O/a 3-4-86

67,207

IN THE
SUPREME COURT OF THE STATE OF FLORIDA

IN RE:

CHRISTOPHER DeBOCK,
Petitioner,

STATE OF FLORIDA,
Plaintiff/Respondant,

v.

RICHARD F. RENDINA,
Defendant.

INITIAL BRIEF

Upon Discretionary Review of Opinion of
Fourth District Court of Appeals
Case No. 84-2632

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TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

TABLE OF CITATIONS

TABLE OF CITATIONS (Continued)

Constitutional Provisions:

TABLE OF CITATIONS (Continued)

STATEMENT OF THE CASE AND FACTS

A. Course of Proceedings And Disposition In The Court Below

This case comes before the Supreme Court upon the Petitioner, CHRISTOPHER DE BOCK'S, petition for discretionary review, pursuant to Rule 9.030, Florida Rules of Appellate Procedure, and this Court's acceptance of jurisdiction hereover by Order dated October 21, 1985.1

The review sought is of the issuance of a writ of common law certiorari obtained by Respondent, the State of Florida, from the Fourth District Court of Appeal on March 27, 1985, and of the Fourth District's reaffirmance thereof on May 15, 1985, by denial of this Petitioner's timely motion for rehearing.

The procedural history of this case commenced with the service of a deposition subpoena, issued pursuant to Section 27.04, Fla.Stat., upon the Petitioner by the State Attorney's Office for the Seventeenth Judicial Circuit of this State, seeking Petitioner's testimony in connection with a criminal case, State of Florida v. Richard Rendina, Case No. 84-6521-CF-10, pending in that Circuit. After appearing, but refusing to testify, the State

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1 The instant Brief was initially due 20 days from the rendition of this Court's Order, or on or before November 10, 1985. Prior to this due date, Petitioner requested by unopposed motion an extension of five days in which to file his initial Brief. This motion has yet to be ruled upon; but, since service thereof "shall toll the time schedule of any proceeding in the court until disposition of the motion," the transmittal of this Brief for filing on November 15, 1985, constitutes timely filing, pursuant to Rule 9.300, Florida Rules of Appellate Procedure.

petitioned the trial court for a rule to show cause why the Petitioner should not be held in contempt. After briefing and oral argument, the Honorable Harry G. Hinkley, Circuit Court Judge, denied the State's request, holding that this Petitioner could validly assert his Fifth Amendment right, despite service of the subpoena and the application of Section 914.04, Fla.Stat. Judge Hinckley's Order, detailing his ruling and the rationale therefor, is dated November 14, 1984, and may be found at Appendix A, pp. 1-3.

The Fourth District's subsequent issuance of a common law writ dated March 27, 1985 -- sought by the Respondent, State of Florida -- quashed Judge Hinckley's order. See Appendix B, passim. A timely motion for rehearing filed by the Petitioner was denied May 15, 1985. Appendix C.

From this Fourth District writ, Petitioner sought discretionary review and is now before this Court, pursuant to Rule 9.030, Florida Rules of Appellate Procedure, and this Court's order accepting jurisdiction dated October 21, 1985.

B. Statement of Facts

This Petitioner is an attorney and a member of the Bar of this State. At the time of the events herein, Mr. DeBock was an Assistant State Attorney for the Seventeenth Judicial Circuit.

On November 7, 1985, he appeared at a deposition, pursuant to the service of a subpoena, issued by the State of Florida, which sought his testimony in a criminal case then pending in that Circuit. Petitioner refused to answer the questions propounded,

asserting instead his privilege against self-incrimination. Appendix A, p.1

On the same day, the State of Florida moved the trial court for a rule to show cause why Petitioner should not be held in contempt, given the operation of Section 914.04, Fla.Stat., which purports to extend full use and derivative use immunity upon witnesses who are compelled to attend pursuant to a subpoena issued under Section 27.04, Fla.Stat. Id. Petitioner explained that his continued assertion of his privilege against self-incrimination, despite the use immunity conferred by statute, rested upon the State's inability to extend immunity from Bar disciplinary action, and its failure to apply to this Court for such immunity, in accord with Ciravolo v. The Florida Bar, 361 So.2d 121 (Fla. 1978). Appendix A, p. 2.

The State -- persisting in its position that its only obligation in order to obtain petitioner's compelled and immunized testimony was the service of the subpoena, notwithstanding Petitioner's status as an attorney licensed by this State -- announced its firm intention to actively pursue disciplinary action against the Petitioner Id. Thus, despite its decision to obtain his immunized testimony and thus forego his prosecution in the criminal proceedings it had instituted, no Bar immunity was sought. Throughout these proceedings, the State has never contested the self-incriminatory nature of the testimony it seeks to elicit from the Petitioner here, nor its intent to seek disciplinary measures against him as a result of the subject matter of his intended testimony.

After arguments of counsel, the Circuit Court, through the Honorable Harry G. Hinckley, denied the State's rule to show cause. Judge Hinckley's ruling, memorialized by written order dated November 14, 1984, was predicated upon the following findings:

> It is the finding of this Court that the case authorities cited on behalf of the Witness hold that:
>
> 1) The Fifth Amendment applies to Florida Bar disciplinary proceedings;
>
> 2) The use immunity conferred upon the Witness pursuant to Section 914.04 does not reach Bar disciplinary proceedings and would not immunize the Witness from his testimony being used against him in a Florida Bar proceeding.
>
> 3) That only the Supreme Court of Florida can confer immunity in Bar proceedings and that the State has had the option of petitioning the Supreme Court of Florida for the necessary immunity grant.

The trial court further found that:

> [T]he Witness has a substantial and imminent danger of prosecution both before the Florida Bar in disciplinary proceedings and in possible criminal sanctions. In this regard the Court notes that the State Attorney has represented its intention to pursue Florida Bar disciplinary proceedings against the Witness.

Appendix A, pp. 2-3

The State thereafter petitioned the Fourth District Court of Appeal for a writ of common law certiorari, seeking to quash the trial court's order refusing to hold Petitioner in contempt. On March 27, 1985, the Fourth District Court of Appeal granted the writ and quashed the trial court's order, finding that it is the Petitioner who must shoulder the responsibility for seeking immunity from Bar disciplinary proceedings. Appendix B, p. 2. It added that "[t]he reason for this rule is that Bar disciplinary

proceedings are remedial, not punitive; they are designed to determine the lawyer's fitness to practice so as to protect the public, not to punish the lawyer in question." Id. Basing this legal pronouncement solely upon law of other jurisdictions, see Appendix B, pp. 2-4, the Fourth District further held, that since Bar disciplinary proceedings were not penal in nature, a witness may not properly invoke his Fifth Amemdment privilege for fear that his answers may tend to incriminate him if used by the Bar in disciplinary proceedings instituted against him. Appendix B, p.4.

From this ruling, Petitioner sought review by this Court, as the Fourth District's ruling expressly affects the rights, duties and obligations of two classes of constitutional and State officers, and directly and expressly conflicts with this Court's holding in Ciravolo v. The Florida Bar, 361 So.2d 121 (Fla. 1978).

SUMMARY OF ARGUMENT

This Court -- the sole and final arbiter of matters governing attorneys licensed to practice in this State -- has reaffirmed that Bar disciplinary proceedings are penal in nature, by announcing that immunity from such proceedings was available, if applied for and granted by this Court. The Fourth District Court of Appeal erred in holding otherwise in this case, as it, by necessity, had to reject binding precedent of this Court to reach such a result.

Because Bar proceedings are penal, and immunity from them can be obtained, an attorney may properly assert his right to remain silent, even after statutory immunity pursuant to Section 914.04, Fla.Stat., is given him, unless and until Bar disciplinary immunity is obtained from this Court. The task of obtaining such immunity rests squarely on the shoulders of the State Attorney who seeks to compel a witness' testimony on its behalf.

Furthermore, now that the reach of Section 914.04, Fla.Stat. has been altered by legislative amendment to confer only use and derivative use -- rather than transactional -- immunity, this Court could, should it so choose, announce a constitutional rule that immunized, compelled testimony will be prohibited from use by the Florida Bar in disciplinary proceedings instituted against the witness. This would thereby grant to a witness/attorney constitutional protection co-extensive with his privilege against self-incrimination, in the same way that compelled, immunized testimony obtained by one jurisdiction cannot be later used

against the witness in another jurisdiction, as mandated by Murphy v. Waterfront Comm'n, 378 U.S. 52, 79, 84 S.Ct. 1594, 12 L.Ed.2d 678, 695 (1964).

ARGUMENT

I. IMMUNITY IS AVAILABLE FROM BAR DISCIPLINE BECAUSE SUCH PROCEEDINGS ARE PENAL IN NATURE AND THUS, UNLESS AND UNTIL PETITIONER -- AN ATTORNEY -- IS GIVEN IMMUNITY FROM THIS COURT HIS REFUSAL TO TESTIFY IS PROTECTED BY HIS CONSTITUTIONAL RIGHT TO REMAIN SILENT

In 1978, this Court in Ciravolo v. The Florida Bar, 361 So.2d 122 (Fla. 1978), laid to rest two legal issues central to this cause. First, Ciravolo held that statutory immunity conferred by the State Attorney pursuant to the issuance of a subpoena, and the operation of Section 914.04, Fla.Stat., does not immunize an attorney/witness from Bar disciplinary proceedings, because the Separation of Powers Doctrine forbids the Executive Branch from exercising any of the powers solely within the jurisdiction of the Judicial Branch. Id. 124-125. Second, it held that immunity is nevertheless available, in order to assist a prosecutor "to obtain and utilize evidence which would otherwise be unavailable because of important and cherished federal and state constitutional freedoms," id. at 125, but must be separately applied for and granted by this Court. Id.

The Ciravolo opinion is both the basis for our plea to review and reverse this cause, and the possible source from which the Fourth District mistakenly assumed that it was free to rewrite the law and find that Bar discipline -- as opposed to discipline of any other professional licensed by this State -- was remedial. If remedial, of course, Petitioner's fear that incriminating statements compelled by subpoena in a criminal proceeding might be used against him in a disciplinary proceeding, would be an invalid basis for asserting his

right to remain silent. The Fourth District's mistaken belief in this regard improperly extend Ciravolo's narrow holding, and distorts the rationale upon which that holding was based. Thus the Fourth District improperly exceeded its jurisdiction by imposing new substantive law in an area whose regulation is within the exclusive jurisdiction of this Court and no other.

The Ciravolo opinion itself, as well as its historical underpinnings clearly disclose the Fourth District's error, and mandate that Petitioner has the right to resist giving testimony unless and until Bar immunity is granted him.

A. Ciravolo, While Announcing New Procedural Requirements for Obtaining Bar Immunity, Left Intact the Law of this State that Administrative Penalties are Protected by the Privilege Against Self-Incrimination

This Court in Ciravolo took great pains not only to expressly announce the narrow basis for its holding, but also to acknowledge, in dicta, that no substantive alteration of the law was wrought by its new procedural requirement that immunity be sought from the Supreme Court, and not directly conferred by the State Attorney through operation of the immunity statute.

Ciravolo's holding was limited to mandating that statutory immunity conferred by Section 914.04, Fla.Stat., could not immunize a witness from the institution of Bar disciplinary proceedings. This ruling was grounded upon a well-delineated legal basis: that given the Supreme Court's exclusive jurisdiction over attorneys under Article V, Section 15, Fla.Const., and the Constitution's firm Separation of Powers

Doctrine contained in Article II, Section 3, neither the legislature, by statute, nor a member of the Executive, could tread upon its disciplinary powers by conferring immunity against Bar proceedings. Id. at 124-125.

This holding did not signal a substantive change in the character of Bar disciplinary proceedings, as the Fourth District mistakenly believes.[1]

To assure that its opinion not be read as having ruled that attorneys are to be accorded different rights and constitutional privileges to administrative immunity than other professionals -- upon which the State Attorney may properly confer administrative immunity by service of a subpoena -- the Court offered a procedural mechanism by which identical immunity could nonetheless be obtained:

> Is there any way in which an attorney may be granted immunity from disciplinary proceedings? Yes, by application to and order of this Court.

Id. at 125.

This creation of Bar immunity affirmed the penal nature of disciplinary proceedings before the Bar. Immunity's only purpose is to supplant a valid privilege against compulsory self-incrimination. Once "a grant of immunity has removed the dangers

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[1] See special concurring opinion of Chief Judge Letts in City of Hollywood v. Washington, 384 So.2d 1315, 1320 (Fla. 4th DCA 1980): "I am . . . intrigued by the Ciravolo v. The Florida Bar decision, supra. Is it fundamentally fair to say: Dentists can do it but lawyer's can't." Chief Judge Letts was on the panel which decided this case in the Fourth District, and his mistaken belief of the reach of Ciravolo may well be the reason why the decision below departed from the holding of Lurie v. Florida State Board of Dentistry, 288 So.2d 233 (Fla. 1973).

against which the privilege protects," a witness is no longer justified in refusing to answer questions. Kastigar v. United States, 406 U.S. 441, 449, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972). Conversely, if no valid privilege is available -- because the witness has no fear of incrimination which could lead to criminal sanctions or subject him to a penalty or forfeiture -- then immunity is unnecessary and improper.

This Court also commented in Ciravolo upon the necessity of immunity as a prosecutorial tool, as "[i]t allows him to obtain and utilize evidence which would otherwise be unavailable because of important and cherished federal and State constitutional freedoms." (Emphasis added) Id. These constitutional freedoms, of course, are those shared by all professionals licensed by this State and guaranteed to them by the Fifth and Fourteenth Amendments to the United States Constitution, and Section 9, Article 1, of the Florida Constitution: to be free from compulsion to testify about that which will incriminate, by exposing a witness to either criminal liability or subjecting him to a forfeiture or penalty.

Ciravolo's pronouncement regarding the availability of Bar immunity, to promote the obtainment by prosecutors of otherwise unavailable evidence, is susceptible to only one reading: that Bar discipline -- like all other administrative revocation proceedings in the State of Florida, see Florida State Board of Architecture v. Seymour, 62 So.2d 1 (Fla. 1952)(architects); Lurie v. Florida State Board of Dentistry, 288 So.2d 223 (Fla. 1973)(dentists); State ex rel Vining v. Florida, 281 So.2d 487

(Fla. 1954)(real estate broker); Anson v. Florida Board of Architecture, 354 So.2d 386 (Fla. 1st DCA 1977); Metropolitan Dade County v. Mandelkern, 372 So.2d 204 (Fla. 3rd DCA 1979)(county employee) -- are penal, are within the protection afforded by the State and Federal constitutional guarantee against self-incrimination; and, unless armed with immunity from the use of compelled incriminatory statements before such proceedings, a threatened professional may properly remain silent.

The Fourth District's opinion here, finding that Bar proceedings can now be construed as remedial -- thus not generating the privilege against self-incrimination -- is directly contrary to these precedents[2] and must be reversed. Only this Court can make a determination which so radically affects the legal profession. This, in Ciravolo, it refused to do. See the dissenting portion of Judge England's separate opinion in Ciravolo, supra, 361 So.2d at 127-128, unsuccessfully suggesting the same rationale which the Fourth District has now sought to make law in this case.

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[2] The only Florida case to even hint at such a holding was The Florida Bar v. Massfeller, 170 So.2d 834 (Fla. 1964), which held that attorney, who voluntarily testified, pursuant to a rule to show cause issued by a Circuit Court judge conducting an inquiry, could not seek the benefit of the immunity statute, as it was not an "investigation, proceeding, or trial, for a violation of any of the statutes of this state. . ." Because there the attorney was not compelled to testify, his statements could be used in any future proceeding, whether criminal prosecution or disciplinary hearing. The inapplicability of Massfeller to the issue here was well explicated in Ciravolo v. The Florida Bar, supra, 361 So.2d at 125.

B. State Constitutional Law Requires That Bar Disciplinary Proceedings, like All Other Administrative Revocations in this State, Be Construed as Penal in Nature, for Self-Incrimination Purposes

Despite a legal history which is speckled with reversals[3], the law of this State regarding administrative immunity has been, for over a decade, contained in this Court's opinion in Lurie v. Florida State Board of Dentistry, 288 So.2d 223 (Fla 1973). Accord, Ciravolo v. The Florida Bar, supra, 361 So.2d at 123-124; cf., City of Hollywood v. Washington, 384 So.2d 1315, 1319 (Fla. 4th DCA 1980). In Lurie, this court ruled that the immunity statute, in order "[t]o be efficacious in securing testimony of a citizen, must be co-extensive with all possible governmental penalties and forfeitures, criminal or civil," including the loss of a professional license in revocation proceedings.

This finding is firmly grounded in the law of the Fifth Amendment. As the Supreme Court of the United States first explained almost a century ago, "'proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason

[3] Compare Florida State Board of Architecture v. Seymour, 62 So.2d 2 (Fla. 1952)(holding that immunity given by statute also immunized architect from license revocation, if revocation was predicated upon his immunized statements); with Headley v. Baron, 228 So.2d 281 (Fla. 1979)(overruling Seymour by holding that statutory immunity no longer extended to loss of profession -- i.e., civil penalty or forfeiture -- but only to criminal sanctions); and now with Lurie v. Florida State Board of Dentistry, 228 So.2d 223 (Fla. 2974)(overruling Headley, reviving Seymour, and finding that the loss of a professional license was a "penalty or forfeiture" encompassed within the protection afforded by the constitutional privilege against self-incrimination).

of offences commited by him, though they may be civil in form, are in their nature criminal' for Fifth Amendment purposes." United States v. U. S. Coin & Currency, 402 U.S. 715, 718, 912 S.Ct. 1041, 28 L.Ed.2d 434, 437 (1972), quoting Boyd v. United States, 116 U.S. 616, 634, 9 S.Ct. 524, 29 L.Ed. 736, 752 (1886). See also Lees v. United States, 150 U.S. 476, 14 S.Ct. 163, 37 L.Ed. 1150 (1893). Accord, Counselman v. Hitchcock, 142 U.S. 547, 12 S.Ct. 195, 35 L.Ed. 1110 (1892)(Fifth Amendment can only be displaced with immunity which prevents the use of incriminatory statements of a witness in any criminal proceeding, or for the enforcement of any penalty or forfeiture).

The immunity statute of this State expressly extends its reach to not only a witness' testimony which "may tend to convict him of a crime" but also to that which may "subject him to a penalty or forfeiture." Thus this statute is expressly in accord with these constitutional requirements. Section 924.04, Fla.Stat.

Lurie's holding, and its concomitant resurrection of Florida State Board of Architecture v. Seymour, 62 So.2d 1 (Fla. 1952), defined these protected penalties and forfeitures to encompass the loss of license or livelihood. See Seymour, supra at 2:

> A penalty generally has reference to punishment imposed for any offense against the law. It may be corporal or pecuniary. A forfeiture is also a penalty and has to do with the loss of property, position or some other personal right for failure to comply with the law. The right to earn a living including other personal rights are protected by the immunity statute.
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> * * *
>
> It is accordingly our view that a proceeding to revoke appellee's certificate as an architect amounts to prosecution

> to effect a penalty or forfeiture as contemplated by Section 932.29, Florida Statutes 1941, F.S.A. [now renumbed 924.04]

See also Lurie, supra, 288 So.2d at 227, quoting State ex rel Vining v. Florida, 281 So.2d 487 (Fla. 1972):

> 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 standing, professional reputation or livelihood.

Given the continuing vitality of Lurie and Seymour, the law of this State is that administrative revocations constitute the type of penalty or forfeiture against which the right to remain silent protects.

Given this constitutional grant, whether there were an immunity statute involved or not, Lurie and Seymour require, as a matter of constitutional interpretation, that administrative proceedings involving the revocation of a license or the loss of a profession are penal in nature, and the privilege against self-incrimination apply to them with the same vigor as if they were criminal proceedings. United States v. U.S. Coin & Currency, supra; Boyd v. United States, supra.

C. Finding Bar Disciplinary Proceedings Remedial Violates the Equal Protection Clause of the State and Federal Constitutions

To now hold that the loss of an attorney's license to practice can be exempted from this protection, and be termed instead remedial, is to single out the legal profession for unequal treatment under State law. The only distinguishing characteristic of the legal profession is that its regulation is entrusted to the Judicial, rather than the Executive Branch,

thereby requiring immunity to be conferred by the Supreme Court, rather than by the automatic operation of the immunity statute involved in Lurie and Seymour. Such procedural distinction fails to supply a rational basis -- much less a compelling State interest -- for depriving a lawyer of constitutional protection against the costly loss of his license to practice a chosen profession.

Despite the Fourth District's attempt to so hold here and elsewhere,[4] nothing in Ciravolo justifies such a constitutionally suspect interpretation, and the Petitioner did not and does not assume that the Supreme Court intended that result. Even without any direction from the Ciravolo opinion, the force of interpretative construction alone imposes such a reading upon us. Judicial rulings, no less than statutes, should be interpreted in accord with constitutional strictures. Cf., United States v. Johnson, 323 U.S. 273, 276, 89 L.Ed. 236, 65 S.Ct. 249 (1944). Were we to read Ciravolo as having somehow substantively exempted lawyers from the protection of the privilege against self-incrimination, which all other licensed professionals enjoy in Florida, see, Lurie, supra, this dichotomous treatment would be without justification. There is simply no rational basis for applying constitutional guarantees differently to, for example, the loss of the license of a certified public accountant, than to the loss of a lawyer's license. The fact, however, remains that

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[4] See City of Hollywood v. Washington, 384 So.2d 1315, 1310, (Fla. 4th DCA 1980), Letts, C.J., concurring specially with opinion.

the accountant is regulated by the Executive Branch, see Section 473.323, Fla.Stat., and thus, if subpoenaed to testify in a criminal matter, will receive the automatic benefit of statutory immunity under Section 914.04; while the lawyer -- whose regulation is within the exclusive jurisdiction of the Judicial Branch -- will not. It is this distinction that is and must be procedural, since this Court expressly restored the substantive equality of lawyer's rights under the Constitution by replacing the lack of statutory immunity with its own similar grant of immunity.

Thus, to hold that Ciravolo did anything more than procedurally change the method by which immunity can be obtained from administrative discipline, is to tip open a Pandora's box of unconstitutional results. We do not believe this Court meant to do this, and thus the Fourth District's opinion -- finding Bar proceedings remedial, and thus substantively different from other license revocation proceedings in this State -- is simply incorrect. We pray that this Court therefore reverse the Fourth District's quashing of the Circuit Court's Order, and reaffirm the penal nature of Bar disciplinary proceedings.

II. THE PROSECUTOR IS REQUIRED TO SEEK BAR IMMUNITY OR FAIL IN HIS ATTEMPT TO COMPEL PETITIONER'S TESTIMONY, OVER HIS ASSERTION OF THE PRIVILEGE AGAINST SELF-INCRIMINATION

This Court had opportunity in Tsavaris v. Scruggs, 360 So.2d 745, 749 (Fla. 1977), to expound at length upon the reason and purpose behind grants of immunity:

> In construing Section 914.04, Florida Statutes (1975), it is important to bear in mind 'the very purpose for its enactment . . . [is] to aid the state in the prosecution of crimes.' State v. Schell, 222 So.2d 757, 758 (Fla. 2d DCA 1969). Immunity statutes are mechanisms for securing witnesses' self-incriminating testimony in the prosecution of third parties.
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> > [T]he state may elect to immunize one offender from prosecution in order to secure the conviction of another, and this statute should be liberally construed to accomplish that purpose. State ex rel. Reynolds v. Newell, Fla.1958, 1202 So.2d 613; State ex rel. Johnson v. MacMillan, Fla.App.1967, 194 So.2d 627; Lewis v. State, Fla.App. 1963, 155 So.2d 841; State v. Schell, supra at 758.
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> The wisdom of investing the prosecutor with authority to confer immunity is clear. The need for an immunity statute is a corollary to the privilege against self-incrimination, guaranteed by both the Florida and federal constitutions. Equipped with his statutory powers, the prosecutor can loosen lips the Constitution would otherwise permit to remain sealed. Where a witness' testimony is crucial, prosecution of a third party accused could be stymied without the immunity statute even though the witness' testimony would only tend to incriminate the witness of some trivial offense. Similarly, in a case where the only evidence against the witness is unconvincing, the immunity statute enables the prosecution to use the witness' self-incriminating testimony in order to convict a third party, without forfeiting any realistic chance of securing the witness' conviction for his own offense.

As this Court explained, the offer of immunity "requires hard judgments on close questions," by prosecutors in the determination of whose testimony should be obtained for another's prosecution.

These judgments are purely prosecutorial; they cannot be made nor properly expressed by a witness himself.

Nevertheless, both the State Attorney and the Fourth District would have Petitioner seek his own immunity from this Court, albeit for differing reasons. The Fourth District held below that "a witness in DeBock's position must apply [for immunity from the Supreme Court] because, when the statutory immunity provided by Section 914.04 has been granted by a state attorney, the witness is immunized from criminal prosecution and must testify." Appendix B, p. 2. This reason is based upon the faulty assumption that Bar disciplinary proceedings are no longer penal in nature, an assumption clearly erroneous given the law cited in the preceding section of this Brief.

The prosecutor's purpose of laying the burden of obtaining Bar immunity upon the Petitioner is quite different. In the case at bar, the prosecutor declined to apply to this Court for Bar immunity, pursuant to Ciravolo v. The Florida Bar, supra, even though the trial court found that it had adequate notice and opportunity to do so. Appendix A, p. 3. Instead, the trial court found that the State Attorney was willing to forego its power to prosecute Petitioner in exchange for his testimony in one proceeding -- State v. Rendina, Case No. 84-6521-CF-10 -- while coyly reserving its power to pursue Petitioner's punishment in another. See Order of Judge Hinckley, dated November 14, 1984, Appendix B, p. 2:

> [T]he Court notes that the State Attorney has represented its intention to pursue Florida Bar disciplinary proceedings against the Witness.

Not only does this factual scenario display cogent reason why disciplinary proceedings must be encompassed within the protection of the right to remain silent,[5] it also exhibits the reason why the seeker of the testimony -- not the potential giver of it -- must pursue the grants of immunity necessary to fully replace the protection otherwise afforded by the privilege against self-incrimination. To illustrate.

Seemingly, the loss of some forum in which the State may use Petitioner's incriminating testimony against him to exact punishment, is seen by Respondent as too high a price to pay without unequivocal orders that they must do so, or not obtain the testimony they seek. In proverbial terms, the State is seeking to have its cake and eat it too. If so predisposed, this Court -- if confronted with an application by Petitioner for his own immunity before it -- will find itself unable to assess whether in fact the State is willing to forego such disciplinary action to obtain

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[5] It has been established that a person's privilege against self-incrimination cannot be circumvented by thinly disguising a penalty as a civil proceeding, where the end result is the substantial equivalent of a criminal sanction. Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886), and Lees v. United States, 150 U.S. 476, 14 S.Ct. 163, 37 L.Ed. 1150 (1893). Here it appears that the State Attorney intends to utilize disciplinary proceedings to seek the punishment he had to forego in criminal proceedings in order to obtain Petitioner's testimony under the statute. This demonstrates the abuse to which penalties and forfeitures can be subject, if they are not accorded protected status under the privilege against self-incrimination. See United States v. U. S. Coin and Currency, supra, 401 U.S. at 721-722: "When the forfeiture statutes are viewed in their entirety, it is manifest that they are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise. It follows from Boyd, Marchetti, and Grosso that the Fifth Amendment's privilege may properly be invoked in these proceedings."

Petitioner's testimony. By force of reason, it would to the contrary have to conclude that it was not. Thus Petitioner, as witness, would be forced to undergo a act which most likely would be futile.

In contrast, the Petitioner himself may -- without more -- rest upon his constitutional right to remain silent, as is his unalienable right, even though given use and derivative use from his testimony in future criminal cases. He simply has no overriding inducement to knock on this Court's door seeking immunity.

Only the prosecutor has the desire and reason to pursue such a remedy from this Court. Since it is he who can best express whether "the greater good to society will be served" by the grant of Bar immunity, Ciravolo, supra, 361 So.2d 125, the prosecutor is also the one from who this Court would most properly like to hear.

At least one of the justices of this Court has revealed his assumption that it was the State Attorney -- not the witness -- who would seek immunity, as we request this Court to so hold. In Petition of Supreme Court Special Com., Etc., 373 So.2d 1, 38 (Fla. 1979) the majority of this Court rejected a rule (proposed Rule 11.12(6)(c)) codifying the grant of immunity from Bar discipline conferred in Ciravolo v. The Florida Bar, supra, since "[f]urther amplication of that decision by rule does not appear to be necessary or advisable." Justice Overton, however, dissented in part, stating as follows:

> I dissent from the total rejection of proposed Rule 11.12(6)(c) which implements in a more effective manner our decision in Ciravolo v. The Florida Bar, 361 So.2d 121 (Fla. 1978). I believe that for the aid of the state

> attorneys of this state, a specific procedure should be placed in the disciplinary rules for obtaining immunity from bar discipline. . . . Whether we provide the means to grant this immunity through the entire court or through the Chief Justice alone, better administration would result from placing the procedure within our disciplinary rules and not leave it to this Court's decision in Ciravolo v. The Florida Bar to establish that procedure. (Emphasis added)

We urge this Court to announce that the State Attorney seeking the use of an attorney/witness' immunized testimony in a criminal proceeding must assume the responsibility of making application to this Court for immunity from Bar discipline.

III. THIS COURT COULD AVOID THE NEED TO CONFER SEPARATE GRANTS OF BAR IMMUNITY BY RULING THAT THE COMPELLED NATURE OF OF TESTIMONY GIVEN PURSUANT TO STATUTORY IMMUNITY PROHIBITS ITS USE, OR DERIVATIVE USE, BEFORE DISCIPLINARY BAR PROCEEDINGS IN WHICH THE COMPELLED WITNESS IS THE SUBJECT OF THE PROCEEDINGS

When this Court rendered its opinion in Ciravolo v. The Florida Bar, supra, Section 914.04, Fla.Stat. conferred transactional immunity upon witnesses served by subpoena. Tsavaris v. Scruggs, 360 So.2d 745, 749 n.6 (Fla. 1977). In 1982, Section 914.04 was amended "to delete the provision regarding transactional immunity." Jenny v. State, 447 So.2d 1351, 1352 n.* (Fla. 1984). Presently, the statute "provides both use and desirative use immunity. State v. Harrison, 442 So.2d 389 (Fla. 4th DCA 1983); Novo v. Scott, 438 So.2d 477 (Fla. 3d DCA 1983); State v. McSwain, 440 So.2d 502 (Fla. 2d DCA 1983)." Menut v. State, 446 So.2d 718, 719 (Fla. 4th DCA 1984).

Use and derivative use immunity is the minimum requirement for compelling the testimony of a witness over a valid assertion of his constitutional right to remain silent. Kastigar v. United States, 406 U.S. 441, 32 L.Ed.2d 212, 92 S.Ct. 1653 (1972). In order to "accommodate the interests of the State and Federal Government in investigating and prosecuting crime," the United States Supreme Court held in Murphy v. Waterfront Comm'n, 378 U.S. 52, 79, 84 S.Ct. 1594, 12 L.Ed.2d 678, 695 (1964), that, as a matter of constitutional law, one jurisdiction is prohibited from using testimony, and its fruits, if previously compelled by a valid grant of immunity given to the witness by another jurisdiction. Thus, in Murphy, witnesses, granted immunity from

prosecution under the laws of New Jersey and New York, were nevertheless compelled to testify over objection that they did not have immunity under the federal laws.

This constitutional rule, mandating use and derivative use immunity to testimony compelled by a foreign jurisdiction, however, has only been announced for State and federal jurisdictions. Thus, the Petitioner, by blindly relying upon such effect, would be acting at his substantial peril -- especially given the prosecutor's expressed intention to actively initiate Bar disciplinary proceedings against him -- without an unequivocal statement by this Court that such constitutional rule would apply to its proceedings as well.

Should this Court decide, however, to apply this rule, this should adequately assure that a witness/attorney is accorded the full extent of his privilege against self-incrimination, solely by being compelled to testify by service of a subpoena. While the State Attorney cannot confer Bar disciplinary immunity directly upon an witness/attorney -- any more than he could directly confer immunity on behalf of any other state or federal government -- by operation of this rule, the witness would nevertheless receive the benefit of having the use or derivative use of that testimony prohibited in any subsequent disciplinary proceeding initiated against him.

CONCLUSION

For all the above and foregoing reasons, Petitioner prays this Court rule 1) that because of the penal nature of all administrative revocation or disciplinary proceedings in this State, and upon the decision in Ciravolo v. The Florida Bar, supra, an attorney has the right to invoke his privilege against self-incrimination, even after service of a subpoena conferring statutory immunity by Section 914.04, unless and until he is assured -- by grant of Bar immunity or by operation of a constitutional rule -- that this compelled testimony and its fruits cannot be used against him in any subsequent Bar disciplinary proceeding; 2) that it is the State Attorney who must apply for Bar immunity from this Court; and, unless he does so, or a constitutional rule prohibiting use of compelled testimony before the Bar is instituted, a witness/attorney may persist in refusing to answer, based upon his privilege against self-incrimination.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by mail to Assistant Attorney General Joan Fowler Rossin, 222 Georgia Avenue, Suite 204, West Palm Beach, FL 33401, and by mail to Special Prosecutor Steven Russell, Assistant State Attorney, P. O. Drawer 2007, Collier County Courthouse, Naples, Florida, this 15th day of November, 1985.

DAVID R. DAMORE, ESQUIRE