



investigation” by objecting to the subpoena.

Initially, the Court finds that the matter is not moot even though the grand jury has been canceled. It appears from the comments of the DA at the earlier hearing that the investigation is ongoing and the DA did not rule out attempting to subpoena Petitioner’s statement again in the future. Both the Sheriff and the DA argue that the Court does not have jurisdiction to proceed because “there is no Grand Jury subpoena in existence.” However, the motion before the Court asserts that the document being sought is entitled to protection because it is privileged under the 5<sup>th</sup> Amendment. The Court believes that it is the existence of the privileged document, not the subpoena, which presents an ongoing issue for adjudication.

The DA is correct that *Gwillim* contains the best explanation of the procedures involving IA statements. In *Gwillim*, a male San Jose police Sgt. and a female officer were assigned to a stake-out as part of burglary sting. The female officer later reported that she was sexually assaulted by the Sgt. during the stake-out. The PD initiated two simultaneous investigations: an IA investigation, and a criminal investigation against the Sgt. Both officers were required to give statements as part of the IA investigation, and were told that the statements could not be used against them in a criminal proceeding (commonly called *Lybarger* statements [*Lybarger v. City of Los Angeles* (1985) 40 Cal. 3d 822]).

Upon completion of the criminal investigation, the matter was forwarded to the DA’s Office for prosecution of the Sgt. Inexplicably, the Sgt’s immunized *Lybarger* statement was also included in the reports (apparently without request by the DA). Meanwhile, the female officer was beginning to have second thoughts about testifying against the Sgt, so the DA let her read the Sgt’s presumably unflattering version of events from his *Lybarger* statement. She thereafter agreed to cooperate. Three days later he was charged.

The defendant Sgt. did not know until after the prelim that his *Lybarger* statement had been turned over to the DA. Upon discovering this, he moved to dismiss the charges based on a violation of the *Lybarger* immunity. At the hearing, the trial court conceded that *Lybarger* only prevented *use* of the statement, but that the DA was still technically entitled to *receive* it under §832.7. The trial court found that sharing the statement with the female officer was a misuse by the Deputy DA in violation of the 5th Amendment immunity, and ordered the DA involved recused from the case and the case reassigned. The recused DA was ordered not to communicate with anyone in the office about the statement, and the statement was ordered removed from the DA’s file.

Later a second motion to dismiss was filed, and after further testimony, the Court found that despite the above measures, there was still some “taint” from the misuse, and therefore ordered the case dismissed.

The Appellate Court found the original measures taken by the trial court to be reasonable and proper, but reversed the dismissal granted at the second motion. The appellate court found that some “taint” was inevitable, since the same witnesses could potentially testify at the administrative hearing as at the criminal hearing, and might become familiar with a party’s *Lybarger* statement that way. (*Gwillim* at p. 1270-71.) However, the Appellate Court found that the criminal proceedings were not unduly “tainted” by the DA’s misuse of the statement here, because the female officer gave her statement before reading the Sgt’s statement. She testified that she had consulted a

number of other confidants in making her decision to testify, and reading the Sgt's statement really didn't influence her. The Court explained that mere knowledge of the statement by the prosecution or a witness is not a "use" (*Gwillim* at p. 1270) and misuse by the DA, as in this case, does not warrant dismissal if it does not effect the case in any fashion. (*Gwillim* at p. 1275). However, the Court pointed out that it did not intend to condone the DA's attempt to use the statement in the criminal proceedings, just to point out that the attempt was ineffective. (*Gwillim* at p. 1275.)

At the hearing on the Motion to Quash in the instant matter, the DA did not articulate a basis for using the statement of Petitioner, nor explain how the DA's office believed that *Gwillim* allowed them to do so. Instead, the DA appeared to take the position that the Court should do nothing to insure that the statement is not misused, because even if it is, the DA can still argue that the misuse did not unduly "taint" the proceedings, as in *Gwillim*, and the Petitioner can always file a motion to set aside any indictment for the misuse. Such a position would be preposterous, and border on bad faith. PC §939.6 does not say that the grand jury "should not" receive inadmissible evidence, as suggested by the DA, but says it "shall" not.

*Gwillim* makes it quite clear that *Lybarger* provides immunity for any type of "use or derivative use" of the officer's statement. "The district attorney is bound by this immunity agreement and may not use defendant's statement to advance the criminal prosecution in any way."(*Gwillim* at p. 1272-73) "[T]he district attorney who obtains a statement under Penal Code section 832.7 must develop, prepare, and present the criminal case without reference to defendant's immunized statement." (*Gwillim* at p. 1273.) Although Petitioner in this matter is not a sworn peace officer, the Court believes that the same principles apply from *Lybarger* in the case of non-sworn law enforcement employees who are ordered to answer questions in an IA setting under threat of termination, and admonished that the answers may not be used against them in a criminal proceeding. Such a coerced statement is clearly inadmissible in a criminal proceeding under the 5<sup>th</sup> Amendment, regardless of whether it is characterized as a *Lybarger* statement at the time (*Garrity v. New Jersey* (1967) 385 U.S. 493, 497; *Uniformed Sanitation Men's Association v. New York City Sanitation Commissioner* (1968) 392 U.S. 280; *Hankla v. Roseland School District* (1975) 46 Cal. App. 3d 644; GC §18678). Lt. Heyne was correct that he could not provide "immunity" for the statement, from the standpoint of "transactional" immunity, in that the DA may still prosecute for any offense that is the subject of the statement. He was also correct that the statement could not be used in such a prosecution, however. This amounts to *de facto* "use and derivative use" immunity, regardless of how it is characterized at the time.

There is a very narrow range of legitimate uses the DA might have for Petitioner's statement at this early stage. The DA was either unwilling or unable to suggest any at either hearing. It could be that Petitioner is anticipated to solely be a witness at the Grand Jury proceedings and her statement would be used strictly for impeachment purposes (an arguably proper use of the statement). However, clearly it would be improper to use it to prosecute her if she were to testify differently at the grand jury proceeding. At the initial hearing, the DA was unwilling to agree to any limitations on the use of Petitioner's statement, or even to acknowledge that he was bound by the "use" immunity statements of the investigating team. In fact, the Court's concerns that some use of the statement against the Petitioner was contemplated were heightened when the DA implied at the

earlier hearing that the criminal grand jury investigation would not go forward without the Petitioner's statement.

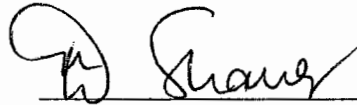
The Court makes no findings on whether the DA is entitled to the statement without a subpoena. But where the DA is seeking a court order for records containing compelled statements obtained on the understanding that they can not be used in a criminal proceeding, as here, this Court holds that it has the discretion to impose reasonable protective orders, based on input from both parties, including *in camera* review of its intended use if appropriate, to insure that the privileged statement is not misused. In order to allow a petitioner to exercise such right, the Custodian of such records may reasonably notify the person whose records are being sought by the subpoena. In this case, the Sheriff states in his brief that he "declines to oppose or impede" the investigation. However, as pointed out by the People themselves on p. 7 of their brief, "the custodian of materials protected by an evidentiary privilege owes a duty to the holder of the privilege to claim the privilege and to take actions necessary to ensure that the materials are not disclosed improperly." Regardless of who owns the personnel file, it is clear that the holder of the 5<sup>th</sup> Amendment privilege as to the immunized statement is the Petitioner, and the Sheriff's Office, as "custodian," has a fiduciary responsibility to protect it.

Further, the Court finds that the Sheriff's Office custodian in this case acted reasonably and appropriately here in notifying the Petitioner of the subpoena of her immunized statement, given the legitimate concern that it may be misused.

Accordingly, the Motion to Quash is granted. Should the DA's office attempt further to obtain or use Petitioner's immunized statement, it is ordered to provide Petitioner notice and opportunity to seek a protective order prior to any use of the statement.

Dated: \_\_\_\_\_

1/8/08



Donald E. Shaver  
Judge of the Superior Court