Ex. 4). In other words, Investigator Yoakam's method was to avoid a scenario in which his interview (of Gideon) could not be used as part of the criminal case because (as indicated by Investigator Yoakam) the lack of a criminal conviction would make his administrative-sanction case more cumbersome. *Compare Gradisher* at ¶ 23 (Belfance, J., dissenting) (expressing concern that "government overreaching could easily occur by pushing off criminal investigations to state agents so as to bypass protection against the abridgement of an individual's Fifth Amendment rights"); *Camacho*, 739 F.Supp. at 1519 (noting that the investigator's action in purposely omitting "his preamble regarding voluntariness and compulsion * * * in order to avoid flagging the issue of voluntariness" "speaks louder" than any belief that the statements were voluntary and concluding that "the investigators' central aim was to take a statement first and litigate its admissibility later").

Moreover, based on our review of the record, Investigator Yoakam's intent for the investigation reflects the demonstrable state action necessary to support Gideon's subjective belief that his medical license would be penalized if he failed to cooperate with Investigator Yoakam's investigation. Specifically, Investigator Yoakam's interview of Gideon reflects his intent to assist law enforcement in obtaining a criminal conviction of Gideon for purposes of influencing the outcome the administrative-sanction case against Gideon.

Even though he is not a law enforcement officer, Investigator Yoakam testified that he had law enforcement training and is familiar with the elements of offenses under the Revised Code, including sexual imposition. Keeping his training in mind, Investigator Yoakam arrived unannounced to Gideon's medical office to conduct his interview to catch him "off guard" "to get the truth out of [him]." (Oct. 13, 2017 Tr. at 5, 32-33). Despite Gideon having patient appointments at the time of the visit, Investigator Yoakam did not advise Gideon that he did not have to speak with him that day or otherwise offer to reschedule—he merely asked Gideon "if he would have a few minutes to chat with" him. (*Id.* at 5). (*See also* State's Ex. A). In other words, Investigator Yoakam did nothing to dissuade Gideon's belief that he was statutorily obligated to cooperate with his investigation, which included consenting to Investigator Yoakam's request to "chat." *Compare Camacho* at 1511 ("At no time during the interview or after did either Sergeant Green or Assistant State Attorney DiGregory make any effort to dissuade Sinclair of his view that he was compelled to give a statement or answer his question.").

(Emphases and ellipses sic; brackets added in citations and footnote numbers; remaining brackets sic.) 2019-Ohio-2482, 130 N.E.3d 357, at ¶ 38-45.

{¶ 33} This analysis amply supports a conclusion that Yoakam's investigation was improperly coercive under *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967). Although there is nothing wrong with Yoakam and the Bluffton Police Department sharing information, their approach suggests that Yoakam was strategically attempting to elicit information to benefit the Bluffton Police Department investigation. This is tantamount to collaborating—not merely sharing information that was collected independently. If Yoakam had appeared at Gideon's office with an officer from the Bluffton Police Department, the coercive nature of the investigation would have been manifest. It is no less so here. Yoakam was all but deputized to act for the benefit of the Bluffton Police Department. Moreover, the court of appeals examined another way in which the interview demonstrates that Gideon had an objectively reasonable belief that his medical license was at risk if he did not cooperate:

> Investigator Yoakam advised Gideon at multiple points to "to go back to [law enforcement] and change his statement" to avoid facing possible falsification charges. (Oct. 13, 2017 Tr. at 22). Investigator Yoakam's insistence that Gideon return to law enforcement to change his statement is also evidence supporting Gideon's belief that a refusal to give a statement will be met with a licensure penalty. That is, Investigator Yoakam's insistence that Gideon provide law enforcement with a statement reflects an intent to coerce Gideon to cooperate with the investigation. Indeed, (as raised during cross-examination) if Investigator Yoakam was "just concerned about [the] medical investigation there would be no need to tell [Gideon]

> to go back to the police department and change his statement * * *." (*Id.* at 22).

(Brackets and ellipsis sic.) 2019-Ohio-2482, 130 N.E.3d 357, at ¶ 48.

{¶ 34} The court of appeals also had appropriate concern that Yoakam's conduct after the interview reflects his understanding that he and the Bluffton Police were engaged in a joint investigation, not a mere sharing of information:

> At the conclusion of the interview, instead of reporting back to the board, Investigator Yoakam immediately went to the Bluffton Police Department to report Gideon's confessions to law enforcement. (*See* Defendant's Ex. 2). Despite his employment responsibilities with the State Medical Board, Investigator Yoakam chose to *immediately share* Gideon's confessions with law enforcement "because the doctor had [ ] an interview with [law enforcement] where he denied any impropriety so [he] wanted to tell [law enforcement] what happened during [his] interview." (Oct. 13, 2017 Tr. at 26-27). Moreover, Investigator Yoakam agreed that he "wanted to assist [law enforcement] in that criminal investigation by providing [law enforcement] with statements made by Dr. Gideon during an interview that same day * * *[.]" (*Id.* at 27).

(Emphasis, brackets, and ellipsis sic.) 2019-Ohio-2482, 130 N.E.3d 357, at ¶ 50.

{¶ 35} I agree with the court of appeals' conclusion that

> based on the facts and circumstances presented by this case, Investigator Yoakam's actions created an impression that Gideon's refusal to cooperate with his investigation would result in the type

> of penalty prohibited under *Garrity*. *See Camacho* at 1520 (concluding "that the actions of the State were directly implicated in creating [the] belief" that the defendants' subjective belief "that failure to answer would result in termination"). Therefore, Gideon's belief that his medical license would be penalized if he did not cooperate with Investigator Yoakam's investigation was objectively reasonable. *See id.* Thus, Gideon's statements were not voluntary within the meaning of *Garrity*. *Accord Graham*, 136 Ohio St.3d 125, 2013-Ohio-2114, 991 N.E.2d 1116, at ¶ 30 ("Statements extracted under these circumstances cannot be considered voluntary within the meaning of *Garrity*.")

2019-Ohio-2482, 130 N.E.3d 357, at ¶ 51.

{¶ 36} The circumstances of Yoakum's interview demonstrate that it was coercive and therefore that Gideon's subjective belief that he could lose his medical license if he did not answer was objectively reasonable. Accordingly, I conclude that the trial court erred when it denied Gideon's motion to suppress statements he made to Yoakam. I would affirm the well-reasoned decision of the court of appeals. I dissent.

Nicole M. Smith, Lima Assistant City Prosecuting Attorney, and Anthony M. DiPietro, Deputy Law Director, for appellant and cross-appellee.

Dennis C. Belli, for appellee and cross-appellant.

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
ALLEN COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE, **CASE NO. 1-18-27**

v.

JAMES A. GIDEON, **O P I N I O N**

DEFENDANT-APPELLANT.

STATE OF OHIO,

PLAINTIFF-APPELLEE, **CASE NO. 1-18-28**

v.

JAMES A. GIDEON, **O P I N I O N**

DEFENDANT-APPELLANT.

STATE OF OHIO,

PLAINTIFF-APPELLEE, **CASE NO. 1-18-29**

v.

JAMES A. GIDEON, **O P I N I O N**

DEFENDANT-APPELLANT.

Appeals from Lima Municipal Court
Trial Court Nos. 17CRB01386, 17CRB01387, and 17CRB01385

Judgments Reversed and Causes Remanded

Date of Decision: June 24, 2019

APPEARANCES:

***Dennis C. Belli* for Appellant**

***Anthony L. Geiger* for Appellee**

ZIMMERMAN, P.J.

{¶1} Defendant-appellant, James A. Gideon ("Gideon"), appeals the May 11, 2018 judgment entries of sentence of the Lima Municipal Court. For the reasons that follow, we reverse.

{¶2} This case stems from an investigation of Gideon for allegedly inappropriately touching patients in his capacity as a licensed physician. As part of the investigation, Sergeant Tyler Hochstetler ("Sergeant Hochstetler") of the Bluffton Police Department criminally investigated the patient complaints, while Investigator Chad Yoakam ("Investigator Yoakam") of the State Medical Board pursued an administrative investigation for possible violations of the statutes and rules governing the practice of medicine.

{¶3} Sergeant Hochstetler and Investigator Yoakam agreed "to cooperate with each other" by trading information during the course of their investigations. (Oct. 13, 2017 Tr. at 51-52). According to Investigator Yoakam, it is advantageous for state investigators to cooperate with law enforcement under "what they call a bootstrap on a criminal case" because proving an administrative-sanction case is easier "from a criminal conviction" as opposed to "through witness testimony." (*Id.* at 15-16). Thus, Investigator Yoakam met with Sergeant Hochstetler "to determine how [he] was going to proceed with the criminal case." (*Id.* at 15). After learning from Sergeant Hochstetler that Gideon denied the patients' allegations to Sergeant Hochstetler, Investigator Yoakam informed Sergeant Hochstetler that he was going to interview Gideon himself. Importantly, Investigator Yoakam warned Sergeant Hochstetler against participating in his interview with Gideon—because Gideon was statutorily obligated to cooperate with his investigation—so that any confession could be used in a criminal proceeding against Gideon. (*See* Oct. 13, 2017 Tr. at 28-29, 55-56); (Defendant's Ex. 4).

{¶4} In accordance with that agreement, Investigator Yoakam arrived unannounced at Gideon's medical office and asked Gideon "if he would have a few minutes to chat with" him to which Gideon—who was aware of his duty to cooperate with Investigator Yoakam's investigation—responded that he did. (Aug. 22, 2017 Tr. at 5). Commensurate with his duty to cooperate and provide truthful

answers to Investigator Yoakam's questions, Gideon provided Investigator Yoakam with an oral and written statement. Thereafter, Investigator Yoakam immediately shared the information from his interview of Gideon with law enforcement "because the doctor had [] an interview with [law enforcement] where he denied any impropriety so I wanted to tell [law enforcement] what happened during [his] interview." (Oct. 13, 2017 Tr. at 26-27).

{¶5} On May 26, 2017, three complaints were filed in the Lima Municipal Court, each charging Gideon with sexual imposition in violation of R.C. 2907.06(A)(1), third-degree misdemeanors. (Case No. 17CRB01385, Doc. No. 3); (Case No. 17CRB01386, Doc. No. 3); (Case No. 17CRB01387, Doc. No. 3). The complaints were assigned case numbers 17CRB01385, 17CRB01386, and 17CRB01387, respectively. (*Id.*); (*Id.*); (*Id.*). Gideon appeared for arraignment and entered pleas of not guilty on June 6, 2017. (Case No. 17CRB01385, Doc. No. 7); (Case No. 17CRB01386, Doc. No. 7); (Case No. 17CRB01387, Doc. No. 7).

{¶6} On July 5, 2017, Gideon filed a motion to suppress evidence. (Case No. 17CRB01385, Doc. No. 10); (Case No. 17CRB01386, Doc. No. 12); (Case No. 17CRB01387, Doc. No. 11). Specifically, Gideon requested that "his written and recorded statements given during an interrogation conducted by [Investigator Yoakam]" be suppressed because "the statements were involuntary and elicited in violation of [Gideon's] right to Due Process and the Privilege against Self-

Incrimination guaranteed under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution." (*Id.*); (*Id.*); (*Id.*). After the conclusion of suppression hearings on August 22, 2017 and October 13, 2017, the trial court determined that Gideon "made voluntary statements during a noncustodial interview" and denied the motion to suppress his statements. (Case No. 17CRB01385, Doc. Nos. 12, 14, 17); (Case No. 17CRB01386, Doc. Nos. 14, 17); (Case No. 17CRB01387, Doc. No. 12, 14). (*See also* Case No. 17CRB01385, Doc. Nos. 14, 15, 16).

{¶7} On February 6, 2018, the State filed a motion to join case numbers 17CRB01385, 17CRB01386, 17CRB01387. (Case No. 17CRB01385, Doc. No. 18).[1] Gideon filed a memorandum in opposition to the State's joinder request on February 23, 2018. (Case No. 17CRB01385, Doc. No. 20). The trial court granted the State's motion on April 9, 2018 and joined all of the cases for trial. (Case No. 17CRB01385, Doc. No. 27A); (Case No. 17CRB01386, Doc. No. 18A); (Case No. 17CRB01387, Doc. No. 15A). (*See* Case No. 17CRB01385, Doc. Nos. 21, 25, 27). (*See also* Case No. 17CRB01385, Doc. No. 22).

{¶8} The cases proceeded to a jury trial on April 18-20, 2018. (Apr. 18, 2018 Tr., Vol. I, at 1); (Apr. 19, 2018 Tr., Vol. II, at 1); (Apr. 20, 2018 Tr., Vol. III, at 1).

[1] The State's February 6, 2018 motion requesting joinder also requests the joinder of case numbers 17CRB01711, 17CRB01712, 17CRB01713, and 17CRB01765; however, those cases are not before this court.

The jury found Gideon guilty of the sexual-imposition charge in case number 17CRB01385, 17CRB01386, and 17CRB01387, respectively. (Case No. 17CRB01385, Doc. No. 42); (Case No. 17CRB01386, Doc. No. 22); (Case No. 17CRB01387, Doc. No. 19).

{¶9} On May 11, 2018, the trial court sentenced Gideon to 60 days in jail in case number 17CRB01385, 60 days in jail in case number 17CRB01386, and 60 days in jail in case number 17CRB01387. (Case No. 17CRB01385, Doc. No. 45); (Case No. 17CRB01386, Doc. No. 25); (Case No. 17CRB01387, Doc. No. 22). The jail terms imposed were ordered to be served consecutively for an aggregate sentence of 180 days in jail. (*Id.*); (*Id.*); (*Id.*). The trial court also classified Gideon as a Tier I sex offender. (*Id.*); (*Id.*); (*Id.*).

{¶10} Gideon filed his notice of appeal on May 11, 2018, and raises four assignments of error for our review. (Case No. 17CRB01385, Doc. No. 46); (Case No. 17CRB01386, Doc. No. 26); (Case No. 17CRB01387, Doc. No. 23). Because it is dispositive, we address only Gideon's first assignment of error.

Assignment of Error No. I

> **The Denial of Defendant-Appellant's Motion to Suppress His Oral and Written Statements to the Medical Board Investigator and the Admission of Those Statements in the State's Case-In-Chief Violated His Rights Under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution. (Apx.A-7)**

{¶11} In his first assignment of error, Gideon argues that the trial court erred by denying his motion to suppress oral and written statements that he made to Investigator Yoakam as evidence. In particular, Gideon contends that the trial court erred by concluding that his belief that his statements were coerced was objectively unreasonable under the circumstances. In making that determination, Gideon argues that the trial court "failed to consider the degree to which [Investigator] Yoakam's disciplinary investigation was intertwined with the police department's criminal investigation." (Appellant's Brief at 8).[2]

Standard of Review

{¶12} A review of the denial of a motion to suppress involves mixed questions of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. At a suppression hearing, the trial court assumes the role of trier of fact and, as such, is in the best position to evaluate the evidence and the credibility of witnesses. *Id. See also State v. Carter*, 72 Ohio St.3d 545, 552 (1995). When reviewing a ruling on a motion to suppress, "an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence." *Burnside* at ¶ 8, citing *State v. Fanning*, 1 Ohio St.3d 19 (1982). With respect to the trial court's

[2] Gideon also argues that the trial court's admission of his involuntary confessions into evidence at trial "was not harmless beyond a reasonable doubt." (Appellant's Brief at 14, citing *Arizona v. Fulimante*, 499 U.S. 279, 295, 111 S.Ct. 1246 (1991)). In other words, Gideon argues that the admission of his involuntary confessions into evidence at trial amounted to structural error. However, based on our conclusion that Gideon's statements should have been suppressed under the Fifth Amendment's privilege against self incrimination, we need not address Gideon's structural-error argument.

conclusions of law, however, our standard of review is de novo, and we must independently determine whether the facts satisfy the applicable legal standard. *Id.*, citing *State v. McNamara*, 124 Ohio App.3d 706 (4th Dist.1997).

Due Process Voluntariness

{¶13} First, we will address Gideon's argument that his pre-trial statements "were procured in violation of his right to due process * * *." (Appellant's Brief at 5). Separate from the consideration of whether a defendant's statements should be suppressed under the Fifth Amendment's self-incrimination privilege, is the consideration of whether the defendant's statements were voluntary. *See, e.g.*, *Oregon v. Elstad*, 470 U.S. 298, 304, 105 S.Ct. 1285 (1985) ("Prior to *Miranda*, the admissibility of an accused's in-custody statements was judged solely by whether they were 'voluntary' within the meaning of the Due Process Clause."); *State v. Jenkins*, 15 Ohio St.3d 164, 231 (1984) (noting that "due process provisions of the federal Constitution dictate that the state must meet by a preponderance of the evidence its burden of proving that any inculpatory statement was made voluntarily"); *State v. Tussing*, 3d Dist. Logan No. 8-10-11, 2011-Ohio-1727, ¶ 32 (stating that "the Due Process Clause requires an inquiry regarding the voluntariness of a defendant's confession, which is a separate inquiry from the considerations regarding whether a defendant is subject to a custodial interrogation"), citing *State v. Petitjean*, 140 Ohio App.3d 517, 526 (2d Dist.2000), citing *Dickerson v. United*

States, 530 U.S. 428, 434, 120 S.Ct. 2326 (2000); *State v. Scholl*, 10th Dist. Franklin No. 12AP-309, 2012-Ohio-6233, ¶ 7 ("The voluntariness of a confession presents 'an issue analytically separate from those issues surrounding custodial interrogations and *Miranda* warnings.'"), quoting *State v. Walker*, 10th Dist. Franklin No. 04AP-1107, 2005-Ohio-3540, ¶ 24, citing *State v. Kelly*, 2d Dist. Greene No. 2004-CA-20, 2005-Ohio-305, ¶ 10. *See also United States v. Goodpaster*, 65 F.Supp.3d 1016, 1021-1022 (D.Or.2014). "Using an involuntary statement against a defendant in a criminal trial is a denial of due process of law." *State v. Carse*, 10th Dist. Franklin No. 09AP-932, 2010-Ohio-4513, ¶ 23, citing *Mincey v. Arizona*, 437 U.S. 385, 398, 98 S.Ct. 2408 (1978). Statements are considered involuntary when, under the totality of the circumstances, the "defendant's will was overborne." *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S.Ct. 2041 (1973). Some of the circumstances that are commonly considered include the defendant's age, education, intelligence, and knowledge of his rights; the duration and nature of detention and questioning; and whether physical punishment was used or threatened. *Id.*

{¶14} Although Gideon asserts that he is challenging the admissibility of his pre-trial statements under the Due Process Clause, he failed to make any argument in support of that contention. "[A] defendant has the burden of affirmatively demonstrating the error of the trial court on appeal." *State v. Stelzer*, 9th Dist.

Summit No. 23174, 2006-Ohio-6912, ¶ 7, citing *State v. Cook*, 9th Dist. Summit No. 20675, 2002-Ohio-2646, ¶ 27. "Moreover, '[i]f an argument exists that can support this assignment of error, it is not this court's duty to root it out.'" *Id.*, quoting *Cook* at ¶ 27. "App.R. 12(A)(2) provides that an appellate court 'may disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based or fails to argue the assignment separately in the brief, as required under App.R. 16(A).'" *State v. Jackson*, 10th Dist. Franklin No. 14AP-670, 2015-Ohio-3322, ¶ 11, quoting App.R. 12(A)(2). "Additionally, App.R. 16(A)(7) requires that an appellant's brief include '[a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies.'" *Id.*, quoting App.R. 16(A)(7). Notwithstanding Gideon's failure to include an argument regarding how his pre-trial statements were inadmissible under the Due Process Clause, the voluntariness of his statements are immaterial to the resolution of his suppression argument because we conclude that his statements were otherwise per se compelled under the Fifth Amendment to the United States Constitution.

Fifth Amendment

{¶15} "'The Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, states that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself."'" *State v. Jackson*, 154 Ohio St.3d 542, 2018-Ohio-2169, ¶ 14, quoting *State v. Graham*, 136 Ohio St.3d 125, 2013-Ohio-2114, ¶ 19, quoting the Fifth Amendment to the U.S. Constitution.[3] *See also* Ohio Constitution, Article I, Section 10. "It has long been held that this prohibition not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, 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.'" *Minnesota v. Murphy*, 465 U.S. 420, 426, 104 S.Ct. 1136 (1984), quoting *Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S.Ct. 316 (1973).

{¶16} "The privilege against self-incrimination is generally not self-executing; a person 'ordinarily must assert the privilege rather than answer if he

[3] Gideon's argument necessarily incorporates the procedural safeguards of the Sixth Amendment. *See State v. Jackson*, 154 Ohio St.3d 542, 2018-Ohio-2169, ¶ 13. (*See also* Appellant's Brief at 13). "'The Sixth Amendment, applied to the States through the Fourteenth Amendment, guarantees that "[i]n all criminal prosecutions, the accused shall * * * have the Assistance of Counsel for his defence."'" *Jackson* at ¶ 16, quoting *Kansas v. Ventris*, 556 U.S. 586, 590, 129 S.Ct. 1841 (2009). "'The core of this right has historically been, and remains today, 'the opportunity for a defendant to consult with an attorney and to have him investigate the case and prepare a defense for trial."'" *Id.*, quoting *Ventris* at 590, quoting *Michigan v. Harvey*, 494 U.S. 344, 348, 110 S.Ct. 1176 (1990). However, "'[t]hat the right extends to having counsel present at various pretrial "critical" interactions between the defendant and the State, * * * including the deliberate elicitation *by law enforcement officers (and their agents)* of statements pertaining to the charge.'" (Emphasis added.) *Id.*, quoting *Ventris* at 590.

desires not to incriminate himself.'" *Graham* at ¶ 19, quoting *Murphy* at 429. *See also Murphy* at 427 (noting that "[t]his principle has been applied in cases involving a variety of criminal and noncriminal investigations"). Thus, "[i]f a witness—even one under a general compulsion to testify—answers a question that both he and the government should reasonably expect to incriminate him, the Court need ask only whether the particular disclosure was 'compelled' within the meaning of the Fifth Amendment." *Murphy* at 428.

> There are well-known exceptions to the requirement of asserting the privilege: (1) "custodial interrogation"; (2) situations where the assertion is penalized to an extent that a "'free choice to remain silent'" is foreclosed; and (3) situations where parties fail to file tax returns rather than identifying themselves as gamblers and asserting the Fifth Amendment privilege.

State v. Schimmel, 2d Dist. Clark No. 2017-CA-23, 2017-Ohio-7747, ¶ 17, quoting *Murphy* at 429-430, 434, 439, quoting *Garner v. United States*, 424 U.S. 648, 661, 96 S.Ct. 1178 (1976). *See also Goodpaster*, 65 F.Supp.3d at 1022-1023 ("Rather than ask whether statements were actually compelled, a prophylactic rule asks whether certain other conditions were met and provides that statements made under those conditions are deemed per se compelled.), citing *Elstad*, 470 U.S. at 307. "A prophylactic rule, therefore, 'sweeps more broadly than the Fifth Amendment itself' and may exclude even 'patently *voluntary* statements.'" (Emphasis sic.) *Goodpaster* at 1023, quoting *Elstad* at 306-307.

{¶17} Here, the trial court addressed two of the exceptions to the requirement of asserting the privilege: the *Miranda* and the *Garrity* rules. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966); *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 616 (1967). Accordingly, we will review the trial court's application of the *Miranda* and *Garrity* rules to the facts and circumstances presented by this case.

Miranda

{¶18} The first well-known exception under *Miranda* excludes "'statements, whether exculpatory or inculpatory, stemming from *custodial interrogation* of the defendant unless [the state] demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.'" (Emphasis added.) *Jackson*, 154 Ohio St.3d 542, 2018-Ohio-2169, at ¶ 14, quoting *Miranda* at 444. "The basic insight of *Miranda* is that custody contains 'inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.'" *Goodpaster* at 1023, quoting *Miranda* at 467. "To offset this coercion, *Miranda* mandated that certain warnings be given before a suspect in custody is interrogated." *Id.*, citing *Miranda* at 478-479. "Absent these warnings, * * * a suspect's statements made during custodial interrogation * * * may not be used against him * * *." *Id.*, citing *Elstad* at 307 and *Miranda* at 478-479.

{¶19} "The prophylactic rule of *Miranda*, therefore, substitutes the totality-of-the-circumstances voluntariness inquiry with" a four-prong inquiry: First, was the suspect in custody? Second, was the suspected being interrogated? Third, was the custodial interrogation conducted by law enforcement? Fourth, if the first three inquiries produce an affirmative result, were adequate warnings given? *See id.*

{¶20} A "custodial interrogation" within the meaning of *Miranda* "'means "questioning initiated by *law enforcement* after a person has been taken into *custody*."'" (Emphasis added.) *Jackson* at ¶ 15, quoting *State v. Watson*, 28 Ohio St.2d 15 (1971), paragraph five of the syllabus, quoting *Miranda* at 444, and citing *State v. Bernard*, 31 So.3d 1025, 1029 (La.2010) (noting that *Miranda* applies only if "the interrogation is conducted by a 'law enforcement officer' or someone acting as their agent"). *See also Rhode Island v. Innis*, 446 U.S. 291, 300-301, 100 S.Ct. 1682 (1980) (defining "interrogation" as "express questioning or its functional equivalent"). "When determining whether an individual is in custody for *Miranda* purposes, we must consider whether there was a formal arrest or the functional equivalent of 'a restraint of an individual's freedom of movement commensurate with that of a formal arrest.'" *In re M.H.*, 8th Dist. Cuyahoga No. 105742, 2018-Ohio-4848, ¶ 20, quoting *State v. Jones*, 8th Dist. Cuyahoga No. 83481, 2004-Ohio-5205, ¶ 39, citing *Miranda* at 444. "In considering whether an individual is in custody for *Miranda* purposes, "courts must first inquire into the circumstances

surrounding the questioning and, second, given those circumstances, determine whether a reasonable person would have felt that he or she was not at liberty to terminate the interview and leave.'" *Id.* at ¶ 24, quoting *State v. Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3430, ¶ 27, citing *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S.Ct. 457 (1995). "In so doing, we examine the totality of the circumstances and how a reasonable person would have understood the circumstances." *Id.* at ¶ 20, citing *State v. Montague*, 8th Dist. Cuyahoga No. 97958, 2012-Ohio-4285, ¶ 8, citing *Berkemer v. McCarty*, 468 U.S. 420, 442, 104 S.Ct. 3138 (1984). "Relevant factors to consider in determining whether a custodial interrogation took place are: (1) the location of the questioning; (2) duration of the questioning; (3) statements made during the interview; (4) the presence or absence of physical restraints; and (5) whether the interviewee was released at the end of the interview." *State v. Billenstein*, 3d Dist. Mercer No. 10-13-10, 2014-Ohio-255, ¶ 44, citing *Howes v. Fields*, 565 U.S. 499, 132 S.Ct. 1181 (2012).

{¶21} However, generally, "[t]he *Miranda* requirements do not apply when admissions are made to persons who are not law enforcement officers or their agents, even if an individual's efforts aid in law enforcement."[4] *In re M.H.* at ¶ 19, citing *Jackson* at ¶ 15. *See also id.* at ¶ 21 ("Generally, courts have held that [state

[4] A law enforcement officer is defined under R.C. 2901.01(A)(11)(b) as follows: "An officer, agent, or employee of the state or any of its agencies, instrumentalities, or political subdivisions, upon whom, by statute, a duty to conserve the peace or to enforce all or certain laws is imposed and the authority to arrest violators is conferred * * *."

investigators—namely, social workers—]do not have a duty to advise suspects of their *Miranda* rights because they are private citizens with no power to arrest."), citing *Jones* at ¶ 40, *State v. Coonrod*, 12th Dist. Fayette No. CA2009-08-013, 2010-Ohio-1102, ¶ 9, *State v. Thoman*, 10th Dist. Franklin No. 04AP-787, 2005-Ohio-898, ¶ 7, *State v. Dobies*, 11th Dist. Lake No. 91-L-123, 1992 WL 387356, *3 (Dec. 18, 1992), and *State v. Simpson*, 4th Dist. Ross No. 1706, 1992 WL 37793, *4 (Feb. 21, 1992). Nevertheless, when a state investigator acts as an agent of law enforcement, that investigator may be required to provide *Miranda* warnings. *Id.* at ¶ 22. A state investigator is an agent of law enforcement when he or she acts under the direction or control of law enforcement. *Id.*, citing *State v. Bolen*, 27 Ohio St.2d 15, 18 (1971). Whether an individual is acting as an agent of law enforcement depends on the specific facts and circumstances of each case. *Jackson* at ¶ 17.

{¶22} In the case before us, the trial court concluded that suppression of Gideon's statements was not warranted under *Miranda* because Gideon was not in custody. In support of its conclusion that Gideon was not in custody, the trial court found that (1) the interview with Investigator Yoakam was conducted at Gideon's office; (2) Gideon was freely accessible to his staff; (3) Gideon repeatedly left his office to see patients; (4) Gideon was not physically threatened, intimidated, or restrained; and (5) Investigator Yoakam did not dominate the interview. The record reveals that the trial court's findings are supported by competent, credible evidence.

Accordingly, although there may a tenable argument that Investigator Yoakam was acting as an agent of law enforcement, suppression of Gideon's statements under *Miranda* is unavailing. *Compare State v. Kuruc*, 9th Dist. Medina No. 15CA0088-M, 2017-Ohio-4112, ¶ 22 ("concluding that suppression was not warranted under *Miranda* because, "[e]ven assuming that the Fire Chief and/or the other firefighters here were acting as agents of the police when they met with Kuruc, the record does not support his assertion that they subjected him to custodial interrogation). *See also State v. Woods*, 4th Dist. Lawrence Nos. 16CA28 and 16CA29, 2018-Ohio-4588, ¶ 49-50, 52.

Garrity

{¶23} "The *Garrity* rule * * * applies when the government threatens to *penalize* the assertion of the Fifth Amendment privilege." (Emphasis added.) *Goodpaster*, 65 F.Supp.3d at 1023. Specifically, the Garrity rule applies "when a person's assertion of the privilege is penalized in a way that precludes that person from choosing to remain silent and compels his or her incriminating testimony." *Graham*, 136 Ohio St.3d 125, 2013-Ohio-2114, at ¶ 20. "For instance, a person need not assert the [self-incrimination] privilege in cases in which the state compels the person to give up the 'privilege by threatening to impose economic or other sanctions "capable of forcing the self-incrimination which the [Fifth] Amendment forbids."'" *Id.*, quoting *Murphy*, 465 U.S. at 434, quoting *Lefkowitz v. Cunningham*,

431 U.S. 801, 806, 97 S.Ct. 2132 (1977). "Where it has threatened to do so, the government has created a 'classic penalty situation,' and any answers given by the suspect are 'deemed compelled and inadmissible in a criminal prosecution.'" *Goodpaster* at 1024, quoting *Murphy* at 435.

{¶24} "[T]he constitutional protection 'against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic.'" *Graham* at ¶ 21, quoting *Garrity*, 385 U.S. at 500. *See Goodpaster* at 1024 (noting that the "'loss of job, loss of state contracts, loss of future contracting privileges with the state, loss of political office, loss of the right to run for political office in the future, and revocation of probation all are "penalties" that cannot be imposed on the exercise of the privilege'"), quoting *United States v. Frierson*, 945 F.2d 650, 658 (3d Cir.1991). *See also Spevack v. Klein*, 385 U.S. 511, 516, 87 S.Ct. 625 (1967) (applying the "classic-penalty-situation" rule to lawyers and noting that "[t]he threat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion to make a lawyer relinquish the privilege"); *Moody v. Michigan Gaming Control Bd.*, 790 F.3d 669, 674 (6th Cir.2015) (applying the rule to state-license holders).

{¶25} In classic-penalty-situation cases,

> the government is playing two roles. One role is always law enforcer—police and prosecutor. Often, as in *Garrity*, the second role is employer, but it need not be. The key is that in these second roles, the state has special relationships with certain people—employees, probationers, and so on—through which it can apply additional pressure to cooperate.

Goodpaster at 1024-1025.

> Corresponding to these dual roles, the Fifth Amendment principle implemented by *Garrity* can be implicated in two distinct contexts. In the more common scenario, the individual does not succumb to the state's pressure, but stands upon his privilege and maintains his silence; in this context, he appears as a civil plaintiff, seeking to prevent the government—employer from "mak[ing] good on its prior threat" by penalizing him.

Id., quoting *Murphy* at 434. "But sometimes, as in *Garrity* and *Murphy*, the individual succumbs to the pressure and discloses incriminating information; in this context, he appears as a criminal defendant, seeking to prevent the government—prosecutor from using his statements against him." *Id.*, citing *Murphy* at 434.

{¶26} "*Garrity* does not, however, discount the important public interest in obtaining information to ensure effective governmental functioning." *Graham* at ¶ 21, citing *Turley*, 414 U.S. at 81, citing *Murphy v. Waterfront Comm. of New York Harbor*, 378 U.S. 52, 93, 84 S.Ct. 1594 (1964) (White, J., concurring). "Indeed, the United States Supreme Court has recognized that *Garrity* rests on reconciling the recognized policies behind the privilege against self-incrimination and the government's need to obtain information." *Id.*, citing *Turley* at 81. *See also Goodpaster* at 1025, citing *Gardner v. Broderick*, 392 U.S. 273, 276, 88 S.Ct. 1913

(1968) and *Murphy* at 435. "A state may compel a public employee's cooperation in a job-related investigation, so long as the employee is not asked to surrender the privilege against self-incrimination." *Graham* at ¶ 21, citing *Turley* at 84. "For example, the state may compel incriminating answers from its employee if neither those answers nor the fruits thereof are available for use against the employee in criminal proceedings." *Id.*, citing *Turley* at 84 and *Jones v. Franklin Cty. Sheriff*, 52 Ohio St.3d 40, 44 (1990) (stating that a grant of immunity preserves the self-incrimination privilege because no statement made in that context is incriminatory). "But when the state compels testimony by threatening potent sanctions unless the witness surrenders the constitutional privilege, the state obtains the testimony in violation of the Fifth Amendment, and it may not use that testimony against the witness in a subsequent criminal prosecution." *Id.*, citing *Cunningham*, 431 U.S. at 805 and *State v. Jackson*, 125 Ohio St.3d 218, 2010-Ohio-621, ¶ 14 (plurality opinion) (noting that the State may not directly or derivatively use statements that are compelled under threat of termination). "This balance 'provid[es] for effectuation of the important public interest in securing from public employees an accounting of their public trust.'" *Id.*, quoting *Cunningham* at 806.

{¶27} "Compulsion within the meaning of *Garrity* is obvious in cases in which, as in *Garrity*, the state has *expressly* confronted the public employee with the inescapable choice of either making an incriminatory statement or being fired."

(Emphasis added.) *Id.* at ¶ 23. In the absence of an express threat, "'"for statements to be considered compelled by threat of discharge, (1) a person must subjectively believe that he will be fired for asserting the privilege, and (2) that belief must be objectively reasonable under the circumstances."'" *Id.*, quoting *State v. Brockdorf*, 291 Wis.2d 635, 2006 WI 76, ¶ 25, quoting *People v. Sapp*, 934 P.2d 1367, 1372 (Colo.1997). "Determining whether an employee's subjective belief was objectively reasonable requires a court to examine the totality of the circumstances." *Id.*, citing *Brockdorf* at ¶ 36. "The circumstances must show some demonstrable coercive action by the state beyond '[t]he general directive to cooperate.'" *Id.*, quoting *United States v. Vangates*, 287 F.3d 1315, 1324 (11th Cir.2002).

{¶28} In this case, after concluding that there was no express threat of penalty by Investigator Yoakam, the trial court examined whether Gideon *subjectively* believed that he would be penalized and, if so, whether that belief was *objectively reasonable*. The trial court found that Gideon "testified that he believed he would be penalized" if he did not answer Investigator Yoakam's questions. And, in our review, the trial court's finding is supported by competent, credible evidence because Gideon testified as follows:

> "My understanding is that I have a legal obligation to comply with questions asked by the Medical Board and my understanding was that I have an obligation to comply with Mr. Yoakam's visit subject to penalties if I didn't, potentially even loss of licensure."

(Oct. 13, 2017 Tr. at 72).

{¶29} Nevertheless, the trial court ultimately concluded that Gideon's belief was *not* objectively reasonable based on the totality of the circumstances. Specifically, the trial court found that Gideon,

> a well-educated individual, initiated contact with the investigator, spoke with him at his medical office after already communicating with law enforcement, was given the opportunity to reschedule, took the lead in the discussion throughout, treated/examined patients, and never sought to invoke his Fifth Amendment rights.

(Case No. 17CRB01385, Doc. No. 17); (Case No. 17CRB01386, Doc. No. 17); (Case No. 17CRB01387, Doc. No. 14). Even though the trial court's findings are primarily supported by competent, credible evidence, the trial court's totality-of-the-circumstances analysis necessarily applies to whether Gideon's statements were voluntary within the meaning of the Due Process Clause, or whether his statements should be suppressed under *Miranda*.[5] *See, e.g.*, *Schneckloth*, 412 U.S. at 226 (noting that a court may consider a defendant's age, education, intelligence, and knowledge of his rights; the duration and nature of the detention and questioning; and whether physical punishment was used or threatened to determine whether the defendant's statements were voluntary); *Billenstein*, 2014-Ohio-255, at ¶ 44 (noting that the factors to consider when determining whether a custodial interrogation took

[5] The trial court's finding that Gideon "was given the opportunity to reschedule" is not supported by competent, credible evidence. (Case No. 17CRB01385, Doc. No. 17); (Case No. 17CRB01386, Doc. No. 17); (Case No. 17CRB01387, Doc. No. 14). Rather, the record reflects that Investigator Yoakam asked Gideon "if he would have a few minutes to chat with" him, which is different than offering Gideon the opportunity to reschedule. (*See* Oct. 13, 2017 Tr. at 5). (*See also* State's Ex. A). Indeed, Gideon testified that Yoakam did not explicitly offer him the opportunity to reschedule. (Oct. 13, 2017 Tr. at 73).

place includes "(1) the location of the questioning; (2) duration of the questioning; (3) statements made during the interview; (4) the presence or absence of physical restraints; and (5) whether the interviewee was released at the end of the interview").

{¶30} In considering the totality of the circumstances as to whether a person was compelled to make statements against his or her own interest within the meaning of *Garrity*—that is, whether the subject's subjective belief that he or she would be penalized for remaining silent was objectively reasonable—a trial court must consider the circumstances surrounding the subject's "'duty to cooperate' and the threat of 'administrative discipline.'" *Goodpaster*, 65 F.Supp. at 1032. *See also Graham*, 136 Ohio St.3d 125, 2013-Ohio-2114, at ¶ 27. As to those circumstances, the trial court specifically found that

> the Board of Medical Examiners may consider a refusal to cooperate with their investigations when reviewing Complaints, this does not necessarily lead to a termination of his medical license. It just may be one of the many considerations taken into account by the Board.

(Case No. 17CRB01385, Doc. No. 17); (Case No. 17CRB01386, Doc. No. 17); (Case No. 17CRB01387, Doc. No. 14). *See* R.C. 4731.22 (Apr. 4, 2017) (current version at R.C. 4731.22 (Mar. 20, 2019)).

{¶31} In our view, the trial court did not capture the concept of the statute and, more importantly, failed to consider the *totality* of the circumstances surrounding Gideon's interview with Investigator Yoakam to determine whether suppression is warranted under *Garrity*. Indeed, we cannot turn a blind eye to the

totality of the evidence presented at the suppression hearing supporting that Gideon's belief (that he would be penalized if he remained silent) was objectively reasonable. The requirements of R.C. 4731.22 are but one piece of the puzzle.

R.C. Chapter 4731 and Garrity

{¶32} "R.C. Chapter 4731 provides for the establishment of the State Medical Board and contains provisions concerning the licensing and disciplining of physicians." *State ex rel. Corn v. Russo*, 90 Ohio St.3d 551, 557 (2001). In general, the board "has authority to investigate possible violations of the statutes and rules governing the practice of medicine, to hold hearings, and to share its information with other licensing boards and with law enforcement agencies." 1999 Ohio Atty.Gen.Ops. No. 1999-044, citing R.C. 4731.22(F). *See also* R.C. 4731.22(F)(1) (April 6, 2017) ("The board shall investigate evidence that appears to show that person has violated any provision of this chapter or any rule adopted under it.") (current version at R.C. 4731.22(F)(1) ((Mar. 20, 2019)).. "All investigations that are conducted by the Board are conducted in accordance with R.C. 4731.22 and the rules adopted by the Board under R.C. 4731.05." *State ex rel. Corn v. Russo*, 8th Dist. Cuyahoga No. 76730, 1999 WL 1085519, *8 (Nov. 24, 1999), *rev'd on other grounds*, 90 Ohio St.3d at 557-558.[6] In accordance with those investigations, the

[6] This court could not find any administrative rules adopted by the State Medical Board pertaining to the conduct of its investigators during the course of an investigation under R.C. 4731.22. *See* Ohio Adm.Code 4731-1-01, et seq. *But see* R.C. 4731.05(C) (stating that "[t]he state medical board shall *develop requirements for* and provide appropriate initial and continuing training for *investigators employed by the board to carry*

board "is authorized to limit, revoke, or suspend a certificate or otherwise discipline the holder of a certificate who commits any of a number of violations." 1999 Ohio Atty.Gen.Ops. No. 1999-044, citing R.C. 4731.22(A), (B).

{¶33} In particular, regarding the board's disciplinary procedure, R.C. 4731.22(B) provides, in its relevant part, as follows:

> The board, by an affirmative vote of not fewer than six members, shall, to the extent permitted by law, limit, revoke, or suspend an individual's certificate to practice * * * or reprimand or place on probation the holder of a certificate for one or more of the following reasons:
>
> * * *
>
> (11) A plea of guilty to, a judicial finding of guilt of, or a judicial finding of eligibility for intervention in lieu of conviction for, a misdemeanor committed in the course of practice;
>
> (12) Commission of an act in the course of practice that constitutes a misdemeanor in this state, regardless of the jurisdiction in which the act was committed;
>
> (13) A plea of guilty to, a judicial finding of guilt of, or a judicial finding of eligibility for intervention in lieu of conviction for, a misdemeanor involving moral turpitude;
>
> (14) Commission of an act involving moral turpitude that constitutes a misdemeanor in this state, regardless of the jurisdiction in which the act was committed;
>
> * * *

out its duties under Chapter 4731. of the Revised Code. The training and continuing education may include enrollment in courses operated or approved by the Ohio peace officer training commission that the board considers appropriate under conditions set forth in section 109.79 of the Revised Code.").

> (34) Failure to cooperate in an investigation conducted by the board under division (F) of this section, including failure to comply with a subpoena or order issued by the board or failure to answer truthfully a question presented by the board in an investigative interview, an investigative office conference, at a deposition, or in written interrogatories, except that failure to cooperate with an investigation shall not constitute grounds for discipline under this section if a court of competent jurisdiction has issued an order that either quashes a subpoena or permits the individual to withhold the testimony or evidence in issue.

R.C. 4731.22(B)(11)-(14), (34) (Apr. 4. 2017) (current version at R.C. 4731.22(B)(11)-(14), (34) (Mar. 20, 2019)).

{¶34} On appeal, the State argues that the trial court correctly concluded that Gideon's belief that he would suffer a penalty if he remained silent was not objectively reasonable—that is, the State argues that the trial court correctly concluded that Gideon's belief was not objectively reasonable because R.C. 4731.22(B) does not result in an automatic penalty. In support of its argument, the State contends that the word "shall" as used in R.C. 4731.22(B) "does not mandate a medical license revocation, because the statute (1) requires an affirmative vote of six board members; (2) provides limiting language on the board's powers ('to the extent permitted by law'); and, (3) provides a variety of disciplinary options short of revocation." (Emphasis sic.) (Appellee's Brief at 5-6).

{¶35} The State's argument is problematic for a several reasons. The State's argument that Gideon's belief could not be objectively reasonable because R.C. 4731.22(B) authorizes the board to institute a "variety of disciplinary options short

of license revocation" is misguided. Rather, the disciplinary options authorized by the statute—namely, the authority to limit, revoke, suspend, reprimand, or place on probation the holder of a medical license—are penalties for conduct, such as the failure to cooperate in an investigation, that resemble the "classic penalty situation" prohibited by *Garrity* and its progeny. *See Schimmel*, 2017-Ohio-7747, at ¶ 38 (recognizing that the Supreme Court of Ohio has *not* adopted a "narrow view" of what constitutes a penalty within the meaning of *Garrity*), citing *Graham*, 136 Ohio St.3d 125, 2013-Ohio-2114, at ¶ 27 (considering "disciplinary action up to and including termination" as a penalty within the meaning of *Garrity*). *See also Murphy*, 465 U.S. at 434 ("In each of the so-called 'penalty' cases, the state not only compelled an individual to appear and testify, but also sought to induce him to forgo the Fifth Amendment privilege by threatening to impose economic or other sanctions 'capable of forcing the self-incrimination which the Amendment forbids.'"), quoting *Cunningham*, 431 U.S. at 806 (noting that the Fifth Amendment protects against state-imposed "potent sanctions" or "substantial penalties").

{¶36} Next, suppression under *Garrity* does not fail in the absence of a statute clearly mandating an automatic penalty. *See Goodpaster*, 65 F.Supp. at 1029 (stating that "a clear-statement rule is foreclosed [because] threatening a penalty 'by implication' is sufficient to create a penalty situation"), quoting *United States v. Saechao*, 418 F.3d 1073, 1076-1080 (9th Cir.2005). *See also Graham* at ¶ 25

(considering a notice, which provided that the "failure to answer truthfully '*may* lead to disciplinary action up to and including termination'"); *United States v. Camacho*, 739 F.Supp. 1504, 1517, 1520 (S.D.Fla.1990) (considering a statute, which provided "that a city employee who is guilty of insubordination *may* be subject to dismissal, suspension, or demotion" when considered in combination with the state's conduct). "[E]vidence of an express threat of termination or a statute, rule, or policy *demanding* termination will almost always be sufficient to show coercion"; however, it is not the *only* evidence that can be considered. (Emphasis added.) *See Graham* at ¶ 24; *Walker v. State Med. Bd. of Ohio*, 10th Dist. Franklin No. 01AP-791, 2002 WL 243318, *5 (Feb. 21, 2002) ("The potential loss of her medical license does not, in and of itself, raise a claim of compulsion by the state."); *State v. Connor*, 124 Idaho 547, 548, 861 P.2d 1212 (1993) (stating that evidence of a "policy, rule, or regulation concerning the effect on the employment of a state police officer who refuses to cooperate in an investigation" is evidence of "an objectively reasonable belief that [the] use of the Fifth Amendment in response to questions would result in" the loss of a job).

{¶37} Further, the State's contention that "the mere possibility of license revocation is insufficient to show that the person had an objectively reasonable expectation of discharge" misconstrues the Supreme Court of Ohio's recitation in *Graham*. (Appellee's Brief at 6, citing *Graham* at ¶ 23, citing *Sapp*, 934 P.2d at

1372). In *Graham*, the court offered that "'*ordinary* job pressures, such as the possibility of discipline or discharge for insubordination, are not sufficient to support an objectively reasonable expectation of discharge.'" (Emphasis added.) *Graham* at ¶ 23, quoting *Sapp* at 1372. The case to which the court cited in *Graham*—*Sapp*—follows its "ordinary-job-pressures" statement with the rule that for a "subjective belief that [a person] might be fired to be considered objectively reasonable for purposes of *Garrity* immunity, it must be supported by some demonstrable action of the state."[7] *Sapp* at 1372. Thus, a subjective belief will be considered objectively reasonable if the state played a role in creating an impression that the refusal to give a statement will be met with the type of penalty prohibited under *Garrity*. *Camacho* at 1515, citing *United States v. Solomon*, 509 F.2d 863, 871-872 (2d Cir.1975) and *United States v. Montanye*, 500 F.2d 411, 415 (2d Cir.1974).

{¶38} The evidence in the record reflects that the circumstances surrounding the administrative investigation at issue in this case show some demonstrable, coercive action by the state beyond the general directive to cooperate. Indeed, the combination of Gideon's duty to cooperate under R.C. 4731.22(B)(34) and Investigator Yoakam's process in this case exceeded an *ordinary* job pressure to

[7] The Supreme Court of Ohio was not presented in *Graham* with a situation involving a subjective belief that a person might suffer a penalty because the sanction in that case was expressly conveyed. *See State v. Graham*, 136 Ohio St.3d 125, 2013-Ohio-2114, ¶ 25.

cooperate. As we have noted, R.C. 4731.22(B)(34) requires licensees to cooperate with investigations of the board.[8] *Compare Goodpaster* at 1029 (noting that "Goodpaster was subject to a regulation * * * requiring that he 'cooperate with all audits, reviews, and investigations conducted by the Office of Inspector General'"), quoting 39 C.F.R. 230.3(a). R.C. 4731.22(B) puts licensees on notice that their failure to cooperate, amongst other reasons, will penalize their license (by a vote of no fewer than six members of the board). *Compare id.* ("The same regulation provides that 'failing to cooperate [* * *] may be grounds for disciplinary or other legal action.'"), quoting 39 C.F.R. 230.3(a).

{¶39} Further, in addition to R.C. 4731.22(B)(34)'s directive to cooperate with the board's investigation, the record reflects "some demonstrable action of the state" supporting Gideon's subjective belief. *See Sapp* at 1372; *Camacho* at 1518. In this case, the demonstrable action of the State lies with Investigator Yoakam's conduct and his intent underlying that conduct. *Compare Camacho*, 739 F.Supp. at

[8] It appears that the State contends that R.C. 4731.22(B)(34)'s duty to cooperate requires *only* that a subject answer truthfully questions posed by an investigator of the board during an interview. *Compare United States v. Goodpaster*, 65 F.Supp.3d 1016, 1029 (D.Or.2014) (noting that "[a]n order to 'cooperate' demands more of the reasonable employee than an order merely to be 'truthful'"), citing *Minnesota v. Murphy*, 465 U.S. 420, 434, 104 S.Ct. 1136 (1984) (observing that "Murphy's probation condition [to be truthful] proscribed only false statements"). That is, the State argues that "[t]elling falsehoods * * * is different than remaining silent, and the Fifth Amendment is not implicated." (Appellee's Brief at 6). However, the text of that subsection of the statute states that a subject must *cooperate* in investigations of the board. R.C. 4731.22(B)(34) proceeds to provide a non-exhaustive list of ways in which a subject must cooperate with an investigation of the board—only one of which is to provide truthful answers to questions presented by the board in an investigative interview. *See In re Hartman*, 2 Ohio St.3d 154, 155-156 (1983) (noting that the word "'including' implies that that which follows is a partial, not an exhaustive listing of all that is subsumed within the stated category. 'Including' is a word of expansion rather than one of limitation or restriction.").

1518-1519 (construing the evidence in the record reflecting the "actions of the investigators" to determine whether there was "demonstrable state conduct" and, thus, whether the defendants' beliefs that they would penalized for asserting their Fifth Amendment rights were objectively reasonable).

{¶40} At the suppression hearing, Investigator Yoakam testified to the extent that he collaborated with law enforcement as part of his investigation—that is, he specifically stated that the investigation of Gideon "turned into a joint investigation." (Aug. 22, 2017 Tr. at 4); (Oct. 13, 2017 Tr. at 7, 20-21). Indeed, Sergeant Hochstetler concurred that he and Investigator Yoakam agreed "to cooperate with each other" during the course of their investigations. (Oct. 13, 2017 Tr. at 51-52). By cooperating, Sergeant Hochstetler clarified that meant that he and Investigator Yoakam would share information. Investigator Yoakam elaborated that the Revised Code permits him to share information obtained as part of his investigations with law enforcement and that he will share such information if there is "a shared interest." (*Id.* at 19-20). Investigator Yoakam further testified that he shared the information he collected (regarding Gideon) with the Bluffton Police Department.

{¶41} Undeniably, R.C. 4731.22(F) provides, in relevant part, the following:

> (3) In investigating a possible violation of this chapter or any rule adopted under this chapter, * * * the board may question witnesses, conduct interviews, administer oaths, order the taking of depositions, inspect and copy any books, accounts, papers, records, or documents,

> issue subpoenas, and compel the attendance of witnesses and production of books, accounts, papers, records, documents, and testimony, except that a subpoena for patient record information shall not be issued without consultation with the attorney general's office and approval of the secretary and supervising member of the board.
>
> * * *
>
> (4) All * * * investigations * * * of the board shall be considered civil actions for the purposes of section 2305.252 of the Revised Code.
>
> (5) * * *
>
> The board may share any information it receives pursuant to an investigation * * * with law enforcement agencies, other licensing boards, and other governmental agencies that are prosecuting, adjudicating, or investigating alleged violations of statutes or administrative rules.

R.C. 4731.22(F)(3)-(5) (Apr. 6, 2017) (current version at R.C. 4731.22(F)(3)-(5) (Mar. 20, 2019)).[9]

{¶42} Thus, while there is nothing inherently wrong with Investigator Yoakam and law enforcement's agreement to share information, the evidence in the record reveals that Investigator Yoakam exceeded statutorily permissible collaboration by taking demonstrable steps to coerce Gideon to provide him an

[9] R.C. 2305.252 applies to peer-review privilege. *See, e.g., Cousino v. Mercy St. Vincent Med. Ctr.*, 6th Dist. Lucas No. L-17-1218, 2018-Ohio-1550, ¶ 15 ("The purpose of this statute is to protect the integrity and confidentiality of the peer review process so that health care entities have the freedom to meaningfully review and critique—and thereby improve—the overall quality of the healthcare services they provide."). The statute also applies the peer-review privilege to *only* the Bureau of Workers' Compensation ("BWC"); however, the statute excepts the BWC to "share proceedings and records within the scope of the peer review committee * * * with law enforcement agencies, licensing boards, and other governmental agencies that are prosecuting, adjudicating, or investigating alleged violations of applicable statutes or administrative rules". R.C. 2305.252(B).

incriminating, oral and written statement in reliance on Gideon's duty to cooperate. In other words, Investigator Yoakam was posing as a "straw man" to effectuate law enforcement's criminal investigation. *See State v. Gradisher*, 9th Dist. Summit No. 24716, 2009-Ohio-6433, ¶ 23 (Belfance, J., dissenting) (approving the "concern that government agents should not pose as 'straw men' in order to effectuate police investigations"). Specifically, Investigator Yoakam contacted Sergeant Hochstetler prior to interviewing Gideon, and "discussed that [he] was going to hold off on the administrative investigation until [law enforcement determined] that [Investigator Yoakam] could interview [Gideon]." (Oct. 13, 2017 Tr. at 7-8). Investigator Yoakam's intention for sharing his investigative plan with law enforcement was to "determine how [law enforcement] was going to proceed with the criminal case" because proving an administrative-sanction case is easier "from a criminal conviction" as opposed to "through witness testimony." (*Id.* at 15-16). That is, he elaborated that his method is "what they call a bootstrap on a criminal case that's where a physician * * * is criminally charged, and the Board takes action on that criminal disposition, and the other [is] based on information gathered in the course of an investigation. Action that's taken based on that." (*Id.* at 15).

{¶43} Prior to Investigator Yoakam's interview of Gideon, Sergeant Hochstetler told Investigator Yoakam that Gideon "denied any improprieties during [law enforcement's] interview" of Gideon. (Oct. 13, 2017 Tr. at 21, 55). And, after

discussing Gideon's denials to law enforcement with Sergeant Hochstetler, Investigator Yoakam informed Sergeant Hochstetler that it would not be "appropriate" for law enforcement to jointly interview Gideon with Investigator Yoakam. (*Id.* at 28, 55-56). Specifically, Investigator Yoakam testified that

> doctor's [sic] are obligated to cooperate in our investigation. So [he] did not want that to * * * impede in * * * any of the criminal proceedings…And [he] didn't want * * * there to be an issue that the doctor provided a statement with law enforcement present because the provider is *obligated to cooperate in our investigations*.

(Emphasis added.) (*Id.* at 29). (*See also* Oct. 13, 2017 Tr. at 55); (Defendant's Ex. 4). In other words, Investigator Yoakam's method was to avoid a scenario in which his interview (of Gideon) could not be used as part of the criminal case because (as indicated by Investigator Yoakam) the lack of a criminal conviction would make his administrative-sanction case more cumbersome. *Compare Gradisher* at ¶ 23 (Belfance, J., dissenting) (expressing concern that "government overreaching could easily occur by pushing off criminal investigations to state agents so as to bypass protection against the abridgement of an individual's Fifth Amendment rights"); *Camacho*, 739 F.Supp. at 1519 (noting that the investigator's action in purposely omitting "his preamble regarding voluntariness and compulsion * * * in order to avoid flagging the issue of voluntariness" "speaks louder" than any belief that the statements were voluntary and concluding that "the investigators' central aim was to take a statement first and litigate its admissibility later").

{¶44} Moreover, based on our review of the record, Investigator Yoakam's intent for the investigation reflects the demonstrable state action necessary to support Gideon's subjective belief that his medical license would be penalized if he failed to cooperate with Investigator Yoakam's investigation. Specifically, Investigator Yoakam's interview of Gideon reflects his intent to assist law enforcement in obtaining a criminal conviction of Gideon for purposes of influencing the outcome the administrative-sanction case against Gideon.

{¶45} Even though he is not a law enforcement officer, Investigator Yoakam testified that he had law enforcement training and is familiar with the elements of offenses under the Revised Code, including sexual imposition. Keeping his training in mind, Investigator Yoakam arrived unannounced to Gideon's medical office to conduct his interview to catch him "off guard" "to get the truth out of [him]." (Oct. 13, 2017 Tr. at 5, 32-33). Despite Gideon having patient appointments at the time of the visit, Investigator Yoakam did not advise Gideon that he did not have to speak with him that day or otherwise offer to reschedule—he merely asked Gideon "if he would have a few minutes to chat with" him. (*Id.* at 5). (*See also* State's Ex. A). In other words, Investigator Yoakam did nothing to dissuade Gideon's belief that he was statutorily obligated to cooperate with his investigation, which included consenting to Investigator Yoakam's request to "chat." *Compare Camacho* at 1511 ("At no time during the interview or after did either Sergeant Green or Assistant

State Attorney DiGregory make any effort to dissuade Sinclair of his view that he was compelled to give a statement or answer his question.").

{¶46} Likewise, and unbeknownst to Gideon, Investigator Yoakam recorded the interview even though it is not the board's "protocol" to surreptitiously record interviews of subjects. (*See* Aug. 22, 2017 Tr. at 5-6); (State's Ex. A). (*See also* Oct. 13, 2017 Tr. at 7, 13). Rather, as a "general practice" of his office, Investigator Yoakam secretly records interviews of subjects involving sexual-impropriety allegations. (Aug. 22, 2017 Tr. at 5-6). (*See also* Oct. 13, 2017 Tr. at 7, 33-34). Further, Investigator Yoakam testified that he does not inform providers that they are being recorded because "[s]ometimes if * * * a provider knows that they're being recorded then they're more guarded in what they say." (Oct. 13, 2017 Tr. at 34). Moreover, Investigator Yoakam chose not to inform Gideon that he intended to share with law enforcement Gideon's statements despite it being his intention to do so.

{¶47} During the two-hour "chat," Investigator Yoakam pressured Gideon "that [he] wanted to get [the] interview done there * * * on all the subjects [he] wanted to address, because [he] did not want to return" and that he "did not want to *drag him through the mud* by interviewing multiple people." (Emphasis added.) (*Id.* at 39). *Compare Camacho*, 739 F.Supp. at 1518 (considering the evidence that the defendants were not asked to provide statements, but rather, directed to provide

statements and the evidence that the investigators would not "even answer [the] question as to whether the inquiry was administrative or criminal in nature").

{¶48} In addition, during the interview, Investigator Yoakam advised Gideon at multiple points to "to go back to [law enforcement] and change his statement" to avoid facing possible falsification charges. (Oct. 13, 2017 Tr. at 22). Investigator Yoakam's insistence that Gideon return to law enforcement to change his statement is also evidence supporting Gideon's belief that a refusal to give a statement will be met with a licensure penalty. That is, Investigator Yoakam's insistence that Gideon provide law enforcement with a statement reflects an intent to coerce Gideon to cooperate with the investigation. Indeed, (as raised during cross-examination) if Investigator Yoakam was "just concerned about [the] medical investigation there would be no need to tell [Gideon] to go back to the police department and change his statement * * *." (*Id.* at 22).

{¶49} The record also reflects that Gideon and Investigator Yoakam possessed an implicit, trust-like relationship and that Investigator Yoakam exploited that relationship to satisfy his ulterior motive of coercing Gideon into making statements against his interest for law enforcement to ultimately obtain a criminal conviction against him. That is, Gideon and Investigator Yoakam had a 15-year relationship during which Investigator Yoakam investigated a prior complaint against Gideon (which was determined to be unsubstantiated). Based on their prior

relationship, Gideon initially contacted Investigator Yoakam by text message to inform him of the complaints at issue in this case. Likewise, Investigator Yoakam can be heard during the beginning of the interview recalling their past relationship by reminding Gideon that he has never "judged" him in their past dealings—a characterization to which Gideon agrees. The record further reflects that Investigator Yoakam was aware of Gideon's religious beliefs and, as such, used the words "confession" and "reconciliation" during his interview of Gideon because Investigator Yoakam "figured he could relate to that." (Oct. 13, 2017 Tr. at 41).

{¶50} At the conclusion of the interview, instead of reporting back to the board, Investigator Yoakam immediately went to the Bluffton Police Department to report Gideon's confessions to law enforcement. (*See* Defendant's Ex. 2). Despite his employment responsibilities with the State Medical Board, Investigator Yoakam chose to *immediately share* Gideon's confessions with law enforcement "because the doctor had [] an interview with [law enforcement] where he denied any impropriety so [he] wanted to tell [law enforcement] what happened during [his] interview." (Oct. 13, 2017 Tr. at 26-27). Moreover, Investigator Yoakam agreed that he "wanted to assist [law enforcement] in that criminal investigation by providing [law enforcement] with statements made by Dr. Gideon during an interview that same day * * *[.]" (*Id.* at 27).

{¶51} Accordingly, we conclude that, based on the facts and circumstances presented by this case, Investigator Yoakam's actions created an impression that Gideon's refusal to cooperate with his investigation would result in the type of penalty prohibited under *Garrity*. *See Camacho* at 1520 (concluding "that the actions of the State were directly implicated in creating [the] belief" that the defendants' subjective belief "that failure to answer would result in termination"). Therefore, Gideon's belief that his medical license would be penalized if he did not cooperate with Investigator Yoakam's investigation was objectively reasonable. *See id.* Thus, Gideon's statements were not voluntary within the meaning of *Garrity*. *Accord Graham*, 136 Ohio St.3d 125, 2013-Ohio-2114, at ¶ 30 ("Statements extracted under these circumstances cannot be considered voluntary within the meaning of *Garrity*."); *Goodpaster*, 65 F.Supp. at 1033 (Under the facts presented, the Government created a 'classic penalty situation' by threatening to punish Goodpaster for remaining silent. Accordingly, under the Supreme Court's decision in *Garrity v. New Jersey* and its progeny, Goodpaster's statements must be suppressed.").

{¶52} For these reasons, we conclude that the trial court erred by denying Gideon's motion to suppress oral and written statements that he made to Investigator Yoakam as evidence. His first assignment of error is sustained.

Assignment of Error No. II

The Trial Court's Order Consolidating the Separately-Docketed Sexual Imposition Charges for the Trial Exposed Defendant-Appellant to a Substantial Likelihood that the Jury Would "Bootstrap" the Allegations of Different Patients in Contravention of Evid.R. 404(B) and R.C. 2907.06(B), and Thereby Violated His Sixth and Fourteenth Amendment Right to a Fundamentally Fair Jury Trial. (Apx. A-19; 04/20/18 Tr. 82-84; 04/21/18 Tr. 20-21)

Assignment of Error No. III

The Trial Court's Instructions and the Prosecutor's Closing Argument Encouraged the Jurors to Consider the Testimony of One Alleged Victim as Corroboration of the Testimony of Another Alleged Victim in Contravention of Evid.R. 404(B) and R.C. 2907.06(B), and Thereby Violated Defendant-Appellant's Right to a Fundamentally Fair Jury Trial Under the Sixth and Fourteenth Amendments to the United States Constitution. (04/18/18 Tr. 115-17; 04/21/18 44, 104-05, 114-15)

Assignment of Error No. IV

Defendant-Appellant's Conviction for Sexual Imposition as to Former Patient [M.M.] is Not Supported by Sufficient Evidence to Satisfy the Requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Alternatively, the Jury's Guilty Verdict is Against the Manifest Weight of the Evidence. (04/20/18 Tr. 79; 04/21/18 Tr. 20-21).

{¶53} In his second, third, and fourth assignments of error, Gideon argues that: (1) he was unfairly prejudiced by the trial court's order consolidating the cases for purposes of trial; (2) the trial court and the State improperly encouraged the jury to consider the testimony of one victim as corroborating evidence of the veracity of

another victim's testimony; and (3) his conviction in case number 17CRB01385 is based on insufficient evidence and is against the manifest weight of the evidence.

{¶54} In light of our decision to sustain Gideon's first assignment of error, his second, third, and fourth assignments of error are rendered moot, and we decline to address them. App.R. 12(A)(1)(c); *State v. Unger*, 5th Dist. Stark No. 2016 CA 00148, 2017-Ohio-5553, ¶ 22; *State v. Caldwell*, 4th Dist. Jackson No. 97-CA-802, 1998 WL 8847, *2 (Jan. 8, 1998). *See also State v. Ecker*, 9th Dist. Summit No. 28431, 2018-Ohio-940, ¶ 10-12 (suggesting that joinder decisions are ripe for review after the trial court has had the opportunity to evaluate a defendant's Crim.R. 14 motion for severance at trial).

{¶55} Having found error prejudicial to the appellant herein in the particulars assigned and argued in his first assignment of error, we reverse the judgments of the trial court and remand for further proceedings.

Judgments Reversed and Causes Remanded

WILLAMOWSKI and SHAW, J.J., concur.

/jlr

IN THE LIMA MUNICIPAL COURT, LIMA, ALLEN COUNTY, OHIO

STATE OF OHIO **PLAINTIFF**	:	**CASE NO: 17CRB01385** ✓ **17CRB01386** **17CRB01387**
-vs-	:	
JAMES A. GIDEON **DEFENDANT**	:	**JOURNAL ENTRY** **(Motion to Suppress)**

This matter came before the Court August 22, 2017 and October 13, 2017 for purposes of a Motion to Suppress statements made by the Defendant during an interview conducted by State Medical Board Investigator Chad Yoakam on May 16, 2017. The Defendant is currently charged for violations of R.C. 2907.06(A)(1), acts of sexual imposition involving medical patients. Both parties were afforded the opportunity to file written briefs regarding the issues before the Court and the Court has reviewed the same. In his Motion to Suppress the Defendant requested an oral hearing indicating that his "statements were involuntary and elicited in violation of his right to Due Process and the Privilege against Self-Incrimination guaranteed under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution." The Defendant additionally urges the Court, in his post hearing brief, to find that statements made were illegally procured in violation of his right to due process and protection against self-incrimination as set forth in *Garrity v. New Jersey*, 398 U.S. 493, 87 S.Ct. 616, 17L.Ed.2d 562 (1967).

FACTS

In May of 2017 the State Medical Board commenced an investigation of Dr. James A. Gideon after a complaint was filed with the Board and three complaints were filed with local authorities involving patient care and inappropriate touching. James Gideon informed the Board, through texts with Chad Yoakum, of the local investigations. Investigator Chad E. Yoakum was assigned by the Board to investigate the complaints. Initially he contacted the Bluffton Police Department in order to review their reports and victim statements, interview patients, and thereafter interviewed James Gideon at his office on May 16, 2017, whom he was familiar with from previous investigations. Sergeant Hostetler offered to attend the interview but was told by Investigator Yoakum that it would not be appropriate.

Investigator Yoakum arrived at Dr. Gideon's office in the afternoon unannounced and presented his card to a staff person in the office and asked if he could speak with Dr. Gideon. Investigator was informed that the Doctor had patients waiting. The two initially had contact in a back hallway and asked if they could talk. Dr. Gideon agreed to a conversation, even sounding eager to speak with Yoakum, and they conversed at length in the Doctor's Office. According to the Investigator the Doctor was free to leave and left the area of the interview approximately three times. The Doctor was informed if he did not have time that day an appointment could be scheduled and that he could leave to take care of patient needs. Investigator Yoakum took notes and recorded the interview, the recording was done without the knowledge of the Defendant. Recording interviews was not a matter of office protocol but was a tool used by some investigators. His intention was to share the information with law enforcement.

The office where they met had a desk and bookcases, the Investigator and the Doctor were on opposite sides of the desk and the door was to their side, accessible to both parties.

During the interview the Investigator believed that the Defendant was not being truthful due to inconsistent statements, burying his head in his hands, giving equivocal answers. The audio recording was admitted into evidence for the court to review. The interview lasted approximately 2 hours that afternoon. According to the Defendant and his office manager, Janice Dawson, he had a busy, chaotic schedule and attempted to meet patient needs throughout the interview. The Doctor took the lead initially in the interview and described his techniques with his patients prior to any substantive questions being posed by the investigator. Upon inquiry the Defendant explained that he has been practicing medicine since 2002 and his specialty is Rheumatology. It was clarified that the Defendant initiated contact via text regarding patient complaints.

They first discussed the nature and procedures of his treatments and whether the patients are disrobed. Yoakum then explained that there were three separate complainants who were alleging inappropriate behavior. The two discussed the specific treatments for the patients that lodged the complaints. Defendant was able to give a very detailed account of the treatments provided. When asked specific questions regarding areas that he may have touched and whether the patient was exposed, he did not recall the particular acts or circumstances. Yoakum continued to follow up with the details contained within the reports and explained that he was not there to judge the Defendant. While the discussion ensued the investigator did not raise his voice but did discuss the importance of confession and reconciliation. He indicated that he believed the Defendant succumbed to temptation. After this portion of the exchange, approximately 18 minutes into the interview the Defendant admitted to touching certain areas on the patients and succumbing to temptation. The Defendant continued to explain that he very rarely had patients exposed during exams. Defendant indicated if the victims said that he did that then the victim

may have been truthful and he did not remember but later stated that he believed that he did the actions referenced.

The investigator went on to discuss the use of gowns and a third party witness and possible intent for gratification on the part of the Defendant. At approximately 28 minutes into the interview they discussed a patient that may have passed out or was sleeping during treatment and the Defendant admitted to inappropriate behavior and the patient being exposed. Then at approximately 30 minutes into the interview the Investigator confronted the Doctor about using ethyl chloride during treatment and the discussion became more argumentative. Defendant adamantly denied sedating patients. The next topic of discussion was an after-hours emergency appointment with a patient who was suffering from a migraine. At approximately 36 minutes into the interview Yoakum explained the necessity of interviewing other patients if the Defendant did not tell him about his inappropriate behavior. After a pause the Defendant admitted that he felt bad about his inappropriate behavior with at least two patients. There were long breaks in the interview where it appears that the Investigator is waiting for a response from the Defendant regarding other times he may have been inappropriate with patients.

At approximately 44 minutes into the interview you can hear a knock at the door and someone from his office informing him that he had patients ready. After that the Defendant sounded more angry and agitated. The Investigator sounded calm and continued questioning, specifically regarding sports bras and patients trying on these bras in front of the Defendant. The Investigator then asked if there were more than 2 patients that he inappropriately touched. The Defendant suggested there were less than 5 but had no further recollection. There was a pause and Yoakum suggested he see his patients and see if anything jogged his memory. The Defendant apparently left the room and the interview stops. When he returns to the room and

dictates patient file notes in the presence of the Investigator. Twenty two minutes later the doctor reinitiates the conversation about patients being exposed. They discuss the nature of various relationships and the specifics of the Defendant's behavior and Yoakum asks about fondling.

At 1 hour and 15 minutes into the interview Defendant again is informed that patients are ready for examination. The two discussed a written statement being made and the Defendant tended to patients prior to completing the statement. The investigator encouraged the Defendant to see his patients first before completing the interview, which he did. When the Defendant returned, nearly 1 hour and 41 minutes into the interview, he apologized for the delay and further dictated detailed patient notes. Defendant then took the lead on the interview and said that he mostly made good decisions regarding his patients in a high percentage of the cases. He then discussed an incident that occurred within the last couple of weeks, possibly with an additional patient. Yoakum expressed the number of complaints in the prior 2 week period and his concern.

The two then discussed the Defendant's medical condition (fatigue, low iron, high blood sugar). Defendant stated that his medical condition left him with poor judgement which led to a guilty conscience. He was then provided with the written statement form. Yoakum further questioned the Defendant regarding the patient that fell asleep and the discussed the potential use of a topical analgesic. At this point the Defendant raised his voice and seemed more frustrated and guarded. Yoakum then informed him that if he gave an inconsistent statement to police then he may want to clarify his statement in order to avoid a possible falsification. Yoakum also attempted to clarify that the inappropriate touching was not for a medical purpose but for gratification and suggested that he may want to retire. Defendant indicated that he was hoping for mercy, and would do therapy so that he could continue helping people. He then appeared to

be negotiating leniency with the Investigator and continued to inquire as to what his recommendation would or what actions may be taken by the Board.

Defendant testified on his own behalf concerning the interview. He stated that he believed that he had to comply with the interviewing process based upon the rules regarding his medical license and disciplinary investigation. At hearing he objected to the manner the interview was conducted and indicated he would have been better prepared if he had advance notice, without the necessity to meet with his patients. Defendant testified that he was struggling that day and felt like he was subjected to a brow beating while he was exhausted and distracted. Defendant said he felt threatened because the investigator said he would come back and talk with other patients thereby undermining his credibility and patient confidence. He also said he believed the discussion regarding possible falsehoods to the police was also threatening. [1] Defendant also testified that he felt compelled to sign the statement and he was concerned that he did not know he was being recorded. He said that he would have sought legal advice if he know that the interview was recorded and to be shared with law enforcement.

CONCLUSIONS OF LAW

The Defendant thus claims his "statements were involuntary and elicited in violation of his right to Due Process and the Privilege against Self-incrimination guaranteed under the fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution." Specifically.

> "[t]he Fifth Amendment provides no person 'shall be compelled in any criminal case to be a witness against himself.' 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." *Turley*, 414 U.S. at 77, 94 S.Ct. 316, 38 :.Ed.2d 274 , citing *McCarthy v.*

[1] It should be noted that this conversation was at the end of the interview after the incriminating statements were made.

> *Arndstein*, 266 U.S. 34, 40, 45 S.Ct. 16, 69 L.Ed. 158 (1924). Thus , "a witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant. *** Absent such protection, if he is nevertheless compelled to answer, his answers are admissible against him in later criminal prosecution." (Citations omitted.). Id, at 78, 94 S.Ct. 316."

State v. Schimmel, 2017-Ohio-7747, ¶ 16. This privilege, however; is not generally self-executing and a person who answers is considered to have made a voluntary choice unless an exception applies. *Minnesota v. Murphy*, 465 U.S. 420, 425, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984); *see also, State v. Mara*, 253 N.J.Super 204, 211 (1992) (physician appearing before the Medical Board is not the subject of a custodial interrogation and therefore must assert the right against self-incrimination, otherwise it is waived.). In the case at bar the Defendant did not assert his privilege against self-incrimination with Investigator Yoakum. He spoke to the Medical Board Investigator following an interview with police and he contacted the investigator on his own accord to discuss the matter. Exceptions to this rule, however; may apply. These well-known exceptions include (1) custodial interrogation and (2) situations where the assertion is penalized to extent that a free choice to remain silent is foreclosed." *Schimmel* at ¶ 17.

***Miranda*/Custodial Interrogation**

Therefore, the first analysis in this matter must be whether the statements made by the Defendant during a custodial investigation in violation of the mandates proscribed in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966). As the Third District Court of Appeals explained in *State v. Luke*, 2007-Ohio-5906 that,

> [o]nly "custodial interrogations" trigger the requirement to provide Miranda warnings. *Moor*, 2007-Ohio3600, at ¶12. "[T]he determination as to whether a custodial interrogation has occurred requires an inquiry into 'how a reasonable man in the suspect's position would have understood his situation.'" *Ransom*, 2006-Ohio-6490 at ¶20, citing *State v. Mason*, 82 Ohio St. 3d 144, 154, 694 N.E.2d 932, quoting *Berkemer v. McCarty* (1984), 468 U.S. 420, 442, 104 S.Ct. 3138, 82 L.Ed.2d 317. "in judging whether an individual has been placed into custody the test is whether, under the totality

> of the circumstances, a 'reasonable person would have believed that he was not free to leave.'" Id., citing *State v. Gumm* (1995), 73 Ohio St.3d 413, 429, 653 N.E.2d 253, quoting *United States v. Mendenhall* (1980), 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed2d 497.

Id at ¶10. Therefore the Court must determine whether a reasonable person in the Defendant's situation would believe they were in custody or free to leave.

To assist in this analysis Appellate Courts have set forth various factors to be considered. They include, but are not limited to, the following;

> (1) What was the location where the questioning took place-i.e ., was the defendant comfortable and in a place a person would normally feel free to leave? For example, the defendant might be at home as opposed to being in the more restrictive environment of a police station;
> (2) Was the defendant a suspect at the time the interview began (bearing in mind that Miranda warnings are not required simply because the investigation has focused);
> (3) Was the defendant's freedom to leave restricted in any way;
> (4) Was the defendant handcuffed or told he was under arrest;
> (5) Were threats made during the interrogation;
> (6) Was the defendant physically intimidated during the interrogation;
> (7) Did the police verbally dominate the interrogation;
> (8) What was the defendant's purpose for being at the place where questioning took place? For example, the defendant might be at a hospital for treatment instead of being brought to the location for questioning;
> (9) Were neutral parties present at any point during the questioning;
> (10) Did police take any action to overpower, trick, or coerce the defendant into making a statement?

State v. Luke, 3d Dist. No. 1–06–103, 2007–Ohio–5906, ¶ 11, quoting *Greeno*, 2003–Ohio–3687, at ¶ 15, citing *State v. Estepp*, 2d Dist. No. 16279, 1997 WL 736501.

In the case at bar the interview was conducted in the Defendant's Office, freely accessible to his staff, he continued to leave the office, see patients and dictated detailed physician notes during the discussions. Defendant was not physically threatened, intimidated, or restricted in any manner. Further, the Investigator did not dominate the interrogation. Therefore, under a traditional *Miranda* analysis, concerning custodial interrogations, and considering a

majority of the factors outlined by the Third District Court of Appeals, the statements made by the Defendant are not in violation of the Defendant's Constitutional Fifth Amendment Rights..

Garrity v. New Jersey

Additionally the Defendant claims a violation *Garrity*. In *Garrity v. New Jersey*, 385 U.S. 493 (1967), policer officers subject to a state investigation were given the choice "between self-incrimination or job forfeiture." *Id at* 496. The Court found that this "practice, like interrogation practices ... reviewed in *Miranda v. State of Arizona,* 384 U.S. 436, 464-465, 86 S.Ct. 1602, 1623, 16 L.Ed.2d 694, 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 then went on to specifically hold that "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of the body politic." *Id at* 500. Here, we have a physician subject to a licensing investigation where the Board may consider, among other things, if he failed "to cooperate in an investigation by the board *** [or] failed to answer truthfully a question presented by the board in an investigative review." *O.R.C. 4731.22(B)(34).* The controlling statute does not require that the Defendant waive his rights against self-incrimination or be subject to specific licensure penalties as a result of his exercise of the right.

The Ohio Supreme Court has not applied *Garrity* to this specific type of situation which involves a medical board investigation where non-custodial statements are sought to be introduced against a non-employee defendant at a criminal trial. *See, State v. Schimmel,* 2017-Ohio-7747. Therefore as a matter of first impression this Court must determine whether the

Defendant's statement, under the circumstances, was coerced with a "threat of removal from office" that renders his statements non-voluntary and inadmissible.

An analysis of *Garrity* and its progeny must be conducted and applied to the instant matter. As described in *People v. Sapp,* 934 P.2d 1367, 1370 (Colo. 1997) "[c]ases immediately following *Garrity* largely limited the analysis of voluntariness to situations in which a person was confronted with a statute or regulation which would automatically penalize any exercise of the privilege against self-incrimination, *See Lefkowitz v. Cunningham,* 431 U.S. 801, 97 S.Ct. 2132, 53 L.Ed.2d 1 (1977) (penalty imposed by statute); Lefkowitz v. Turley, 414 U.S. 70, 94 S.Ct. 316, 38 L.Ed.2d 274 (1973) (same); Gardner v. Broderick, 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (1968) *(penalty imposed by municipal ordinance); Uniformed Sanitation Men v. Comm'r of Sanitation,* 392 U.S. 280, 88 S.Ct. 1913, 20 L.Ed.2d 1089 (1968) (same)." *Id.* Further, two factors were then considered; whether the person is told that failure to waive the constitutional right will result in discharge from public employment and whether there is a statute or rule mandating such procedure." *Id at* 1371. In applying this analysis to the matter herein, the Defendant's argument is unpersuasive. In the case at bar, the Defendant was not informed, in any manner, that he must waive his rights against self-incrimination or subject himself to discharge or revocation of his license. Further, the regulations requiring his cooperation in medical board investigations do not subject him to an automatic suspension or revocation of his license should he chose to exercise his right to remain silent.

Later decisions further suggested that *Garrity* may also apply when the Defendant "honestly and reasonably believes that assertion of the privilege will be penalized. *Id at* 1372; *see United States v. Camacho,* 739 F.Supp. 1504 (S.D. Fla. 1990). This analysis as applied to the Defendant is similarly without merit. Although the Defendant testified that he believed he

would be penalized, his belief was not objectively reasonable. "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." *Camacho*, 739 F.Supp. at 1515.

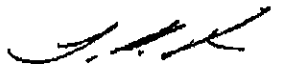
The Ohio Supreme Court has adopted this rationale and expanded upon it in *State v. Graham*, 2013-Ohio, 136 Ohio St.3d 125. There, the Ohio Supreme Court *Garrity* to a case involving Ohio Department of Natural Resources employees who were required to cooperate with an investigation conducted by Ohio Inspector General and given notice that their failure to cooperate would result in in discipline up to termination. In its analysis the Court adopted the *United States v. Friedrick*, 842 F.2d 382 (D.C. Cir. 1988), approach which requires that in order for a statement to be suppressed the employee must believe that his or her statement was compelled on threat of termination and this belief must be objectively reasonable under the totality of circumstances. *Graham at* ¶ 11.

CONCLUSION

In this case, the Defendant, a well-educated individual, initiated contact with the investigator, spoke with him at his medical office after already communicating with law enforcement, was given the opportunity to reschedule, took the lead in the discussion throughout, treated/examined patients, and never sought to invoke his Fifth Amendment rights. Further, although the Board of Medical Examiners may consider a refusal to cooperate with their investigations when reviewing Complaints, this does not necessarily lead to a termination of his medical license. It just may be one of many considerations taken into account by the Board. Therefore, based upon the totality of the circumstances the Court finds that the Defendant made voluntary statements during a noncustodial interview which are admissible in this matter.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Defendant's Motion to Suppress is denied and the Case is scheduled for Jury Pre-Trial.

SO ORDERED.



Tammie K. Hursh, Judge

cc: Dennis C. Belli, Attorney for Defendant
Phillip Germann, Assistant Prosecutor

The Supreme Court of Ohio

State of Ohio

v.

James A. Gideon

Case No. 2019-1104

RECONSIDERATION ENTRY

Allen County

It is ordered by the court that the motion for reconsideration in this case is granted, consistent with the reissued opinion.

(Allen County Court of Appeals; Nos. 1-18-27, 1-18-28 and 1-18-29)

Maureen O'Connor
Chief Justice

The Official Case Announcement can be found at http://www.supremecourt.ohio.gov/ROD/docs/