IN THE SUPREME COURT OF FLORIDA

PAULINE ZILE,

Petitioner,

vs. CASE NO. 93,289

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S INITIAL BRIEF

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MISCELLANEOUS

CERTIFICATE OF FONT AND SIZE

Undersigned counsel certifies that the font and size used in this Initial Brief is Courier 10CPI, 12 point.

PRELIMINARY STATEMENT

In this Brief, PAULINE ZILE will be referred to by name or as "Petitioner" and the STATE OF FLORIDA as the "Respondent".

In the interest of convenience and judicial economy, all Record references will be the same as before the Fourth District Court of Appeal: "R" will refer to the first three volumes of the main Record on Appeal; "T" will refer to the volume number and page of transcript of the trial and sentencing proceedings held before the Circuit Court, Palm Beach County, Florida; and "SR" will refer to the three volumes of newspaper articles filed as a supplemental record in the Fourth District.

The symbol "PZ" followed by a page reference refers to Pauline Zile's immunized statement of October 27, 1994, also part of the Record before the Fourth District. The notation "JZ" will relate to John Zile's immunized statement, also part of that Record.

The symbol "ea" will mean "emphasis added".

The opinion of the Fourth District Court of Appeal in this case is attached as Petitioner's Appendix ("A"). Zile v. State, 710 So.2d 729 (Fla. 4th DCA 1998).

STATEMENT OF THE CASE AND FACTS

Petitioner was charged by indictment on November 9, 1994, as a co-defendant with her husband, Walter John Zile, with one count of first degree murder and four counts of aggravated child abuse in the death of her seven year old daughter, Christina Holt. R1, 34.

The State sought the death penalty on the murder charge. Jury trial on the charges in the Circuit Court in and for Palm Beach County, Florida, the Honorable Stephen A. Rapp presiding, from April 3 through 11, 1995. T13, 1413-2776. The Circuit Court granted Petitioner's motion for judgment of acquittal on one of the aggravated abuse counts, but otherwise denied the Motion. R2, 380; T22, 2514. The jury returned guilty verdicts on all remaining counts. R2, 385-388; T24, 2773-2774. On June 7, 1995, Judge Rapp entered a written Order sentencing Petitioner to life imprisonment on the murder conviction, and 156 months imprisonment on he three aggravated child abuse convictions, to run concurrently with her life term and with each other. R3, 520-524.

In a series of motions seeking dismissal of the case, suppression of evidence and disqualification of the Palm Beach State Attorney's Office, Petitioner's counsel challenged the use of a statement given to police by Pauline Zile on October 27, 1994, entered in the trial record as Defense Exhibit 6, T11, 1180, at the Riviera Beach police station, under subpoena issued by the State Attorneys' Office. R1, 141-143, 178-180, 184-188, 192-194, 196-197; R2, 223, 256-260, 261-262. In these motions, Petitioner maintained that her Federal and Florida Constitutional rights against self-incrimination were violated when the State relied on this statement, immunized under §914.04, Fla.Stat. (1994), to

indict her, obtain evidence against her and convict her. R1 141-143, 178-180, 184-188; R2 223, 261-262.

These motions were the subject of several hearings and legal argument, both before and throughout the course of the trial. T5, 206-225; T7, 566-585, 596-608, 629-642; T9, 856-895, 897-904; T11, 1149-1206; T11/12, 1220-1347; T19, 2098-2112; T19/20, 2121-2213; SRV4, 545-546; R1, 141-143, 178-180, 184-188; R2, 223, 261-262. The Circuit Court ultimately determined that John Zile's statement, T11, 1154 given after Petitioner's statement, was not obtained by use of Petitioner's immunized statement. R2,366.

Petitioner filed a direct appeal to the Fourth District Court of Appeal from her convictions and sentences for first-degree felony murder and three counts of aggravated child abuse. Zile v. State, 710 So.2d 729 (Fla. 4th DCA 1998). Among her claims on appeal, Mrs. Zile challenged the use by the State of her immunized statement to indict and convict her, in violation of her Fifth Amendment rights against self-incrimination and the decision in Kastigar v. United States, 92 S.Ct. 1653 (1972). Zile, 710 So.2d, supra, at 733-735.

Mrs. Zile specifically argued that Florida's immunity statute, Section 914.04, was invalid under Florida's Constitutional provisions against self-incrimination and the right to privacy. Zile, 710 So.2d, at 732, 733. In its opinion of May 20, 1998, affirming all but one of Mrs. Zile's convictions, the Fourth

District panel expressly rejected these challenges to the statute. Zile, at 733. The panel also concluded that Florida's Constitutional privacy provision did not apply to Petitioner because she had no "legitimate expectation of privacy" in her immunized statement. Zile at 732. The appeals court further decided that the "broader" language of Florida's Constitutional right against self-incrimination, compared to the Fifth Amendment, did not require greater protection for a criminal defendant than required under the decision in Kastigar, supra. Id.

The Fourth District panel determined that the trial prosecutor's awareness of Pauline Zile's immunized statement, and/or the failure to segregate these prosecutors from knowledge of or influence from this statement, did not require reversal of Petitioner's convictions. Zile at 733. The panel further decided that John Zile's statement was not improperly "motivated" or "influenced" by the fact that he was told that Mrs. Zile had given "a complete statement" and had told the police "what happened". Zile at 734.

All other relevant facts will be discussed in the Argument part of this Initial Brief.

SUMMARY OF THE ARGUMENT

Section 914.04, Florida Statutes, which confers use/derivation immunity upon a witness in exchange for compelling a statement from that witness, is an Unconstitutional deprivation of the State

Constitutional right against self-incrimination, right to privacy and right of access to courts. This statute does not provide adequate Constitutional protection to the witness because it does not leave the witness and the State in the same position as if the witness said nothing in the exercise of his or her Constitutional rights. Because Florida's state Constitutional provisions, Constitutional and statutory history, and judicial interpretation of immunity requirements is broader than its Federal counterparts, §914.04 is Constitutionally deficient because it does not contain broad enough immunity commensurate with Florida's broader Constitutional rights.

Furthermore, Florida's use/derivative use immunity statute cannot realistically assure protection of these rights or prevent their violation. These conclusions are reinforced by the decisions of at least nine other states which have determined that use/derivative use immunity, without more, does not Constitutionally protect an immunized witness' Constitutional rights against self-incrimination. This Court should require that transactional immunity is the minimum scope required, commensurate with a Florida citizen's state Constitutional rights or that in the alternative, other procedural safeguards and rules must be imposed beyond the use/derivative use immunity. Because Petitioner's immunity was conferred by a Constitutionally defective statute, her conviction and sentence should be reversed.

The Record demonstrates that the State violated Petitioner's Federal and State Constitutional rights under Kastigar v. United States, 92 S.Ct. 1653 (1972). The State illegally used Petitioner's immunized statement as an investigatory lead and to motivate John Zile, her husband and co-defendant, to give a statement. The fruits of these statements were ultimately used to investigate, indict, prosecute and convict Pauline Zile. The State failed to sustain its burden that it did not use Mrs. Zile's statement or that its case and evidence were obtained in a manner wholly independent of Mrs. Zile's immunized information. Because the information derived from Mrs. Zile's statement was critical to obtaining Mrs. Zile's conviction, including Mr. Zile's identification of the location of the body and Mrs. Zile's role and actions when Christina Holt died, this error was not harmless and requires reversal.

I. PETITIONER'S STATEMENT WAS COMPELLED BY PROSECUTION UNDER STATE USE/DERIVATIVE USE IMMUNITY STATUTE THAT VIOLATED PETITIONER'S FLORIDA CONSTITUTIONAL RIGHT AGAINST SELF-INCRIMINATION AND RIGHT TO PRIVACY, THUS REQUIRING THAT PETITIONER'S CONVICTIONS AND SENTENCE BE REVERSED AND DISMISSED.

On October 27, 1994, Pauline Zile was handed a subpoena by Palm Beach County prosecutors which compelled her to give a statement to police and prosecutors in a then-pending investigation into the disappearance of her seven year old daughter, Christine Holt. T11, 1176-1177. It is undisputed that the legal effect of this subpoena conferred "use" and "derivative use" immunity upon Mrs. Zile under

§914.04, Fla.Stat.. Debock v. State, 512 So.2d 164, 167 (Fla 1987); see also Zile v. State, 710 So.2d 729, 732 (Fla 4th DCA 1998); Costello v. Fennelly, 681 So.2d 926, 928 (Fla 4th DCA 1996); Novo v. Scott, 438 So.2d 477, 478 (Fla 3rd DCA 1983). When Petitioner challenged the Constitutional validity of this statute, the Fourth District Court of Appeal concluded that §914.04 did not violate the Florida Constitutional privilege against self-incrimination or even invoke the right of privacy. Zile, 710 So.2d, supra at 732, 733. A comprehensive examination and analysis of State Constitutional law requirements and policy reasons requires the conclusion that Florida's use/derivative use immunity statute is an Unconstitutional encroachment upon these Florida Constitutional rights.

A state statute conferring immunity for compelled statements by citizens must be sufficiently comprehensive to protect a citizen to the same degree as if she had exercised her right to remain silent and said nothing. Murphy v. Waterfront Commission of New York Harbor, 84 S.Ct. 1594, 1609 (1964); Costello, 684 So.2d, supra at 938; State v. Thrift, 440 SE 2d 341, 350 (S. Car. 1994); State v. Gonzalez, 853 P2d 526, 530, 530, n.4 (Alaska 1993); State v. Strong, 541 A2d 866, 871 (NJ 1988), State v. Soriano, 684 P2d 1220, 1232, 1233 (Oreg. App. 1984), affirmed, 693 P2d 26 (Oregon 1984). As a fundamental principle of state constitutional law, Florida courts must ". . .give primacy to our state Constitution and . . . give independent legal import to every phrase and clause contained

therein." Traylor v. State, 596 So.2d 957, 962 (Fla. 1992). (e.a.) When the immunity conferred by a state statute provides less safeguards than required by the nature and scope of a state's constitutional right against self-incrimination, the immunity law is not "co-extensive" with this right and is Unconstitutional. Thrift, 440 SE 2d, supra at 350; Wright v. McAdory, 537 So.2d 897, 903 (Miss. 1988); Attorney General v. Colleton, 444 N.E.2d 915, 918 (Mass. 1982).

Since 1980, the highest courts of nine states have comprehensively examined and interpreted the Constitutional validity of their respective use/derivative use immunity statutes under state constitutional rights against self-incrimination. In a thirteen year period from 1980 to 1993, two-thirds of these states invalidated their use/derivative use immunity statues as Unconstitutional infringements of state Constitutional rights against self-incrimination. Thrift, 440 S.E. 2d, at 350-352; Gonzalez, 853 P.2d, supra, at 528-533; Wright, 536 So.2d, supra at 903-904; Soriano, 684 P.2d supra at 1232-1234; Colleton, 444 N.E.2d, supra at 918-921; State v. Miyasaki, 614 P.2d 915, 921-924 (Hawaii 1980). The three other states construed their respective statutes as constitutional only because the law at issue contained procedural and substantive safeguards not contained in Florida's immunity statute, State v. Ely, 708 A2d 1332, 1338, 1339 (Vt. 1997), and because the courts imposed additional obligations upon

the State not contained in their respective statutes. Ely, 708 A.2d, supra at 1338-1340; Commonwealth v. Swinehart, 664 A2d 957, 961-969 (Pa. 1995); Strong, 542 A2d, supra at 869-872.

The majority of these nine courts reached their conclusions based on an examination and comprehensive review of the state's constitutional history and language, on self-incrimination; the legislative history of immunity both before and after the seminal decision in Kastigar v. United States, 92 S.Ct. 1653 (1972); and the historical judicial interpretation of the state's constitutional right against self-incrimination. Id. These states also analyzed and discussed practical concerns and doubts about whether use/derivative use immunity provided Constitutionally adequate safeguards of state self-incrimination rights. In each of these nine decisions with a "detailed analysis", Ely, 708 A.2d, supra at 1337, 1338, the state's highest appellate courts held that use/derivative use immunity was not sufficient in and of itself to protect a witness' rights against self-incrimination. These states found that either transactional immunity (Thrift, Gonzalez, Soriano, Wright, Colleton, Miyasaki) or some form of use/derivative use immunity "plus" (Ely, Swinehart, Strong)[1] was necessary to be

1 According to the Pennsylvania Supreme Court's analysis in 1995, eleven states continued to require transactional immunity after Kastigar, Swinehart, 664 A.2d at 965, n.13 (listing California, Idaho, Illinois, Maine, Michigan, Nebraska, New Hampshire, Rhode Island, Utah, Washington and Virginia). Adding the nine states whose decisions are most prominently analyzed here, which now require transactional immunity or use/derivative use

Constitutionally valid. Similar examination of Florida's Constitutional history and case law demonstrates that under either of these approaches, §914.04 is Unconstitutional because it does not provide the required Constitutional protection to the degree and scope required by Article I, Section 9 and 23, Fla. Constitution (1980).

In Traylor, supra, this Court emphasized the "unique" and primary importance of the Florida Constitution's Declaration of Rights. Traylor, 596 So.2d at 962, 963. The Court specifically observed that the constitutional rights contained therein required "special vigilance" and that "...no other broad formulation of legal principles, whether state or federal provides more protection from government overreaching..." than Florida's Declaration of Rights. Traylor at 963. (e.a.) This Court specifically examined and interpreted Article I, Section 9, Traylor at 960-966[2] , stressing the "basic" and fundamental nature of this and all other state constitutional rights, and urged that this right be "broadly

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immunity "plus" additional requirements upon the State to be deemed Constitutional, 40% of all states (20) provide or Constitutionally mandate a broader scope of immunity than Florida's statute.

2 This Court observed in Traylor that as of 1986, eleven other states had interpreted their state constitutional right against self-incrimination in a manner independent of the Fifth Amendment or Federal cases. Traylor at 960, 961, n.2. Two of the states cited therein included Colleton, supra, and Miyasaki, supra, both of which declared their immunity statutes to be unconstitutional violations of the state constitutional right against self-incrimination. supra.

construed" to prohibit the obtaining of statements by force. Traylor at 964, citing ex parte Senior, 37 Fla 1, 19 So 652, 654 (1896).

The broader nature of Florida's Constitutional right against self-incrimination is further reflected by the terms used in Article I, Section 9. Prior to 1968, Florida's self-incrimination protection contained the same basic language as the Fifth Amendment's proscription preventing the compelled use of self-incriminating statements "in any criminal trial". (e.a.) Article I, Section 10, Fla. Const. (1838) (prohibiting use of such statements "in all criminal prosecutions", e.a.); Article I, Section 8, Fla. Const. (1868) (prohibiting compulsion of such statements in any criminal case", e.a.); Article I, Section 12, Fla. Const. (1885) (same). In the 1968 revisions, the self-incrimination provision was altered to its present language which prohibits such compelled statements, "In any criminal matter", e.a. Under the rules and rationale of Traylor, this broader language in Article I, Section 9 must be considered to convey a broader right than its Federal counterpart. State ex rel Vining v. Florida Real Estate Commission, 281 So.2d 487, 489 (Fla. 1973) (where Supreme Court noted that Article I, Section 9 "is similarly (if somewhat more broadly) worded than the Fifth Amendment); D'Alemberte, Talbot, Commentary, Florida Constitution, 1968 Revision (where Dean D'Alemberte referred to the change of terms from "case" to

"matter", ". . . which may be construed to be broader in meaning"); (e.a.); see also Colleton, 444 NE 2d at 918, 921 (where language of state right against self-incrimination was cited as part of basis for concluding that state right was broader than Fifth Amendment right).

This conclusion is reinforced by the interpretation of Federal law on immunity that existed at the time Florida broadened its Constitutional language in 1969. From the decision in Counselman v. Hitchcock, 12 S.Ct. 195, 547 (1892), until the Murphy decision in 1964, the Federal viewpoint was that transactional immunity was Constitutionally mandated to overcome Fifth Amendment privilege, e.g. Miyasaki, 614 P.2d at 920, 921; see also State v. Gonzalez, 825 P.2d 920, 928 (Alaska App. 1992). The Kastigar decision in 1972 effectively receded from Counselman, supra, so Federal interpretation was unclear or at least in flux from 1964 (Murphy) until 1972 (Kastigar). Miyasaki, supra. It must be regarded as significant that during a time span where Federal courts were questioning and/or retreating from requiring transactional immunity to supplant Fifth Amendment privilege, Florida lawmakers and voters specifically amended the scope of their self-incrimination provision to include broader language than before. This widening of State Constitutional protection, at a time when the Federal right was being narrowed, further supports the conclusion that Article I, Section 9 compels transactional immunity. Id.

The statutory history of §914.04 also demonstrates this State's commitment to the broadest levels of protection of the right against self-incrimination in its immunity laws. From 1905 to 1969, Florida's general immunity statute provided transactional and use immunity to those compelled to testify or produce documents in any "investigation, proceeding or trial", concerning crimes of "bribery, burglary, larceny, gaming or gambling or . . . illegal sale of spirituous, vinous or malt liquors." §932.09, Fla. Stat. (1927); Historical and Statutory Notes,§914.04, Fla. Stat. (1996). In 1969, this transactional and use immunity was extended to cover testimony or production of documents covering all criminal offenses. Laws of Florida, Chapter 69-316, Section 1.These sections barred prosecution altogether relating to the item or matter testified to; prohibited the use of such testimony in other criminal matters, and barred prosecutions, penalties and/or forfeitures (based on such use). Debock, 512 So.2d, supra at 167; State v.Williams, 487 So.2d 1082, 1084(Fla. 1st DCA 1986); State ex rel Hough v. Kelly, 287 So.2d 282, 284 (Fla. 1973); Gilliam v. State, 267 So.2d 658, 659, (Fla. 2nd DCA 1972); State ex rel Mitchell v. Kelly, 71 So.2d 887, 889 (Fla. 1954); Florida State Board of Architecture v. Seymour, 62 So.2d 1 (Fla. 1952).

These provisions of transactional immunity exceeded the minimum requirements of Kastigar for a full ten years after that opinion was issued, until the Florida legislature again amended

§914.04. Laws of Florida, Chapter 82-393, §1; Debock; Novo, 438 So.2d at 478, 479, n.4; Gilliam, supra, (noting in a Florida post-Kastigar case that witness received "greater protection" under §914.04 "than the [Federal] Constitution requires....") This further shows an historical sensitivity in this state to protect a citizen's rights against self-incrimination in a broader way than required after Kastigar. Compare Thrift 440 SE 2d at 351 (South Carolina retained transactional immunity until 1992, 20 years after Kastigar); Soriano, 684 P2d at 1230 (Oregon law provided transactional immunity until 1971, one year before Kastigar).

Florida's Constitutional provision against self-incrimination has been cited as an independent basis for the enforcement of such rights, dating back to the turn of this century. State ex rel Reynolds v. Newell, 102 So.2d 613, 616 (Fla. 1958); Kelly, 71 So.2d supra at 889-895; Seymour, 62 So.2d supra at 3; Clark v. State, 68 Fla. 433, 67 So. 135 (Fla. 1914). Additionally, both before and after Kastigar, Florida courts have broadly prohibited the use of evidence that is a "link in the chain" of guilt against a witness. Costello, supra; St. George v. State, 564 So.2d 151, 155 (Fla. 5th DCA 1990); Williams, 487 So.2d at 1085; Mitchell, 71 So.2d at 894, 895. In State v. Moore, 486 So.2d 79, 81 (Fla. 2nd DCA 1986), decided 14 years after Kastigar and 4 years after the Florida legislature abrogated transactional immunity from §914.04, the Second District ruled that an indictment must be dismissed if grand

jury evidence "could have been influenced" by an immunized statement, including within prohibited use "testimony or the fact of the testimony." (e.a.) This more expansive view of Article I, Section 9 and the Kastigar requirements further compels the conclusion that Article I, Section 9 is of broader Constitutional import than its Federal counterpart. Compare Strong, 542 A.2d at 870, 872 (New Jersey cases interpreted state use immunity statute as also conveying derivative use immunity; Court also noted past New Jersey court decisions, including those recognizing that state right against self-incrimination included privacy interest component that went beyond what is "addressed" in Fifth Amendment).

Under these historical circumstances, the broader nature of Article I, Section 9 Constitutionally requires an immunity statute broader in scope than §914.04 to be truly "co-extensive" with Florida's Constitutional right against self-incrimination. Thrift, 440 S.E.2d at 351; Soriano, 684 P.2d at 1232; Colleton, 444 N.E.2d at 918-921; Miyasaki, 614 P.2d at 922, 923. The minimum scope of immunity protection Constitutionally mandated to supplant this right is transactional. Id. Contrary to the Fourth District's summary interpretation, this State's legislation, jurisprudence, broader interpretation of the Constitutional protection against self-incrimination and broad interpretation of Kastigar provide compelling reasons why Article I, Section 9 "...would imply a

requirement that (the required) immunity be transactional immunity." Zile, 710 So.2d at 733.

Several Federal and state courts, including the state supreme courts in Strong and Swinehart decisions, have expressly interpreted the right against self-incrimination as inherently encompassing personal privacy rights. Murphy, 84 S.Ct. supra, at 1596; 1597 ("the privilege of self-incrimination...reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt...[and] our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him'...[and] our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life'" citations omitted, e.a.); Swinehart, 664 A.2d at 967) relying on Strong); Strong, 516 A.2d at 872; see also Colleton, 444 N.E.2d at 917; Miyasaki, 615 P.2d at 918. It was this fundamental and "compelling" privacy component of the right against self-incrimination that was the basis in Strong and Swinehart for requiring "use/derivative use immunity plus" by imposing a much higher standard of proof upon the Government to prove non-use than required under Kastigar. Swinehart, 664 A.2d at 965; Strong, 542 A.2d at 872.

The Strong decision cited In the Matter of Grand Jury Proceedings of Joseph Guarino, 516 A.2d 1063, 1069 (N.J. 1986), in finding that the state protection against self-incrimination was, "...if anything, more protective than the Fifth Amendment." Strong at 872. In Guarino, supra, the New Jersey Supreme Court quoted state and Federal authorities at substantial length including Murphy, in concluding that "central to our state common law conception of the privilege against self-incrimination is the notion of personal privacy first embodied in 1886 in Boyd v. United States. [Citation omitted in original] ...We affirm our belief in the Boyd decision and hold that the New Jersey common law privilege against self-incrimination protects the individual's right 'to a private enclave where he may lead a private life'" quoting in part Murphy, 84 S.Ct. 1597; Guarino, 516 A.2d at 1069, 1070; see also Colleton, supra; Miyasaki, supra.

Thus, the Fifth Amendment protection itself not only includes rights of privacy but this privacy aspect has been held to establish broader state constitutional protection to self-incrimination than the Fifth Amendment. Supra. This conclusion must apply with even greater force in Florida which recognizes both a state constitutional right of self-incrimination and an "independent free-standing" state constitutional right of privacy in Article I, Section 23. Winfield v. Division of Pari-Mutuel Wagering, 477 So.2d 544, 546 (Fla. 1985).

As this Court observed in Traylor, state constitutional doctrine mandates that each separate state constitutional provision be interpreted as equally independent fundamental protections to be safeguarded with "identical vigor". Traylor at 962, 963. Florida's express protection of a person's "beliefs... thoughts ...emotions...[and] sensations" and specific constitutional protection of a "right to be let alone" has consistently been viewed in Florida as extremely broad in scope and more protective of privacy interests than its federal counterpart. Von Eiff v. Azicri, 720 So.2d 510, 514 (Fla. 1998); City of North Miami v. Kurtz, 653 So.2d 1025, 1027 (Fla. 1995); Shaktman v. State, 553 So.2d 148, 150 (Fla. 1989); Winfield, 477 So.2d supra at 547. In language and references paralleling those decisions in Murphy, Strong and Guarino, this Court has consistently interpreted Article I, Section 23 as conveying the strongest possible protection of personal privacy rights, so fundamental in nature that these rights involve the most exacting scrutiny to prevent Unconstitutional government intrusion. Id; In re T.W., 551 So.2d 1186, 1192 (Fla. 1989); see also Shaktman, 553 So.2d at 151, n.9. The history of interpretation and analysis of these two Florida constitutional provisions, when considered individually and in tandem, mandate that transactional immunity is the minimum "coextensive" form of immunity with Article I, Section 9 and 23. If the right against self-incrimination alone is broader than its Federal counterpart

and thus requires a broader immunity than contained in §914.04, supra, this conclusion is inescapable when both Florida constitutional interests are taken into account.

The Fourth District's summary conclusion was that Florida's constitutional right of privacy is not invoked or at issue under §914.04. Zile, 810 So.2d at 733. The forcible supplanting of a person's Constitutional rights against self-incrimination by use/derivative use immunity, in the form of a state attorney subpoena, must necessarily involve a "legitimate or reasonable expectation of privacy". Kurtz, 653 So.2d supra at 1027; Shaktman, 553 So.2d at 151; Winfield, 477 So.2d at 547. Section 914.04 compels the "loosening of lips" so that the Government may invade a witness' inner sanctum of thoughts to obtain information it could not otherwise obtain under threat of contempt and possible jail time if refused. Tsavaris v. Scruggs, 360 So.2d 745, 749 (Fla. 1977); Miyasaki, 614 P.2d at 623. A person's thoughts, information and testimony which are potentially and/or actually against that person's penal interests to express is certainly reasonably within the scope of interests that an individual would seek to protect from disclosure of observation by law enforcement or others. Compare, e.g., Shaktman, 553 So.2d at 151 (Constitutional right to privacy invoked by statute authorizing pen register surveillance and recording of phone numbers dialed, since an individual in most

cases has no intention of telling or disclosing who he or she calls or what she said during the call to a third person).

Because the state Constitutional right to privacy is implicated, §914.04 cannot be Constitutionally valid unless there is a compelling state interest shown by the Government accomplished through the "least intrusive means" available. von Eiff, 720 So.2d at 514; Winfield, 477 So.2d at 547. A "crucial component" of this "least intrusive means" part of the Winfield analysis is the adequacy of "procedural safeguards" to prevent unwarranted intrusion into the privacy interest involved. Shaktman, 553 So.2d at 152. Under either the "transactional immunity" approach or the "use/derivative use immunity plus" analysis, no state court to address the issue in detail has concluded that use/derivative use immunity in and of itself sufficiently supplies these safeguards. Supra; infra. Florida's circumstances compels the same result and a conclusion that §914.04 Unconstitutionally infringes upon Article I, Section 23, Florida Constitution.

In evaluating policy concerns and practical considerations of use derivative/use immunity, six states invalidated their statutes because of use derivative/use immunity could not sufficiently prevent illegal use of immunized testimony or statements by the State. Thrift, 440 S.E.2d at 351, 357; Gonzales, 853 P.2d at 530-532; Wright, 536 So.2d at 903-904; Soriano, 684 P.2d at 1232-1234; Colleton, 444 N.E.2d at 920-921; Miyasaki, 614 P.2d at 921-924. A

significant deficiency of use/derivative use immunity is the inability of a defendant to meaningfully present any claimed violation of rights against self-incrimination based on illegal use of immunized information in the Kastigar context. Gonzales, 853 P.2d at 530, 531 Miyasaki, 614 P.2d at 923-924; Keenan, Jefferson, Notes: No Evidentiary Use Of Compelled Testimony And The Increased Likelihood Of Conviction, 32 Ariz. Law Review 173, 187, 188 (1990); Strachan, Kristine, Self-Incrimination Immunity and Watergate, 56 Tex. Law Review 791, 820, 821 (1978); see also Ely, 708 A.2d at 1338, (noting this policy concern as discussed in Gonzales and originating from Justice Marshall's dissent in Kastigar, 92 S.Ct. at 1668-1670); Swinehart, 664 A.2d at 967, 968 (noting that the difficulty and "practical effect of separating out the information governed from the compelled testimony when later prosecuting the individual" is "what appears most striking" amongst states invalidating use derivative use statutes, presenting "the most salient argument" against Constitutionality).

When a witness seeks to demonstrate that the State violated her rights by making use or derivative use of her immunized statement, all of the evidence connected with this use "necessarily rests with the State." Gonzalez, at 530; see also, Keenan, supra at 187; Strachan, supra at 820. To mount an intelligent, thorough and effective Kastigar-related challenge to illegal "use" of such evidence, a defendant must trace all evidence from state witnesses,

some of whom have "faded memories and incomplete recollection" as to what happened from the time immunized evidence was "given" to the time it was "used." Gonzalez, at 530. If this information is not written down or is unavailable because of an absence of adequate record keeping,[3] a defendant has no recourse in obtaining and presenting adequate information and evidence to try and establish that a violation of her self-incrimination rights occurred. Miyasaki at 523-524. Some of the information may be kept secret from the witness, such as grand jury testimony,[4] making

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3 The Record here demonstrates an appallingly lackadaisical absence of any effective control of knowledge or access to Mrs. Zile's immunized statement. The unrebutted testimony from one of the trial prosecutors established there were no records kept concerning who copied and labelled a tape of Pauline Zile's immunized statement or when this occurred. T20, 2187, 2188, 2195, 2196, 2197. This prosecutor did not know that one of her own investigators had a copy of the tape. T20, 2194. The prosecutor could not even definitively state that this tape was duplicated in the Palm Beach County State Attorney's Office. T26, 2956. She did not know how the medical examiner received a copy of the tape. T20, 2188 a question no other witness could answer. T26, 2956, 2961, 2962. In fact, the medical examiner "found" this tape, unsecured, laying on his desk during a break in one of the Kastigar hearings at trial. T20,2173.

Furthermore, a Riviera Beach investigator, Ed Brochu, and state attorney investigator, Jensen Ross, could not negate the possibility that they had discussions with other officers about the contents of Mrs. Zile's statement. T11, 1193-1205; T11/12, 1220-1314. Brochu specifically described the content of Mrs. Zile's statement in his probable cause affidavit which was not sealed and was available for any other police officer (or reporter) to see.

4 While Petitioner's counsel obtained post-trial access to grand jury transcripts, requests for such access made pre-trial and during trial in connection with Petitioner's Kastigar-related challenges and motions were denied. e.g., T7, 635; T12, 1333-1334. This denial of access was all the more compellingly prejudicial at

it impossible for a witness to make any effective argument that there was illegal use of immunized information to indict the witness. These circumstances prohibit any comprehensive investigation or presentation of illegal use by a witness turned defendant, or any effective cross-examination or rebuttal of the government's "independent source" proof. Gonzalez, at 530, 531; Miyasaki, at 922-924; Keenan, at 188; Strachan, at 821.

Because a defendant in this position is thus left to speculate about the manner, extent and scope to which the immunized information may have been used, this emasculates any meaningful or legitimate presentation or evaluation by a reviewing court of whether self-incrimination rights were violated. This conclusion is reinforced by sharing of information within a large office by prosecutors and investigators, like here, without any accountability or index of how and when such information was shared. Gonzalez, at 531; Soriano, 684 P.2d at 1233; Miyasaki, at 523-524; Strachan, at 821 (where article's author noted that a prosecutor ". . . cannot be certain that other members of his staff have not made prohibited use of compelled testimony"). Florida's use/derivative use immunity statute does not contain any procedures or rules that would in any way alleviate a witness-defendant's virtually impossible burden of production and proof under these

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trial because the trial judge reviewed the grand jury transcripts in camera in ruling against Petitioner's Kastigar challenge. R2, 365.

circumstances. Compare Ely, 708 A.2d at 1338-1340 (where Vermont Supreme Court, inter alia, imposed additional requirement not contained in State's use/derivative use immunity statute, requiring State to "can" all information in its possession prior to grant of immunity, so that witness-turned defendant and subsequent reviewing court could more fully present and evaluate Kastigar-related claims made.)

Thus, §914.04 does not adequately protect a witness-defendant's Constitutional rights against these deficiencies. Worse than that, Florida's statute does not protect a witness' meaningful exercise of these rights, since a witness-defendant lacks the minimum tools--access to the information concerning "use"--to even present an effective claim of violation of Federal or State constitutional rights against self-incrimination and of privacy. Section 914.04 thus also denies a witness-defendant his or her state Constitutional right of access to courts, Article I, Section 21, Fla. Constitution, for "redress" of potential violations of rights under Kastigar and Article I, Sections 9 and 23, and/or to meaningfully "test" the State's "adherence" to case law or constitutional requirements. Gonzalez, 853 P.2d at 531.

Other state courts have invalidated use/derivative use immunity laws based on the "illusory" protection they afford when "overwhelming publicity" is given to immunized statements or testimony. Thrift, 440 S.E.2d at 351, n.10 (where South Carolina

Supreme Court spoke of concerns and problems when “overwhelming publicity” surrounds the giving of an immunized statement, citing as an example United States v. North, 910 F.2d 843 (D.C. Cir. 1990); (“North I”) affirmed as modified, 920 F.2d 940 (D.C. Cir. 1990) (“North II”); Gonzalez, 853 P.2d at 531-532, 532, n.6 (where Alaska Supreme Court, also citing North, observed that “significant publicity” could shape or alter other witness’ testimony by “casual exposure” with no adequate procedure under use/derivative use immunity law to enable a witness to “discover” this use; Court also concluded that jurors and some other individuals could be "exposed" to an immunized statement "officially ...or in a particularly notorious case, through...wide dissemination in the media" which use/derivative use law could not "safeguard" against); Strachan at 822, 834 (where law review article's author concluded that "in any case in which immunized disclosures are made in the course of a public proceeding or otherwise made public,...it will be difficult to convince courts that all persons charged with building the case and prosecuting the witness have managed to avoid knowledge or access to the immunized testimony", e.a.; author also observed that even if there were strict controls on access, this would be meaningless if immunized statement were “publicly disseminated”). There is virtually no way that under such circumstances a

use/derivative use immunity statute can Constitutionally "safeguard" against such a broad spectrum of possible use. [5] Id.

Use/derivative use immunity has also been found to be Constitutionally inadequate to protect self-incrimination rights because once a prosecutor learns the contents of an immunized statement it is “human nature” and/or “human frailty” that he cannot help but use this knowledge to influence his thoughts, actions and decisions if he ultimately prosecutes the witness. Wright, 536 So.2d at 903 (Mississippi Supreme Court concluded that inevitably State will “work backwards” from the immunized statement, so that prosecutor’s case not truly based on independent

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5 Mrs. Zile's case presents a classic example of this facial Constitutional deficiency. The Record here demonstrates that of the overwhelming publicity which occurred in Palm Beach County in the five month period before Mrs. Zile's trial included newspaper and television accounts of the "details” of Mrs. Zile's immunized statement and her husband's resulting statement. SR1, 4, 5, 21-25, 27-30, 84, 85, 88, 89, 91-96; SR2, 262, 263, 272, 347-349; Tape I, #833-842, 856-861, 909, 922, 940-960, 1043-1058, 1205-1202. The Ft. Lauderdale Sun Sentinel, prominently displayed the details of this immunized statement in an insert featured in the middle of its first page on October 29, 1994, SR1, 21, along with the fact that Mrs. Zile implicated her husband in her child's death "in exchange for immunity". Still other newspaper references additionally questioned whether Mrs. Zile got "premature immunity" in referring to her immunized statement, SR1, 26. The elected State Attorney in Palm Beach County was himself quoted when he proclaimed that Mrs. Zile would not escape liability or punishment because she had been given immunity for her statement: "It's our intention to make a case against her....This is not that she took a walk, she didn't get a free ride" SR1, 22, 24, 90; Tape III #2785-2790.

It is really apparent that §914.04 could not possibly provide adequate Constitutional protection of Mrs. Zile's rights in the face of this publicity and its impact on the prosecutors, police, witnesses and the public at large.

source.); Soriano, 684 P.2d at 1233, 1234 (where Oregon appellate court, and Supreme Court in adopting opinion 693 P.2d at 26, stated that "It is hard to see how the most conscientious prosecutor could avoid letting the knowledge that the witness admitted the crime while immunized affect decisions", later observing that it is "unrealistic to give a dog a bone and to expect him not to chew on it", other citations omitted); Gonzalez, 853 P.2d at 532 (once known, prosecutor cannot remove knowledge of immunized material).

This knowledge of immunized information affords a prosecutor inherent factual and strategic "uses" that would not be otherwise available, including developing more productive deals and investigations; focus of efforts and resources on the immunized witness as a prime suspect; explanation and/or re-evaluation of the significance of previously known information; providing a preview of the defense case and theories; the formation of strategy and framing of questions; and even assistance in deciding whether to prosecute the immunized witness. Gonzalez, at 531, 532; Soriano at 1233; Miyasaki at 924, Strachan, at 807-808; Keenan, at 188; United States v. McDaniel, 482 F.2d 305, 311, 312 (8th Cir 1973); United States v. Dornau, 359 F.Supp. 864, 686, 687 (S.D.N.Y. 1973); United States v. Semkiw, 712 F.2d 891, 893-895 (3rd Cir. 1983); see also, State v. Gault, 551 N.W.2d 719, 724-726 (Minn 1996); State v. Vallejos, 883 P.2d 1269, 1274 (N. Mex. 1994); State v. Munoz, 702 P.2d 985, 988, 989 (N. Mex. 1985), quoting in part, United States

v. Rice, 421 F.Supp. 871, 877 (E.D. Ill. 1976); People v. Casselman, 583 P.2d 933, 935 (Colo. 1978). Because a prosecutor cannot "unring the bell" in this context, use/derivative use laws cannot adequately guard against these prosecutional advantages. Gonzalez at 531, 536; Wright at 903 (even if done in good faith, prosecutor might "inadvertently" use immunized statement for strategy); Soriano at 1233; Miyasaki at 924.

Section 914.04 does not require prosecutors or law enforcement personnel, who heard or know of the immunized statement, to separate themselves and the information from the investigative, indictment or trial process. In this case, the same two prosecutors heard Pauline Zile's statement and thereafter presented the state's case before the grand jury and at trial. T7, 636-637. The statute's silence on requiring that "Chinese wall" efforts or procedures be established within prosecutor's offices creates the untenable risk that immunized information will be shared and used in violation of the immunized witness' rights, and that a prosecution of the witness would not be built on wholly independent sources. See Department of Justice Manual, Section 9-23.400 (1994 Supplement) (where in regulation governing Federal prosecutors, attorney is required, for prosecution"after compulsion" of a witness' testimony under immunity, to "show affirmatively that no other 'non-evidentiary' use has been or would be made of the compelled testimony in connection with the proposed prosecution

(for example, by having the prosecution handled by an attorney unfamiliar with the substance of the compelled testimony.)" (e.a.); United States v. Hampton, 775 F.2d 1479, 1490 (11th Cir. 1983) (the Kastigar rule "generally requires" that prosecutors and case agents "...were aware of [an] immunity problem and followed reliable procedures for segregating immunized testimony and its fruits from officials pursuing any subsequent violations"); see also United States v. Harris, 973 F.2d 333, 337 (4th Cir. 1992) (quoting Hampton rule); United States v. Byrd, 765 F.2d 1524, 1532, n.11 (11th Cir. 1985) (where Court concluded it would be "unwise" to permit attorney familiar with immunized testimony to participate in trial or trial preparation); United States v. Dynaelectric Company, 859 F.2d 1559, 1579, n.26 (11th Cir. 1988) (noting and quoting Byrd footnote, supra); Semkiw, 712 F.2d, supra at 855; State v. Beard, 1998 W.Va. LEXIS 113, *31 (W.Va., July 15, 1998); Ely, 708 A.2d, at 1340; Vallejos, 883 P.2d, supra at 1274; Munoz, 702 P.2d at 990; Thrift, 440 S.E.2d at 357, n.10, citing Harris. The protection of a witness' rights against self-incrimination under §914.04 are made further illusory because there is no insulation requirement or procedure within Florida's statute. Id.

These dangers and risks can only be adequately neutralized or eliminated by the "certainty" and "simplicity" of transactional immunity. Strachan, at 833; Thrift, at 351, 352; Gonzalez, at 532, 533; Wright, at 903-904 (transactional immunity is the only form of

immunity that will make an immunized witness "as secure as if he had remained silent"); Soriano at 1232-1234; Miyasaki at 924 (where panel concluded that none of the risks or dangers of illegal use would occur if State required transactional immunity). The State's entire case against Petitioner rested upon a statement she was compelled to make through an unconstitutionally based grant of immunity. Because the appropriate grant of transactional immunity would have prohibited her prosecution for the death of Christina Holt, Mrs. Zile's conviction must be reversed and the indictment must be dismissed with prejudice.

While this may be viewed as a harsh result, any other result would create the unconscionable consequence of trampling Mrs. Zile's state constitutional protections in the name of investigating and punishing crime. Traylor, supra at 963; Thrift at 352, n.12; Miyasaki at 916, 924. In Kastigar, the Supreme Court majority that the “degree of protection that the [Federal] Constitution requires” is that a use/derivative use immunity statute “...leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a grant of immunity.” Kastigar, 92 S.Ct. at 1664, quoting Murphy, 84 S.Ct. at 1610 (e.a.) Some Federal and State courts have concluded that such a statute must leave the witness and the State in the exact same position as if the witness had said nothing, consistent with the Kastigar

opinion's broad and unconditional proscription against use of compelled immunized information "in any respect". Kastigar at 1661; U.S. v. Kilroy, 769 F.Supp. 6, 11 (D.D.C. 1991), aff'd; 27 F.3d 675 (D.C. Cir. 1994); Gonzalez, 853 P.2d at 530, n.4 ("... a meaningful reading of the 'same position' argument [of Kastigar] is that the person compelled to testify must be put in the same position with regard to the possibility of incrimination as if he had remained silent. If the person had remained silent, he would have faced no hazard of incrimination from his own words", e.a.); Soriano, 684 P.2d at 1232-1233 (where Oregon courts held that "However correct this modification [Murphy language quoted in Kastigar) may be when the issue is whether the Federal Government may use evidence procured under a state grant of immunity, we cannot agree with the Supreme Court in Kastigar (citations omitted) that [this] statement provides the rule by which we should evaluate the immunity...which the sovereign must provide. The citizens of Oregon are entitled, under their constitution, not merely to a 'substantial' substitute for their constitutional rights, but to one which has the 'same extent in scope and effect'", adopting Justice Marshall's language in Kastigar that the required scope of immunity must put a witness in "exactly the same position" as if the witness aid nothing, Kastigar 92 S.Ct. at 1669, (Marshall, J., dissenting opinion).

Under the Traylor analysis and rules of construction, this Court should adopt and follow the Soriano rationale, since Florida citizens are entitled to the broadest possible protections under Article I, Section 9. However, whether this Court applies the Kastigar "substantially the same position" language as the Soriano rule (the "same" position), §914.04 does not provide the required Constitutional scope of immunity necessary to prohibit a violation of a witness' state Constitutional rights. Supra.

The policy rationale against requiring transactional immunity as the minimum scope Constitutionally required is that such immunity effectively allows amnesty and an escape from responsibility to those who have committed serious crimes. See, e.g., Ely, 708 A.2d at 1338-1339; Swinehart, 664 A.2d at 968; Strachan, at 832. However, Federal and State courts alike have stressed that it is not permissible or appropriate to sacrifice wholesale violations of fundamental Constitutional guarantees in the name of prosecuting or solving a difficult case. e.g., North II; North I; Vallejos; Munoz. Even those goals may not be logically advanced under §914.04. A witness fearful that her rights are not adequately maintained under §914.04 may risk jail for contempt and refuse to disclose subpoenaed testimony rather than cooperate and risk substantially greater punishment like Mrs. Zile suffered. Strachan, at 834.

There is no question that because immunity supplants an otherwise available privilege, it is the Government which must bear the resulting risks and burdens of proof. Kastigar. Armed with whatever information becomes uncovered or available before deciding whether to confer immunity on a witness, the Government is thus equipped to make a choice, assessing the relative benefit of undisclosed information against the risk it may not be able to prosecute the person who possesses this information. North I, 910 F.2d supra at 826; Munoz, 702 P.2d supra at 990, quoting U.S. v. Hossbach, 518 F.Supp. 759, 773 (E.D. Pa. 1980); Keenan, at 187. The prosecution and/or law enforcement is certainly not unduly penalized in making an evaluation at this point, based on what it knows and what it needs, and taking the necessary steps or precautions to secure its case for future purposes. Keenan, at 187; see e.g., LaFave and Israel, Criminal Procedure, §8.11, at p.425, n.10 (2nd Ed. 1992) ("The easiest way for a prosecutor's office to ensure that no use is made of immunized testimony is through a 'Chinese wall' arrangement among the different prosecutors, as recommended in the U.S. Attorney's Manual..."). Any fears that serious criminal acts will go unpunished must be balanced against the more serious and significant concern that the whole purpose of self-incrimination protection is defeated by a Constitutionally defective or inferior law. North I at 861; Vallejos, 883 P.2d at 1277, quoting North I. The overriding policy

rationale is that this Court should not allow Florida's statutory immunity to reduce Constitutional safeguards to permit less protection than the Fifth Amendment and Article I, Section 9 and 23 mandates. When the choice by the State is made to facilitate a particular form of immunity by statute, that choice "never, never, never should trump" these fundamental rights. North II, 920 F.2d at 945-946.

Even amongst state courts which have rejected the conclusion that transactional immunity is the minimum required scope that a state must provide, these states acknowledge the validity of the policy reasons relied upon by those courts invalidating of use immunity statutes in South Carolina, Mississippi, Alaska, Oregon and Hawaii. Ely, 708 A.2d at 1337-1340; Swinehart, 664 A.2d at 966-969. These states further recognize the compelling nature of the state and federal constitutional interests involved, and the need to insure and preserve an immunized witness' interests against self-incrimination. Swinehart, 664 A.2d at 967, 968; Strong, 542 A.2d at 872 (where New Jersey Supreme Court stated that these constitutional interests demand that testifying witness under immunity "must suffer no prosecutional disadvantage" meaning that all testimony or evidence that "would not have been developed or obtained but for the compelled testimony" is barred from use and viewed under the "strictest scrutiny" and "with particular care").

While the decisions in Ely, Swinehart, and Strong concluded that a transactional immunity requirement went too far, these decisions also concluded that use/derivative use immunity statutes did not go far enough. Their approach and analysis also compels the conclusion that §914.04 is Constitutionally inadequate.

In both Strong and Swinehart, the New Jersey and Pennsylvania Supreme Court imposed a higher burden of proof upon the State than Kastigar's preponderance standard, compelling the State to prove non-use of and/or "independent source" from immunized information by clear and convincing evidence. Swinehart at 969; Strong at 872. As noted in Strong, any less onerous a burden upon the State was not deemed enough to provide the State with the corresponding right to compel a citizen's testimony. supra. Legal commentators have also concluded that a preponderance standard is insufficient to address and protect the Constitutional rights involved and properly minimize the deficiencies identified in those cases holding use/derivative use immunity statutes Unconstitutional. Strachan, at 830; 830, n.174 and cases cited therein; Keenan, at 192 (urging that a standard of "at least" clear and convincing be adopted and applied); see also, Department of Justice Manual, §9-23.000; 9-23.330 (1992 Supp.) (referring to burden on Government to prove independent source as "clearly" and "convincingly"). It is incongruous and inappropriate that the "lightest" and least scrutinizing evidentiary standard available be used, particularly

in light of the Supreme Court's express command in Kastigar that the prosecution's burden of proof on non-use should be a "heavy" one. Kastigar at 1665; Keenan at 192. Such an inappropriately "light" burden provides very little incentive to a prosecutor's office or police agency to segregate and "can" people or information, or keep records that would effectively enable a court to fully evaluate whether illegal use is made of immunized statements. Standing alone, §914.04 is Unconstitutional under the Strong/Swinehart approach, unless this Court goes beyond the statute's terms and imposes at least the "clear and convincing evidence" question of proof upon the State.[6]

The Ely case presents a middle ground between the "transactional immunity" approach and the Strong/Swinehart philosophy. The conclusions by the Vermont Supreme Court were primarily based on a comparison and evaluation of the "transactional immunity" approach with the Strong/Swinehart conclusions. Ely, 703 A.2d at 1337, 1338. While deciding that use and derivative use immunity "best matches the protection afforded by the [Fifth Amendment] privilege", Ely at 1338, the Court nevertheless mandated that Vermont's statute provided constitutionally sufficient protection of immunized witness' rights

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6 The trial court applied the Kastigar preponderance standard to the State in evaluating Petitioner's Kastigar-related challenges. e.g., R2, 364-366; T20, 2211.

only "if we adhere to certain statutory and procedural requirements." Ely at 1339.

The statutory features of Vermont's use/derivative use law go far beyond §914.04. The Ely court noted with approval that Vermont's statute required the State to prove independent source under a standard of "beyond a reasonable doubt." Ely at 1339. The Vermont law also specifically prohibits use "for any purpose", prompting the Vermont Supreme Court to decide that this included evidentiary and non-evidentiary use. Ely at 1339. The court concluded that the "high standard of proof" imposed on the State "is sufficient to uncover instances of non-evidentiary use", Ely at 1340, suggesting by implication that a lesser standard would not sufficiently account for such prohibited uses. Significantly, the Court also "emphasize[d]" the statute's provision giving a presiding judge discretion to refuse to compel testimony under a grant of use/derivative use immunity and the power to force the State to provide transaction immunity, when the judge determines that "in some cases, despite all precautions, use and derivative use is inadequate to replace the privilege "(against self-incrimination)". Ely at 1340. These provisions clearly afford the type of meaningful statutory protection of constitutional rights that Florida's statute does not.

Of further significance is that despite Vermont's very broad and stringent requirement upon the State, the Ely court

nevertheless imposed two additional non-statutory requirements. The Vermont Supreme Court determined that prohibited use applied not only to prosecutors and police "but to fact witnesses whose discovery or motivation to provide evidence is related to the immunized testimony or whose evidence is shaped by that testimony." Ely at 1340. The Ely court explained that "[T]he prosecution of an immunized witness must meet a strict 'but for test'", supra, concluding that "any evidence that would not have been available...but for the immunized testimony of the defendant" is prohibited as not being "totally independent" of the immunized statement. Id.

The court in Ely also concluded that "...the [presiding] court should ordinarily require that the State provide a written statement (called 'canning') of all evidence it has against the witness prior to the compelled disclosure...[so that] the statement is available to the court and the defendant to aid in determining whether compelled evidence was used in connection with the criminal case." Ely at 1339. Such a procedural step, critically absent from Florida's statute, would provide at least some ability to a witness-turned defendant to more effectively maintain a Kastigar-type challenge or contest the state's evidence of non-use. See also Department of Justice Manual, §9-23.330 (1992 Supp.) (requiring federal prosecutors "if it appears" that an immunized witness may later "warrant" a future prosecution to "can" and

summarize the State's pre-immunity evidence, keep a record of post-immunity evidence and secure and document access to the immunized information).

Unquestionably, the Ely case has greatly expanded the Strong/Swinehart view that the inherent nature of use/derivative use immunity is Constitutionally inadequate to protect an immunized witness' rights against self-incrimination and privacy. The danger is that under either a "transactional immunity", the "use/derivative use immunity plus" approach, or Ely's "use derivative use immunity plus more" analysis, Florida's statute falls far short of being constitutionally "co-extensive" with Florida's constitutional requirements. Kastigar.

The lack of adequate statutory or procedural safeguards in §914.04 under any of these three approaches penalizes a witness-turned defendant by placing that defendant in a far worse position than if she had said nothing. This is completely contrary to the language of Kastigar itself, where the Supreme Court upheld the validity of use/derivative use immunity only so long as such immunity forbids such a result.

As a matter of state Constitutional law and public policy, this Court should require transactional immunity as the minimum protection necessary, or at a minimum, impose the additional procedural requirements called for in Ely, Strong, and Swinehart. Under each of the varied approaches argued here, §914.04 is

Unconstitutional, requiring that Mrs. Zile's convictions and sentences be reversed.

II. JOHN ZILE'S STATEMENTS TO POLICE DISCLOSING FACT AND CIRCUMSTANCES OF THE DEATH OF CHRISTINA HOLT AND LOCATION OF HER BODY, WERE MOTIVATED, INFLUENCED AND OTHERWISE ILLEGALLY DERIVED FROM PAULINE ZILE'S IMMUNIZED STATEMENT, REQUIRING REVERSAL OR CONVICTION AND DISMISSAL OF CASE UNDER KASTIGAR.

Although the Supreme Court's opinion in Kastigar validated use/derivative use forms of immunity, the opinion does make clear that an immunized persons' Fifth Amendment rights cannot be sacrificed or abandoned as a result. Kastigar, 92 S.Ct at 1661. The Kastigar case requires that the scope of immunity provided must be at least as broad as such a person's Fifth Amendment protections and insure that any immunized information obtained cannot be used "in any respect". Kastigar, 92 S.Ct at 1661; North I, 910 F.2d supra at 861 (Kastigar language does not merely prohibit "primary use", "a whole lot" or "excessive" use of immunized information but "'any use, direct or indirect'", quoting Kastigar, in part); United States v. Poindexter, 951 F.2d 369, 373 (D.C. Cir. 1991) (quoting North I at 861); Debock, 512 So.2d, at 167, n.4 (where this Court quoted Kastigar's prohibition or use of immunized information "in any respect") Williams, supra, (prohibited use includes "incidental facts" derived from immunized statement); Moore, 486 So.2d, supra, at 81. Kastigar held that self-incrimination protections under immunity had to be commensurate with invoking the Fifth Amendment,

to insure that testimony given under immunity could not lead to the "imposition of criminal penalties." Kastigar at 1665.

As already argued, the crucial requirement under Kastigar and its progeny is that a witness who gives information under immunity must be left in exactly the same position as if she had said nothing and had exercised her rights against self-incrimination. Kilroy, 769 F.Supp. supra at 11 (compliance with Kastigar means that the Government's case "must be as pristine as if the witness had never broken silence" about the case involved, citing Murphy, supra); Gonzalez; Soriano. The Record here demonstrates that prosecutors and police illegally "used" Pauline Zile's immunized statement to motivate John Zile into giving a statement which provided leads and information ultimately leading to suspicion, investigation, prosecution and conviction of Petitioner.

In its opinion, the Fourth District acknowledged that prohibited indirect and derivative use of immunized statements under Kastigar include circumstances where another witness' statement or testimony is "motivated" or "influenced" by the immunized statement. Zile, 710 So.2d at 734; see also North II, 920 F.2d at 942; United States v. Rinaldi, 808 F.2d 1579, 1584, n.7 (D.C. Cir. 1987); Hampton, 775 F.2d at 1488; United States v. Barone, 781 F.Supp. 1072, 1079 (E.D. Pa. 1991); United States v. Carpenter, 611 F.Supp. 768, 779 (N.D. Ga. 1985);Ely, 798 A.2d at 1340; Strong, 542 A.2d at 875-876; Moore, 486 So.2d at 81

(prohibits use of "testimony or the fact of the testimony"). However, the Fourth District panel found no Kastigar violation from the use of Pauline Zile's statement to motivate John Zile to speak with police, focusing on the fact that John Zile was not told the contents of the statement or the fact that it was immunized, did not ask about the contents, and made statements indicating that his wife's statement was not his motivation to speak to police. Zile, 710 So.2d at 734. These conclusions ignored the law and the only possible conclusion from the facts in the Record. The police maneuvered the circumstances after Mrs. Zile's statement to make sure John would be forced to talk[7] through a series of acts and statements by police to John Zile that was derived both directly and indirectly from Pauline Zile's immunized statement.

At the critical point when her immunized statement was taken on October 27, 1994, under a prosecutor's subpoena, Pauline Zile was not considered a suspect.[8] T11, 1178, 1206. Detective Brochu

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7 Petitioner is not arguing that police acted illegally in procuring John Zile to talk by playing him against his wife-co-defendant, a practice acknowledged as a frequently employed police tactic. However, it is the fact that police used Pauline Zile's statement under immunity to do so that violated Mrs. Zile's Constitutional rights under Kastigar.

8 The Fourth District stressed that Mr. Zile was a "possible" suspect before the immunized statement. Zile, at 734. The more significant facts under Kastigar were that she was not a suspect and he had not been arrested or charged with any crime before her immunized statement. The statement must be regarded as the catalyst which (directly and indirectly) illegally made her a suspect and led to the "infliction of criminal penalties" upon her. Kastigar, at 1661.

had no evidence at this point in time that Mrs. Zile committed first degree murder. T9, 863-865. John Zile had said nothing incriminating up to this point, five days into the investigation of Christina Holt's disappearance. Mr. Zile had in fact invoked his rights not to speak to police or give a statement. T,11, 1157. At this juncture, police and prosecutors did not know about the death of the child, the circumstances of her death, the exact and specific role of either Petitioner or Mr. Zile in that death, or the physical condition of the child at her death. T11, 1190-1196; T12, 1277-1284; 1288-1289.

Pauline Zile started giving her immunized statement "after 6:00 p.m." speaking for some twenty to thirty minutes. T,1176, 1179. Thereafter, Brochu and state attorney Investigator Ross went to see John Zile. T,1182-1184. Significantly, this visit "shortly thereafter" Pauline Zile completed her statement was not at John Zile's invitation, request or waiver of his prior invocation of silence.

Law enforcement's purpose was apparent--get a statement from John Zile and find out his "side of the story" now that police had Pauline's version. T11, 1182, 1185, 1197, 1242-1243, 1258. Ross and Brochu told John Zile that Petitioner had given "a complete statement and had told the police "what happened". T11, 1242, 1243 (e.a.). The police told Mr. Zile they wanted a statement from him, T11, 1258, and told him to take a few minutes to think about it.

T,7, 581. This use of Petitioner's immunized statement as an investigatory lead to approach and elicit a response and statement from her husband was in and of itself illegal use of Pauline's statement under Kastigar requiring reversal and dismissal. E.g., Kastigar at 1664; North, 910 F.2d at 860, 861 (prohibited use includes focusing a witness' thoughts); Dynaelectric Company, 859 F.2d at 1579, n.27; Byrd, 765 F.2d at 1531 (prohibited use includes obtaining new information directly or indirectly from immunized statement); McDaniel, 482 F.2d at 311; United States v. Kristel, 762 F.Supp. 110, 1105-1108 (S.D.N.Y. 1991); Carpenter, 611 F.Supp. at 779, 780; Costello, 681 So.2d at 928; State v. Williams, 487 So.2d at 1095; State v. Moore, 486 So.2d at 81.

After leaving John Zile alone, Brochu and Ross returned again without invitation or request, and placed John Zile under arrest for aggravated child abuse. T11, 1200. This arrest took place around 6:30 p.m. according to witness Almeida, T11, 1165, which was at most ten minutes after Pauline Zile completed her statement under immunity.

These circumstances told John Zile that (1) no arrest of anyone had occurred to this point, (2) Mr. Zile's wife had made a statement, and (3) the result was his arrest for aggravated child abuse. Up to this point, John Zile had shown no indication to cooperate or speak with police, let alone express any interest to "do the right thing." Zile at 734. This was because John Zile was

afraid that if anyone found Christina Holt, they would see evidence of abuse and as Mrs. Zile stated "[John Zile] thought, if [Pauline] didn't know (where Christina was or could be found) and she was not found, nothing can be proven". PZ at p.16.

Thus, John Zile did not have to be told by police what Pauline specifically said. He knew there were no arrests before she spoke; that the only two people in the world who knew what happened to Christine were he and his wife; and that the only other person with any such knowledge beside him had given police a "complete statement" about "what happened." Zile at 734; T7, 602; T11, 1242, 1243. The Record demonstrates that Mr. Zile appreciated his situation and did not need police to "connect the dots" for him by recounting Mrs. Zile's statement more specifically.

Mr. Zile's conduct after his arrest for aggravated child abuse proves this point. While being booked and processed as part of this charge, T,1155-1156, 1163, 1165, 1166, Brochu deposition at 107, (T11, 1152) John Zile asked to talk to Brochu "within a very short period of time" and/or a "matter of minutes" of his arrest. T11, 1165, 1166. Even then, Almeida reminded Mr. Zile that he had previously invoked his rights and that police could not talk to him. T11, 1157. Mr. Zile suddenly insisted on Almeida finding the police officers that had arrested him (Brochu and Ross). T11, 1158. When this was reported to Brochu, he went to Mr. Zile and arrested him for first degree murder at around 7:00 p.m. T11,

1159, 1166, 1227, 1231. It was not until this point that Mr. Zile stated that the child's death was not premeditated, waived his rights and gave his statement to police. T11, 1232.

Only two conclusions can be reasonably drawn from these facts:

1. John Zile was directly motivated to give a statement because of Mrs. Zile's immunized statement.

The circumstances show a suspect who previously invoked his rights not to talk to police, altering his position 360 degrees within at most 10 minutes after being told that Pauline Zile made a statement about what occurred and being arrested for the first time in connection with the case. Mr. Zile knew this could only have happened as a result of Pauline's version of the events. Additionally, both Ross and Brochu admit that John Zile spoke because of Pauline's statement. T12, 1292, 1318; see Brochu probable cause affidavit at ppg.4, 5.

2. John Zile was motivated to give a statement by his arrest for aggravated child abuse.

The state conceded this in their legal argument before the Fourth District. State's Answer Brief, Zile v. State, Fourth District, Case No. 95-2252 at p.13. It is apparent that no arrest occurred until Mrs. Zile spoke under immunity and the arrest occurred almost immediately thereafter. Furthermore, police witnesses admitted in their Kastigar hearing testimony that Mrs. Zile's immunized statement gave them probable cause for the

aggravated child abuse and murder charges against John Zile. T,11, 1149-1152, 1159, 1160, 1199, 1231, 1232, 1254; Brochu deposition at p.108, 109, 115, 116.

Under either scenario, the State's use of Pauline Zile's statement violated her rights under Kastigar mandating reversal and dismissal. John Zile's statement formed a crucial aspect of the probable cause affidavit for the murder charge against Pauline Zile. T4, 4-5, T6-7, 551-582; T12, 1317-1318. This indirect use of John Zile's statements to indict and prosecute Pauline Zile was a clear Kastigar violation. United States v. Kurzer, 534 F.2d 511, 517 (2nd Cir. 1976)(defendant testified under immunity; his testimony resulted in indictment of Steinman; upon indictment, Steinman agreed to cooperate and provided information resulting in defendant's indictment; court remanded for consideration of whether Steinman's motive for testifying against defendant was the derivative result of defendant's providing of information against Steinman resulting in Steinman's indictment); State v. Lehrmann, 532 So.2d 802, 803-809 (La. App. 1988) (defendant received immunity from federal authorities conducting investigation; under immunity, defendant gave incriminating information against accomplice; as a result, accomplice indicated by federal grand jury, causing accomplice to give information against defendant, resulting in defendant's indictment by state grand jury; Louisiana appeals court held that use of accomplice's testimony against defendant to get

state indictment was motivated by federal indictment of accomplice which resulted from defendant's immunized testimony, violating Kastigar, requiring indictment to be quashed); Strong, 542 A.2d at 873-876 (witness discovered that defendant gave immunized statement implicating witness' friend in robbery-murder; witness went to defendant, tried to elicit information from defendant to help friend and implicate defendant; state Supreme court held that witness' testimony against defendant, having been obtained because witness was "motivated" by fact of immunized statement implicating friend, could be Kastigar violation and remanded case for consideration of this issue); See also Barone, supra, Rinaldi, supra, Hampton, supra.

The Fourth District focused, as did the State at trial, T7, 602, 639, T9, 878, 883, 884, T12, 1343, on a meaningful legal distinction between a witness motivated by the existence of an immunized statement and knowledge of the statement's contents. Both are derivative uses, and each is use "in any respect". Kastigar; North II; North I. The Moore decision by the Second District expressly rejects such a distinction. Moore 486 So.2d at 81. More fundamentally, the Government and Mrs. Zile were not placed in the same position as if she said nothing Kilroy; Gonzalez; Soriano, supra. If Petitioner had said nothing police would not have been able to tell John Zile that his wife had given a statement or arrest him based on that statement. See also

Kurzer, supra, (where court stressed that the focus of Kastigar in this context was whether the giving of information resulting in charges against another contributed to that other person's decision to talk or testify); Lehrmann, supra, (where Louisiana court noted that on remand of Kurzer, District Court focused on whether motivated witness Steinman's decision to cooperate and provide testimony which formed basis for charges against defendant, was "triggered in part" by indictment of Steinman).

The Fourth District apparently relied on testimony that Mr. Zile's motive in giving a statement was to "do the right thing". Zile at 734. John Zile certainly knew what "the right thing" was before Pauline Zile gave her immunized statement. Mr. Zile made no mention that he wanted to "do the right thing" until right after he was told of Mrs. Zile's statement and placed under arrest. This timing cannot be reasonably regarded as merely coincidental. These circumstances undermine any conclusion that John Zile's complete change of heart was suddenly motivated by some altruistic desire to "do the right thing".

The Fourth District also relied on testimony that John Zile was motivated to speak "to refute the severity of charges or penalties" against him. Zile at 734. This proves illegal derivative use, since the "charges or penalties" were the admitted result of Pauline Zile's statement, supra. Without her statement, Mr. Zile was not charged, meaning Mrs. Zile's immunized statement

was the difference between suspicion and arrest. Additionally, Mrs. Zile's statement was the basis of the underlying felony for the murder charge against Mr. Zile, which led to Mr. Zile's "not premeditated" protestations. This further shows that the immunized information indirectly motivated Mr. Zile's statement in this context as well.

The Fourth District's opinion concluded that Mr. Zile's "mere knowledge" that a fellow co-conspirator (Mrs. Zile) implicated him did not constitute illegal derivative use that tainted the case against Mrs. Zile. Zile at 734. To support this, the panel cited two Federal cases that presented completely distinguishable circumstances Id. citing United States v. Biaggi, 909 F.2d 662, 669 (2nd Cir. 1990); United States v. Brimberry, 803 F.2d 908 (7th Cir. 1986). In Biaggi, supra, the defense claim was that witness cooperation occurred because of general knowledge of an ongoing criminal investigation, not because of anything that two other witnesses told the grand jury under immunity. Biaggi, supra, at 669. Furthermore, the evidence in Biaggi was that witness cooperated there out of a fear of the prospect of prison time arising out of a Federal investigation known to exist when the immunized information was given--a situation not at all comparable to the reasons for John Zile's reactions. In Brimberry, one of the defendants agreed to cooperate without knowing that the defendant had implicated him, and the case against the two cooperating

witnesses was largely developed and known to be developed by the witnesses before defendant's immunized testimony was provided to a grand jury. Brimberry, 803 F.2d, supra at 910.

These two decisions simply do not present illegal use of an immunized statement as leverage to anger or goad someone into giving a statement that is ultimately used to prosecute and convict the witness giving the immunized statement. United States v. Helmsley, 947 F.2d 71, 83 (2nd Cir. 1998) (where panel distinguished Kurzer as just such a case); United States v. Jones, 590 F.Supp. 233, 241 (N.D. Ga. 9184) (noting that Kurzer presented circumstances of illegal derivative use when there is Government conduct that uses the existence of an immunized statement "as leverage" to obtain another witness' testimony).

John Zile's inculpatory statements and acts put the State in a far better position than just establishing the mere presence of Pauline Zile during Christina Holt's death. Kastigar; Kilroy. John provided information about and actually led authorities to Christina's body, which the State would not have know and could not have prosecuted Pauline or John without, had Pauline stayed silent. John's statement formed a crucial aspect of probable cause against Pauline, R1,4-5, that no other information provided. R1, 1-5; T7, 581-582; T11, 1205, 1237-1238.

John also provided new evidence of Paul Zile's participation in and awareness of discipline of Christina, JZ, at ppg. 8,25,32

and of bruising on Christina's body. JZ, 4,5,17,18. John's statements also assisted the State in confirming Pauline' statement. Carpenter, supra at 779, 780 (confirming truth or completeness of other information is prohibited under Kastigar); United States v. Nedrow, 1991 U.S. Dist. LEXIS 19427, *42(W.D. Pa. 1991) (corroboration of immunized information is Kastigar prohibited use). The State also used both Zile statements to establish the dates of the alleged murder, and the other counts of aggravated child abuse. T9, 865; T11, 1202; T12, 1320.

The State here did not meet their burden under Kastigar to affirmatively prove that the prosecution derived evidence independently of Pauline Zile's statement.[9] Kurzer, at 517; Lehrmann at 809; Hampton, 775 F.2d at 1488; Carpenter, 611 F.Supp. at 779. Because Pauline and John Zile's statements, and no other information, provided crucial evidence including the fact of Christina's death, this Kastigar violation cannot be harmless error. North I; North II; Hampton; Lehrmann; Carpenter; State v. DiGuilio, 491 So.2d 1129, 1135, 1138, 1139 (Fla. 1986). John Zile's revelations were questionably and "clearly part of the process" of developing the case against Pauline Zile, and the case

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9 As previously noted, the Circuit Court applied a "preponderance of the evidence" as the quantum burden of proof on the Government. supra, n.7 Because the evidence demonstrates that the State failed to meet this burden, the State fell even farther short of proof of "independent source" should this Court determine that a heavier burden of proof must be applied to render §914.04 Constitutional.

would not have been made, but for the use of Pauline Zile's statement to get John Zile's statement. Carpenter, supra at 780.

Mrs. Zile's convictions for felony murder and the underlying felony must be reversed and dismissed with prejudice.

CONCLUSION

Petitioner respectfully requests that this Court declare §914.04 to be Unconstitutional and void, and reverse Petitioner's conviction and sentence with instructions on remand to dismiss all charges against her and/or in the alternative, remand the proceedings for a new trial and a Constitutionally appropriate Kastigar hearing, review and ruling.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served upon Melynda Melear, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Suite 300, West Palm Beach, Florida, 33401, this 23rd day of March, 1999, via U.S. Mail.

Respectfully submitted,

RICHARD G. BARTMON, ESQ.

IN THE SUPREME COURT OF FLORIDA

PAULINE ZILE,

Petitioner,

vs. CASE NO. 93,289

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S APPENDIX

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