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IN THE SUPREME COURT OF FLORIDA

R. FREDERICK BOEDY,

Petitioner,

vs. Case Number: 64,870

DEPARTMENT OF PROFESSIONAL REGULATION,

Respondent.

PETITIONER'S INITIAL BRIEF

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PRELIMINARY STATEMENT

The record on appeal is being compiled by the District Court. Pleadings filed in the administrative proceedings which gave rise to this case will be referred to herein as they were in the District Court, i.e., by reference to the Appendix to the Petition in the District Court (e.g., "App. to Pet.").

The Department of Professional Regulation will be referred to by name or as the Respondent, and R. Frederick Boedy will be referred to by name or as the Petitioner.

All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The Respondent, Department of Professional Regulation, filed an Adminstrative Complaint against the Petitioner on November 15, 1982, seeking to "revoke, suspend, or take other disciplinary action" against him as a licensee under the Medical Practice Act." (App. to Pet. 1,2). The only ground asserted in the Administrative Complaint was that the Petitioner suffered from a mental or emotional illness which rendered him "unable to practice medicine with reasonable skill and safety" under the provisions of §458.331(1)(s), Florida Statutes (1981). (App. to Pet. 1,2). The Petitioner denied these allegations in his Answer. (App. to Pet. 3-6).

On February 18, 1983, the Respondent entered an ex parte Order directing the Petitioner to report and submit to a series of mental examinations commencing on March 1, 1983. The Order stated that the mental examinations were required "for the purpose of obtaining examination reports and expert opinion and testimony concerning [the Petitioner's] ability to practice medicine with reasonable skill and safety." (App. to Pet. 8).

Petitioner Boedy filed a Motion for Protective Order with the Hearing Officer centending, among other things, that (1) the provisions of the Medical Practices Act which require physicians to submit to an involunatry mental examination in disciplinary proceedings as a condition of retaining a Florida Medical License are violative of the Fifth Amendment privilege against self-incrimination.

The examinations were rescheduled over a 13-day period commencing March 29, 1983. (App. to Pet. 13). In a letter to the Hearing Officer dated March 10, 1983, the Petitioner renewed his Motion for Protective Order as to the second ex parte Order scheduling the examinations. (App. to Pet. 15). Thereafter, on March 15, 1983, the Respondent filed a response contending that the Petitioner's privilege against self-incrimination would not be violated by the mental examinations in question. (App. 17 to Pet.).

On March 16, 1983, the Hearing Officer entered an Order denying the Petitioner's Motion for Protective Order. (App. 20 to Pet.). A Petition for Review was file in the District Court shortly thereafter to challenge the constitutional validity of the Agency's determination that the Petitioner must give testimony against himself in the administrative proceeding below.

On Janaury 18, 1984, the First District Court of Appeal entered its decision upholding the challenged statutes and certifying the following question as one of great public importance:

> WHETHER THE FIFTH AMENDMENT PRIVILEGE AGAINST COMPELLED SELF-INCRIMINATION APPLIES TO DISCIPLINARY PROCEEDINGS INITIATED UNDER SECTION 458.331(1)(s), 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.

Boedy v. Department of Professional Regulation, Board of Medical Examiners, ____ So.2d ____, 9 F.L.W. 190 (Fla. 1st DCA January 18, 1984).

On February 13, 1984, the Petitioner filed a timely Notice to Invoke Discretionary Review.

ARGUMENT

THE CONSTITUTIONAL PRIVILEGE AGAINST COMPELLED SELF-INCRIMINATION EMBODIED IN THE STATE AND FEDERAL CONSTITUTIONS APPLIES TO DISCIPLINARY PROCEEDINGS UNDER SECTION 458.331(1)(s), FLORIDA STATUTES (1981).

The precise question here is whether the state, in a professional disciplinary proceeding, can revoke or suspend a physician's license solely because he invokes his constitutional right not to incriminate himself by refusing to submit to an involuntary mental examination.[1] The Petitioner contends that the issue is controlled by Vining v. Florida Real Estate Commission, 281 So.2d 487 (Fla. 1973), which requires a conclusion that a physician cannot be compelled to waive his privilege against self incrimination in a professional disciplinary proceeding.

The Court below rejected the Petitioner's constitutional attack on Sections 458.331(1)(s) and 458.339, Florida Statutes (1981), and held that a physician may be put to the choice of witnessing against himself or losing his medical license where

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[1] The potential penalty for refusal to submit to the examination is not limited to suspension or revocation of a physician's license. Section 458.327(2)(b), Florida Statutes (1981), states that "Knowingly concealing information relating to violations of this chapeter" is a first-degree misdemeanor.

the proceeding is predicated on inability to practice rather than misconduct. However, the Petitioner contends that the State's reasons for initiating a professional disciplinary proceeding which may result in license suspension or revocation are irrelevant because the penalty imposed upon the professional is the same in either case. Therefore, the District Court erred in its failure to apply Vining.

A.

VINING IS DISPOSITIVE

In Vining, a licensed real estate broker refused to file the required sworn answer to charges made against him in a professional disciplinary proceeding and the statute provided for entry of a default if no answer was filed. This Court held that filing an answer amounted to testimony, that the testimony was compelled under threat of license forfeiture, and that the potential penalty of license suspension or revocation was sufficiently severe to invoke the state and federal constitutional protections against compulsory self-incrimination. The Court concluded:

> [T]he right to remain silent applies not only to the traditional criminal case, but also to proceedings "penal" in nature in that they tend to degrade the individual's professional standing, professional reputation or livelihood. . . .
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> * * * *

> . . . The basic constitutional infirmity of the statute lies in requirement of a response under threat of license revocation or suspension, which amounts to compelling the defendant to be a witness against himself within the meaning of the Fifth Amendment to the U.S. Constitution and Article 1, §9 of the Florida Constitution, F.S.A.

Id., at 491-492. The Vining decision has been consistently affirmed[2], since the law on which it rested remains intact (see, infra, at 12-20) and the "logic and reason" which "demand[ed]" that opinion certainly remain with us. Id., at 491. See also, Lester v. Department of Professional and Occupational Regulations, State Board of Medical Examiners, 348 So.2d 923, 925 (Fla. 1st DCA 1977) (statute permitting suspension or revocation of physician's license is "a penal statute").[3]

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[2] Kozerowitz v. Florida Real Estate Commission, 289 So.2d 391 (Fla. 1974); Buchman v. State Board of Accountancy, 300 So.2d 671, 673 (Fla. 1974) ("It has long been the rule in this State that statutes permitting the revocation of occupational licenses are penal in nature", citing State ex rel. Jordan v. Pattishall, 99 Fla. 296, 126 So.2d 423, 425 (Fla. 1st DCA 1974).

[3] Lester has also been consistently affirmed: Solloway v. Department of Professional Regulation, 421 So.2d 573 (Fla. 3rd DCA 1982) (revocation of psychiatrists's license); School Board of Pinellas County v. Noble, 384 So.2d 205 (Fla. 1st DCA 1980) (discharge of teacher under contract); Fox v. Florida State Board of Osteopathic Medical Examiners, 366 So.2d 515 (Fla. 1st DCA 1979).

1.

A Mental Examination is Testimonial

The applicability of the constitutional privilege against self-incrimination turns on the nature of (a) the testimony, and (b) the compulsion which is said to make the testimony involuntary. The privilege extends only to disclosures which are testimonial,[4] Holt v. United States, 218 U.S. 245 (1910), and the court below did not dispute that compelled submission to a mental examination is testimony within this context.

In Estelle v. Smith, 451 U.S. 454, 68 L.Ed.2d 359, 101 S.Ct. 1866 (1981), the United States Supreme Court held that disclosures made in a psychiatric examination were testimonial. This is true because a mental examination requires the examinee to reveal his mental content to the examining doctor, e.g., answering questions regarding thoughts, feelings, and opinions.[5] In this regard, note that the order for Petitioner to

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[4] For this reason, the state's reliance below on blood alcohol tests compelled of drunk drivers was wholly misplaced. See Schmerber v. California, infra.

[5] Query whether an examination based solely on physical movements, such as positioning figures or doll play, or such as the card placement of an MMPI test, would require "testimony"?

submit to the series of mental examinations expressly required his "testimony". In Schmerber v. California, 384 U.S. 757, 763-764, 16 L.Ed.2d 908, 86 S.Ct. 1826 (1966), the definition of testimony was set out:

> It is clear that the protection of the privilege reaches an accused's communications whatever form they might take, and the compulsion of responses which are also communications, . . . The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling "communications" or "testimony," but that compulsion which makes a suspect or accused the source of "real or physical evidence" does not violate it.

See also, United States v. Wade, 338 U.S. 218 (1967) ("compulsion to disclose any knowledge he might have"). [6]

2.

An Examination Ordered Under Threat of License Forfeiture is Compelled.

Again, the court below did not dispute that the statutory scheme at issue here "compels" testimony. That issue was put to rest with Vining's holding, quoted above, that "requirement of a response under threat of license revocation or suspension . . . amounts to compelling the defendant to be a witness against himself". In Spevack v. Klein, 385 U.S. 511, 514, 17 L.Ed.2d

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[6] The state's attempt below to characterize the evidence sought as the examining psychiatrist's "conclusion" was totally convoluted and ignored the obvious response that the "conclusion" sought could only be obtained through the "testimony" of the individual being examined.

574, 87 S.Ct. 625 (1967), the Supreme Court held unconstitutional the disbarment of an attorney for the sole reason that he invoked the right not to testify against himself in an administrative inquiry. The Court found the statutory choice between witnessing against oneself and license forfeiture to be untenable:

> The threat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion to make a lawyer relinquish the privilege. That threat is indeed as powerful an instrument of compulsion as "the use of legal process to force from the lips of the accused individual the evidence necessary to convict him . . . ." United States v. White, 322 U.S. 694, 698. As we recently stated in Miranda v. Arizona, 384 U.S. 346, 461, "In this Court, the privilege has consistently been accorded a liberal construction."

The Supreme Court's decision in Garrity v. New Jersey, 385 U.S. 493, 497, 17 L.Ed.2d 562, 87 S.Ct. 616 (1967), best characterized the compulsion imposed upon Petitioner by the statutes in question:

> The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent.

That is, "a choice between the rock and the whirlpool" is no choice at all. Id., at U.S. 496. Subsequently, in Lefkowitz v.

Cunningham, 431 U.S. 801, 806-80, 53 L.Ed.2d 1, 97 S.Ct. 2132 (1977), the Court wrote:

> the touchstone of the Fifth Amendment is compulsion, and direct economic sanctions and imprisonment are not the only penalties capable of forcing the self-incrimination which the Amendment forbids.
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> * * * *
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> The threatened loss of such widely sought positions [political party offices], with their power and prerequisites, is inherently coercive. Additionally, compelled forfeiture of these positions demeans appellee's general reputation in his community.

The District Court rejected Vining (and Lester), writing:

> These 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.
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> In the instant case, the Department of Professional Regulation seeks to curtail, at least temporarily, Dr. Boedy's right to practice medicine, on the ground that he is suffering from a mental or emotional illness which renders him "unable to practice medicine with reasonable skill and safety" under the provisions of Section 458.331(1)(s), Florida Statutes (1981). This subsection provides that the affected physician "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." Disciplinary action under this subsection is not premised on misconduct by the physician,

> as in Vining and Lester, but instead upon his inability, due to some mental or physical condition, to practice medicine with reasonable skill and safety to patients.

Boedy v. Department of Professional Regulation, Board of Medical Examiners, supra, at 192.

The District Court's off-handed rejection of these two cases is unsound for the following reasons. First, neither Vining nor Lester turned on the reasons for the disciplinary proceeding. Rather, both cases correctly focused on the effect of the sanctions upon the professional, holding that license revocation or suspension is penal. Thus, the particular grounds motivating the regulatory agency are irrelevant to that determination. As the United States Supreme Court wrote in In re Gault, 387 U.S. 1, 49, 18 L.Ed.2d 527, 87 S.Ct. 1428 (1967), the availability of the privilege turns upon "the exposure which [the testimony] invites". Quoted by this Court in Vining, supra, at 490.

Second, as the District Court noted in its certified question, the proceedings against the Petitioner were statutorily classified as "disciplinary" just as in Vining and Lester.

Third, the District Court framed the penalty for invoking Petitioner's right not to incriminate himself as "temporary suspension". However, the penalty was revocation of his license, and the fact that the physician could later regain his license by "realizing the error of his ways", so to speak, i.e., submitting

to the ordered examination and carrying the burden of proof, in no way minimizes the penalty inflicted upon the Petitioner as the price for exercising his constitutional right not to incriminate himself.

Finally, even if misconduct by the professional were the turning point, the Respondent is obviously alleging that the Petitioner's behavior transcends the bounds of competent medical practice (i.e., his behavior is mis-conduct), since the regulatory agency's proper concern is with protecting the public from inadequate or incompetent practitioners, and the agency's authority does not and could not extend to censoring a practitioner's mental content where no behavior in the practice is implicated without violating the First Amendment to the United States Constitution and Article 1, Sections 3 & 4, of the Florida Constitution. See, infra, at 26-27.

In sum, this case is squarely controlled by Vining v. Florida Read Estate Commission, supra, and the decision below, being in direct conflict therewith, should be summarily reversed on that authority.

B.

VINING IS SOUND LAW

Both the state and federal precedential foundation and this Court's legal analysis in Vining remain unassailable.

1.

Federal Precedent

The Court in Vining, supra, at 489-491, relied on several decisions of the United States Supreme Court, and those precedents remain intact. In Malloy v. Hogan, 378 U.S. 1, 12 L.Ed.2d 653, 84 S.Ct. 1489 (1964), the Court held the Fifth Amendment privilege against self-incrimination applicable to the states and defined the privilege as "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty." Id. at U.S. 8. This "penalty" was later defined:

> In this context "penalty" is not restricted to fine or imprisonment. It means, as we said in Griffin v. California, 380 U.S. 609, the imposition of any sanction which makes assertion of the Fifth Amendment privilege "costly". Id., at 614.

Spevack v. Klein, supra, at 515. The In re Gault decision, supra, was important to Vining for its analysis of a "penal" proceeding; Vining quoted, in part:

> Against the application to juveniles of the right to silence, it is argued that juvenile proceedings are 'civil' and not 'criminal,' and therefore the privilege should not apply. It is true that the statement of the privilege in the Fifth Amendment, which is applicable to the States by reason of the Fourteenth Amendment, is that no person 'shall be compelled in any criminal case to be a witness against himself.' However, it is also 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,

> for example, be claimed in a civil or administrative proceeding, if the statement is or may be inculpatory.

Vining, supra, at 490.

The Vining analysis of federal law relied most heavily upon Spevack v. Klein, supra, where the Supreme Court first set out the rule - unchanged today - that an attorney could not be deprived of his license to practice due to his refusal to be a witness against himself or, in other words, that an attorney could not constitutionally be put to the choice of license forfeiture or self-incrimination. Spevack held:

> that the Self-Incrimination Clause of the Fifth Amendment . . . extends its protection to lawyers as well as to other individuals, and that it should not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it.
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> . . . We find no room in the privilege against self-incrimination for classifications of people so as to deny it to some and extend it to others. Lawyers are not excepted from the words "no person . . . shall be compelled in any criminal case to be a witness against himself;" and we can imply no exception. Like the school teacher in Slochower v. Board of Education, 350 U.S. 551, and the policemen in Garrity v. New Jersey, ante, p. 493, lawyers also enjoy first-class citizenship.

Id., at U.S. 514, 516. Spevack squarely overruled the six-year-old Cohen v. Hurley, 366 U.S. 117, 6 L.Ed.2d 156, 81 S.Ct. 954 (1961), and adopted the reasoned analysis of the Cohen dissent. The historical and societal policies underlying the Spevack holding, as outlined in the Cohen dissent, are highly relevant to

this case: (a) professionals are first and foremost individual citizens and do not give up or obtain reduced constitutional rights upon receiving a license to practice[7]; (b) that history bears witness to a societal danger of the highest order when courts begin to "balance" the most fundamental constitutional rights, particularly when the state need prove no more than a "reasonable" need to override those rights (as opposed to the state literally having no alternative means to fulfill its duties); (c) that a state should not be able to take punitive action against a citizen on the mere insistence of that citizen that the state meet its own burden of proof; and (d) that license forfeiture is a penalty "as severe as a criminal sanction, perhaps more so." Cohen v. Hurley, supra, at U.S. 145-148, 153-154.[8]

A line of cases from the United States Supreme Court, including Spevack v. Klein, supra, has made it clear that the federal constitution will not tolerate either a license forfeiture statute predicated on the exercise of a professional's right not to be a witness against himself or the requirement that a professional cannot avail himself of Fifth Amendment protections in such an administrative disciplinary proceeding.

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[7] Justice Douglas outlined the exercises of the privilege against self-incrimination by Presidents Grant and Andrew Jackson and a former Attorney General in his dissenting opinion in Cohen v. Hurley, supra, at U.S. 150-151.

[8] Waiver of the privilege can be coercive even though a political party position carries no monetary benefit. Lefkowitz v. Cunningham, supra.

Garrity v. New Jersey, 385 U.S. 493, 17 L.Ed.2d 562, 87 S.Ct. 616 (1967); Gardner v. Broderick, 392 U.S. 273, 20 L.Ed.2d 1082, 88 S.Ct. 1913 (1968); Uniformed Sanitation Men Ass'n v. Commissioner, 392 So.2d 280 (1968); Slochower v. Board of Education, 350 U.S. 551, 557-558, 100 L.Ed 692, 96 S.Ct. 637 (1956); Lefkowitz v. Cunningham, supra; Lefkowitz v. Turley, 414 U.S. 70, 38 L.Ed.2d 274, 94 S.Ct. 316 (1973); and National Acceptance Co. of America v. Bathalter, 705 F.2d 924 (7th Cir. 1983).[9]

The District Court's failure to even cite these cases is puzzling. Rather, the court relied on cases that are transparently inapposite: Garner v. United States, 424 U.S. 648, 47 L.Ed.2d 370, 96 S.Ct. 1178 (1976), was a criminal prosecution in which the defendant had voluntarily revealed the incriminating information on a tax return and subsequently attempted to claim the information was privileged under the Fifth Amendment. Thus, the privilege was unavailable since the information had already been voluntarily revealed, and the case turned on the Court's determination that the statement was voluntary and thus not coerced. That is certainly not the case here. Further, Garner had nothing to do with license forfeiture or professional disciplinary proceedings. Likewise, United States v. Ward, 448 U.S. 242, 65 L.Ed.2d 742, 100 S.Ct. 2626 (1980), involved a civil penalty (fine) for oil spills where the violator was required to

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[9] National Acceptance Co. of America v. Bathalter, supra, held that the Fifth Amendment right not to incriminate oneself may be claimed in a civil proceeding.

report the spill. The Supreme Court determined that the fine imposed was indeed a civil penalty, the reporting of which was unprotected under the Fifth Amendment, but the case bore no relevance to and in no way affected the holdings of the license forfeiture cases that that severe penalty does implicate the Fifth Amendment; indeed, those cases were not even cited in Ward.[10] Finally, the factors set out in Kennedy v. Mendosa-Martinez, 372 U.S. 144, 168-169, 9 L.Ed.2d 644, 83 S.Ct. 554 (1963), and relied on in Ward, are applicable only to determining whether a penalty which is civil on its face is sufficiently severe to invoke the Fifth Amendment. Thus, the Kennedy test is not only inapplicable but unnecessary to the issue here.

Again, why the district court chose to ignore Supreme Court decisions directly on the issue of the intersection between the privilege against self-incrimination and professional disciplinary proceedings, and instead cited cases that are irrelevant, is inexplicable, because the federal rule of law in this area is settled.

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[10] The Ward court expressly distinguished Boyd v. United States, 116 U.S. 616 (1886), which was approved in Spevack v. Klein, supra.

2.

State Law

This Court concluded in Vining, supra, at 491-492:

> In our judgment, logic and reason demand that the rationale of Spevack be applied not only to disbarment proceedings, but as well to other types of administrative proceedings which may result in deprivation of livelihood. Certainly, threatened loss of professional standing through revocation of his real estate license is as serious and compelling to the realtor as disbarment is to the attorney. In succinct terms, it is our view that the right to remain silent applies not only to the traditional criminal case, but also, to proceedings "penal" in nature in that they tend to degrade the individual's professional reputation or livelihood. Spevack v. Klein, supra; Stockham v. Stockham, 168 So.2d 320 (Fla. 1964).
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> In the instant case, the penalty for failure to respond by means of a sworn answer to charges made by the Real Estate Commission is the entry of a default judgment against the defendant which may result in suspension or revocation of the realtor's license. Fla. Stat. §475.30(3), F.S.A. Thus, it is apparent that the Fla. Stat. §475.30(1), F.S.A., has a coercive effect in that it requires a defendant to answer allegations made against him or suffer possible loss of livelihood. The requirement that the answer be "verified" or sworn to produces an additional coercive effect in that it exposes the defendant to a possible perjury proceeding if he does not respond truthfully to the charges against him. However, we regard the latter effect of the statute as secondary in importance to the fact that the defendant is required to respond at all. The basic constitutional infirmity of the statute lies in requirement of a response under threat of license revocation or suspension, which amounts to compelling the defendant to be a witness against himself within the meaning of the Fifth Amendment to the U.S. Constitution and Article 1, §9 of the Florida Constitution, F.S.A.

Thus, Vining reached its holding based not only on federal precedent but also on state precedent and the "more broadly worded" state constitution. Id., at 489, 492. That holding was reiterated in Kozerowitz v. Florida Real Estate Commission, 289 So.2d 391, 392 (Fla. 1974):

> In Vining we explained that Kozerowitz [Kozerowitz v. Stack, 226 So.2d 682 (Fla. 1969)] was based upon the premise that the self-incrimination clause of the Fifth Amendment extended only to proceedings criminal in nature. Our Vining opinion, however, concluded that the proscription against self-incrimination also applies to any administrative proceeding of a "penal" character. We held that a revocation or suspension hearing before the Florida Real Estate Commission is a proceeding of this nature, and we specifically held that Florida Statutes, Section 475.30(1), F.S.A., was unconstitutional to the extent that it required a defendant in a discipline proceeding before the Real Estate Commission to respond to the charges against him.

See also, Buchman v. State Board of Accountancy, supra. In Solloway v. Department of Professional Regulation, supra, at 574, the Third District agreed that the very statute under consideration here (Section 458.331, Florida Statutes) "should be strictly construed with any ambiguity being interpreted in favor of the licensee, this being so because of the penal nature of the statute." In School Board of Pinellas County v. Noble, supra, at 206, (after this Court had quashed the decision of the First District dismissing the appeal) the First District held that the statute providing for discipline and discharge of a school teacher "is in effect a penal statute, as it imposes sanctions,

including suspension or dismissal of an employee under continuing contract . . .." Accord, Fox v. Florida State Board of Osteopathic Medical Examiners, supra (disciplinary proceedings against physician). See also, Stockham v. Stockham, supra, at 322 (privilege against self-incrimination not available to party bringing civil suit, distinguishing "criminal or other proceedings which might degrade him").

Thus, as this Court held in State ex rel. Sbordy v. Rowlett, 138 Fla. 330, 190 So. 59, 62 (1939), "the right to practice medicine is a valuable property right and must be protected under the constitution and laws of Florida." That right has been consistently protected by this Court from revocation or suspension proceedings depriving a physician of the right to freely decide whether or not to cooperate with the state by testifying. Moreover, even if the Spevack rule did not exist and there were no other federal precedent on this issue, it is the province of this Court to interpret the state constitutional provision as it sees fit. Therefore, if there were no federal precedent, this Court has the authority to impose a standard stricter than the federal courts. See, e.g., Oregon v. Hass, 420 U.S. 714, 43 L.Ed.2d 570, 95 S.Ct. 1215 (1975); and State v. Sarmiento, 397 So.2d 643 (Fla. 1981).[11]

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[11] Again, recall that the holding in Vining was predicated on both the state and federal constitutions.

3.

Accommodating State and Individual Interests

It is important to clarify what this case is not about.[12] The Petitioner in no way disputes the right of government in the exercise of its police power to regulate professionals whom it has licensed. The question is - what limits are constitutionally placed upon the Respondent's regulation of a physician's practice. The answer lies in the appropriate tension between the individual's fundamental constitutional right not to involuntarily testify against himself in a professional disciplinary proceeding and the state's duty to protect the public from practitioners who are "unable to practice medicine with reasonable skill and safety." Section 458.331(1)(s), Florida Statutes (1981). The Petitioner contends that the proper procedure is for the state, when clothed with probable cause that the physician is not practicing competently, to institute disciplinary proceedings. All evidence possessed by the state or legally available to it - including both records maintained by

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[12] This case does not involve an employer-employee relationship, where arguably the very fabric of that close working relationship could be destroyed if an employee could refuse with impunity to discuss job performance with the employer and suffer no penalty therefor. This distinction was first set out in Justice Fostas' concurring opinion in Spevack and Klein, supra, at 519. See also, In Re John H. Shearer, Jr., 377 So.2d 970 (Fla. 1979) (judge could properly refuse to discuss auto accident with police officer; the matter was not within the scope of his official duties); State Department of Highway Safety and Motor Vehicles v. Zimmer, 398 So.2d 463 (Fla. 4th DCA 1981)(police officer could be dismissed for insubordination for refusing to submit to a polygraph examination relating to his employment).

the physician pursuant to statutory requirements and records of mental health treatment voluntarily received by the physician - would be admissible. It would then be the physician's choice - if the state has sufficient independent evidence to justify suspension or other discipline - whether to waive his privilege against self-incrimination and to present defensive evidence, including testimony, whether it be testimony at the actual disciplinary hearing or voluntary examination by a psychiatrist if mental state has been put in issue by the state. This scheme would not interfere with the individual's constitutional right not to incriminate himself, since it is no different than the choice criminal defendants make daily when faced with the state's evidence against them.

However, the statutory scheme here fails to employ the least intrusive means available to meet the state's interest. The standard of review applicable to this situation is compelling state interest or strict scrutiny which

> imposes a heavy burden of justification upon the state to show an important societal need and the use of the least intrusive means to achieve that goal. Carey v. Population Services International, 431 U.S. 678 (1977); Roe v. Wade, 410 U.S. 113 (1973); In re Estate of Greenberg, 390 So.2d 40 (Fla. 1980).

Florida Board of Bar Examiners Re: Applicant, ___ So.2d ___, 8 F.L.W. 430, 431 (Fla. November 3, 1983). As in that case, the Petitioner agrees that the Respondent has a compelling state interest in ensuring that physicians whose practice falls below competent standards due to mental problems not be allowed to

practice until those disabilities are removed, but that is the extent to which that case is applicable here.

One distinction is immedately apparent in that Florida Board of Bar Examiners Re: Applicant dealt with an individual who was seeking admission to a profession and who, as such, carried the burden of proving fitness to practice.[13] He had "no constitutional right to be admitted to the Bar," id., at 431. To the contrary, in this case the state has the burden of proving unfitness but is nonetheless statutorily empowered either to compel the Petitioner to furnish it with testimonial proof or to revoke his license without any proof (until he does testify). The Petitioner does have a constitutional right not to be deprived of his professional license in a proceeding denying his right not to incriminate himself. The distinction under the federal constitution (Spevack v. Klein) and under the state constitution (Vining) is that in a license forfeiture proceeding a professional may not be compelled to meet the state's burden of

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[13] This is analogous to a civil case in which the party bringing the suit cannot claim the privilege against self-incrimination and a criminal case in which the defendant raising insanity cannot claim the privilege to prevent a government examination on this issue. See, Infra, n.11 at 21.

proof,[14] either by giving testimony adverse to his interests or by having his silence be the only proof necessary. As Justice Douglas wrote in his dissent to Cohen v. Hurley, supra, at 154, that is proof "less than negligible". Another distinction between the present case and Florida Board of Bar Examiners Re: Applicant is that an applicant for a professional license, though surely possessed of a significant investment in education, does not yet have the vested interest or property right in an outstanding license[15] and certainly could not be said to suffer exposure to the enormous penalties occasioning loss of a professional license (e.g., years of building a career, incredible financial investments, reputation and status in the community as a practicing professional[16], loss of identity, and loss of the goodwill established in a professional office.)

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[14] The state relied below on Hinckley v. United States, 525 F. Supp. 1342, 1349 (D.C. D.C. 1981), but Hinckley was expressly limited to a situation where a criminal defendant raises insanity as an affirmative defense and thereby assumes the burden of proof on the issue. For that reason, Hinckley could not simultaneously hide behind the Fifth Amendment's protection. This is similar to those cases which correctly hold that a party bringing a civil suit may not claim the privilege without the suit being dismissed. See, e.g., Stockham v. Stockham, 168 So.2d 320, 322-323 (Fla. 1964); City of St. Petersburg v. Houghton, 362 So.2d 681 (Fla. 2d DCA 1978).

[15] State ex rel. Estep v. Richardson, 3 So.2d 512 (Fla. 1941).

[16] See, The Florida Bar v. Prior, 330 So.2d 697, 711 (Fla. 1976) (J. Roberts dissenting).

The most crucial constitutional distinction is that Florida Board of Bar Examiners Re: Applicant dealt with a compelled disclosure of medical records, not testimony compelled from an individual for the state's benefit. Thus, as this Court pointed out, Florida Board of Bar Examiners Re: Applicant dealt with a question of first impression on the applicability of the right to privacy and due process of law available to an applicant for a professional license. It did not address a claim of compelled testimony in violation of the privilege against self-incrimination in a proceeding to revoke or suspend a professional license, and thus it did not require a weighing of the fundamental interests protected by that privilege in such a disciplinary proceeding. The Supreme Court rejected a similar balancing argument by the state in Lefkowitz v. Cunningham, supra, at 808:

> Appellant argues that even if § 22 is violative of Fifth Amendment rights, the State's overriding interest in preserving public confidence in the integrity of its political process justifies the constitutional infringement. We have already rejected the notion that citizens may be forced to incriminate themselves because it serves a governmental need. E.g., Lefkowitz v. Turley, 414 US, at 78-79 . . . . Government has compelling interests in maintaining an honest police force and civil service, but this Court did not permit those interests to justify infringement of Fifth Amendment rights in Garrity, Gardner, and Sanitation Men, where alternative methods of promoting state aims were no more apparent than here. Where, as here, the state has other means for obtaining its evidence [Infra, at 26], the privilege against self-incrimination would be "watered down". Spevack v. Klein, supra, at 514.

The most critical practical distinction between an applicant and a practicing, licensed professional exists in the consideration of the least intrusive means aspect of the strict scrutiny standard: An applicant, having never practiced, has no record from which the state can ascertain or judge competent practice; the state is thus forced to predict the applicant's ability to practice from other sources. In this context, an applicant's prior mental or emotional difficulties takes on greater importance to the consideration whether to issue a license. To the contrary, when the Petitioner was charged with being unable to practice competently, he had been practicing medicine for several years. Thus, in the situation of a professional who has already been issued a license, the state is much better able to decide the professional's ability to competently practice because the professional has been practicing and, in effect, making or breaking the state's case in that way.

If, in fact, the professional has been practicing competently and the state's claim is limited to concern that some mental condition may exist which may cause future problems with the professional's practice, then the state is clearly going beyond the scope of its authority by delving into the mental content of the professional when its only proper concern is with the professional's actual practice. Allowing a state regulatory agency to investigate a professional's mental content, against the professional's will, would obviously be censorship and run afoul of the First Amendment to the United States Constitution

and Article 1, Sections 3 & 4 of the Florida Constitution, since the agency has no right to intrude upon or interfere with a professional's freedoms of speech, thought and religion absent some unprotected conduct, i.e., incompetent practice.[17] In Vining, this Court found no undue burden on the state in proving its complaint without compelling testimony from the professional:

> It is not our intention to attempt "judicial legislation" to correct the infirmities of Fla.Stat. §475.30(1), F.S.A. Until the Florida Legislature enacts new legislation to replace the expunged language, the Real Estate Commission will be required to proceed without responses from realtors charged with violations of the Real Estate Licensing Law. However, we do not view this state of affairs as imposing an undue hardship on the Commission. In criminal matters the State must prosecute without benefit of a statement from the defendant, unless the defendant, within the framework of his constitutional rights and privileges, volunteers information to the State. Since the burden of proving the defendant's guilt is the obligation of the State in any event, requiring the defendant to speak would amount to compelling the defendant to prove the State's case for it. This, of course, is the evil sought to be remedied by the Fifth Amendment right to silence.
>
> The same situation obtains in the instant case. As in other types of disciplinary proceedings, the burden of proving relator violated the Real Estate Licensing Law is on the Real Estate Commission as the initiator of the proceedings. Thus, by requiring the

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[17] At oral argument below, the court questioned how else the state could prove its allegations without compelling the Petitioner to testify. The response is - in the same way the state proves any charge against a citizen, by proof of incompetent practice or behavior. Again, if the state has no such proof, then it has no authority to violate Petitioner's rights under both the Fifth and First Amendments to obtain that proof.

> defendant to answer, the Commission is clearly seeking to shift to defendant the burden of proving his own guilt. As we have said, this result is constitutionally impermissible.

Id., at 492.

In sum, when the state's ability to fulfill its duty is considered in light of the historically enormous role of the privilege against self-incrimination, it is clear that no justification exists for upholding the statutory scheme at issue here, as the state can prove incompetent practice without a compelled mental examination. Vining v. Florida Real Estate Commission was and is a sound decision, and the ruling below should be reversed.

CONCLUSION

The certified question should be answered in the affirmative, and the decision of the District Court should be reversed on the authority of Vining v. Florida Real Estate Commission.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing has been furnished by U.S. Mail on this 26 day of March, 1984 to: Charles Tunnicliff, Esquire, Department of Professional Regulation, 130 North Monroe Street, Tallahassee, Florida 32301.

ATTORNEY