64870.

IN THE SUPREME COURT OF FLORIDA

R. Frederick Boedy,

Petitioner,

vs. CASE NO. 64,870

DEPARTMENT OF PROFESSIONAL REGULATION

Respondent.

_____/

RESPONDENT'S BRIEF

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REFERENCES

The Petitioner, Dr. Frederick Boedy, M. D., will be referred to as "the Appellant" or as "Dr. Boedy." The Respondent, Department of Professional Regulation will be referred to as "the Appellee" or as "the Department". References to the record below will be referred to as "App. to Pet.".

STATEMENT OF CASE AND FACTS

Respondent, Department of Professional Regulation, filed an administrative complaint against the Petitioner on November 15, 1982, asserting that he suffered from a mental or emotional illness which rendered him "unable to practice medicine with reasonable skill and safety" as provided in Section 458.331(1)(s), Florida Statutes (1981). (App. to Pet. 1,2). The Petitioner denied the allegations. (App. to Pet. 3-6).

On February 18, 1983, the Respondent entered an Order which required the Petitioner to undergo a series of psychiatric examinations beginning on March 1, 1983. The purpose of the examinations was to allow the Department's examining physician to examine the Petitioner and evaluate his mental and physicial condition to ascertain whether he was competent to practice medicine with reasonable skill and safety. (App. to Pet. 8).

The Petitioner sought a Protective Order to avoid the examination requirement, based in part, on the claim that his privilege against self-incrimination would be violated by the mental examinations required under Section 458.331(1)(s), Florida Statutes (1981).

In a second ex parte Order the Respondent rescheduled the examination to begin on March 29, 1983. Petitioner renewed his Motion for a Protective Order. (App. to Pet. 15). In response, the Respondent denied that the mental examinations were violative of the Petitioner's constitutional right against self-incrimination. (App. to Pet. 17)

The Petitioner's Motion for a Protective Order was denied by Order of the Hearing Officer, entered on March 16, 1983. (App. to Pet. 20). Petitioner filed for review of the Order in the First District Court of Appeal, based, in part, upon his Fifth Amendment interpretation.

On January 18, 1984, the District Court issued its opinion that the statutory competence proceedings are not penal proceedings, and therefore the court rejected Petitioner's claim of Fifth Amendment protection. Boedy v. Department of Professional Regulation, Board of Medical Examiners, ____So.2d____ 9. F.L.W. 190, at 191 (Fla. 1st DCA, January 18, 1984). The District Court, finding the question to be of great public importance, certified the following question to the Florida Supreme Court:

> WHETHER THE FIFTH AMENDMENT PRIVILEGE AGAINST COMPELLED SELF-INCRIMINATION APPLIED TO DISCIPLINARY PROCEEDINGS INITIATED UNDER SECTION 458.331(1)(5), FLORIDA STATUTES, TO DETERMINE WHETHER A PHYSICIAN IS UNABLE TO PRACTICE MEDICINE WITH REASONABLE SKILL AND SAFETY TO PATIENTS AS A RESULT OF A MENTAL OR PHYSICAL CONDITION. Id.

On February 13, 1984, Petitioner filed a Notice to Invoke Discretionary Review in this Court.

ARGUMENT

> THERE IS NO FEDERAL OR STATE CONSTITUTIONAL PRIVILEGE AGAINST COMPELLED SELF-INCRIMINATION IN PROCEEDINGS TO DETERMINE FITNESS TO PRACTICE MEDICINE INITIATED UNDER SECTION 458.331(1)(s), FLORIDA STATUTES (1981).

The Department of Professional Regulation, Board of Medical Examiners is required to ensure that every physician

practicing in the state meets minimum requirements for safe practice. By refusing to allow an examination into his fitness to practice medicine, pursuant to Section 458.331(1)(s), Florida Statutes (1981) Petitioner may be forced by the Board of Medical Examiners to curtail his practice under Section 458.331(1)(x), Florida Statutes (1981), which provides that the failure to comply with a lawful order of the Board of Medical Examiners is grounds for disciplinary action under Section 458.331(2), Florida Statutes (1981).

Petitioner relies upon the Florida Supreme Court's holding in Vining v. Florida Real Estate Commission, 281 So.2d 487 (Fla. 1973) in support of his claim that self-incrimination may not properly be compelled in professional disciplinary proceedings. Petitioner asserts that Sections 458.331(1)(s) and 458.339(2) Florida Statutes (1981), are unconstitutional under Vining.

Recognizing that proceedings under Section 458.331(1)(s), Florida Statutes (1981), are limited to determinations of fitness to practice, the court below distinguished Vining, which involved penal sanctions which were sought due to professional misconduct. The court below also properly recognized that while certain provisions of the Medical Practice Act impose sanctions for misconduct, proceedings under Section 458.331(1)(s), Florida Statutes (1981), are of a different nature, and "cannot be considered penal in character for purposes of the Fifth Amendment privilege against compelled self-incrimination." Boedy, supra, 191. Thus Lester v. Department of Professional and Occupational Regulations, State Board of Medical Examiners, 348 So.2d 923 (1st DCA 1977), was distinguished by the court below.

A. SECTION 458.331(1)(s), FLORIDA STATUTES (1981), IS NOT INTENDED TO PUNISH.

As the court below noted, "the compelling State interest in the protection of the public is the basis for regulating the medical profession . . . ." Boedy, supra, at 1981. The legislature has an inherent right to promote the public health, safety and welfare by regulating the practice of medicine in the state. State v. Davis, 196 So. 491 (Fla. 1940). In exercising that right, the legislature may prescribe reasonable rules and regulations to govern the practice of medicine. Page v. State Board of Medical Examiners, 198 So. 82 (Fla. 1940); State ex rel Sbordy v. Rowlett, 190 So. 59 (Fla. 1939).

The stated legislative intent of the Medical Practice Act, Chapter 458 Florida Statutes (1981) is as follows:

> The Legislature recognizes that the practice of medicine is potentially dangerous to the public if conducted by unsafe and incompetent practitioners. The Legislature finds further the it is difficult for the public to make an informed choice when selecting a physician and that the consequences of a wrong decision could seriously harm the public health and safety. The sole legislature purpose in enacting this Chapter is to ensure that every physician practicing in this state meet minimum requirements for safe practice. It is the legislative intent that physicians who fall below minimum competency or who otherwise present a danger to the public shall be prohibited from practicing in this state. Section 458.30, Florida Statutes (1981).

To effectuate that intent, the legislature provided that certain acts constitute grounds for disciplinary action. Section 458.331(1), Florida Statutes (1981).

1. The statutory purpose is to protect the public from impaired doctors.

Several of the acts which constitute grounds for disciplinary action under Section 458.331, Florida Statutes (1981), address culpable conduct which may give rise to additional civil or criminal liabilities. For example, the act of "procuring , or aiding or abetting in the procuring of, an unlawful termination of pregnancy" constitutes grounds for disciplinary action under the Medical Practice Act. Section 458.331(1)(z), Florida Statutes (1981). Section 390.001 (10)(a) Florida Statutes (1983) provides: "any person who willfully performs, or participates in, a termination of pregnancy in violation of the requirements of this Section is guilty of a felony of the third degree . . . ." See Board of Medical Examiners v. James, 158 So.2d 574 (3rd DCA, 1964); Grimes v. Kennedy, 152 So.2d 509 (1st DCA, 1963). Additionally, the act of "gross or repeated malpractice" is addressed under the disciplinary provisions of the Medical Practice Act, but may also give rise to a cause of action in tort. Section 458.331(1)(t), Florida Statutes (1981).

The Petitioner, however, is the subject of action under the non-penal provisions of Section 458.331(1)(s), Florida Statues (1981), which address the act of:

> (s) Being unable to practice medicine with reasonable skill and safety to patients by reason of illness or use of alcohol, drugs, narcotics, chemicals, or any other type of material or as a result of any mental or physical condition. In enforcing this paragraph, the department shall have, upon probable cause, authority to compel a physician to submit

> to a mental or physical examination by physicians designated by the department. Failure of a physician to submit to such examination when so directed shall constitute an admission of the allegations against him, unless the failure was due to circumstances beyond his control, consequent upon which a default and final order may be entered without the taking of testimony or presentation of evidence. A physician affected under this paragraph shall at reasonable intervals be afforded an opportunity to demonstrate that he can resume the competent practice of medicine with reasonable skill and safety to patients. In any proceeding under this paragraph, neither the record of proceedings nor the orders entered by the board shall be used against a physician in any other proceeding.

On its face the section addresses the doctor's inability to practice medicine with reasonable skill and safety. Unlike the doctor who aids and abetts an illegal abortion, the subject of this section is the "sick doctor", who may be suffering from senility, delirium tremons, delusion of prosecution, pneumonia, Parkinson's disease or some other affliction. As such, acts complained of under this section differ from the reprehensible acts associated with illegal abortions under Section 458.331(1)(z), Florida Statutes (1981); and the pecuniary acts subject to discipline under Sections 458.331(1)(m) and (o), Florida Statutes (1981).

In Lester v. Department of Professional and Occupational Regulations, State Board of Medical Examiners, supra, a physician was charged with misconduct under the 1975 version to the Medical Practice Act, for allegedly charging a four per cent kick-back on gross hospital receipts or hospital charges incurred by his

patients. Under the statute, unprofessional conduct was defined to include:

> Any departure from, or the failure to conform to, the standard of acceptable and prevailing medical practice in his area of expertise as determined by the board, in which proceeding actual injury to a patient need not be established; when the same is committed in the course of his practice, whether committed within or without this state. Section 458.1201(1)(m), Florida Statutes (1975).

Although the court noted the legislative intent that, "the provisions of this section are enacted in the public welfare and shall be liberally construed so as to advance the remedy," Section 458.1201(6), Florida Statutes (1975), the court found the statute to be penal in effect, and as such, entitled to a strict construction. Lester, supra, at 925. Since Lester could not know that his alleged rebate contract was prohibited as "unprofessional conduct" under the statute, to discipline him would deny him due process of law. It is noteworthy that the stated purpose of the 1975 version of the Medical Practice Act was to protect the public against "unprofessional, improper, unauthorized, and unqualified practice of medicine, and from unprofessional conduct by persons licensed to practice medicine." Section 458.001, Florida Statutes. (1975). The purpose of the 1975 Medical Practice Act was thus arguably broader than that of the 1981 version.

Fox v. Florida State Board of Osteopathic Medical Examiners, 366 So.2d 515 (1st DCA 1979), likewise involved a pecuniary matter alleged to constitute unprofessional conduct. Fox was charged with violating Sections 459.14(2)(h),(k),(m), and

(n), Florida Statutes (1977), in that he violated Rule 21R-3.12, Florida Administrative Code. Rule 21R-3.12 provided:

> The physician shall cooperate fully in complying with all laws and regulations pertaining to the practice of the healing arts and protection of the public health.

Because Fox allegedly schemed to defraud several persons by mailing bills for medical services not actually rendered, the court, following Lester, supra construed the statute strictly. Since none of the statutory sections cited in the administrative complaint addressed allegedly violated laws which pertained "to the practice of healing arts and protection of the public health", the complaint was held insufficient. Fox, supra at 518.

In proceeding against the Petitioner under Section 458.331(1)(s), Florida Statutes (1981), the Respondent does not seek to condemn errant conduct (such as performing an illegal abortion), or beguiling conduct (such as accepting kick-backs); rather, Respondent seeks merely to determine whether the Petitioner is "unable to practice medicine with reasonable skill and safety to patients by reason of illness . . . or as a result of any mental or physical condition." Section 458.331(1)(s), Florida Statutes (1981).

The fitness examination is designed to allow an independent psychiatrist to evaluate whether or not a doctor is mentally competent to practice. The psychiatrist is subject to cross-examination and rebuttal during the subsequent administrative hearing. Further, the conclusion of the

psychiatrist rather than the statements elicited from the examinee are determinative of the decision to suspend. Often, however, the content of communications made during the course of examinations may be an essential basis for meaningful psychiatric examination. United States v. Hinkley, 525 F. Supp. 1342, 1348 (D.C. Cir. 1981).

2. Medical examinations are a reasonable means to determine fitness.

Section 458.331(1)(s), Florida Statutes (1981), provides: "In enforcing this paragraph, the department shall have, upon probable cause, authority to compel a physician to submit to a mental or physical examination by physicians designated by the department."

As alleged in Petitioner's Administrative Complaint, the Respondent reported to law enforcement officers on two occasions that he had been assaulted and wounded by unknown assailant(s), when in fact, he knew the reports to be false as the stab wounds were self-inflicted. (Pet. A.C., 1) Shortly thereafter, on or about October 1, 1982, Respondent was admitted to Charter Wood Hospital, in Dothan, Alabama for psychiatric examination and treatment. (Pet. A.C., 2) Under these circumstances, the Petitioner found probable cause to require the Respondent to submit to mental examination. Given a duty to protect the public from practice by mentally debilitated physicians, Petitioner would have been remiss not to have ordered the examination.

The compelling state interest in protection of the public justifies an investigation into mental fitness. In Florida Board

of Bar Examiners Re: Applicant 443 So.2d 71 (Fla. 1984), the Florida Supreme Court upheld the authority of the Florida Board of Bar Examiners to require applicants for admission to the Florida Bar to disclose prior treatment for "amnesia, or any form of insanity, emotional disturbance, nervous or mental disorder", and to release all medical records pertaining thereto. Id at 73 The court rejected the Applicant's claims that compelled disclosure was violative of his federal or state constitutional right to privacy, his right to due process of law, his rights guaranteed under Article I, Section 2 of the Florida Constitution, and his rights under Section 90.503, Florida Statutes (1981), governing psychotherapist-patient privilege. Id at 72.

In rejecting the Applicant's claims, the court found that the state's interest in ensuring that only those fit to practice law were admitted to the Bar met the "compelling state interest standard." Id at 74 . That standard "imposes a heavy burden of justification upon the state too show an important societal need and use the least intrusive means to achieve that goal." Id , citing Carey v. Population Services International, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977); Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 197 (1973); and In re Estate of Greenberg, 390 So.2d 40 (Fla. 1980). Similarly, the court below recognized that regulation of the medical profession is a compelling state interest. Boedy, supra at 191.

This Court has also recognized the compelling state interest in highway safety as a justification for summary

suspension of drivers licenses where a driver refuses to submit to a breathalyzer or blood alcohol test. State v. Bender, 382 So.2d 697 (Fla. 1980). The U.S. Supreme Court held that in-court use of a refusal to submit to a blood alcohol test does not violate the Fifth Amendment privilege against compelled self-incrimination. South Dakota v. Neville, ____U.S._____ , 74 L.Ed.2d 748, 103 S.Ct. _____(1983).

When the state is compelled to protect its citizens from the dangerous actions of its licensees, be they doctors, lawyers or automobile drivers, reasonable, unintrusive, fitness determinations are not subject to the bar to testimony provided by the Fifth Amendment self-incrimination provision.

The psychiatric examination sought by the Department is the least intrusive means available to determine Respondent's mental fitness to practice. Petitioner need not rely upon a court-ordered declaration of insanity as evidence of Respondent's mental condition to practice medicine with reasonable skill and safety to the public. In Hubbard v. Washington State Medical Disciplinary Board, 348 P.2d 981 (Wash. 1960), a surgeon was declared mentally incompetent in Oregon. Subsequently his license to practice medicine was revoked. Despite the fact that the surgeon's competency had been restored prior to the license revocation, the court upheld the suspension.

> In addition to being competent to . . . engage in ordinary business transactions, a person desirous to practice medicine . . . must convince the board that he possesses the peculiar qualifications which the legislature has prescribed . . . Id at 984.

The doctor did not produce witnesses to testify as to his mental competence nor did he testify at his license revocation hearing. Id. See also, 28 ALR 3d 487, 498.

The scope of the examination sought by the Petitioner is limited to Respondent's mental ability to practice safely. Testimony of the examining psychiatrist in any subsequent hearing is subject to cross examination and rebuttal. The conclusion of the psychiatrist rather than the verbal content of the examination is determinative of the decision to suspend Respondent's license. See U.S. v. Hinkley, supra. Information obtained in the examination may not be used against the Respondent in any other proceeding. Section 458.331(1)(s), Florida Statutes (1981). Examination by an expert psychiatrist is a reasonable, unintrusive means to determine Respondent's mental fitness to practice safely.

3. Impaired Physicians are subject only to temporary suspension, and guaranteed periodic review of their fitness.

> A physician affected under this paragraph shall at reasonable intervals be afforded an opportunity to demonstrate that he can resume the competent practice of medicine with reasonable skill and safety to patients.

Section 458.331(1)(s), Florida Statutes (1981).

The statutory language clearly indicates that a temporary suspension of medical licensure is intended. It is conceivable that a physician with a serious physical or mental sickness may never recover to the extent that he can practice safely. Nevertheless, that doctor is entitled to periodic opportunities to prove otherwise.

No exception from this range of sanctions is provided for Section 458.331(1)(s), Florida Statutes (1981), which specifically contemplates suspension only.

The provisions of Chapter 458, Florida Statutes (1981), are "penal in nature" and are therefore to be "strictly construed." Lester, supra. "However, they must not be construed so strictly as to emasculate the statute and defeat the obvious intention of the legislature." Martin v. State, 367 So.2d 1119, 1120 (1st DCA 1979); citing State v. Hooten, 122 So.2d 336 (2nd DCA 1960); Associated Dry Goods Corp. v. Department of Revenue, 335 So.2d 832 (1st DCA 1976). See also Griffis v. State, 356 So.2d 297 (Fla. 1978) (statutes to be construed so as to give effect to the evident legislative intent, "regardless of whether such construction varies from the statute's literal meaning").

> When there is in the same statute a specific provision, and also a general one that in its most comprehensive sense would include matters embraced in the former; the particular provision will nevertheless prevail; the general provision must be taken to affect only such cases as are not within the terms of the particular provision.

30 Fla. Jur. Statutes 122 citing 73 Am Jur. 2d, Statues 257 and Bryan v. Landis, 142 So. 650 (Div. B 1932).

Given the express statutory provision for periodic reevaluation of an afflicted physician's capacity to practice safely, the section contemplates suspension rather than revocation.

4. Proceeding on records and orders entered under the statute may not be used against the physician in any other proceeding.

The non-punitive nature of Section 458.331(1)(s), Florida Statutes (1981), is reflected in limitations on the use of the product of the fitness examination:

> In any proceeding under this paragraph, neither the record of proceedings nor the orders entered by the board shall be used against a physician in any other proceeding. Id.

Clearly, neither the testimony received, (including conclusions of the examining psychiatrist or the verbal content of his examination of the Respondent), nor the orders subsequently entered on the basis of that testimony may be used against the Respondent in any other administrative, civil or criminal proceeding.

This grant of immunity allows this case to be distinguished from the cases where the threat of an economic or other disability was held to unconstitutionally coerce incriminating testimony. See Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 567 (1967); Gardner v. Broderick, 392 U.S. 273,88 S.Ct. 1917, 20 L.Ed.2d 1082 (1968); Uniform Sanitation Men Association v. Commissioner, 392 U.S. 280,88 S.Ct. 1917, 20 L.Ed.2d 1089 (1968); Slochower v. Board of Education, 350 U.S. 552,76 S.Ct. 637, 100 L.Ed. 692 (1953); Lefkowitz v. Cunningham, 431 U.S. 801, 97 S. Ct. 2132, 53 L.Ed. 2d 1 (1977); Lefkowitz v. Turley, 414 U.S. 70, 94 S.Ct. 316, 38 L.Ed.2d 274 414 (1973); National Acceptance Co. of America v. Bathalter, 705 F.2d 924 (7th Cir. 1983).

In Garrity supra, the Court held that the threat of dismissal of a public officer to coerce incriminating statements

precluded the use of those statements in the subsequent criminal proceedings.

> We now hold 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 . . . . 17 L.Ed.2d at 567 (emphasis supplied)

In Gardner v. Broderick, supra, the Court, citing Garrity, held that a policeman was wrongfully fired for his refusal to sign a "waiver of immunity" for his testimony before a grand jury.

> It is clear that petitioner's testimony was demanded before the grand jury in part so that it might be used to prosecute him, and not solely for the purpose of securing all accounting of his performance of the public trust.
> Id, 20 L. Ed. 2d at 1087, (emphasis supplied).

Uniform Sanitation Men Association, supra, likewise addressed an unconstitutional attempt to secure a waiver of immunity.

> They were discharged for refusal to expose themselves to criminal prosecution based on testimony which they would give under compulsion despite their constitutional privilege.
> 20 L. Ed. 2d at 1092, (emphasis supplied).

In Lefkowitz v. Turley, supra, two architects were summoned to testify before a grand jury investigating charges of conspiracy, bribery and larceny. 38 L. Ed. 2d at 281. Because of their refusal to sign waivers of immunity, the architect's state contract rights were automatically cancelled and suspended. Id. The Court held that the compelled forfeiture was invalid

because of the threat of criminal prosecution, citing McCarthy v. Arndstern, 266 U.S. 34, 40, 45 S.Ct. 16, 69 L. Ed. 2d 158, (1924):

> [t]he privilege is not ordinarily dependent upon the nature of the proceeding in which testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who give it. The privilege protects a mere witness as fully as it does one who is also a party defendant. 38 L. Ed. 2d at 281, (emphasis supplied).

Once again it was the threat of future criminal exposure that rendered the state's conduct unconstitutional.

In Lefkowitz v. Cunningham, supra, a New York Democratic Party official was called to "testify before a special grand jury authorized to investigate his conduct in the political offices he then held." 53 L. Ed. 2d at 5. The official's eventual refusal to sign a waiver of immunity caused the state to remove him from his party offices and too prohibit him from holding any party or public office for four years. The Supreme Court held this from of economic coercion unconstitutional under the Fifth and Fourteenth Amendments, stating:

> Moreover, since the test is whether the testimony might later subject the witness to criminal prosecution, the privilege is available to a witness in a civil proceeding, as well as to a defendant in a criminal prosecution. 53 L. Ed. 2d at 7, emphasis supplied.

Although National Acceptance Co. of America, supra, involved private parties in civil litigation, the defendant, was held entitled to invoke his Fifth Amendment privilege against

self-incrimination without having his silence serve as an admission of the allegations in the complaint. The threat of future criminal prosecution was determinative:

> Thus in a civil case, the Fifth Amendment does not privilege from disclosure facts which simply would tend to establish civil liability, but does protect witnesses from being required to make disclosures, otherwise compelable in the trial court's contempt power, which could incriminate them in a later criminal prosecution.
> 705 F. 2d 926, 927, (emphasis supplied).

Slochower v. Board of Higher Education, supra, is perhaps more difficult to distinguish than the preceeding cases. Slochower, a public college professor, was dismissed for invoking the Fifth Amendment privilege against self-incrimination before the Subcommittee to Investigate the Administration of the Internal Security Act and other Internal Security laws of Senate Committee on the Judiciary. More specifically, he refused to answer questions regarding his membership in the Communist Party during 1940 and 1941. 100 L. Ed.2d at 692. Although the Court did not indicate whether past membership in the Communist Party constituted a crime, the Court held that Slochower's summary dismissal violated his due process rights under the Constitution. Id. at 701.

> As we pointed out in Ullmann, a witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might be ensnared by ambigious circumstances.
> Id. at 700, (emphasis supplied).

Thus, while Slochower did not clearly contemplate the threat of future criminal proceedings as substantiation of a finding of unconstitutionally compelled self-incrimination, the "reasonable fear of prosecution" was considered as well.

Here, the Respondent is not being subjected to criminal liability in any way. His testimony and any orders entered therein are fully immunized from any future prosecution, be it civil, administrative or criminal. Section 458.331(1)(s), Florida Statutes (1981) is a limited, non-punitive provision, intended to allow the Petitioner to protect the public through the examination of doctors, where probable cause exists to believe that the physician may be suffering from a physical or emotional affliction to the possible detriment of the public.

B. THE PRIVILEGE AGAINST COMPELLED SELF-INCRIMINATION DOES NOT APPLY TO ADMINISTRATIVE DISCIPLINARY PROCEEDINGS WHICH IMPOSE NON-PUNITIVE CIVIL PENALTIES.

Read literally, neither the state nor the federal self incrimination provisions apply to non-criminal proceedings. United States Constitution, Amendment V; and, Florida Constitution Article I, Section 9 (1968). The courts, however, have expanded the applicability of the privilege to a variety of other proceedings, including administrative, bankruptcy, contempt, grand jury, juvenile delinquency and others. Courts have focused upon the threat of punishment rather than the context in which the privilege in invoked.

In Gault, supra, the Court said:

> [I]t is . . . clear that the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but

> upon the nature of the statement or admission and the exposure which it invites. The privilege may be claimed in a civil or administrative proceeding, if the statement is or may be inculpatory.

1 L.Ed 2d at 558, noting language in Murphy v. Waterfront Commission, 378 U.S. 52, 94, 84 S. Ct. 1594, 12 L.Ed.2d 678 at 704,(1964):

> The privilege can be claimed in any proceeding . . . [sic] it protects any disclosures which the witness may reasonably apprehend could be used in a criminal prosecution or which could lead to other evidence that might be so used.(emphasis supplied).

Gault supra, at 557. See also Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489; 12 L Ed. 2d 653, (1964); McCarthy v. Arndstein, Supra.

The language cited from Gault, which footnoted the above quoted language, was cited with approval by the Florida Supreme Court in Vining, supra.

> "Gault is significant for our purposes because it marks the beginning of a continuing trend toward application of the privilege against self-incrimination to "penal" proceedings regardless of their "criminal" status in the orthodox sense.

Id at 490. In the footnote to this language the court cited Garrity, supra; Gardner, supra; and, Uniformed Sanitation Men Assoc., supra, which all involved possible criminal sanctions.

The court below correctly distinguished the holding in Vining as well as that in Lester, supra, saying:

> [The][sic] two cases are distinguishable from the case at issue on their facts, since they both deal with violations of the respective statutes amounting to misconduct, for which sanctions were sought.

9 FLW at 191.

It is clear that the applicability of the privilege is contingent upon the statutory intent to punish rather than merely to regulate for the public health, safety or welfare. Both federal and state precedent supports a finding of constitutionality of Section 458.331(1)(s), Florida Statues (1981).

1. Federal Precedent demonstrates that the Department's actions are not punitive.

In determining the scope of the privilege against self-incrimination, the Supreme Court focuses upon " the nature of the statement and the exposure that it invites". Gault, supra, at 558. The statutory language and the legislative intent are therefore determinative of whether the statute is so penal as to require application of the Fifth Amendment's self-incrimination protection.

In Ward v. Coleman', the Court of Appeals stated:

> Judicial determinations as to the civil or penal nature of a particular provision generally center around the issue of 'whether the legislative aim in providing the sanction was to punish the individual for engaging in the activity involved or to regulate the activity in question.'

598 F.2d 1187 at 1190, citing Telephone News System Inc. v. Illinois Bell Telephone Co., 220 F. Supp. 621, 630 (N.D. Ill, 1963) aff'd, 376 U.S. 782, 12 L.Ed,2d 83,84 S.Ct. 1134 (1964);

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S.Ct. 554,9 L.Ed.2d 644, (1963); Trop v. Dulles, 356 U.S. 86, 78 S. Ct. 590, 2 L.Ed. 2d 630 (1958).

In Ward, the Court of Appeals determined that a proceeding for the assessment of monetary civil penalties under Section 311(b)(6) of the Federal Water Pollution Control Act (FWPCA) was so criminal in nature that the Fifth Amendment self-incrimination privilege applied. Ward was required to report a spill under threat of a criminal penalty, but after doing so he was assessed civil penalties under Section 311(b)(6) of the FWPCA. The Court of Appeals applied the guidelines specified in Kennedy v. Mendoza-Martinez, supra and determined that Section 311(b)(6) was "sufficiently punitive to intrude upon the Fifth Amendment's protection against compulsory self-incrimination." Ward, supra, 65 L.Ed.2d at 749. On appeal, the Supreme Court reversed, guided in part by the seven part Mendoza-Martinez test to determine whether a so-called civil penalty is in effect criminal.

> Our inquiry on this regard has traditionally proceeded on two levels. First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. (citation omitted) Second, where Congress has intended to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention. Id.

Thus, were the court to analyze the state Medical Practice Act and the section at issue on the case at bar, it would first look to the statutory label and if a civil penalty was provided, the punitive nature of that provision would then be analyzed.

Since the Medical Practice Act, generally, provides for "penalties" upon violation of various "grounds for disciplinary action" an analysis of the punitive nature of the challenged provision would be required under the holding in Ward and Mendoza-Martinez. [Section 458.331, Florida Statutes (1981).]

The court below followed this constitutional analysis and concluded:

> Applying each of the Mendoza-Martinez considerations to the facts of the case at issue, we find that the proceedings to determine if Dr. Boedy is mentally competent to practice medicine with reasonable skill and safety to his patients, though they may result in temporary suspension of his license to practice medicine, cannot be considered 'penal' in character for purposes of the Fifth Amendment privilege against compelled self-incrimination. Boedy, supra, 191.

In United States v. General Motors, 403 F. Supp. 1151 (D. Conn. 1975), the court applied the Mendoza-Martinez test to evaluate the punitive nature of civil penalties assessed pursuant to the oil spill provision of the FWPCA. The court correctly interpreted the manner in which the Mendoza-Martinez test is to be applied:

> The Mendoza Martinez test is actually composed to two stages: first, a determination of whether Congress intended the statute to have a penal or remedial effect; second, if necessary, an analysis of the operative effect of the statute in terms of the seven listed characteristics. If the Court finds that Congress unmistakably intended the sanction as punishment, as the Court found in Mendoza-Martinez, then the inquiry is finished. If the congressional intent is ambiguous, however, as it is in the present case, it is necessary to inquire

> whether the actual effect of the statute is punitive by the standards of the second stage of the test. Id at 1158.

As demonstrated by an analysis of the purpose of Section 458.331(1)(s), Florida Statutes (1981), the legislative intent is not to punish, but rather to ensure that medical practice is performed safely. Nevertheless, if the intent of the section is arguably penal, then the "punative effect" must be analyzed.

The traditional tests for evaluating the punitive nature of sanctions were summarized by the Supreme Court as follows:

> [1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as punishment, [3] whether it comes into pay only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment -retribution and deterence, [5] whether the behavior to which it applied is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions. Absent conclusive evidence of congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face"

Mendoza-Martinez, supra, at 666, 667.

Applying the test to Section 458.331(1)(s), Florida Statutes (1981), demonstrates that the section has a non-punitive effect:

(1) Whether the sanction involves an affirmative disability or restraint.

Only after probable cause exists to believe that a physician is physically or mentally unable to practice safely can the Petitioner compel an examination. If the expert opinion of the examining psychiatrist indicates that the Respondent can practice safely, then very little restraint will have resulted. (Neither the record of proceedings nor the orders entered thereunder can be used against Respondent in any other proceeding.)

Alternatively, if the Respondent is found to be impaired, then his practice will be suspended. This is clearly an affirmative disability, and is similar to exclusion of an attorney from the practice of law before certain courts. Ex parte Garland, 4 Wall 333, 337, 71 U.S. 333, 18 L Ed 366 (1866). The disability is somewhat less severe than in Garland, however, since the Respondent is entitled to periodic review as to his condition. It is important to note at this point, however, that the Supreme Court knew that the various factors "may often point in differing directions." Mendoza-Martinez, supra, at 667. Nevertheless all the factors are "relevant". Id.

(2) Whether the sanction has historically been regarded as punishment.

Obviously a mental or physical examination has not historically been considered as punishment. Justice Frankfurter opined:

> The fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation.

United States v. Lovett, 328 U.S. 303, 66 S.Ct. 1073 ,90 L. Ed. 2d 1252 (1946),(concurring opinion).

While a mental examination may be discomforting to the Respondent, it has a valid regulatory purpose, and may even help the Respondent, especially if he is given a clean bill of health.

While a temporary suspension of the ability to practice medicine may involve an element of retribution, as in the case of the doctor found guilty of aiding an illegal abortion; the temporary suspension here protects the public from substandard or dangerous medical care, and protects the Respondent from a possible malpractice suit. Temporary suspension here has a remedial effect.

(3) Whether the sanction comes into play only on a finding of scienter.

Since the act complained of, that of being unable to practice safely does not involve a culpable act for which a "guilty mind" is required, this factor shows the non-punitive intent of the section.

(4) Whether the sanction's operation will promote the traditional areas of punishment-retribution and deterence.

Neither a fitness examination nor a temporary suspension subject to periodic review will promote retribution. On the contrary, the intent is to help the impaired professional, as is strongly evidenced by the 1983 enactment of Section 458.3315, Florida Statutes (1983), which provides for the creation of an Impaired Professionals Advisory Committee to provide information and assistance to impaired professionals.

To deter is "to discourage or stop by fear." Black's Law Dictionary (5th ed), 404. The Department can hardly be expected to stop physicians from becoming ill or diseased by its requirement of fitness examinations for physicians believed to be impaired. Nor can the Petitioner beat Dr. Boedy into mental fitness to practice safely by threatening to suspend his license to practice. The "traditional aims of punishment" are in no way furthered by the challenged provision.

(5) Whether the behavior to which it applies is already a crime.

Certain acts constitute felonies or misdemeanors under the Medical Practice Act and are also subject to disciple under the act. For example, it is a misdemeanor to attempt to obtain or to obtain a license to practice medicine by fraudulent misrepresentation. Section 458.327(2)(c), Florida Statutes (1983). The act of "attempting to obtain, obtaining, or renewing a license to practice medicine by fraudulent misrepresentations . . . " is subject to discipline under Section 458.331(1)(a), Florida Statutes (1983). In addition to conduct which is subject to both civil and criminal penalties under the Medical Practice Act itself, certain conduct may be subject to discipline under the Medical Practice Act and under another criminal statute. For example, the act of assisting in an illegal abortion, previously discussed, is subject to both civil and criminal penalties. Sections 458.331(1)(z), 390.001, Florida Statutes (1983).

The challenged section, in contrast with other disciplinary provisions of the Medical Practice Act, is not subject to criminal proscription and is, therefore non-punitive under this Mendoza-Martinez test.

(6) Whether an alternative purpose other than punishment may rationally be ascribed to the sanction.

An analysis of the challenged section demonstrated that it can have no alternative purpose. The sole purpose of Section 458.331(1)(s), is protection of the public from physicians who are "unable to practice medicine with reasonable skill and safety to patients by reason of illness. . . ." The fitness examination, conducted only upon probable cause , is mean to effectuate that purpose and no other purpose could be intended. A suspension of practice may be ascribed a punitive intent however, but would result only if the physician were found to be impaired, and such suspension would be subject to periodic review as mandated by law.

(7) Whether the sanction appears excessive in relation to the alternative purpose assigned.

This factor is inherently subjective. Atlas Roofing Co. v. Occupational Safety and Health Review Comm., 518 F.2d 990 at 1110. Petitioner has probable cause to believe that the Respondent maybe too sick to practice safely. For this reason the Petitioner seeks to have an expert psychiatrist evaluate Respondent's condition, and to testify at a disciplinary hearing. Neither the record of the proceedings nor any order entered thereunder maybe used against the Respondent in any other proceeding. The requested medical examination is certainly not excessive under the circumstances. If the Respondent is found to be impaired then his license may be suspended. No other sanction may reasonably be read into the statute, especially given the express provision for periodic review of the suspension.

As the preceeding analysis demonstrates, application of the Mendoza-Martinez tests for punitive effect demonstrate that Section 458.331(1)(s), Florida Statutes (1981) is not intended as punishment. The consequence of suspension does not necessarily render the sanction punitive. The Supreme Court held that employment disqualifications were not punitive in several contexts. See DeVeau v. Braisted. 363 U.S. 144, 80 S.Ct. 1146, 4 L.Ed.2d. 1109 (1960); Hawker v. New York, 170 U.S. 189,18 S.Ct. 573, 42 L.Ed. 1002 (1898); and Ex parte Wall 107 U.S. 265,25 S.Ct. 569, 27 L.Ed. 552 (1883).

The Court said in DeVeau:

> The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation such as the proper qualification for a profession.
> Id. at 160, citing Hawker, supra.

Similarly, the Court below determined, (based upon its analysis of the Mendoza-Martinez test) that the intent of Section 458.331(1)(s), Florida Statutes (1981) is not penal for purposes of the Fifth Amendment privilege against compelled self-incrimination.

2. Florida precedent.

In State ex rel Sbordy v. Rowlett, supra, this court recognized the property interest represented by a license to practice medicine, but also that the state has a right to limit the use of that interest:

> Likewise, the preservation of the public health is one of the duties of sovereignty and in conflict between the right of a citizen to follow a profession and the right of the sovereign to guard the health and welfare, it logically follows that the rights of the citizen to pursue his profession must yield to the power of the state to prescribe such restriction and regulations as shall fully protect the people from ignorance, incapacity, deception and fraud. Id at 63 (emphasis supplied).

See also State ex rel Munch v Davis, 196 So. 491 (Fla. 1940), Page v State Board of Medical Examiners, suprarSpencer v. Hunt, 147 So. 282 (Fla. 1933).

In order that the practice of medicine by regulated so as to protect the public, the legislature enacted the Medical Practice Act, specified which acts are subject to discipline, and provided penalties for violations. A prior version of the act provided that "being guilty of immoral or unprofessional conduct, incompetence, negligence or willful misconduct" constituted grounds for discipline. Section 458.120(1)(m), Florida Statutes (1975) . Based upon allegations that a scheme to obtain hospital kick-backs constituted "unprofessional conduct," the Firester, supra, at 925. Since Dr. Lester had no notice that kick-backs constituted unprofessional conduct, the court. at 927.

In Fox, supra, the same court, following Lester, held that the physician could not properly be disciplined for perpetrating several allegedly fraudulent acts under a rule mandating com-

pliance with "all laws and regulations pertaining to the practice of the healing acts and protection of the public health." Rule 21R-3.12, Florida Administrative Code, cited in Fox, supra at 515-516. The Court in Lester and Fox thus refused to condone penal sanctions under the Medical Practice Act for illegal conduct which did not relate to the practice of medicine. The Department is not seeking to punish Dr. Boedy for past illegal acts. Nor is the Department seeking to regulate conduct which is not directly related to the practice of medicine. The Respondent only seeks to compel the Petitioner to undergo a mental examination as to his ability to practice medicine safely.

In Vining, supra, this court interpreted the Supreme Court's Spevack rationale:

> . . . it is our view that the right to remain, silent applies . . . to proceedings 'penal' in nature in that they tend to degrade the individuals professional standing, professional reputation or livelihood. supra at 491.

The court was influenced by the Supreme Court's language in In re Gault, supra;

> . . . the availability of the privilege does not turn upon the type of proceeding . . . but upon the nature of the statement and the exposure which it invites. supra 490. (emphasis supplied).

Vining was charged with a variety of criminal misdeeds including breach of trust, and dishonest dealings, misrepresentation and failure to properly maintain trust accounts. In answering these charges, Vining was required to

admit or deny facts alleged in the complaint, and failure to file a sworn answer constituted grounds for license suspension or revocation. Id. Undenied allegations in the complaint or admissions made by Vining were immunized from use in subsequent criminal or civil procedings. Testimony at Vining's disciplinary hearing and orders entered thereunder, however, were not immunized. Thus, the nature of the statements (alleged criminal misconduct) and the possible exposure (license revocation or suspension) rendered the proceedings penal.

Vining was distinguished in City of Hollywood v. Washington, 384 So.2d 1315 (4th DCA 1980). That case involved an illegitimate grant of immunity which elicited incriminating statements from a city employee. The employee subsequently sought to supress the incriminating statements at a hearing on the city's decision to terminate his employment. After finding that no federally protected self-incrimination right would be offended by the use of the statements, the court applied Florida law. Vining was distinguished since " there was no element of immunity involved." Id at 1318. The court then concluded that "at least a statutory [Section 914.04 Florida Statutes] [sic] if not a constitutional right is offended by the use of immunized testimony under the particular circumstances involved in this case." Id at 1319. The court noted that loss of government employment may constitute a penalty or forfeiture. Id at 1317.

The court below also distinguished Vining, but on the ground that the Respondent was not seeking penal sanctions for "misconduct", rather than on the grant of immunity provided in

the challenged statute. While that grant of immunity provides important protection to Dr. Boedy, it is but one indication of the non-punitive nature of Section 458.331(1)(s), Florida Statutes (1981). Of greater significance is the requirement that, only upon a showing probable cause, can the Department order Dr. Boedy to undergo an independent medical examination to determine his fitness to practice. The medical conclusions of the expert are subject to cross-examination and rebuttal; but, they may in fact demonstrate that Dr. Boedy is fit to practice. In the event that he is not, he is further entitled to periodic review of his suspension. Petitioner is not being punished for being incapacitated, the Respondent merely seeks to determine if the Petitioner is in fact incapacitated. As such, the lower Court's holding should be affirmed.

CONCLUSION

The certified question should be answered in the negative, and the decision of the lower court affirmed to allow the legislative intent to be adequately implemented.

Respectfully submitted,

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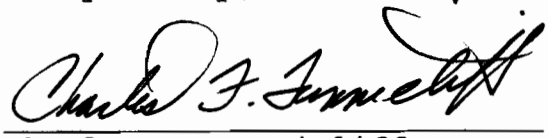
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to Philip J. Padovano, Esquire, 1020 East Lafayette Street, Suite 201, Tallahassee, Florida 32302 this 8th day of May, 1984.



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