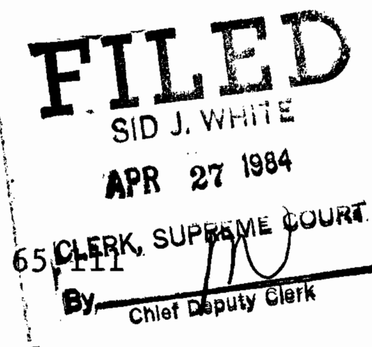
IN THE SUPREME COURT OF FLORIDA



STATE OF FLORIDA,

Petitioner/Appellee,

v. CASE NO.: 65,111

VIRGIE FOWLER,

Respondent/Appellant.

BRIEF OF THE MERITS

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STATEMENT OF THE CASE

This appeal was initially filed pursuant to Fla. R. App. P. 9.140 in the Florida Second District Court of Appeal from an order of the Circuit Court, Sixth Judicial Circuit, denying Appellant/Respondent's Motion to Dismiss pursuant to Fla. R. Crim. P. 3.190(c)(3).

In the trial court, Respondent was charged with perjury by contradictory statements. (R 32-33) Respondent filed a Motion to Dismiss. (R 39-40) After hearing, the Motion was denied. (R 41) Respondent thereafter entered a nolo contendere plea reserving the right to appeal. (R 43) Respondent was placed on probation and appealed. (R 46) A timely notice of appeal was filed. (R 47) An appeal was prosecuted in the Florida Second District Court of Appeal where she appealed her conviction for perjury by contradictory statements. On January 13, 1984, the Second District filed an opinion reversing the judgment and vacating her probation. On Motion for Rehearing, pages 4 and 5 were withdrawn and substituted pages 4 and 5 were inserted on March 28, 1984.[1/] At that time, the Second District certified a question to this Court as a matter of great public importance.

[1/] Petitioner would thank C. Marie King, Assistant State Attorney for her contributions in this appeal.

Petitioner filed his Notice of Discretionary Jurisdiction on April 2, 1984. Petitioner filed a Motion to Stay Mandate in the Second District. On April 10, 1984, that Motion was denied; however, on April 16, 1984, the Second District issued (1) a corrected order granting the Motion to Stay Mandate and (2) a separate order recalling the Mandate.

STATEMENT OF THE FACTS

Petitioner adopts the Statement of the Facts as written by Judge Scheb and reported as Fowler v. State, 9 FLW 173, __So.2d__, (Fla. 2d DCA, Case No. 83-628)(January 13, 1984) on Motion for Rehearing 9 FLW 755, __So.2d__, (Fla. 2d DCA, Case No. 83-628)(March 28, 1984). Opinions are attached hereto. See Appendix.

In February 1980, an apartment complex in St. Petersburg was burned by a suspected arsonist. Shortly thereafter Virgie Fowler informed the St. Petersburg Police Department that she had knowledge of an insurance fraud committed by her ex-husband. As a result of that information, the State Attorney's Office conducted a formal investigation in September 1981 and compelled Fowler to testify. In exchange for her testimony and cooperation in the investigation, Folwer was granted immunity pursuant to section 914.04, Florida Statutes (1981). She gave sworn incriminating testimony that she, her ex-husband, and another friend had committed the arson.

After the investigation, Fowler's ex-husband was charged with various offenses including arson and insurance fraud. Prior to her ex-husband's trial, defense counsel subpoenaed Fowler in May 1982 to appear for deposition. She then gave a second and allegedly different account of the arson, which conflicted with her pervious testimony concerning her ex-husband's knowledge of the arson.

The state then charged Fowler with perjury by contradictory statements in violation of section 837.021, Florida Statutes (1981).

CERTIFIED QUESTION

The Second District certifies to this Court the following question as being one of great public importance:

> 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 SECTION 837.021; AND (b) FOR PERJURY UNDER SECTION 837.02?

Respondent's contention is that the testimony she gave under a grant of immunity was impermissibly used by the state as the basis for the charge against her. This Court's opinion in The Florida Bar v. Doe, 384 So.2d 30 (Fla. 1980) casts an intertwined dichotomy which acts to the people's disadvantage.

The question avails an opportunity for this Court to recede from the Doe opinion to the extent that the practical legislative intent of Sections 837.02, and 837.021, Florida Statutes are not frustrated.

This Court held in The Florida Bar v. Doe, 384 So.2d 30, 32 (Fla. 1980) that the initial immunization given to Attorneys Doe and Roe which caused them to testify carries forward and protects them from now having their prior statements used against them to show inconsistency with their then present testimony. This Court did point out that if Doe and Roe now committed perjury they were subject themselves to a perjury prosecution (perjury in an official proceeding) and Bar discipline. The Second District recognizes

that the 1981 grant of immunity did not free Respondent to perjure herself; however, the practical effect of this Court's opinion in Doe casts difficulty for the State to prosecute Respondent for perjury in official proceedings under Section 837.02, Florida Statutes (1983) as Doe holds the immunity carries forward. From an evidentiary stance, the prosecution is placed in a Catch-22 syndrome as the State cannot introduce any statements made by Respondent while under a grant of immunity. Under the rationale of Doe, there can be a prosecution limited to the extent that the prosecution cannot introduce any statement made by Fowler while under a grant of immunity; thus, the prosecution cannot penetrate the barrier of proving the falsity of the initial statement. Neither Petitioner nor the Second District believe this Court intended its holding in Doe to have this effect.

The general rule of law addressing this topic is set forth in the encyclopedia: "It is generally held this immunity relates entirely to prosecution for past crimes that he admits in his testimony to have committed or of which his testimony might assist in convicting him, and not to perjury committed in giving that testimony." 60 Am Jur 2d, Perjury, §51, n. 996.

In the instant case, Virgie Fowler was given only use immunity pursuant to Section 914.04, Florida Statutes (1982),

and was immunized only for the first occasion of testimony. The second incidence of her testifying occurred at a defense deposition. Florida use immunity is now co-extensive with Fifth Amendment requirements for immunization. See, Kastigar v. United States, 406 U.S. 441, 32 L.Ed.2d 212, 92 S.Ct. 1653 (1972); and, see generally, United States v. Doe, __U.S.__, 79 L.Ed.2d 552, 104 S.Ct.__(1984) where the Court held that the Fifth Amendment priviledge against self-incrimination is applicable to the act of producing business but not to contents of such records.

The majority of Federal jurisdiction do not permit a defendant to "set-up" a criminal investigation, such as that of a grand jury or prosecutor, by discrediting prior sworn, immunized testimony with a false "recantation" statement, merely because the government cannot tell which of the two statements may be a lie.

A grant of immunity protects only from past crimes. McCarthy v. Arndstein, 266 U.S. 34, 42 (1924); U.S. v. Apfelbaum, infra, at 130. The United States Supreme Court in U.S. v. Apfelbaum, 445 U.S. 114, 100 S.Ct. 948, 63 L.Ed. 2d 250 (1980), held that truthful as well as false immunized testimony could be used against a defendant in a perjury prosecution. The facts of Apfelbaum were of a single incidence of perjury and not a perjury by contradictory statements. The language, however, as regreted in the concurring

opinions, was clearly broad enough to support the result that prior immunized testimony whether false or truthful can be used against a defendant in a prosecution for perjury by contradictory statement. Apfelbaum pointed out that the federal statute granting use immunity "makes no distinction between truthful and untruthful statements made during the course of the immunized testimony." Apfelbaum at 122. Neither the Fifth Amendment or immunity statute was held to preclude the use of the immunized testimony at a later prosecution for perjury.

> "For a grant of immunity to provide protection 'co-extensive' with that of the Fifth Amendment, it need not treat the witness as if he had remained silent." Apfelbaum at 127.

The government had kept its part of the immunity bargain since the prosecution was for perjury and not any other crime, Apfelbaum found.

Within two weeks of Apfelbaum the Eighth Circuit affirmed an order of civil contempt for refusal to testify before a federal grand jury after a grant of immunity. If Horack testified truthfully, the Court held, in agreement with the lower court, his prior immunized testimony before an earlier grand jury could not be used against him, even if the testimony now conflicted with the earlier testimony. Apfelbaum was cited in a footnote as holding that the protection would not apply should he testify falsely.

> "Furthermore, truthful testimony may be used in conjunction with false testimony given during the course of immunized testiomny at a subsequent trial for perjury where its use is not prohibited by the fifth amendment." In re Grand Jury Proceedings, Horak, 625 F.2d 767, 770 n.2 (8th Cir. 1980).

Four months after Apfelbaum, the District Court for the Eastern District of New York denied motions to dismiss an indictment for false declaration and obstructing a grand jury on facts of the defendant's having twice given testimony and admitting in the second that he lied in the first. The first testimony was immunized and the second found to have been given on a "waiver of immunity," since the defendant had sought to give a recantation. The second testimony was, therefore, not barred, the court found. It went on to explain that Apfelbaum had resolved the issue anyway.

> "it is also clear now, since the Supreme Court's recent decision in United States v. Apfelbaum [citation omitted], that no restrictions need be placed on the use at trial of either his immunized December 6 testimony or his non-immunized January 3 testimony. The Court held that neither the Fifth Amendment, nor the federal immunity statute, 18 U.S.C. §6001 et seq., bars the use of immunized or non-immunized testimony in a prosecution for perjury, and further that no distinction need be made between truthful and false testimony given under immunity. The whole of defendant's testimony is thus 'fair game' for use at his trial, so long as it conforms to otherwise applicable rules of evidence." U.S. v. Tucker, 495 F. Supp. 607, 616 (D.C. E.D. N.Y. 1980).

Although the issues of pretrial motions to dismiss the Indictment did not require a holding as to admissibility or evidence including any truthful portion of the first immunized testimony, this quote shows that the Court obviously found no problem with admissibility of the prior immunized testimony in any subsequent prosecution for perjury, based on Apfelbaum.

By the fall of 1980, the U.S. District Court for the Southern District of New York acknowledged that it was precluded from considering an additional claim after the Second District's mandate of dismissal after the U.S. Supreme Court vacated and remanded for further consideration in light of Apfelbaum. Aloi v. Abrams, 500 F.Supp. 170 (D.C. S.D. N.Y. 1980). The district court could not resist a footnote expressing its opinion that Apfelbaum did not necessitate reversal of its original Aloi holding that immunized truthful grand jury testimony could not be introduced in a subsequent perjury prosecution based on later false testimony before the same grand jury. The Second District did not write an opinion explaining its application of Apfelbaum to the Aloi facts. The district court capsulized the imunized truthful testimony introduced as follows:

> ". . . [A]s part of proving the petitioner's perjury at the state trial on whether he had been at an apartment in Nyack, New York, the prosecution introduced substantial immunized truthful testimony previously given by the petitioner concerning the petitioner's position as the leader of a crime family and the fact that Gallo's death was the result of a war between two organized crime groups, thus unfairly influencing the jury." Aloi at 172.

By the following year, the Fifth Circuit in the case of In re Grand Jury Proceedings, Greentree, 644 F.2d 348 (5th Cir. 1981), held that Greentree could be compelled to answer questions before a grand jury after a grant of immunity

despite the implication from his taking the Fifth Amendment that answering truthfully now would be inconsistent with his prior testimony in his criminal trial. The court distinguished Apfelbaum on a concession from the government that Apfelbaum

> "was distinguished from a situation where an immunized witness had made a false statement before being granted immunity. . . . [I]n those circumstances the grant of immunity would protect the witness from the use of his testimony to prove that he committed perjury during the prior proceeding." Greentree at 380.

The Court confidently concluded that so long as Greentree told the truth before the grand jury his prior immunized statements could not be used against him. The Court ignored the obvious problem that should his grand jury testimony conflict with his trial testimony it would not assure which was the truthful testimony.

By summer of that year, the Seventh Circuit revealed its confusion and discord over the application of Apfelbaum to the question of the right to take the Fifth Amendment in a civil proceeding after previous immunized testimony given the Justice Department and the grand jury. The court first held, in a 2-1 decision, that one could be held in contempt for refusing to give the same testimony in the civil proceeding previously given before the grand jury. In re Corrugated Container Antitrust Litigation, Conboy, 655 F.2d 748 (7th Cir. 1981). The original decision noted in a footnote that Conboy could, of course, invoke the privilege against self-

incrimination if "by answering truthfully any question at the [civil] deposition, [he] would be risking prosecution for perjury, . . ." In re Corrugated at 753, n. 6, emphasis added. It was within the authority of the lower court to inquire into the basis of the claim, and Conboy would, in effect, have to recant the prior testimony as untruthful in order to be entitled to invoke his Fifth Amendment Right.

The dissent, in this original decision in In re Corrugated, was not satisfied, however, that the answer was not satisfied, however, that the answer was this simple. Among the things analyzed in reaching the opposing result was Apfelbaum's holding that truthful as well as false immunized testimony could be used in a later prosecution for perjury. In re Corrugated at 765.

On rehearing by five judges, however, the Seventh Circuit decided 4 to 1, with the dissenting judge now writing the majority decision, that the contempt order could not stand because Conboy's prior immunized testimony could later be used against him in several regards, among which was the Apfelbaum usage.

> ". . .[I]f Conboy's answers at his deposition are even inconsistent with his earlier answers during the preliminary interview, or at the grand jury interview, he could be subject to presecution for perjury or giving false statements even without a specification in the indictment as to which answer is false. See 18 U.S.C. s. 1623(c).
>
> Recently, the Supreme Court has ruled that perjury prosecutions based on immunized testimony are permissible and that all statement s made during the giving of immunized testimony, both true and false, may be admitted in the course of a

> subsequent perjury action if such use was not otherwise prohibited by the Fifth Amendment." In re Corrugated, 661 F.2d 1145 at 1158, on rehearing; Affirmed with opinion at Pillsbury Co. v. Conboy, 103 S.Ct. 608 (1982).

In the spring of 1983, the district court for the middle district of Pennsylvania cited Apfelbaum only for the repeal of the old federal transactional immunity statutes and followed the Fifth Circuit's Greentree in holding, opposite to Conboy, that one could be compelled to testify in a civil proceeding because the prior immunized testimony could not be used even for perjury unless the prior testimony was false.

> "Thus, if Mahler testifies truthfully under under a grant of immunity in this case, he cannot be prosecuted for perjury on the basis of inconsistent statements." U.S. v. Mahler, 567 F. Supp. 82, 86 (D.C. M.D. Pa. 1983).

Of the varied fact patterns in these federal cases applying Apfelbaum, the case of U. S. v. Tucker, 495 F. Supp. 607 (D. C. E. D. N. Y. 1980), is the closest on point to the facts of the instant case. The first testimony was immunized and the second testimony was given under a "waiver of immunity" because the defendant was not compelled to testify but did so voluntarily, in Tucker as a request to recant and in the instant case on a defense deposition. As in Tucker, the defendant claimed in the voluntary testimony that she had lied in the prior immunized testimony. Although Tucker's prosecution, unlike the instant defendant's, was not for perjury by inconsistent statements, the Court instructed that there need be no restrictions at the perjury trial "of either his immunized December 6 testimony or his non-immunized January 3 testimony."

In re Grand Jury Proceedings, Horak, 625 F.2d 767 (8th

Cir. 1980), and U.S. v. Mahler, 567 F.Supp. 82 (D.C. N.D. Pa. 1982), although apparently reaching an opposite conclusion, are actually not applicable since. like The Florida Bar v. Doe, supra, they address the issue of two instances of compelled, immunized testimony which conflicts. These cases really stand only for the proposition that one may not be compelled to give incriminating testimony, and if one is compelled to testify the two compelled testimonies may not be used against one to show inconsistent testimony. The holdings in Aloi v. Abams, 500 F.Supp. 170 (D.C. S.D. N.Y. 1980), and In re Corrugated Container Antitrust Litigation, Conboy, 661 F.2d 1145 (7th Cir. 1981), are to the contrary, but, again, they address the fact pattern of two instances of compelled testimony.

In re Grand Jury Proceedings, Greentree, 644 F.2d 348 (5th Cir. 1981), is clearly inapplicable on the fact pattern of the prior testimony in question being non-immunized testimony. The government had admitted both in Greentree and Apfelbaum that a statement given prior to a grant of immunity could not be used since the latter grant of immunity would preclude use of the immunized testimony to prove the prior perjury. In the instant case, however, the first testimony was the immunized testimony, and not the second testimony Apfelbaum then permits the use of the immunized testimony for proof in the later perjury prosecution. See, Tucker and Conboy. Petitioner would urge that this Court recede from

The Florida Bar v. Doe, supra that the grant of immunity does not carry forward to the extent that the prosecution cannot sustain the burden of proving the falsity of the initial statement.

CONCLUSION

WHEREFORE, Petitioner prays that this Court not treat the question certified by the Second District on an alternative syllogistic basis and answer affirmatively both subparts in the one certified question by receding from The Florida Bar v. Doe, 384 So.2d 30 (Fla. 1980) so that the practical effect does not preclude prosecution for perjury for later contradictory statements and perjury in official proceedings.

Respectfully submitted,

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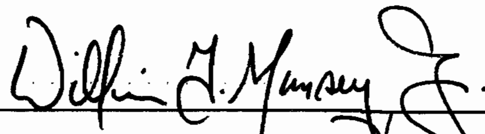
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Tom McCoun, Esquire, Louderback, McCoun & Helinger, 1 Plaza Place, N.E., Suite 1009, St. Petersburg, Florida 33701 (with Appendix attached) on this 25th day of April, 1984.



OF COUNSEL FOR PETITIONER/APPELLEE