O/a 4-3-87

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67,207

IN THE

SUPREME COURT OF THE STATE OF FLORIDA

CHRISTOPHER DeBOCK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

REPLY BRIEF OF PETITIONER TO
AMICUS CURIAE BRIEF OF THE FLORIDA BAR

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INTRODUCTION

Amicus, The Florida Bar, urges rehearing to clarify and correct what it claims are two erroneous elements of this Court's October 30, 1986 order, viz; 1) that this Court erred in determining that a license to practice law is a right rather than a privilege; and, 2) that this Court erroneously concluded that Bar proceedings are penal rather than remedial in nature.

Although seemingly appearing as amicus on behalf of the Respondent herein, the Florida Bar does not urge that immunity is not available in Bar disciplinary proceedings nor that this Petitioner, as an individual whose alleged misconduct would clearly be "criminal in nature," does not have a right to assert his Fifth Amendment privilege here. Instead, the Florida Bar has addressed its Brief solely to concerns about the possible consequences which it perceives might flow from the Court's opinion, rather than the result of this case upon Mr. DeBock's assertion of the Fifth Amendment.

Because of the rather unique position The Florida Bar has taken, we first turn to what it appears to be urging as a result, and second, to responding to its two alleged assignments of error.

I.

THE FLORIDA BAR SEEKS REHEARING SOLELY AS A RESULT OF ITS CONCERN WITH THE OVERBREADTH OF THE OPINION, NOT ITS RESULT

The Florida Bar urges that this Court vacate its opinion and find that the assertion of "the Fifth Amendment right would only be appropriate [in a disciplinary proceeding] where misconduct is of a criminal nature." "Amicus Curiae Brief of The Florida Bar," p. 13.

Despite its disagreement with the finding of this Court that disciplinary proceedings are penal (although agreeing that there is a "penal aspect to [Bar] discipline," "Amicus Curiae Brief of The Florida Bar," p. 9), the Bar agrees that this Court may grant immunity from the use of ones testimony in a disciplinary proceeding, and that Ciravolo v. The Florida Bar, 361 So.2d 121 (Fla. 1978), holds as much. "Amicus Curiae Brief of The Florida Bar," pp. 12-13. Its concern appears to center upon the possible consequence of what it considers to be the overbreadth of this Court's opinion.

Specifically, the Florida Bar states that this opinion should be vacated in order to overcome the possibility that "the holding of the instant case (DeBock) could be construed to apply immunity in all disciplinary cases," id., not just those concerning misconduct of a criminal nature; and thus seriously "impede Bar investigations," by, for example, prompting an attorney to refuse to produce a client's case file when requested "relying on

this Court's holding [to] invoke his Fifth Amendment right of silence not to incriminate himself." Id. p. 11.

Prior to addressing the legal issues underlying these concerns, we must point out that the instant case fails to present a proper forum for their resolution. Here, the testimony sought by the State (and to which Mr. DeBock has asserted his Fifth Amendment privilege, unless and until receiving Bar immunity) concerns "misconduct of a criminal nature." Specifically, Petitioner's testimony is sought in a case pending against a criminal defense attorney who is charged with having offered unlawful compensation or reward for official behavior, allegedly in relation to a criminal case in which Mr. DeBock was the prosecutor. State v. Rendina, Case No. 84-6521-CF-10, pending in the Seventeenth Judicial Circuit in and for Broward County, Florida. The Florida Bar agrees that, where misconduct is of a "criminal nature," the Fifth Amendment privilege could be appropriately invoked. Id., p. 13, and therefore voices no objection to this Court's holding that Mr. DeBock has a valid right to assert his privilege herein. The Florida Bar's concern that, in announcing that disciplinary proceedings penal in nature, the Court has opened the door to a situation in which "the Fifth Amendment could be invoked in any disciplinary proceeding whether the misconduct was of a criminal nature or not," id., p. 15, is thus not properly raised by the facts of this case.

As such, this alleged overbreadth is simply not properly justiciable under these facts. Cf., Sandstrom v. Leader, 370 So.2d 3, 4 (Fla. 1979)("Fundamental constitutional principles

dictate that one may not challenge those portions of an enactment which do not adversely affect his personal or property rights.") If, in fact, this Court's opinion is relied upon to grant "blanket' immunity" from disciplinary proceedings, "whether the misconduct was of a criminal nature or not," the time to jurisdictionally resolve that issue is when a live case and controversy arises upon facts that "'assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions,' Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962)." Sandstrom v. Leader, supra, 370 So.2d at 4. Furthermore, this Court has found itself quite capable of distinguishing the proper scope of the Fifth Amendment privilege in administrative actions raising noncriminal bases for curtailing a professional license, and we are convinced it will be able to do so in the future in the appropriate case. See e.g., Boedy v. Dept. of Professional Regulation, 463 So.2d 215 (Fla. 1985)(holding that physician could not properly claim the privilege against self-incrimination to exempt him from submitting to a series of mental examinations for the purpose of determining whether he was able to practice medicine with reasonable skill and safety to patients).

Furthermore, much of what Amicus argues as possible results of the alleged overbreadth of this opinion, are illfounded and without legal support. Specifically, it states:

> Using the Court's reasoning [in its October 30 opinion], if Bar proceedings are penal in nature, then an accused attorney might assert the Fifth Amendment right of silence in any Bar disciplinary matter, as testifying or producing records might

> result in a "penalty." For example, where the Bar might request an attorney to produce his file in a case where there have been allegations of neglect, the attorney might refuse, relying on this Court's holding and invoke his Fifth Amendment right of silence not to incriminate himself.

"Amicus Curiae Brief of The Florida Bar," p. 12.

This statement seriously misperceives the settled scope of the Fifth Amendment privilege, under both State and federal Constitutions, and raises hypothetical fears which are foolish and fanciful.1

The privilege against self-incrimination only extends to those matters which are testimonial and compelled. Andreson v. Maryland, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed. 627 (1976). Numerous investigative methods do not implicate its protections, even if used to compel evidence from the accused himself. Thus, the Fifth Amendment cannot properly be invoked to exempt one from participating in roadside sobriety tests, State v. Macias, 481 So.2d 979 (Fla. 4th DCA 1986); voice exemplars, id., United States v. Shaw, 555 F.2d 1295 (5th Cir. 1977); an appearance in a lineup, O'Brien v. Wainwright, 739 F.2d 1139 (11th Cir. 1984); handwriting exemplars, United States v. Chaney, 662 F.2d 1148 (11th Cir. 1981); or fingerprinting, Pearson v. United States, 389 F.2d 684 (5th Cir. 1968), Alford v. Northeast Ins. Co., Inc., 102 F.R.D. 99 (N.D. Fla. 1984). Further, the use of personal

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1 We point out in this context, The Florida Bar's seeming misreading of this Court's Opinion as having provided for anything other than use immunity. See "Amicus Curiae Brief of The Florida Bar," pp. 12-13. This Court made it clear that the application which the State can make is solely "to obtain use immunity for the attorney witness," Opinion, p. 5, not "blanket" immunity, by which we assume The Florida Bar means "transactional immunity."

documents as evidence -- even if testimonial -- has been held in this State not to implicate the privilege unless there is a showing that the records contain a "confession by the accused," State v. Gonzalez, 467 So.2d 623, 629 (Fa. 3rd DCA 1985), citing State v. Gibson, 362 So.2d 41 (Fla. 3d DCA 1978), cert. denied, 368 So.2d 1367 (Fla. 1979); Hampton v. State, 308 So.2d 560 (Fla. 3d DCA), cert. denied, 317 So.2d 78 (Fla. 1975); Kircheis v. State, 269 So.2d 16 (Fla. 3d DCA 1972). Finally, the Fifth Amendment could not successfully be asserted to bar the production of a client's case file, as Amicus seems to believe (See Amicus Curiae Brief, p. 22), as it most certainly would contain only public records or records required by law to be maintained (and available to the client), The Florida Bar v. White, 384 So.2d 1266 (Fla. 1980), either of which would exempt it from the scope of the Fifth Amendment privilege, even if the contents were in fact incriminating. See Anderson v. Bar Association of Montgomery County, 269 Md. 313 (1973).

The Fifth Amendment privilege is not a broad privilege which prevents the accumulation, production and/or use of incriminating evidence; it only seeks to permit a putative accused the right not to be compelled to be his own accuser. Johnson v. United States, 228 U.S. 457, 458, 33 S.Ct. 472, 57 L.Ed. 919 (1913).

To prevent a prosecutorial agency from demanding an accused to answer questions, the response to which may be used to exact a penalty against him, was and should still be heralded as "one of the great landmarks in man's struggle to make himself civilized." Ullman v. United States, 350 U.S. 425, 426, 76 S.Ct. 497 (1956).

It perhaps serves us well to remember the abusive practices that the privilege was meant to eradicate. Specifically, in early England the ecclesiastical courts, in punishing heretics, and the Star Chamber -- a special King's court which investigated and punished individuals for all kinds of allegedly seditious activities -- had the power to impose an "oath ex officio," by which "a person who had not been charged by formal presentment or accusation [could be required to] answer under oath all questions put to him. . . to discover suspected violations of church law or custom, or to establish the truth of either vague or definite charges not disclosed to the person questioned. " Morgan, The Privilege Against Self-Incrimination, 34 Minn. L.Rev. 1 (Dec. 1949). Failure to answer all questions could, in itself result in the exaction of punishment. Id. Thus, the Church and the King had the power to pry open the lips of a citizen against his will, and demand that he provide evidence against himself. This coercion was perceived by our Founders to be unconscionable; and thus the right to remain silent, should ones answer be incriminating, became an integral part of the individual protections against unwarranted governmental power contained in the Bill of Rights.

We urge this Court that whatever impediment the Bar may in fact confront as a result of the privilege, in carrying out its "proper and primary function of such disciplinary actions, which is the protection of the public," is worth the price of preventing those odious practices of the Star Chamber and the High Commission which individuals once had to suffer. It is a price

our forefathers were willing to pay in balancing the rights of the individual against its interest in protecting the citizenry, through the criminal justice system; it is a price that is equally reasonable in balancing the rights of the individual lawyer against the Bar's interest in protecting the citizenry through the Bar's disciplinary process.

II.

THIS COURT PROPERLY RELIED ON PRECEDENT IN FINDING THAT PETITIONER'S RIGHT TO EARN A LIVING AND HIS PRIVILEGE TO PRACTICE LAW ARE ONE AND THE SAME

This Court followed a well-established line of precedent in announcing the inescapable truism that the loss of the privilege to practice law is, to a lawyer, in fact the loss of ones right to earn a living. The Supreme Court of the United States has consistently said as much, see Spevack v. Klein, 385 U.S. 511, 514, 87 S.Ct. 625, 17 L.Ed.2d 574 (1967); Gardner v. Broderick, 392 U.S. 273, 277, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (1968). Indeed, the Supreme Court of the United States has further found that lawyers, just like all other licensed and/or regulated professionals, should be accorded the same rights and privileges, even in the face of any "special responsibilities that [a lawyer] assumes as licensee of the State and officer of the Court," including the rights secured by the Fifth Amendment privilege. Spevack, supra, 385 U.S. at 516 and 520.

The Florida Bar urges this Court to disregard this constitutional precedent, and reverse its holding in this regard, solely as a result of a rule it promulgated, denominating a

license to practice law as a "conditional privilege which is revocable for cause," rather than a vested right. "Amicus Curiae Brief of The Florida Bar, p. 6.

Whether called a "conditional privilege . . . revocable for cause" or a right, subject to discipline and loss thereof for cause, is truly a semantic distinction of no constitutional dimension in this case. A license to practice law, like any other license, cannot be denied, revoked or suspended for unreasonable or arbitrary reasons, Gustafson v. Ocala, 53 So.2d 658 (Fla. 1951), nor can it be denied, revoked or suspended if such encroaches on any of the rights and liberties guaranteed by the Bill of Rights. Thornhill v. Kirkman, 62 So.2d 740 (Fla. 1953); Crudele v. Cook, 165 So.2d 424 (Fla. 3rd DCA 1963). As Justice Fortas, concurring, expressed, "[t]he special responsibilities that [an attorney] assumes as licensee of the State and officer of the court do not carry with them a diminution, however limited, of his Fifth Amendment rights." Spevack, supra, 385 U.S. at 520.

For these reasons, we assert that this Court properly found that Mr. DeBock's privilege to practice law and his right to earn a living were, for purposes of this case, one and the same.

III.

THE COURT WAS CONSTRAINED BY PRECEDENT AND LOGIC TO FIND BAR PROCEEDINGS PENAL FOR FIFTH AMENDMENT PURPOSES

While conceding that disciplinary proceedings have a "penal aspect," The Florida Bar takes umbrage with this Court's ruling that such proceedings cannot be deemed remedial for Fifth Amendment purposes, arguing that such a finding is against the

weight of authority in other jurisdictions, and would place severe limitations upon its ability "to protect the public interest and to perform its prosecutorial function." "Amicus Curiae Brief of The Florida Bar," p. 10.

First, we must point out that The Florida Bar's string cite of cases, see pp. 9-10, is misleading if construed to be a list of cases supporting the concept that Bar proceedings are remedial, or that the Fifth Amendment privilege is not applicable. Of the 34 of the 35 cases listed therein,[2] the overwhelming majority of them,[3] contain only dicta reciting the public protection purpose of Bar discipline in justifying the punishment imposed therein. Nine others address issues of what due process is necessary in such administrative proceedings, and make comment that such proceedings should not be construed as requiring all that is

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[2] We were unable to locate Committee on Legal Ethics of West Virginia State Bar v. Pence, 20 S.E.2d 668 (W.Va. 1977), at the cite given or any similar cite.

[3] Louisiana State Bar Association v. Causey, 393 So.2d 88 (La. 1980); Louisiana State Bar Association v. Stinson, 368 So.2d 88 (La. 1979); appeal dismissed, 444 U.S. 803 (1979), reh. den., 444 U.S. 985 (1979); Matter of Stout, 596 P.2d. 29 (Ariz. 1979); Disciplinary Board of Supreme Court v. Kim, 583 P.2d 333 (Hawaii, 1978); Matter of Clark, 613 P.2d 1218 (Wyo. 1980); In Re Petty, 627 P.2d 191 (Cal. 1981); State ex rel. Oklahoma Bar Association, v. Peveto, 620 P.2d 392 (Okla. 1980); Matter of Burr, 228 S.E.2d 678 (S.C. 1976); Matter of Preston, 616 P.2d 1 (Alas. 1980); Attorney Grievance Commission v. Bailey, 408 A.2d 1330 (Md. 1979); Matter of Wilson, 409 A.2d 1153 (N.J. 1979); Matter of Leopold, 366 A.2d 227 (Pa. 1976); Carter v. Folcarelli, 402 A.2d 1175 (R.I. 1979); Petition of Harrington, 367 A.2d 161 (Va. 1976); In re Zahn, 413 N.E.2d 421 (Ill. 1980); Matter of Trombly, 247 N.W.2d 873 (Mich. 1976); Matter of Maragos, 285 N.W.2d 541 (N.D. 1979); Matter of Wallace, 254 N.W.2d 452 (S.D. 1977); Matter of Bear, 578 S.W.2d 928 (Mo. 1979).

necessary in a criminal proceeding.[4] One of these cases in fact holds, as this Court has here, that the Fifth Amendment is applicable to such proceedings, see, State v. Russell, 610 P.2d 1122, 1130 (Kan. 1980),[5] another holds that such proceedings are penal in nature, Application of Dimestein, 410 A.2d 491, 493 (Conn. 1979);[6] and yet another characterizes such proceedings as "quasi-criminal," Matter of Jaques, 258 N.W.2d 443, 447 (Mich. 1977), vacated sub. nom. Jaques v. State Bar Grievance Administrator, 436 U.S. 952, on remand, 281 N.W.2d 469.[7]

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[4] In Re Rook, 556 P.2d 1351 (Or. 1976); In Re Alper, 617 P.2d 982 (Wash. 1980); Matter of Stoner, 272 S.E.2d 313 (Ga. 1980); Matter of Robinson, 247 S.E.2d 241 (N.C. 1978); Matter of Kesler, 397 N.E.2d 574 (Ind. 1979); Matter of Hanratty, 277 N.W.2d 373 (Minn. 1979); Matter of Rabideau, 306 N.W.2d 1 (Wis. 1981); Kentucky Bar Association v. Singer, 558 S.W.2d 582 (Ky. 1977); Howell v. State, 559 S.W.2d 432 (Tex.Civ. App. 1977).

[5] "Although disciplinary proceedings against attorneys are neither civil or criminal (State v. Holmes, 218 Kan. 531, 545 P.2d 343 [1976]), such proceedings have frequently been characterized as quasi-criminal in nature for purposes of considering the application of procedural safeguards. . . . The sanctions threatened under such proceedings, loss of professional status and livelihood, have been equated to criminal penalities for the purpose of deciding whether the clause against self-incrimination of the Fifth Amendment applies in such proceedings." (Emphasis added)

[6] "Although disbarment is not punishment for a crime, it cannot be denied that the requirement of permanent, irrevocable disbarment, is, in effect, a consequence so severe that it partakes of the nature of punishment, and a statute providing for the same must be interpreted in the light of the fundamental canon that penal statutes mut be strictly construed."

[7] "We have long recognized that discipline and disbarment proceedings are quasi-criminal in character. . . . In light of that recognition we have imposed some of the same safeguards applied in normal proceedings to grievance procedures for the protection of attorneys faced with charges of professional misconduct."

Only two cases of the thirty-five cases Amicus lists in its string cite, find bar proceedings to be remedial for purposes of the Fifth Amendment privilege.[8] Thus, if this string cite has been employed to imply some overwhelming weight of authority for its position, it is misleading and false.

This Court's finding that bar proceedings are penal in nature for purposes of the Fifth Amendment privilege is required by precedent in this State. Indeed, this Court's decision in Ciravolo v. The Florida Bar, 361 So.2d 122 (Fla. 1978), by announcing the availability of use immunity conferred by the Court, when the "greater good to society will be served," made it clear that Bar proceedings were penal for purpose of the Fifth Amendment privilege, see Initial Brief of Petitioner, pp. 8-13, and would be treated in the same manner as all other licensing proceedings in this State have been, since this Court's opinion in Lurie v. Florida State Board of Dentistry, 288 So.2d 223 (Fla. 1973) and that which it resurrected, Florida State Board of Architecture v. Seymour, 62 So.2d 1 (Fla. 1952). See Initial Brief of Petitioner, pp. 13-18.

The Florida Bar does not ask this Court to overrule this precedent, as the Respondent apparently had; but instead, suggests that it find that disciplinary proceedings' "primary purpose" is remedial, thereby somehow restricting the application of te privilege against self-incrimination to some disciplinary

[8] In Re March, 376 N.E.2d 213 (Ill. 1978); Anonymous Attorney v. Bar Association of Erie County, 362 N.E.2d 592 (N.Y. 1977).

proceedings but not others. Such a result is simply impossible to construct and does not accord with the law.

We recognize and concede that The Florida Bar fulfills an important function in disciplining attorneys of this State, and that the protection of the citizens of this State from lawyers unfit for their profession is a State interest of great concern. Nevertheless, such interests cannot justify the diminution of an individual's right to assert his privilege against self-incrimination. As the Supreme Court of the United States succinctly put it in Lefkowitz v. Cunningham, 431 U.S. 801, 808, 97 S.Ct. 3132, 53 L.Ed.2d 1 (1977):

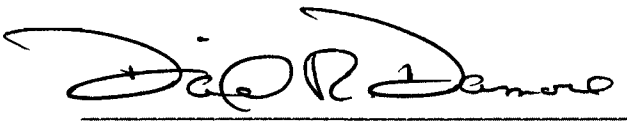
> Appellant argues that even if Section 22 is violative of Fifth Amendment rights, the State's overriding interest in preserving public confidence in the integrity of its political process justifies the constitutional infringement. We have already rejected the notion that citizens may be forced to incriminate themselves because it serves a governmental interest. E.g., Lefkowitz v. Turley, 414 U.S. at 7-79, 94 S.Ct. at 322-323. The government has compelling interests in maintaining a 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.

Such dilution of the privilege against self-incrimination cannot similarly be justified here.

CONCLUSION

For all the above reasons, as well as those set forth in our Initial Brief herein which we reassert and incorporate herein by reference, Petitioner prays this Court affirm its original Opinion of October 30, 1986, in its entirety; and reject the arguments of Amicus asserted upon Rehearing.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing was furnished by mail to Assistant Attorney General Joan Fowler Rossin, 222 Georgia Avenue, Suite 204, West Palm Beach, FL 33402, by mail to Special Prosecutor Steven Russell, Assistant State Attorney, P. O. Drawer 2007, Collier County Courthouse, Naples, Florida, and by mail to John A. Boggs, Director of Lawyer Regulation, The Florida Bar, 600 Apalachee Parkway, Tallahassee, Florida 32301-8226, this 19th day of March, 1987.

David R. Damore