University of Baltimore Law Forum

Volume 17
Number 3 *Spring, 1987*

Article 2

1987

Smith v. Howard County: Permanent Injunction Against "Chilling" Fifth Amendment Rights

Byron L. Warnken
University of Baltimore School of Law, bwarnken@ubalt.edu

Smith v. Howard County: Permanent Injunction Against "Chilling" Fifth Amendment Rights

by Professor Byron L. Warnken

In 1974, the Maryland General Assembly enacted the Law-Enforcement Officers' Bill of Rights.[1] "The purpose of LEOBOR was to guarantee to those law-enforcement officers embraced therein procedural safeguards during investigation and hearing of matters concerned with disciplinary action against the officer. . . . In enacting the LEOBOR, the Legislature vested in law-enforcement officers certain 'rights' not available to the general public."[2] Section 728(b) of the LEOBOR establishes procedural safeguards for law-enforcement officers under investigation or subject to interrogation. Section 733 prohibits actual or threatened punitive personnel action for the exercise or demand of rights under the LEOBOR or constitutional rights.

In *Smith v. Howard County*,[3] the Howard County Police Department alleged that Officer Harry Smith used a cassette tape recorder to tape a conversation between himself and one of his superior officers. He was formally notified that he was under investigation for this alleged conduct and was ordered to answer questions. Officer Smith was told that his failure to answer questions could result in the commencement of an action leading to punitive measures in the form of sanctions up through and including dismissal.

Officer Smith sought and obtained an ex parte temporary injunction against the Police Department from taking or threatening to take punitive personnel action in return for his exercise of his Fifth Amendment privilege against compelled self-incrimination or his rights under the LEOBOR. In the subsequent hearing concerning a permanent injunction, the Police Department took the position that (1) injunctive equitable relief was not the appropriate remedy, (2) the right to be a police officer is dependent upon a willingness to forego constitutional rights, (3) Officer Smith would only be subjected to departmental disciplinary action and would not be subjected to criminal charges, and (4) any answers that he was forced to provide would be inadmissible in any criminal proceeding under the LEOBOR. Chief Judge Guy J. Cicone of the Circuit Court for Howard County rejected the arguments of the defendant and permanently enjoined the Police Department from taking or threatening any punitive personnel action

against Officer Smith as a result of the assertion of his Fifth Amendment privilege against compelled self-incrimination.

The Fifth Amendment

The Fifth Amendment privilege against compelled self-incrimination was made applicable against the states through the Due Process Clause of the Fourteenth Amendment in 1964.[4] The following year, in *Griffin v. California*,[5] the Supreme Court held that a "chilling effect" upon the exercise of the privilege against compelled self-incrimination is just as much a constitutional violation as actually compelling self-incriminating testimony. The Court prohibited both jury instructions and prosecutorial comment that permit the drawing of a negative inference from a defendant's silence, exercised in *Griffin* through an election not to testify. "[C]omment on the refusal to testify . . . is a penalty imposed by the courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly."[6]

Two years after *Griffin*, the Supreme Court decided the companion cases of *Garrity v. New Jersey*[7] and *Spevak v. Klein*.[8] In *Garrity*, police officers were interrogated for an alleged conspiracy to obstruct the administration of traffic laws. They were informed that, although they had a right not to answer, if they exercised their right to remain silent, they would be subject to removal from office. The officers answered the questions, their answers were admitted into evidence in their subsequent criminal trials on conspiracy charges, and they were convicted. The Supreme Court framed the issue as "whether a State, contrary to the requirement of the Fourteenth Amendment, can use the threat of discharge to secure incriminating evidence against an employee."[9] The Court held that the statements were coerced in violation of the Fifth Amendment privilege against compelled self-incrimination. The Court emphasized that police officers "are not relegated to a watered-down version of constitutional rights [and] a State may not condition [the exercise of a constitutional right] by the exaction of a price."[10] In sum, "[t]he option [presented to the police officers] to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or remain silent."[11] In *Holloway v. State*,[12] the Court of Special Appeals of Maryland noted that statements controlled by *Garrity* are involuntary as a matter of law. In *Widomski v. Chief of Police of Baltimore City*,[13] the court recognized that *Garrity*, as applied in *Holloway*, would prohibit ordering a police officer, under threat of disciplinary action, to take a polygraph test.

In the companion case to *Garrity*, *Spevak v. Klein*,[14] the Supreme Court followed the *Garrity* analysis, holding that a state cannot disbar an attorney because of the refusal to testify at a judicial inquiry. The Court posited that an individual cannot enjoy the constitutionally guaranteed unfettered exercise of the right to remain silent if there may be a penalty for asserting that right. "[T]hreat is indeed as powerful an instrument of compulsion as the use of legal process to force from lips . . . the evidence necessary to convict. . . ."[15]

"In enacting the LEOBOR, the Legislature vested in law-enforcement officers certain 'rights' not available to the general public."

The year after *Garrity-Spevak*, the Supreme Court decided the companion cases of *Gardner v. Broderick*[16] and *Uniformed Sanitation Men Ass'n, Inc. v. Commission of Sanitation*.[17] In *Gardner*, a police officer was advised of his constitutional rights and further advised that, if he did not waive his right and waive immunity from prosecution, he would be fired. He refused to waive his constitutional rights and was discharged solely for that refusal. Recognizing that the facts in *Gardner* went beyond those in *Garrity*, the Court framed the issue as "whether a policeman who refuses to waive the protections which the privilege guarantees him may be dismissed from office because of that refusal."[18] The Court found *Garrity* controlling and reversed the appellate court's affirmance of the trial court's dismissal of the officer's petition for reinstatement. The Court's rationale was articulated as follows:

> He was discharged from office not for failure to answer relevant questions about his official duties, but for refusal to waive a constitutional right. He was dismissed for failure to relinquish the protections of the privilege against self-incrimination. . . .
>
> [T]he mandate of the great privilege against self-incrimination does not tolerate the attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers on penalty of the loss of employment. It is clear that petitioner's testimony was demanded . . . in part so that it might be used to prosecute him, and not *solely* for the purpose of securing an accounting of his performance of his public trust. If the latter had been the *only* purpose, there would have been no reason to seek to compel petitioner to waive his immunity.[19]

In *DiGrazia v. County Executive for Montgomery County*,[20] the Court of Appeals of Maryland held that even a police chief who was a political appointee, and who therefore could be replaced by another appointee within the absolute discretion of the county executive, could not be terminated because of the exercise of his constitutional rights. The court quoted from *Mt. Healthy City Board of Education v. Doyle*,[21] wherein the Supreme Court stated: "The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct."[22]

In the companion case to *Gardner*, *Uniformed Sanitation Men Ass'n, Inc. v. Commission of Sanitation*,[23] fifteen sanitation workers were discharged, twelve because of their assertion of the constitutional privilege against compelled self-incrimination and three because of their refusal to waive immunity from prosecution. The Court made the following factual finding, upon which it based its holding.

> Petitioners were not discharged merely for refusal to account for their conduct as employees of the city. They were dismissed for invoking and refusing to waive their constitutional right against self-incrimination. They were

> discharged for refusal to expose themselves to criminal prosecution based on testimony which they would give under compulsion, despite their constitutional privilege.[24]

Relying upon *Garrity* and *Gardner*, the Court reversed the judgment that had affirmed the dismissal of their action for a declaratory judgment and for injunctive relief.

The final relevant Supreme Court authority is *Lefkowitz v. Turley*,[25] in which architects were disqualified from public contracts because of their refusal to waive their privilege against compelled self-incrimination and their refusal to waive immunity from prosecution, both with respect to their governmental transactions. The Court declared that *Garrity*, *Gardner* and *Sanitation Men* were controlling, stating that a "waiver secured under threat of substantial economic sanction cannot be termed voluntary."[26] The Court added that if a governmental agency needs the information to the point of compelling testimony, the State must provide both immunity and the power of the courts to compel testimony, after a grant of immunity, through civil contempt proceedings.[27]

In *Smith v. Howard County*,[28] the conduct for which Officer Smith was required to report and answer questions was the alleged cassette tape recording of a conversation between himself and a superior officer. The alleged conduct is criminal under section 10-402 of the Maryland Courts and Judicial Proceedings Code Annotated.[29] Subsection (a) prohibits the interception, disclosure or use of certain wire or oral communication. Subsection (b) establishes that the offense is a felony, subject to five years imprisonment and a $10,000 fine. Officer Smith was not charged with a violation of any departmental regulation and the alleged conduct does not violate any departmental regulation. Thus, the charge could only be brought, and the unrefuted testimony was that it was brought, solely by virtue of the felony criminal statute. Consequently, Officer Smith's counsel informed the Police Department that his client would appear as required, but would assert his Fifth Amendment privilege against compelled self-incrimination. The response of the Police Department was that Officer Smith's failure to answer questions "could result in commencement of an action which may lead to punitive measures" in the form of sanctions up through and including dismissal.

The defendant relied upon two cases in an attempt to counter the plaintiff's constitutional argument. The first case, *Christal v. Police Commissioner of San Francisco*,[30] was relied upon for the proposition that the right of a police officer to keep his or her job is dependent upon the officer's willingness to forego constitutional rights. Officer Smith argued that this 1939 California intermediate appellate opinion was handed down, without reliance upon Supreme Court authority, twenty-five years before the Fifth Amendment was incorporated against the states through the Due Process Clause of the Fourteenth Amendment and twenty-six years before the first of the six Supreme Court decisions, which together established the sanctity of the right to the unfettered exercise of his privilege against compelled self-incrimination.

The other case, *Nichols v. Baltimore Police Department*,[31] was relied upon by the defendant as dispositive of the self-incrimination issue. Officer Smith, on the other hand, argued that the issue before the court was controlled by the Supreme Court decisions interpreting the Fifth Amendment privilege against compelled self-incrimination. In *Nichols*, the Court of Special Appeals of Maryland addressed only the limited issue of the meaning of selection 728(b)(10) of the LEOBOR, determining the extent to which a police officer and his or her representative may consult in order to enter objections to a question asked by an interrogator. Chief Judge Gilbert, writing for the court, stated the obvious – that the legislature, in enacting the LEOBOR, could not have provided less rights than the supreme law of the land embodied in the Constitution.[32] The General Assembly likewise recognized this when it enacted section 733 as part of the LEOBOR.

> A law-enforcement officer may not be discharged, demoted, or denied promotion, transfer, or reassignment, or otherwise discriminated against in regard to his employment or be threatened with any such treatment, by reason of his exercise of or demand for the rights granted in this subtitle, or by reason of the lawful exercise of his constitutional rights.[33]

The plaintiff further argued that the case before the court was distinguishable from *Nichols* and that there was nothing in *Nichols* that conflicted with either the Supreme Court's decisions or the plaintiff's position. In *Nichols*, Chief Judge Gilbert, in analyzing subsection (b)(10) of section 728, stated that it was

> *concerned solely with* investigations or interrogations involving possible violations of *non-criminal department policies*. Otherwise, the full panoply of *Miranda* would be applicable, and subsection 728(b)(10) would be mere surplusage, since *Miranda* is founded on the supreme law of the land, the Constitution of the United States. Consequently, any attempt by State law to restrict *Miranda*'s application would be futile.[34]

Not only did Chief Judge Gilbert hold that the lone subsection before the court addressed only "non-criminal departmental policies," he found that the complaint against Officer Nichols was that he " 'shirked . . . [his] responsibilities,' "[35] and thus the "interrogation is, in appellant's case, strictly non-criminal."[36] It was in this context that Chief Judge Gilbert wrote the language upon which the defendant relied.

> The commander may order the officer to answer the question, and if that order is refused, the officer in all likelihood faces a charge of disobeying the commander's direct order. Dismissal from the department is a possible, if not probable, product of the disobedience. In short, the officer, confronted by not answering a question or disobeying a direct order of his or her commander, is placed in the position of choosing between facing a tiger or facing a lion. Either choice might prove fatal to the officer's career in law-enforcement.[37]

Officer Smith argued that this language was inapplicable to the investigation of him for alleged felonious conduct and that it merely restated, in other words, the teachings of the Supreme Court, particularly that provided in *Gardner v. Broderick*.[38] If the sole purpose of an investigation is an accounting of job performance, without any potential criminality, then, and only then, is an order to answer questions, under threat of loss of job, constitutionally permissible. The purely non-criminal context of Chief Judge Gilbert's language in *Nichols* is demonstrated by his follow-up statement. "Notwithstanding the degree of difficulty which the officer faces when put to a Hobson's choice, the Legislature never intended to permit an officer, *under investigation for such non-criminal matters*, to stifle the interrogation or investigation to the point where it is for all practical purposes non-existent."[39]

In granting the permanent injunction in *Smith v. Howard County*, Chief Judge Cicone appeared unpersuaded, particularly in light of the plaintiff's uncontraverted evidence, by the defendant's assertion that it considered this matter purely non-criminal, departmental and administrative in nature. In any event, the assertion by the

Police Department that it considered the investigation non-criminal would not be controlling. An individual may refuse "to answer official questions put to him in any . . . proceeding, civil or criminal, formal or informal, when the answers *might* incriminate him in future criminal proceedings."[40] As long as there is potential for criminal charges arising from the conduct, the right to remain silent is absolute. Unless there has been a constitutionally sufficient grant of immunity,[41] the person being interrogated is, effectively, the final authority of the applicability of the right to remain silent.[42]

The Law-Enforcement Officers' Bill of Rights

It is ironic that, when a Police Department interrogates one of its officers, under threat of punitive disciplinary action for refusal to answer questions, the Law-Enforcement Officers' Bill of Rights could be argued to afford the officer less rights than would otherwise be available. First, as Chief Judge Gilbert recognized in *Nichols v. Baltimore Police Department*,[43] the Constitution of the United States controls over the LEOBOR.[44] Second, the express language of the LEOBOR provides that "[a] law-enforcement officer may not be . . . threatened with [discharge or other adverse personnel action] by reason of his exercise of . . . his constitutional rights."[45] Thus, both the Fifth Amendment and the LEOBOR preclude threatened or actual penalty for assertion of the right to remain silent. Third, the legislature, in enacting the LEOBOR in 1974, intended to provide more rights – not less – to police officers under investigation. "The purpose of the LEOBOR was to guarantee to those law-enforcement officers embraced therein procedural safeguards during investigation. . . . In enacting the LEOBOR, the Legislature vested in law-enforcement officers certain 'rights' not available to the general public."[46] Fourth, section 728 (b)(7)(i) of the LEOBOR provides that "[t]he law-enforcement officer under interrogation may not be threatened with transfer, dismissal or disciplinary action."[47]

Notwithstanding the Fifth Amendment and the language of the LEOBOR just presented, section 728 (b)(7)(ii) provided the other basis for the defendant's argument in *Smith v. Howard County*. That section reads in part:

> This subtitle does not prevent any law-enforcement agency from requiring a law-enforcement officer under investigation to submit to . . . interrogations which specifically relate to the subject matter of the investigation. This subtitle does not prevent a law-enforcement agency from commencing any action which may lead to a punitive measure as a result of a law-enforcement officer's refusal to submit to . . . interrogation, after having been ordered to do so by the law-enforcement agency.[48]

The defendant argued that subsection (b)(7)(ii) supports the position that a police officer must answer potentially incriminating questions or be subject to dismissal for the refusal to answer such questions. Officer Smith argued that, if that is what subsection (b)(7)(ii) means, then *Garrity v. New Jersey*[49] and *Gardner v. Broderick*[50] would render the statute unconstitutional as applied in any situation, unless the questions related to matters with no potential for criminality. However, instead of arguing the unconstitutionality of section 728 (b)(7)(ii), Officer Smith used principles of statutory construction to reconcile it with the Fifth Amendment, with section 728 (b)(7)(i) and with section 733.

First, as to the constitutionality of the statute, all statutes are presumed to be constitutional. The legislature is presumed to be aware of existing law, which includes the United States Constitution.[51] The legislature is presumed, in light of that knowledge and the oath of office, to enact legislation that is constitutional. If the legislature enacts a statute that is both plain on its face and unconstitutional, it must be struck down.[52] However, because of these presumptions, if there is any ambiguity in the statute and there is any reading of the statute that will render it constitutional, it must be so interpreted.[53]

Second, as to the reconciliation of subsection 728 (b)(7)(ii) with subsection 728 (b)(7)(i), as well as with section 733, statutes must be read as a whole.[54] No statute should be read in such a manner as to render any portion of it superfluous, meaningless or nugatory.[55] When interpreting the LEOBOR, the determination of the constitutionality of subsection (b)(7)(ii), as well its reconciliation with the remainder of the statute, both produce the same result. The first step is to eliminate what subsection (b)(7)(ii) does not mean; the second step is to discover what it does mean.

Subsection (b)(7)(ii) does not provide any police department with the authority to take or threaten punitive personnel action in return for the assertion of the Fifth Amendment privilege against compelled self-incrimination. First, *Garrity* and *Gardner* make any such action unconstitutional. Second, section 728 (b)(7)(i) provides that "[t]he law-enforcement officer under interrogation may not be threatened with transfer, dismissal, or disciplinary action."[56] Third, section 733 provides that "[a] law-enforcement officer may not be [subjected to punitive personnel action] or be threatened with any such treatment, by reason of his exercise of or demand for the rights granted in this subtitle, [e.g., the right not to be threatened under section 728 (b)(7)(i)] or by reason of the lawful exercise of his constitutional rights, [e.g., the right against compelled self-incrimination under the Fifth Amendment]."[57] Thus, to read subsection (b)(7)(ii) as authorizing threatened or actual dismissal for assertion of the Fifth Amendment privilege would not only be unconstitutional, it would "write out" of the statute subsection (b)(7)(i).

Officer Smith argued that there is only one possible reading of section 728(b)(7)(ii) that renders it consistent with section 728(b)(7)(i), with section 733 and with the Fifth Amendment. Subsection (b)(7)(i) provides that "[t]he law-enforcement officer *under interrogation* may not be threatened with transfer, dismissal or disciplinary action."[58] Subsection (b)(7)(ii) provides that "[t]his subtitle does not prevent a law-enforcement agency from commencing any action which may lead to a punitive measure as a result of a law-enforcement officer's *refusal to submit to . . . interrogation*, after having been ordered to do so by the law-enforcement agency."[59] Thus, if a police department complies with all of the provisions of the LEOBOR, subsection (b)(7)(ii) authorizes it to require one of its officers to participate in an investigation and report for an interrogation session. This is consistent with the Fifth Amendment. Only the defendant in a criminal trial may assert the "blanket" Fifth Amendment privilege of refusing to even take the stand. In all other settings, the individual must submit to the interrogation process.[60] However, even though the individual must submit to the interrogation process, he may refuse "to answer official questions put to him in any . . . proceeding, civil or criminal, formal or informal, when the answers might incriminate him in future criminal proceedings."[61] The perfect analogy is the issuance of a grand jury subpoena. "Refusal to submit to interrogation" can result in incarceration for contempt of court. However, once "under interrogation," the individual may assert, as to any and all questions, the Fifth Amendment privilege against compelled self-incrimination. Subsection (b)(7)(i) recognizes that constitutional privilege, as well as the Supreme Court decisions precluding any threats that may create a "chilling effect" upon that privilege.

The final argument presented by Officer Smith was in response to the following language in section 728(b)(7)(ii). "The results of any . . . interrogation, as may be required by the law-enforcement agency under this subtitle are not admissible or discoverable in any criminal proceedings against the law-enforcement officer when the law-enforcement officer has been ordered to submit."[62] He argued, and the defendant conceded, that this was not an immunity provision under which the Office of the State's Attorney could grant immunity and compel the testimony.

There is no inherent or common law power of immunity. It exists only when the legislature (or the Constitution) expressly authorizes a grant of immunity.[63] Maryland has only a few immunity statutes, each limited to a particular offense that the legislature has found difficult to investigate and prosecute without the testimony of those involved in the crime.[64] Maryland does not have a general immunity statute, and this is certainly not due to an oversight on the part of the legislature. At least five general immunity bills have failed in the General Assembly since 1978.[65]

There are three kinds of immunity. From most broad to most narrow, they are (1) transactional immunity, (2) use plus derivative use immunity, and (3) use immunity. "Transactional immunity" prohibits the prosecution of all criminal transactions about which the individual is compelled to testify. Almost all of Maryland's limited number of immunity statutes provide transactional immunity.[66] "Use plus derivative use immunity" is the minimum needed to satisfy the Fifth Amendment by "giving" as much as it "takes away".[67] Use plus derivative use immunity "guarantees the compelled witness not simply that his words will not be used against him directly, but also that they will not be used indirectly as leads to the development of derivative evidence."[68] Once a prosecutor gives a constitutional grant of immunity, pursuant to an express immunity statute, "his only guarantees of adequate testimonial performance are the threat of contempt and the threat of perjury."[69] Mere "use immunity", on the other hand, is constitutionally defective as a "trade off" to compel testimony in the face of an assertion of the Fifth Amendment privilege against compelled self-incrimination. Use immunity merely guarantees that the compelled testimony will not be used against the compelled witness.

"This decision could affect the manner in which police departments throughout the State respect the constitutional rights of their officers."

There is nothing in section 728(b)(7)(ii) to permit reading it as an express grant of immunity by the legislature. If it did provide for a grant of immunity, it would be Maryland's first general immunity statute, applying to all crimes if the alleged perpetrator were a law-enforcement officer. The LEOBOR was designed to provide more rights—not less—to law-enforcement officers. If police officers are the only citizens upon whom immunity may be "forced" for all crimes, it is clear they would be receiving less rights than the average citizen, because immunity is "no favor" to the one immunized.

> Formal immunity is not necessarily the subject of a bargain and is frequently forced upon a reluctant witness against that witness's will. A witness is summoned to testify at a trial or before a grand jury. The witness claims the privilege against compelled testimonial self-incrimination. The State, upon explicit statutory authorization, may then officially and upon the record confer a grant of the appropriate form of immunity upon the recalcitrant witness, whether that witness wishes it or not.[70]

Moreover, if section 728(b)(7)(ii) were an immunity statute, it would permit enforcement of a grant of immunity not simply by the judicially approved methods of threat of contempt and threat of perjury, but by a new threat, that of disciplinary action and loss of employment.

In the alternative, Officer Smith argued that if section 728(b)(7)(ii) is an immunity statute, it is unconstitutional, because it neither protects him from prosecution for any transaction for which his testimony is compelled, nor does it protect him from both the use of the statements as evidence and the use of the statements as leads to develop derivative evidence. Section 728(b)(7)(ii) is merely an exclusionary device, rendering his statements inadmissible as evidence, which is constitutionally insufficient to compel testimony from an individual desiring to exercise his unfettered Fifth Amendment right to remain silent without penalty.

Conclusion

Upon announcing in open court his order for a permanent injunction, Chief Judge Cicone noted that Officer Smith did not relinquish any of his constitutional privileges by virtue of accepting employment as a Howard County Police Officer. Our society, which rightfully demands *from* our police officers that they not infringe upon *our* constitutional rights, must similarly demand *for* our police officers that they receive *their* constitutional rights.

Consider the following: (1) a superficial reading by police superiors and their legal advisers of certain language out of context, in either or both *Nichols*[71] and section 728(b)(7)(ii) of the LEOBOR,[72] (2) the pari-military nature of any police force, (3) the ability to deprive an accused officer of his entitlement to future employment, and (4) the extent of interest and inquiry from attorneys throughout the State since the permanent injunction in *Smith v. Howard County*. This decision could affect the manner in which police departments throughout the State respect the constitutional rights of their officers.

Notes

[1] Act of May 31, 1974, ch. 722, 1974 Md. Laws 2471, codified in Md. Ann. Code art. 27, §§ 727-734D (Supp. 1986).
[2] *Nichols v. Baltimore Police Dep't.*, 53 Md. App. 623, 626-27, 455 A.2d 446, 448-49 (1983).
[3] No. 87-CA5262 (Cir. Ct. Howard Co. Md.).
[4] *Malloy v. Hogan*, 378 U.S. 1 (1964). Article 22 of the Declaration of Rights of the Maryland Constitution provides a state constitutional privilege against compelled self-incrimination. Article 22 has been interpreted to be in pari materia with the Fifth Amendment. *Richardson v. State*, 285 Md. 261, 401 A.2d 1021 (1979).
[5] 380 U.S. 609, *reh'g denied*, 381 U.S. 957 (1965).
[6] *Id.* at 614.
[7] 385 U.S. 493 (1967).
[8] 385 U.S. 511 (1967).
[9] *Garrity*, 385 U.S. at 499.
[10] *Id.* at 500.
[11] *Id.* at 497.
[12] 26 Md. App. 382, 388, 339 A.2d 319, 323, *cert. denied*, 276 Md. 745 (1975).
[13] 41 Md. App. 361, 376, 397 A.2d 222, 231, *cert. denied*, 284 Md. 750 (1979).
[14] 385 U.S. 511 (1967).
[15] *Id.* at 516.
[16] 392 U.S. 273 (1968).
[17] 392 U.S. 280 (1968).
[18] *Gardner*, 392 U.S. at 276.
[19] *Id.* at 278-79 (emphasis added). Dismissal of a public employee merely for asserting the right to remain silent also violates the due process guarantee against arbitrary exercise of governmental power. *See Slochower v. Board of Educ.*, 350 U.S. 551 (1956).
[20] 288 Md. 437, 447, 418 A.2d 1191, 1197 (1980).
[21] 429 U.S. 274 (1977).
[22] *Id.* at 285-86.
[23] 392 U.S. 280 (1968).
[24] *Id.* at 283.
[25] 411 U.S. 70 (1973).
[26] *Id.* at 82-83.
[27] *Id.* at 81-82, 84. See notes 62-70 *infra* and accompanying text.
[28] No. 87-CA5262 (Cir. Ct. Howard Co. Md.).
[29] Md. Cts. & Jud. Proc. Code Ann. § 10-402 (Supp. 1986).
[30] 33 Cal. App. 2d 564, 92 P.2d 416 (1939).
[31] 53 Md. App. 623, 455 A.2d 446 (1983).
[32] *Id.* at 628, 455 A.2d at 449.
[33] Md. Ann. Code art. 27, § 733 (Supp. 1986).
[34] *Nichols*, 53 Md. App. at 628, 455 A.2d at 449 (emphasis added).
[35] *Id.* at 624, 455 A.2d at 447.
[36] *Id.* at 629, 455 A.2d at 450.
[37] *Id.* at 628-29, 455 A.2d at 449-50.
[38] 392 U.S. at 278-79.
[39] *Nichols*, 53 Md. App. at 629, 455 A.2d at 450 (emphasis added).
[40] *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) (emphasis added); *see Kastigar v. United States*, 406 U.S. 441, 445 (1972) (includes administrative and investigatory proceedings); *In re Criminal Investigation No. 1-162*, 307 Md. 674, 683, 516 A.2d 976, 981 (1986).
[41] *See Kastigar v. United States*, 406 U.S. 441 (1972).
[42] *See Hoffman v. United States*, 341 U.S. 479 (1951).
[43] 53 Md. App. 623, 455 A.2d 446 (1983).
[44] *Id.* at 628, 455 A.2d at 449. See text accompanying note 32 *supra*.
[45] Md. Ann. Code art. 27, § 733 (Supp. 1986).
[46] *Nichols*, 53 Md. App. at 626-27, 455 A.2d at 448-49.
[47] Md. Ann. Code art. 27, §728(b)(7)(i) (Supp. 1986).
[48] *Id.* § 728(b)(7)(ii).
[49] 385 U.S. 493 (1967).
[50] 392 U.S. 273 (1968).
[51] *See Mayor of Baltimore v. Hackley*, 300 Md. 277, 477 A.2d 1174 (1984); *Board of Educ. v. Lendo*, 295 Md. 55, 453 A.2d 1185 (1982).
[52] *See Bright v. Unsatisfied Claim & Judgment Fund Bd.*, 275 Md. 165, 338 A.2d 248 (1975); *Greenbelt Consumer Servs., Inc. v. Acme Markets, Inc.*, 272 Md. 222, 322 A.2d 521 (1974).
[53] *See Moberly v. Herboldsheimer*, 276 Md. 211, 345 A.2d 855 (1975); *Prince George's County v. Chillum-Adelphi Volunteer Fire Dep't., Inc.*, 275 Md. 374, 340 A.2d 265 (1975).
[54] *McAlear v. McAlear*, 298 Md. 320, 469 A.2d 1256 (1984); *Howard County Ass'n for Retarded Citizens, Inc. v. Walls*, 288 Md. 526, 418 A.2d 1210 (1980).
[55] *Management Personnel Servs., Inc. v. Sandefur*, 300 Md. 332, 478 A.2d 310 (1984); *Mayor of Baltimore v. Hackley*, 300 Md. 277, 477 A.2d 1174 (1984).
[56] Md. Ann. Code art. 27, § 728(b)(7)(i) (Supp. 1986).
[57] *Id.* § 733.
[58] *Id.* § 728(b)(7)(i).
[59] *Id.* § 728(b)(7)(ii).
[60] E. Cleary, McCormick on Evidence § 130 (3d ed. 1984); 1 W. LaFave & J. Israel, Criminal Procedure § 8.10(c) (1984).
[61] *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973).
[62] Md. Ann. Code art. 27, § 728(b)(7)(ii) (Supp. 1986).
[63] *Butler v. State*, 55 Md. App. 409, 418, 462 A.2d 1230, 1234 (1983); *Bowie v. State*, 14 Md. App. 567, 575, 287 A.2d 782, 786 (1972).
[64] *In re Criminal Investigation No. 1-162*, 307 Md. 674, 686-87, 516 A.2d 976, 983 (1986); *e.g.*, Md. Ann. Code art. 27, §§ 23-24 (1982 Repl. Vol.) (bribery); *id.* § 39 (conspiracy); *id.* § 262 (gambling); *id.* § 371 (lottery).
[65] *In re Criminal Investigation*, 307 Md. at 685 n.5, 516 A.2d at 982 n.5.
[66] *Butler*, 55 Md. App. at 420, 462 A.2d at 1235.
[67] *Kastigar v. United States*, 406 U.S. 441, 446 (1972); *In re Criminal Investigation*, 307 Md. at 684, 516 A.2d at 982.
[68] *Butler*, 55 Md. App. at 421, 462 A.2d at 1235.
[69] *Id.* at 422, 462 A.2d at 1236.
[70] *Id.* at 421, 462 A.2d at 1236.
[71] See text accompanying note 37 *supra*.
[72] See text accompanying note 48 *supra*.

Professor Byron L. Warnken *is a member of the full-time faculty of the University of Baltimore School of Law, where he has taught since 1977. He teaches Criminal Law, Constitutional Criminal Procedure and Legal Analysis. He serves as Faculty Director of both the Internship Program and the Summer Institute; he is Co-Director of the Legal Analysis, Research and Writing Program and the Moot Court Program. For five years, Professor Warnken coached the National Appellate Advocacy Competition team, including two nationally ranked teams. He has served as the Chairman of both the Law School Curriculum Committee and the Law School Admissions Committee.*

Professor Warnken is Reporter for the Maryland Criminal Pattern Jury Instructions. Additionally, he has lectured to groups of prosecutors, defense counsel and bar candidates in ten states on the subjects of criminal law and criminal procedure. He represents, on post-conviction, inmates under sentence of death.

Professor Warnken served, pro bono, as co-counsel, on behalf of Officer Harry Smith, in Smith v. Howard County. *Clarke F. Ahlers, Esq., a former Howard County Police Officer, represents Harry Smith.*