IN THE SUPREME COURT
STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

NO.: 65,111

VIRGIE L. FOWLER,

Respondent.

_____/

ANSWER BRIEF ON THE MERIT

TOM McCOUN, ESQUIRE
LOUDERBACK, McCOUN & HELINGER
1 Plaza Place NE, Suite 1009
St. Petersburg, Florida 33701
(813) 896-2147

Attorney for Respondent

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES:

STATEMENT OF THE CASE

The Respondent, VIRGIE L. FOWLER, accepts the Statement of the Case as set out in the Petitioner's Brief on the Merits.

STATEMENT OF THE FACTS

The Respondent, VIRGIE L. FOWLER, accepts the Statement of the Facts as set out in the Second District Court of Appeal's Opinion and the Petitioner's Brief.

ARGUMENT

The Second District Court of Appeal reversed the denial of Respondent's Motion to Dismiss and certified to this Court the following question:

> WHETHER THE FLORIDA BAR v. DOE, 384 So.2d 30 (Fla. 1980), BARS THE STATE FROM USING STATEMENTS MADE BY THE DEFENDANT UNDER A GRANT OF IMMUNITY IN PROSECUTION (A) FOR PERJURY BY LATER CONTRADICTORY STATEMENTS UNDER §837.021; and (B) FOR PERJURY UNDER §837.02??

Virgie Fowler contends that the testimony she gave under a grant of transactional and use immunity was improperly used by the State as the basis for the later charge of perjury by contradictory statements. Virgie Fowler concedes that the State could prosecute her for perjury in an official proceeding if they believe that the second statement made by her without a grant of immunity was in fact untrue. However, as the Second District recognized, this Court's ruling in The Florida Bar v. Doe, 384 So.2d 30 (Fla. 1980) is on point and requires a reversal of the trial court's denial of Fowler's motion to dismiss. Since immunity is a creature of statute and since the statute governing immunity at the time of Fowler's immunized statement precluded use of the testimony in any criminal proceeding, this case does not present this Court with facts or law which would require it to recede from its opinion in Doe.

Certain of Petitioner's contentions need to be clarified. In an effort to factually line its case

up with the numerous federal cases cited in its brief, the Petitioner asserts that, "in the instant case, Virgie Fowler was given only use immunity pursuant to §914.04, Fla. Stat. (1982)." (Brief of Petitioner at p. 6) This is not correct. As the Second District noted, the initial immunized statement given by Fowler occurred in September 1981. The grant of immunity was pursuant to §914.04 Fla. Stat. (1981). Thus, at the time of this first statement, Fowler testified under a grant of transactional and use immunity, not solely use immunity as asserted by the Petitioner. See, Tsavaris v. Scruggs, 360 So.2d 745 (Fla. 1977); McDonald v. State, 321 So.2d 453 (4DCA 1975). Furthermore, the statutory provision applicable here is substantially different from that United States Code provision relied upon by Petitioner.[1/]

The second and allegedly contradictory statement

1/ §914.04, Fla. Stat.

No person, having been duly served with a subpoena or subpoena duces tecum, shall be excused from attending and testifying or producing any book, paper, or other document before any court having felony trial jurisdiction, grand jury, or state attorney, upon investigation, proceeding, or trial for a violation of any of the criminal statutes of this state upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or to subject him to a penalty or forfeiture, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation or proceeding.

was made in May 1982 and was not an immunized statement. The record establishes that it is this second non-immunized statement which is believed to be false. Nothing in this Court's opinion in Doe precludes the State from charging Fowler with perjury in an official proceeding if they desire to do so.[2/] Although the Petitioner is correct in asserting in the abstract that the ruling in Doe precludes the prosecution from "penetrating the barrier of proving the falsity of the initial statement", it is nothing more than an abstract argument as it relates to the facts of this case, because the initial statement is the one believed by the State to be the truthful statement.

1/ cont'd. Title 18 U.S.C. 6002

"Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to -- "(1) a court or grand jury of the United States, ... and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

2/ In fact, the Second District properly recognized that the State could prosecute Fowler for perjury in an official proceeding for any false statement made during either the immunized statement or the subsequent non-immunized statement. See, Daniels v. Kirkland, 379 So.2d 197 (5DCA 1980).

Since this is not a case where there is a need for "penetrating the barrier of proving the falsity of the initial statement", Respondent believes that certain principles of judicial review are controlling and need be discussed at the outset.

Respondent believes that the issue which the Petitioner wishes to raise is not, in fact, properly raised by the facts presented and therefore should not be addressed by this Court. This Court many years ago stated,

> This Court is committed to the method of a gradual approach to the general, by a systematically guarded application and extension of constitutional principles to particular cases as they arise, rather than by out of hand attempts to establish general rules to which future cases must be fitted. State ex rel Helseth et al v. DuBose, 129 So. 4 (Fla. 1930).

This maxim of judicial review, "that courts consistently decline to settle questions beyond the necessities of the immediate case" has been cited by this Court and the district courts on numerous occasions. See, State Commissioner on Ethics v. Sullivan, 430 So.2d 928 (Fla. 1983)((Shaw, J. concurring); Gaines v. Nortrust Realty Management, 422 So.2d 1037 (3DCA 1982); Southeastern Fidelity Insurance Co. v. Earnest, 378 So.2d 787 (3DCA 1979); City of Coral Gables v. Puiggros, 376 So.2d 281 (3DCA 1979); State ex rel Christian v. Austin, 302 So.2d 811 (1DCA 1974). Since the necessities of the factual circumstances here do not require the opinion sought, this Court should decline to rule upon the question presented. See also, Bluett v. Nicholson, 1 Fla. 384 (Fla. 1947); Brautigam v. MacVicar, 73 So.2d 863 (Fla. 1954).

Furthermore, where the district court has properly analyzed a case and applied appropriate precedent, this Court is not required to duplicate the lower court effort. Although the question is one of importance and this Court's ruling in Doe may in certain cases work a hardship on the prosecution, neither consideration requires this Court to address the question already properly decided. Pan American Bank of Miami v. Alliegro, 149 So.2d 45 (Fla. 1963); Beach v. Kirk, 189 So. 263 (Fla. 1939).

Should this Court decide to rule on the certified question it must find that under Florida's immunity statute, as worded at the time of Fowler's prosecution, her truthful, immunized testimony may not be used against her in a criminal prosecution for perjury by contradictory statements.

The Petitioner relies chiefly upon United States v. Apfelbaum, 445 U.S. 114, 100 S.Ct. 948 (1980) to assert that this Court should recede from its earlier ruling in The Florida Bar v. Doe, supra. In effect, the Petitioner is requesting this Court to use Apfelbaum as a vehicle for judicially constructing an exception to Florida's former immunity statute. This Court cannot do without rewriting Florida's statute.

Apfelbaum is however, instructive on how the Court should analyze this issue.

As the Supreme Court stated in Apfelbaum,

> It is a well-established principle of statutory construction that absent clear evidence of a contrary legislative

> intention, a statute should be interpreted according to its plain language. Here 18 U.S.C. §6002 provides that when a witness is compelled to testify over his claim of a Fifth Amendment privilege "no testimony or other information compelled under the order ... may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement or otherwise failing to comply with the order. (Emphasis added) The statute thus makes no distinction between truthful and untruthful statements made during the course of the immunized testimony. Rather, it creates a blanket exemption from the bar against the use of immunized testimony in cases in which the witness is subsequently prosecuted for making false statements. Apfelbaum at p. 122, 123.

Interpreting Florida's Section 914.04 (1981) according to its plain language, it was clearly the intent of Florida's legislature to provide both transactional and use immunity to those such as Fowler, compelled to testify before the State Attorney. Florida's provision contains no exemption from the bar against the use of immunized testimony which would allow Fowler's truthful immunized testimony to be used against her in a criminal prosecution. Immunity for witnesses who testify before a state attorney, grand jury or court is a creature of statute.[3/] Absent a clear showing of a legislative intent to allow the use of immunized testimony in a prosecution for a later false statement, this Court is not at liberty to judicially construct such an exemption. In light of the clear language of §914.04 (Fla. Stat. 1981)

3/ See, Tsavaris v. Scruggs, 360 So.2d 745 (Fla. 1977); State v. Schell, 222 So.2d 757 (2DCA 1969); City of Hollywood v. Washington, 384 So.2d 1315 (4DCA 1980).

the conclusion is inescapable that Florida's legislature intended to prohibit the use of truthful immunized testimony in any criminal case.

Such a decision is wholly consistent with the purpose and policy underlying the immunity statute. "... the very purpose for its enactment was to aid the state in the prosecution of crimes often involving a concert of action which by their nature usually cannot be successfully prosecuted without testimony of persons who may themselves be involved ..." State v. Schell, 222 So.2d 757 (2DCA 1969); State ex rel Christian, supra; Mitchell v. Kelly, 71 So.2d 887 (Fla. 1954); "Immunity statutes are mechanisms for securing witnesses' self-incriminating testimony in the prosecution of third parties." Tsavaris v. Scruggs, supra. This is the precise reason why the State Attorney compelled the testimony of Fowler. The State having made the decision to grant immunity thereby forfeited its right to prosecute Fowler for the transaction about which she testified and further forfeited its right to use her testimony against her in any way. Having testified truthfully before the State Attorney and thus having upheld her end of the bargain, Fowler was entitled to the full protection of the immunity statute. Notwithstanding the obiter dictum in Apfelbaum which would seem to interpret the federal exemption pertaining to perjury broadly enough to allow the use of the immunized testimony, Florida's statute would allow no such judicial construction.

Nor should it. If immunity is in fact going to be an effective tool of the prosecutor to compel truthful, incriminating testimony, those compelled to testify must know that they are fully protected from the use of any statement they would make, in any criminal prosecution. This is simply a necessary and fair trade off between important competing interests.

Since the immunity statute protects only truthful compelled testimony, the state is not deprived of the right or the means of prosecuting false statements. Society's interest is adequately protected. The dichotomy which results between being able to prosecute for perjury in official proceedings but not for perjury by contradictory statements is a necessary result of the effort to protect both society's interest and the individual's Fifth Amendment rights. These competing interests were recognized, even if not directly discussed, in The Florida Bar v. Doe, supra.

Even should this Court decide to answer the certified questions, nothing in the Petitioner's argument dictates that this Court must recede from its earlier interpretation of the Florida's immunity statute. The Second District correctly ruled that "the Doe case mandates dismissal of the Information charging Fowler with a violation of §837.021." Should the State choose to prosecute Fowler for a violation of §837.02, it is free to do so. In neither instance, however, should the immunized testimony be admissible.

CONCLUSION

Respondent, VIRGIE L. FOWLER, respectfully requests this Court to decline to answer the certified question. Should the Court decide to do so, Respondent requests the Court to rule that under Florida's immunity statute no compelled testimony, truthfully made, can be used in a prosecution for a later false statement either under Sections 837.021 or 837.02.

Respectfully submitted,

TOM McCOUN, ESQUIRE
Louderback, McCoun & Helinger
1 Plaza Place NE, Suite 1009
St. Petersburg, FL 33701
(813) 896-2147
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by US MAIL/HAND to the Office of Jim Smith, Attorney General, Park Trammel Building, 1313 Tampa Street, Suite 804, Tampa, Florida 33602, this 14 day of May, 1984.

TOM McCOUN, ESQUIRE
Attorney for Respondent