IN THE SUPREME COURT OF FLORIDA

CASE NO. 93, 289

PAULINE ZILE,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY JURISDICTION FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, THE STATE OF FLORIDA, was the prosecution in the trial court and Appellee in the District Court of Appeal of Florida, Fourth District. Petitioner, PAULINE ZILE, was the Respondent in the trial court and the Appellant in the District Court of Appeal. The parties shall be referred to as they stand before this Court. The symbol "R." designates the original record on appeal, and the symbol “T.” designates the transcript of the trial court proceedings.

Respondent certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

STATEMENT OF THE CASE AND FACTS

Respondent generally accepts Appellant's Statement of the Case and the Facts, but makes the following clarifications and additions:

At trial, Deputy David Robshaw of the Broward Sheriff's Office testified about a report, that Petitioner made on October 22, 1994 at the Swap Shop in Broward County, in which she claimed that her child was missing from a stall in the bathroom (T. 1430-1434). He described efforts by law enforcement to find the child including interviews with witnesses, Petitioner's appearance on America's Most Wanted, and the FBI's involvement due to a potential kidnapping (T. 1493-1495).

Detective Robert Foley with the Broward Sheriff's Office, who executed a consent search of Petitioner's residence pursuant to the missing child investigation, described Petitioner's apartment as having one bedroom and one bath (T. 1511). He discovered drops of suspect blood on the pillow to the victim's bed and on the mattress and box spring (T. 1549, 1552, 1554). He sprayed the walls around the bed with luminol, as well as the bed area and headboard (T. 1558-1559, 1560). The sprayed areas glowed (T. 1562). He also sprayed the rugs in the bedroom and living room, along with the couch and pillows in the living room, and the areas luminesced (T. 1564-1565). He took some of the victim's clothing from the laundry basket that appeared to be stained (T. 1551, 1555-1556).

Dayle Ackerman, who lived in an apartment about 20 feet across from the Ziles, testified that in May of 1994, she started hearing loud voices from Petitioner's apartment (T. 1625, 1626-1627).

On September 16, Ms. Ackerman said that she heard the man say, "Why did you shit on the floor in front of me?" and then she heard him strike the girl, who was crying loudly (T. 1630-1631, 1633). She said that the screaming became "muffled," as if the man had taken her further away, but that she continued to hear crying and hitting (T. 1630-1631). She stated that she then heard the mother's voice, in a regular tone, not raised, say, "That's enough, John" from the bathroom (T. 1631-1632).

Ms. Ackerman said that she could hear the girl's voice before the mother said this, but that after that, the girl's voice stopped (T. 1631-1632). The next thing that Ms. Ackerman heard was water running in the bathtub and the couple saying, "Wake up, Wake up, please Wake up" (T. 1632, 1658). The man was crying and said, "Oh, my God, my God, what did I do" (T. 1632). When Ms. Ackerman returned after a weekend away, she never heard anything again from Petitioner's apartment because the windows to the apartment, which had normally been left open, were closed (T. 1634).

On cross-examination, Ms. Ackerman said that she thought the beating occurred in the kitchen and that she then saw movement in the living room through the window (T. 1647, 1652). On re-direct, she said that Petitioner did not scream or get mad at John Zile

when she said stop (T. 1658).

Chad Brannon, a friend of the Ziles, testified that one day in the first week of September, John Zile told the victim to tell the witness the "bogus" stories that she had been telling him about having been molested, and when the victim said something else, Zile said to get it right or he would spank her (T. 1677, 1680-1681). When the victim asked if Chad could spank her, Zile hit the victim on the buttocks with a belt four or five times (T. 1677, 1680-1681, 1717). Brannon testified that Zile pushed the victim on the bed and picked her up by the shirt (T. 1626). He said that the victim was crying and screaming (T. 1687). Zile had the victim pull down her pants to show the witness the bruises on her right buttock and leg (T. 1683-1685). On cross, Brannon said that they were in the bedroom with the door closed and Petitioner was in the kitchen (T. 1718-1719).

Brannon said that one time Petitioner told him that Zile "gets a little aggressive" in disciplining the victim (T. 1692). He acknowledged that Petitioner told him that sometimes Zile wanted to "take things too far (T. 1696).

Various witnesses testified that Petitioner described the victim as a discipline problem, a liar, and a smart-mouth, and as being disruptive, spoiled rotten, and badly behaved (T. 1464, 1731, 1759, 1894, 2386-2387).

The DNA analysis on the blood samples taken from Petitioner's

apartment were consistent with the victim's blood but not with the Ziles' or their sons' (T. 1833-1834, 1835, 1836, 1837-1838, 1839).

Betty Shultz, an employee at Home Depot, testified that the Ziles purchased a tarp, rose bush, and shovel (T. 1931-1932). She recognized the tarp placed in evidence (T. 1935).

Holly Walsh, the Ziles' upstairs neighbor, testified that she heard yelling, discipline, and a child screaming in the Ziles' apartment (T. 1973-1975). In mid-September, she heard sounds of a child being hit (T. 1977, 1979).

The Ziles' white Cadillac was identified as having been in the back of the Tequesta K-Mart on September 19 at around 11:15 p.m. (T. 2066-2072, 2428-2430).

Dr. James Benz, the medical examiner, testified that the victim had a bluish mark in the head area about three by six inches with a hemorrhage underneath the skin (T. 2268, 2271). She also had a bruised area over the left eyebrow about three by three and a quarter inches (T. 2269, 2271). There were yellowish and grayish discolorations on the head, as well as a bluish mark on the back of the head (T. 2269-2270). The frenulum on the victim's upper lip was torn (T. 2272).

Dr. Benz said that there was a bluish mark on the upper arm with disrupted capillaries but without hemorrhaging (T. 2272-2273). There was a prominent bluish area with hemorrhaging on the right buttock about six by four inches, and another smaller bluish area

(T. 2273-2274). There was bruising on the left forearm and right knuckles, and smaller areas of purplish discoloration on the right leg (T. 2276). There were five areas of bluish discoloration on the left leg, the largest being one inch by three-quarters of an inch (T. 2276).

Dr. Benz said that the victim had a few small particles in the upper respiratory track in the area of the mouth and lungs (T. 2279). There was also evidence of food particles in the lower respiratory track indicating terminal aspiration in the lungs (T. 2780-2781). Dr. Benz determined that the cause of death was asphyxia or a lack of oxygen (T. 2283). He said that there was evidence of suffocation, including the multiple injuries and torn frenulum (T. 2283, 2302). He stated that the mark on the victim's nose could have been from a thumb holding it down (T. 2351). He determined that the death was a homicide (T. 2283-2284). He did not know how long it took the victim to die from asphyxiation (T. 2323).

Respondent will add, clarify, or correct other facts pertinent to a particular issue in the argument portion of this brief.

SUMMARY OF ARGUMENT

Point I

Use and derivative use immunity provided for under section 914.04, Florida Statutes, is constitutional under Article 1, Section 9 of the Florida Constitution on the right against self-incrimination and under Article 1, Section 23 of the Florida Constitution on the right of privacy. Use/derivative use immunity leaves the witness and the government in substantially the same position as if the witness had claimed his privilege against self-incrimination in the absence of a grant of immunity. Like the privilege, such immunity allows the government to prosecute using evidence from legitimate independent sources. Hence, use/derivative use immunity enables the government to compel valuable testimony while still allowing the prosecution of all culpable parties.

Respondent does not believe that the right of privacy addresses the immunity issue because its focus would be on compulsion rather than later use of compelled testimony. Nonetheless, any intrusion on the right of privacy is justified by the compelling state interest in pursuing criminal investigations that will result in holding liable parties accountable for their actions. The granting of use/derivative use immunity is the least intrusive means of achieving this goal because it allows for the prosecution of an immunized witness where there are independent sources establishing guilt, while it protects the witness' right

against self-incrimination.

POINT II

John Zile's statement was not motivated by the use of Petitioner's immunized testimony. Zile originally refused to talk to the officers, despite their telling him that they knew what happened. Only later, when facing actual charges and while being booked, did Zile reconsider and ask to speak to the investigators. At that time, Zile was reminded that he had invoked his rights and was told that the charges had been upgraded. Zile responded by saying he wanted to do the right thing and by asserting that the homicide was not premeditated. He said that he was willing to talk if it would be beneficial to him. Zile never mentioned Petitioner's statement and never asked about the statement or about Petitioner.

ARGUMENT

POINT I

SECTION 914.04, FLORIDA STATUTES, PROVIDING FOR USE AND DERIVATIVE USE IMMUNITY, DOES NOT VIOLATE THE RIGHT AGAINST SELF-INCRIMINATION OR THE RIGHT TO PRIVACY, UNDER THE FLORIDA CONSTITUTION.

Respondent contends that the use and derivative use immunity provided for under section 914.04, Florida Statutes, is constitutional under Article 1, Section 9 of the Florida Constitution on the right against self-incrimination and under Article 1, Section 23 of the Florida Constitution on the right of privacy. Of course, any doubt in the validity of section 914.04, Florida Statutes, should be resolved in favor of its constitutionality. See Leapai v. Milton, 595 So. 2d 12, 14 (Fla. 1992).

SELF-INCRIMINATION

In Kastigar v. United States, 406 U.S. 441, 453 (1972), the United States Supreme Court stated that transactional immunity "affords the witness considerably broader protection than does the Fifth Amendment privilege." It explained that the privilege against self-incrimination has never been construed to mean that one who invokes it cannot subsequently be prosecuted. 406 U.S. at 453. Rather, the sole concern of the privilege is to afford protection against being forced to give testimony leading to the

imposition of criminal penalty. Id. Hence, the court in Kastigar determined that immunity from the use of compelled testimony, along with immunity from the use of evidence derived from that testimony, affords the protection contemplated by the privilege against self-incrimination. Id.

The court emphasized that use/derivative use immunity "'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" Id. at 458-459. It stated, "The statute, like the Fifth Amendment, grants neither pardon nor amnesty. Both the statute and the Fifth Amendment allow the government to prosecute using evidence from legitimate independent sources." Id. at 461.

Petitioner argues that Article 1, Section 9 of the Florida Constitution is broader in scope than the Fifth Amendment on the right against self-incrimination so that it mandates that transactional immunity be afforded. While it is true that the state constitution may place more rigorous restraints on governmental intrusion than the federal constitution imposes, see Traylor v. State, 596 So. 2d 957, 961 (Fla. 1992), the state's constitutional provision on the right against self-incrimination has not been deemed "considerably broader." In fact, this court has generally construed the right against self-incrimination under the Florida Constitution in a manner consistent with federal

precedent.

For instance, this Court declined to construe Article I, Section 9 as affording a defendant greater protection than the federal constitution with regard to anticipatorily invoking *Miranda* rights. See Sapp v. State, 690 So. 2d 581 (Fla. 1997). In fact, this Court has adopted many federal limitations on *Miranda*. See, e.g., State v. Owen, 696 So. 2d 715 (Fla. 1997)(based on Davis v. United States, 512 U.S. 452 (1994), police not required to stop interrogation when suspect makes equivocal request for counsel); Washington v. State, 653 So. 2d 362 (Fla. 1995)(based on Schmerber v. California, 384 U.S. 757 (1966), taking of blood samples does not violate Article I, Section 9); Christmas v. State, 632 So. 2d 1368, 1370-1371 (Fla. 1994)(based on Illinois v. Perkins, 496 U.S. 292 (1990), *Miranda* warnings are not required in custodial situations when defendant initiates conversation with police); Bonifay v. State, 626 So. 2d 1310, 1312 (Fla. 1993)(based on Colorado v. Connely, 479 U.S. 157 (1986), police allaying fears of defendant about safety of family is not psychological coercion); Arbelaez v. State, 626 So. 2d 169, 175 (Fla. 1993)(based on Roberts v. United States, 445 U.S. 552 (1980), *Miranda* does not apply outside the context of the inherently coercive custodial interrogation for which it was designed); Allerd v. State, 622 So. 2d 984, 987 n. 10 (Fla. 1993)(based on Pennsylvania v. Muniz, 496 U.S. 582 (1990), routine booking questions do not violate the

constitutional protection against self-incrimination); Henry v. State, 613 So. 2d 429 (Fla. 1992)(based on Oregon v. Elstad, 470 U.S. 298 (1985), inadmissibility of statements made without the benefit of *Miranda* warnings does not preclude admission of subsequent statements that are made pursuant to such warnings); Parker v. State, 611 So. 2d 1224, 1227 (Fla. 1992)(based on Harris v. New York, 401 U.S. 222 (1971), defendant's otherwise inadmissible statements are admissible during cross-examination of a defendant for impeachment purposes); Gore v. State, 599 So. 2d 978, 981 n. 2 (Fla. 1992)(based on North Carolina v. Butler, 441 U.S. 369 (1979), refusal to sign a written waiver is not dispositive to a finding of a valid waiver); Thompson v. State, 595 So. 2d 16, 17 (Fla. 1992)(based on California v. Prysock, 453 U.S. 355 (1981), no requirement of a 'tailsmanic incantation' of *Miranda* warnings); Henry v. State, 574 So. 2d 66, 69-70 (Fla. 1991)(based on Michigan v. Mosely, 423 U.S. 96 (1975), suspect's assertion of his right to remain silent does not create any per se bar to subsequent interrogation); Brown v. State, 565 So. 2d 304, 306 (Fla. 1990)(based on Duckworth v. Eagan, 492 U.S. 195 (1989), right to cut off questioning is implicit in *Miranda* warnings so that there is no requirement that such a statement be specifically communicated); Herring v. Dugger, 528 So. 2d 1176, 1178 (Fla. 1988)(based on Colorado v. Spring, 479 U.S. 564 (1987), valid *Miranda* warnings do not require that suspect be aware of all

possible subjects of questioning); Caso v. State, 524 So. 2d 422 (Fla. 1988)(based on Michigan v. Tucker, 417 U.S. 433 (1974), exclusionary rule not applicable to testimony of a witness whose identity was discovered through the unwarned statement of defendant).

With regard to the specific area of immunity, this court has also aligned itself with United States Supreme Court case law. In Florida Department of Revenue v. Herre, 634 So. 2d 618 (Fla. 1994), this court considered the constitutionality of section 212.0505, Florida Statutes (Supp. 1988), which called for a tax assessment at the rate of fifty percent of the estimated retail price of controlled substances on persons who had engaged in the distribution of any such medicinal drug. In order to pay this assessment, a taxpayer was expected to file a tax return along with the payment. Even without such a return, though, payment of a fifty percent tax on income would logically indicate involvement in illegal drug transactions. In finding that the statute violated the right against self-incrimination under both the Florida and federal constitutions because it did not grant any immunity, this court stated that it was guided in its analysis by Marchetti v. United States, 390 U.S. 39 (1968), Grosso v. United States, 390 U.S. 62 (1968) and Leary v. United States, 395 U.S. 6 (1969). 634 So. 2d at 619, 621.

Petitioner contends that Article 1, Section 9 of the Florida

Constitution is broader because it refers to criminal "matters" instead of criminal "cases" (Petitioner's Brief p. 11). Petitioner, though, has not provided any instance in which a criminal matter would not also be considered a criminal case. See United States v. Gregory, 730 F. 2d 692, 697 (11th Cir. 1984)("criminal case" includes grand jury proceedings as well as trial). Regardless, Respondent submits that these terms relate to the application of the provision, i.e. criminal context in which it may be invoked, and not to the scope of the privilege, i.e. the degree of protection extended.

Thus, the Florida constitutional provision is substantially similar in character, if not identical, to that of the federal constitution, so as to warrant like interpretations. See State v. Hanson, 342 A. 2d 300, 304 n. 6 (Me. 1975)(Maine constitutional provision similar in purpose to Fifth Amendment). In any event, no significance can be placed on the constitutional amendment from using the term "case" to using the term "matter," because the change occurred prior to the United States Supreme Court's decision in Kastigar v. United States, 406 U.S. 441 (1972), which was the first direct holding by the Supreme Court that transactional immunity was not required under the Fifth Amendment.

Petitioner seeks to have emphasis placed on the fact that the legislature did not amend the immunity statute from transactional immunity until almost ten years after Kastigar (Petitioner's Brief

p. 13). Such significance is not justified. See People v. Lederer, 717 P. 2d 1017 (Colo. App. 1986)(immunity statute amended from transactional in 1983; statute consonant with Fifth Amendment protection). The Senate Staff Analysis to the proposed amendment to section 914.04 indicates that use/derivative use immunity is constitutional under Kastigar and that Florida had at the time a transactional immunity statute which was broader than required by the Fifth Amendment (Appendix).

In construing an immunity statute, it is important to bear in mind the purpose for its enactment. Tsavaris v. Scruggs, 360 So. 2d 745, 749 (Fla. 1977). Indeed, this consideration is a corollary to the privilege against self-incrimination. Id. The purpose of immunity is to aid the prosecution in securing evidence, see Florida State Bd. Of Architecture v. Seymour, 62 So.2d 1, 3 (Fla. 1952), and to provide a mechanism for securing witnesses' self-incriminating testimony, see Tsvavaris, 360 So. 2d at 749.

The State maintains that to construe the Florida Constitution to require transactional immunity would actually defeat the purpose of immunity. In Buonacoure v. U.S., 412 F. Supp. 904, 907 n. 11 (E.D. Penn. 1976), the court recognized that a grant of immunity broader than the privilege against self-incrimination would "infringe 'upon both the great common law principle that 'the public has a right to every man's evidence' and the duty to testify 'recognized in the Sixth Amendment requirements that an accused be

confronted with the witnesses against him, and have compulsory process for obtaining witnesses in his favor'." And, in Brown v. Walker, 161 U.S. 591, 600 (1896), the United States Supreme Court noted, "[t]he danger of extending the principle announced in Counselman v. Hitchcock [transactional immunity] is that the privilege may be put forward for a sentimental reason, or for a purely fanciful protection of the witness against an imaginary danger, and for the real purpose of securing immunity to some third person, who is interested in concealing facts to which he would testify."

On the other hand, use/derivative use immunity serves the public interest. It enables a prosecutor to compel valuable testimony while still allowing the prosecution of all culpable parties provided that independent evidence exists to prosecute the immunized witness.

District courts have found section 914.04 to be constitutional in general terms. See, e.g., Menut v. State, 446 So. 2d 718, 719 (Fla. 4th DCA 1984); State v. Harrison, 442 So. 2d 389 (Fla. 4th DCA 1983); Novo v. Scott, 438 So. 2d 477, 480 (Fla. 3d DCA 1983). Quoting Kastigar, the Fourth District stated that use/derivative use protection under section 914.04 "is coextensive with the scope and privilege against self-incrimination." See Costello v. Fennelly, 681 So. 2d 926, 928 (Fla. 4th DCA 1996). It therefore concluded that the trial court correctly determined that the grant

of immunity subsumed the witness' privilege to remain silent. Id. The court in Gilliam v. State, 267 So. 2d 658, 659 (Fla. 2d DCA 1972) actually noted that transactional immunity was "more than the Constitution requires -- within the State of Florida."

The majority of courts in other states have expressly found use/derivative use immunity constitutional under their state constitutions.[1] See, e.g., Ramona R. v. People, 693 P. 2d 789, 793-794 (Cal. 1985); In re Caito, 459 N.E. 2d 1179, 1184 (Ind. 1984); State v. Hanson, 342 A. 2d 300, 304 (Me. 1975); State v. Strong, 542 A. 2d 866, 872 (N.J. 1988); People v. Johnson, 507 N.Y.S. 2d 791, 793 (Sup. 1986); Com. v. Swinehart, 664 A. 2d 957, 969 (Pa. 1995); Ex Parte Wilkinson, 641 S.W. 2d 927, 929-930 (Tex. Crim. App. 1982); Gosling v. Com., 415 S.E. 2d 870, 873 (Va. App. 1992); State v. Ely, 708 A. 2d 1332, 1338 (Vt. 1997). See also Ex Parte Shorthouse, 640 S.W. 2d 924 (Tex. Crim. App. 1982). And, in Grajedas v. Holum, 515 N.W. 2d 444, 449-450 (N.D. 1994), the court footnoted the North Dakota and United States constitutional provisions on rights against self-incrimination in discussing the privilege, and later ruled that use/derivative use immunity leaves the witness in substantially the same position as if the witness

[1] The court in State v. Ely, 708 A. 2d 1332, 1337-1338 (Vt. 1997), the last state court to decide the issue of immunity under a state constitutional provision, stated that seven state courts had found use/derivative use immunity constitutional under their state constitutions while six had not. The court's holding in Ely made Vermont the eighth state to find that use/derivative use immunity is constitutional under a state constitution.

had claimed the privilege. See also Patchell v. State, 711 P. 2d 647, 648 (Ariz. App. 1985)(court found that use immunity statute did not conflict with self-incrimination constitutional provision and another limiting provision).

Most of the courts of other states that have found that transactional immunity is required have done so for reasons other than post-Kastigar findings that their state constitutions require more than the federal constitution. For instance, in State v. Gonzalez, 853 P.2d 526, 532 n. 5 (Alaska 1993), the court stated that the State had conceded that the state constitution prohibited all nonevidentiary uses of immunized testimony. The court in State v. Miyasaki, 614 P. 2d 915, 922-923 (Haw. 1980) reasoned that transactional immunity was part of the state constitution because the state's organic law was adopted at a time when federal decisional law required transactional immunity and the committee specifically incorporated a like interpretation into its constitution.

In State v. Thrift, 440 S.E. 2d 341, 350-351 (S.C. 1994), the court stated that it was bound by a 1938 decision, In Re: Hearing Before Joint Legislative Committee, Ex parte Johnson, 196 S.E. 164 (S.C. 1938), in which it had been held that the South Carolina state constitution requires transactional immunity. In Thrift, the court noted that the first immunity statute, adopted after Kastigar in 1987, called for transactional immunity. 440 S.E. 2d at 351.

Similarly, in Attorney General v. Colleton, 444 N.E. 2d 915, 919, 921 (Mass. 1982), the court relied on an 1871 case, Emery's Case, 107 Mass. 172 (1871), which held that immunity for a witness cannot be found so long as he remains liable for prosecution for any matters on which he was examined.

In Wright v. McAdory, 536 So. 2d 897, 904 (Miss. 1988), the court did not base its decision requiring transactional immunity on any distinction between the Mississippi constitution and the federal constitution. Recognizing that transactional immunity is broad, the court merely concluded that transactional immunity would make the witness as secure as if he had remained silent. 536 So. 2d at 904. See also State v. Soriano, 684 P. 2d 1220, 1232-1233 (Or. App. 1984)(held that state constitution required immunity with same extent and effect of privilege).

In United States v. Apfelbaum, 445 U.S. 115, 124-125 (1980), however, the United States Supreme Court rejected reasoning which presumed that in order to grant immunity coextensive with the privilege against self-incrimination, the witness must be treated as if he remained silent. It indicated that such reasoning was flawed because it focused on the effect of the assertion of the privilege rather than on the protection that the privilege was designed to confer. 445 U.S. at 124. The court stated:

> Such grants of immunity would not provide a full and complete substitute for a witness' silence because, for example, they do not bar the use of the witness' statements in civil proceedings. Indeed, they fail to prevent the

> use of such statements for any purpose that might cause detriment to the witness other than that resulting from subsequent criminal prosecution.

The court said that a "but for" analysis is not required and that to be coextensive with the privilege against self-incrimination, an immunity statute need not treat a witness as if he remained silent. Id. at 126, 127. Accordingly, the court held that the Fifth Amendment does not preclude the use of immunized testimony at subsequent prosecutions for perjury. The State submits that Apfelbaum provides guidance in this case not on the scope of Florida's privilege, but on how immunity statutes should be viewed. See State v. Owen, 696 So. 2d 715, 719 (Fla. 1997)(court noted that analysis in its precedent, although grounded on Florida constitution, was no different than analysis set forth in holdings of United States Supreme Court).

Petitioner suggests that it is impossible for a defendant to make a comprehensive investigation of illegal use by the State of immunized testimony because of witnesses fading memories and secretive information such as grand jury matters (Petitioner's Brief pgs. 20-21). The State responds that, as in this case, witness statements are documented at least to some extent in law enforcement records and that grand jury transcript may be reviewed by counsel and still remain sealed.[2]

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[2] In this case, the trial court conducted an in camera review of the grand jury proceedings to determine whether the

Petitioner states that a witness is left to speculate about the extent that immunized information has been conveyed or discussed (Petitioner's Brief p. 21). This argument suggests that exposure to immunized statements in itself ought to preclude prosecution. However, almost every federal circuit has rejected the idea that prosecution is foreclosed because an immunized statement might have tangentially influenced a prosecutor's thought processes or because a "Chinese Wall" was not established. See, e.g., United States v. Montoya, 45 F. 3d 1286, 1292 (9th Cir. 1995); United States v. McGuire, 45 F. 3d 1177, 1183-1184 (8th Cir. 1995); United States v. Schmidgall, 25 F. 3d 1523, 1529 (11th Cir. 1994); United States v. Bartel, 19 F. 3d 1105, 1111 (6th Cir. 1994)(grand jury); United States v. Harris, 973 F. 2d 333, 337-338 (4th Cir. 1992); United States v. Velasco, 953 F. 2d 1467, 1474 (7th Cir. 1992); United States v. Poindexter, 951 F. 2d 369, 376 (D.C. 1991); United States v. Schwimmer, 924 F. 2d 443, 446 (2d

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State improperly used the immunized testimony, so that the control of the testimony was not exclusively the State's. See James v. Wille, 480 So. 2d 253, 255 (Fla. 4th DCA 1985)(court indicated that in camera review is for considering the "materiality" of the grand jury testimony). See also United States v. Dynaelectric Co., 859 F. 2d 1559, 1578 n. 25 (11th Cir. 1988)(pretrial in camera examination of grand jury testimony to resolve Kastigar claim proper). Hence, section 914.04 does not deny a defendant the right to access to courts or to redress injury (Petitioner's Brief p. 22-23). Regardless, Petitioner never presented such claims to the trial court or to the Fourth District, so that they should not be considered for the first time in this court. See State v. Dupree, 656 So. 2d 430, 432 (Fla. 1995)(preservation).

Cir. 1991); United States v. Rivieccio, 919 F. 2d 812, 815 (2d Cir. 1990); United States v. Palumbo, 897 F. 2d 245, 251 (7th Cir. 1990); United States v. Serrano, 870 F. 2d 1, 17 (1st Cir. 1989); United States v. Mariani, 851 F. 2d 595, 600 (2d Cir. 1988); United States v. Crowson, 828 F. 2d 1427, 1430 (9th Cir. 1987); United States v. Byrd, 765 F. 2d 1524, 1530-1531 (11th Cir. 1985); United States v. Pantone, 634 F. 2d 716, 720 (3d Cir. 1980). The courts reason that **the focus under Kastigar is not on whether a prosecutor was aware of the contents of immunized testimony, but on whether he used it**. See Harris, 973 F. 2d at 338; United States v. Caporale, 806 F. 2d 1487, 1518 (11th Cir. 1986). Hence, the government is not required to show absence of all overlap between testimony and prosecution, but rather that all evidence it uses was derived from legitimate independent sources. Montoya, 45 F. 3d at 1293; Crowson, 828 F. 2d at 1430. See State v. Ely, 708 A. 2d 1332, 1338 (Vt. 1997)(court noted benefit in reviewing federal cases because of the benefit of twenty-five years of implementing Kastigar).[3]

The Kastigar court rejected Respondent's argument that a person accorded use/derivative use immunity is dependent on the good faith of the prosecuting authorities. 406 U.S. at 460. It stated that the total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an investigatory lead and

[3] The court in Ely considered nonevidentiary uses because the Vermont immunity statute expressly extends to such uses. 708 A. 2d at 1340.

also barring the use of any evidence obtained by focusing investigation on a witness as a result of compelled testimony. Id. It urged that the government's burden of proof to show independent sources for evidence at trial is not limited to just a negation of taint but instead imposes an affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony. Id. See United States v. Dynaelectric Co., 859 F. 2d 1559, 1579 (11th Cir. 1988)(immunized testimony did not provide any direct evidence or investigatory leads for which government did not have legitimate independent source).

Under Kastigar, though, negation of all abstract possibility of taint is not necessary. United States v. Schmidgall, 25 F. 3d 1523, 1529 (11th Cir. 1994); United States v. Byrd, 765 F. 2d 1524, 1529 (11th Cir. 1985). See also State v. Beard, 507 S. E. 2d 688, 698 (W. Va. 1998). In other words, the government is not required to negate speculative opportunities for taint, like those suggested by Petitioner with regard to possible effects due to possible exposure to the witness' statement (Petitioner's Brief p. 24-25). See United States v. Romano, 583 F. 2d 1, 8-9 (1st Cir. 1978)(content of the defendant's immunized statements were released to the media; court rejected claim that case was tainted because defendant could not point to any "revelation" that might have influenced government's actions). 583 F. 2d at 9.

The right against self-incrimination does not foreclose prosecution merely because of a chance that immunized testimony might have tangentially influenced thought processes. United States v. Serrano, 870 F. 2d 1, 17 (1st Cir. 1989). In Serrano, the court noted that no case involving a coerced confessioon has prohibited the nonevidentiary use of an involuntary statement. 870 F. 2d at 18. In his special concurrence in Pillsbury Co. v. Conboy, 459 U.S. 248, 277-278 (1983), Justice Blackman pointed out that framers of the federal use/derivative use immunity statute intended that its scope be the same as that in the case of constitutional violations in the taking of confessions or evidence.

The focus of the right against self-incrimination is the evidentiary effect of immunized testimony and the recognizable danger of official manipulation which may subject an immunized witness to prosecution arising out of the witness' testimony. United States v. Helmsley, 941 F. 2d 71, 82 (2nd Cir. 1991). Thus, the court in Helmsley urged that the defendant's argument that a cause-in-fact relationship between immunized testimony and a subsequent conviction, without more, triggers Fifth Amendment protection, "expands the right against self-incrimination far beyond any discernible policy served by the right." 941 F. 2d at 82.

Most courts have declined to follow the cases on which Petitioner relies for the proposition that exposure to immunized

testimony results in certain strategic advantages. The Eighth Circuit in United States v. McGuire, 45 F. 3d 1177, 1183 (8th Cir. 1995) explained that its decision in United States v. McDaniel, 482 F. 2d 305, 311 (8th Cir. 1973) was limited to the "unusual circumstances" in McDaniel. It said, "The determination of a McDaniel violation necessarily turns on the facts of each case and again **focuses on whether the immunized testimony was used by the prosecutor exposed to it**." 45 F. 3d at 1183. (emphasis added).

The circumstances in McDaniel were unlike those in the instant case. In McDaniel, an Assistant United States Attorney read all of the defendant's immunized state grand jury testimony totally unaware that the defendant had been given immunity. Thereafter, the defendant was indicted on federal charges. The court reasoned that from the very beginning, the federal attorney could not have perceived any reason to segregate the immunized testimony from other sources of information, so that the government was faced with an insurmountable task of showing wholly independent sources. Here, to the contrary, the government agents were aware that Appellant had been given immunity from the start, the State obviously had reason to believe that Appellant had knowledge of a crime even before her statement, and the State established independent sources for its evidence.

In United States v. Mariani, 851 F.2d 595, 600-601 (2nd Cir. 1988), the Second Circuit expressly declined to follow the

reasoning in McDaniel. Hence, the district court case, United States v. Dornau, 359 F. Supp. 684 (S.D.N.Y. 1973), on which the McDaniel court relied, is not viable in the Second Circuit because the Mariani court later made clear that it rejected any per se rule calling for dismissal.

The court in United States v. Semkiw, 712 F. 2d 891 (3rd Cir. 1983), relied on by Petitioner, actually stated that it could not determine from the record before it whether the prosecutor used her knowledge of the immunized statement in the preparation or conduct of trial, so it remanded the case for an evidentiary hearing. Logic dictates that if exposure in itself warranted dismissal, then the court would have so ruled since it was established that the prosecutor had access to the statement.

Indeed, the Third Circuit in United States v. Pantone, 634 F. 2d 716 (3rd Cir. 1980) had already held that mere access to immunized testimony does not prevent the government from carrying its burden under Kastigar. It stated, "The Kastigar rule prohibits the misuse of information gained under a grant of immunity; it does not require the government to disregard or discard information not obtained in this fashion." 634 F. 2d at 720. The court in Semkiw did not recede from its earlier decision in Pantone, but instead distinguished the cases. 712 F. 2d at 894-895.

RIGHT OF PRIVACY

Petitioner contends that section 914.04 violates the right of

privacy under Article 1, Section 23 of the Florida Constitution. Appellee questions whether a grant of immunity in exchange for compelled testimony falls within the domain of the right to privacy clause. The right of privacy goes to the compulsion of testimony, while the issue of immunity and whether it adequately protects a witness goes to the use of the compelled testimony. See State v. Strong, 542 A. 2d 866, 871 (N.J. 1988)(it is the difference between the right in not being compelled to incriminate oneself and the right in not having one's privacy invaded). After all, even in the case of transactional immunity, a witness is still compelled to testify.

Even if the right of privacy clause is applicable to the context of immunity, a person can waive the right. See Spence v. Stewart, 705 So. 2d 996, 998 (Fla. 4th DCA 1998)(parents abandoned right of familial privacy by bringing dispute relating to grandparent visitation to court). Here, Petitioner reported that her child disappeared from a public bathroom, thereby launching a massive missing child investigation. In so doing, Petitioner opened the door to being questioned about matters relating to the victim's disappearance and had no reasonable expectation of privacy therefrom. The fact that in the process Petitioner might have incriminated herself implicated her right against self-incrimination and not her right of privacy.

Article 1, Section 23, of the Florida Constitution does not

confer an absolute right to be free from government intrusion and will yield to compelling state interests. Winfield v. State, 477 So. 2d 544, 547 (Fla. 1985). The State's burden justifying an intrusion on privacy can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means. Von Eiff v. Azicri, 720 So. 2d 510, 514 (Fla. 1998). An ongoing criminal investigation satisfies the compelling state interest test for intrusion on the right of privacy. Shaktman v. State, 553 So. 2d 148, 152 (Fla. 1989). In Doe v. State, 634 So. 2d 613, 615 (Fla. 1994), this court noted that the State has a strong interest in gathering information relevant to an initial inquiry into suspected criminal activity, whether through subpoena power or otherwise.

Clear from these opinions is that the State has a compelling interest in pursuing criminal investigations that will result in holding liable parties accountable for their actions. Respondent submits that the granting of use/derivative use immunity is the least intrusive means of achieving this goal because it allows for the prosecution of an immunized witness where there are independent sources establishing guilt, while it protects the witness' right against self-incrimination. Hence, the statutory grant of immunity in this case protected any right of privacy of Petitioner. See State v. Rutherford, 707 So. 2d 1129, 1132 (Fla. 4th DCA 1997)(en

banc)(evidence that state has followed statutory procedures for obtaining a certain type of information is indicative of the least intrusive means test).

BURDEN OF PROOF

The State notes that section 914.04 is silent as to the burden of proof standard to be met by the State in a Kastigar hearing, so that this court should disregard Petitioner's argument on the "clear and convincing" standard which she has presented as part of her "facial" attack on the statute. Regardless, the State submits that the preponderance of the evidence standard adequately protects a defendant's right, see United States v. Byrd, 765 F. 2d 1524, 1529 (11th Cir. 1985); State v. Beard, 507 S. E. 2d 688, 698 (W. Va. 1998), and notes that this is the same standard used to show the voluntariness of a confession, see United States v. Romano, 583 F. 2d 1, 7 (1st Cir. 1985). In any event, the State presented clear and convincing evidence below.

In Kastigar, the court analogized the use/derivative use proscription to the Fifth Amendment requirement in cases of coerced confessions. 406 U.S. at 461. It noted that while a coerced confession is inadmissible in trial, it does not bar prosecution. Id. The court suggested that the grant of use/derivative use immunity might actually place a defendant in a better position at trial than a defendant who asserts a Fifth Amendment violation based on a coerced confession. Id. It pointed out that with the

grant of immunity, a defendant only needs to show that he gave immunized testimony to require the government to prove that all of the evidence it proposed was derived from legitimate independent sources. Id. at 462. On the other hand, a defendant claiming that a confession was coerced must first prevail in a voluntariness hearing before a confession and evidence derived from it are deemed inadmissible.

POINT II

JOHN ZILE'S STATEMENTS TO POLICE WERE NOT MOTIVATED BY PETITIONER'S IMMUNIZED TESTIMONY.

A trial court's finding that evidence was not tainted should not be reversed unless clearly erroneous. Abbott v. State, 438 So. 2d 1025, 1026 (Fla. 1st DCA 1983). Here, the trial court correctly determined that John Zile's statement was independent of Appellant's immunized statement. See United States v. Streck, 958 F. 2d 141, 145 (6th Cir. 1992)(issue is whether government discovered or inevitably would have discovered evidence).

A Kastigar hearing was held in which the State introduced into evidence pages from the deposition of Detective Alex Perez of the Riviera Beach Police Department (T. 1150-1153). On those pages, Detective Perez indicated that when he and Agent Almieda were in a room with John Zile, Detective Brochu came in because Zile wanted to talk to him, but Brochu told Zile that he could not talk to him because he did not waive his rights (T. 1151). Detective Perez said that Zile told Brochu that he did not care and that he wanted to do the right thing (T. 1151). Perez said that when Brochu informed Zile that he was being arrested for first degree murder, Zile jumped up and said that premeditation was needed for that and that "this wasn't premeditated" (T. 1151-1152). He stated that when Zile was reminded of his rights, Zile said that he wanted to do the right thing and that he would tell them what

they wanted to know (T. 1153).

The State then brought to the court's attention pages from Detective Brochu's deposition where he stated that when he entered the room confirming that Zile wanted to talk to him, Zile stated that the murder was not premeditated (T. 1152-1153).

The State called Mark P. Almieda of the FBI to the stand. Agent Almieda testified that when Detective Perez was getting booking information from John Zile, Zile said that he wanted to speak with some of the investigators about the case (T. 1156-1157). When Agent Almieda told Zile that he had already invoked his rights, Zile continued to indicate that he wished to speak with the investigators (T. 1157). Almieda left the room and located Brochu and Tony Ross, an investigator with the State Attorney's Office (T. 1158). When Detective Brochu came back with Almieda to the room, Zile indicated that he might be willing to speak with the investigators if it would be beneficial to him (T. 1159). Almieda said that when Brochu then told Zile that the investigation had progressed to his being charged with first degree murder, Zile made a spontaneous statement that what happened was not premeditated (T. 1159).

He stated that Zile again indicated that he would continue to be willing to talk to investigators if it would be beneficial to him and that he would provide information about the location of the victim (T. 1159-1160). Agent Almieda testified that he told Zile

that he would have to make his own assessment because he would not be made any promises based on his cooperation (T. 1160). He said that this was also explained to Zile by another, as was the fact that no promises could be made regarding his cooperation (T. 1160). Almieda said that he never said anything to Zile about Petitioner's statement (T. 1160-1161). He said that he was not aware at all of Petitioner's statement so that he could not have communicated to Zile something of which he did not know (T. 1160-1161). Almieda said that it was his opinion that Zile wanted to talk in an effort to reduce the severity of the charges or associated penalties (T. 1162).

On cross-examination, Almieda said that Zile was at the police station from about 3:00 in the afternoon before he was originally told that he was being charged with aggravated child abuse at about 6:15 (T. 1165). He stated that it was a very short time after that, a matter of minutes, when booking information was being taken on the charges, that Zile indicated that he wished to speak with the investigators (T. 1165-1166). It was when Detective Brochu returned to the room that Zile was told that the charges were being upgraded to first degree murder, around 7:00 (T. 1166-1167).[4]

Jensen Ross testified that at the time Zile gave his

[4] Almieda recollected that Brochu returned to the room by himself, and that Mr. Ross was not present (T. 1172).

statements, Zile was never told that Petitioner was given immunity (T. 1175). He stated that Zile was never told by anybody about the content of Petitioner's statement (T. 1175, 1205). He said that Zile never asked questions about Petitioner's statement or about Petitioner (T. 1175). He testified that when Petitioner was given a subpoena, there was evidence that there had been child abuse and that John Zile was a suspect (T. 1178). On cross-examination, he said that they wanted to get a statement from Zile after Petitioner's statement so to corroborate the statement made by Petitioner (T. 1185). On redirect, Ross said that Petitioner did not know where the victim's body was located (T. 1205).

Detective Edward Brochu of the Riviera Beach Police Department testified that police might ask a second suspect to give a statement, after another suspect has already given one, just to try and solve a crime (T. 1226). He said that he went into the room where John Zile was being booked because Zile had initiated contact with him (T. 1231). He said that he explained to Zile that he had already invoked his rights, and informed Zile that he was now being charged with first degree murder (T. 1231). Brochu said that at that time, Zile stated that "it" was not premeditated (T. 1231).

Brochu testified that he gave Zile his *Miranda* warnings, which Zile waived, and that Zile stated he wanted to do the right thing (T. 1232). He stated that he never told Zile about the content of

Petitioner's statement or that Petitioner had been given immunity (T. 1233). He said that Zile appeared to have just wanted to do the right thing and tell them where the victim's body was located (T. 1234, 1291). He did not believe that Zile gave a statement because Petitioner had (T. 1292).

Brochu said that he never used any information that he obtained from Petitioner in asking Zile questions (T. 1234-1235). He said that based on all the information that he had already obtained in the investigation prior to speaking to Petitioner, he felt that there was circumstantial evidence that the victim was killed and that the possible suspects were Zile, Petitioner, and their two young children (T. 1235, 1237-1238, 1249-1250).[5]

On cross-examination, Brochu said that Ross simply told Zile that they had spoken with Petitioner and that she had told them what happened (T. 1242-1243). He indicated that this was done when the two first approached Zile to give a statement (T. 1256-1258). He said that at that time, they did not tell Zile that they learned that the victim was dead (T. 1258). He again stated that Zile initiated the later interview (T. 1257).

As can been seen from the officers' testimony, **Zile originally refused to talk to the officers, despite their telling him that**

[5] The trial court stated that Ross' testimony that Appellant was not a suspect prior to interview was "incredible," noting that Appellant was at the police station (T. 1205-1206).

they knew what happened.[6] Only later, when facing actual charges and while being booked, did Zile reconsider and **ask** to speak to the investigators. At that time, Zile was reminded that he had invoked his rights and was told that the charges had been upgraded. **Zile responded by saying he wanted to do the right thing and by asserting that the homicide was not premeditated**. **He said that he was willing to talk if it would be beneficial to him**. At this time, Petitioner's statement was **not** mentioned, and Zile never asked about the statement or about Petitioner.

And, while Zile was originally told that Petitioner had given a statement (at the time of the first charges when Zile invoked his rights), he was never told about the content of the statement or the fact of immunity. See People v. Gwillim, 274 Cal. Rptr. 415, 427-428 (Cal. App. 6 Dist. 1990)(court looked to whether details given in statement, rather than just fact of statement, influenced witness to speak). See also United States v. Jones, 590 F. Supp. 233, 241 (D.C. Ga. 1984)(witness' decision to cooperate not influenced by knowledge of content of immunized testimony). The fact is that Zile was motivated to make a statement for a reason independent of Petitioner's statement, that he wanted the officers to know that the homicide was not premeditated in hope that this

[6] Of course, Zile knew that he was the only one who knew the whereabouts of the victim's body, so that he also knew that the police had no idea where the body was at that time (T. 241).

fact would reduce the severity of the situation. See United States v. Biaggi, 909 F. 2d 662, 689 (2d Cir. 1990)(witness influenced to talk by possibility of extensive prison terms); United States v. Brimberry, 803 F. 2d 908, 917 (7th Cir. 1986)(witness' cooperation was result of desire to make best deal for himself).

In United States v. Kurzer, 534 F. 2d 511, 517 (2d Cir. 1976), relied on by Appellant, the court remanded the case for consideration like that given by the trial court in this case. The court directed:

> The Government claims that Steinman would have testified against Kurzer because of the case the Government had **developed against him entirely apart form Kurzer's information, even if the prior indictment to which Kurzer's information had contributed never existed. If the Government can prove that proposition to the satisfaction of the trier of fact, it has carried its burden of showing that Steinman was a source "wholly independent of the [immunized] testimony."**

(emphasis added).

The government met its burden in this case.

Petitioner contends that Zile was motivated to talk because the detectives told him that she had talked to them. However, even without this statement, the officers still could have told Zile that they knew everything. Zile was well aware that Petitioner had been taken to a separate interview room upon arriving at the station. There was no reason to believe that but for the detectives' statement, Zile would not have talked. This is especially true since Zile never mentioned Petitioner and did not

indicate a desire to talk until sometime later when he was being booked for a serious felony.

Petitioner argues that Zile did not need to be told what she had said to the police because he was aware that he was being arrested for aggravated child abuse after she had given a statement. If this is true, then Zile had reason to be relieved instead of motivated because he knew that Petitioner knew that he had killed the child yet he was only being accused of aggravated child abuse. In other words, he had reason at that point to keep quiet because he had not been charged with murder after Petitioner's statement.

Petitioner states that the charges and penalties against Zile were the direct result of her statement (Petitioner's Brief p. 42). Given the independent evidence of the investigating officers, though, Petitioner could have clearly been charged with aggravated child abuse, if not murder, upon arriving at the station. The arrest likely came after Petitioner's statement because the officers were busy taking Petitioner's statement before that time and because Zile had declined the opportunity to talk. Regardless, "There is no constitutional right to be arrested." Hoffa v. United States, 385 U.S. 293, 310 (1966).

Brochu said that the independent evidence against Petitioner (and Zile) included the lack of corroborating witnesses to the Swap Shop disappearance, blood samplings from the apartment, statements

from neighbors including Dayle Ackerman, school records, and statements from Chad Brannon (T. 1260, R. 234-238).[7] The Broward Sheriff's Office had already interviewed the Ziles' young sons, Chad and Daniel (T. 1296, R. 235). The children said that John beat the victim's butt, that Petitioner and Zile did not like the victim, and that the victim was dead (T. 1300-1302). Helen Bushnell, a relative from Maryland, reported to Broward that Petitioner might be involved in the victim's disappearance and Paula Yingling, Petitioner's mother, told Broward that something was amiss because the Ziles had checked out of their hotel, leaving the children with her, on the day they failed to keep their appointment with the police (T. 1304-1305, R. 237). Betty Shultz had also provided her information to the police (T. 1307-1308, R. 238).

Finally, Petitioner maintains that Zile's statement was used to corroborate her statement. This argument focuses on the use of Zile's statement and not Petitioner's since Zile's statement was not motivated by Petitioner's immunized testimony. Corroboration, in any event, is not prohibited. In United States v. Schmidgall, 25 F. 3d 1523, 1530 n.8 (llth Cir. 1994), the court explicitly rejected the reasoning in United States v. Carpenter,

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[7] The outline of proof submitted by the State contained information like that testified to by Detective Brochu. Hence, the State also cites to the outline in this discussion. The outline also cited to a "regrets letter" written by Appellant and read by her attorney on November 4 (R. 240).

611 F. Supp. 768 (N. D. Ga. 1985) on which Petitioner relies. It stated that the use of immunized testimony to corroborate independently obtained information does not violate Kastigar. 25 F. 3d at 1530 n.8. See also United States v. Schwimmer, 924 F. 2d 443, 446 (2d Cir. 1991)(confirmatory use not prohibited by Kastigar).

In United States v. North, 910 F. 2d 843 (D. C. Cir. 1990), cited by Petitioner, the immunized testimony was not used to confirm information during an investigation but instead was used to "refresh" witnesses' memories during their testimony.

The cases on which Petitioner relies are distinguishable from the instant case. In State v. Lehrmann, 532 So. 2d 802 (La. 4th Cir. 1988), the witness was confronted with an incriminating conversation between himself and the defendant, made pursuant to the defendant's immunity agreement. Subsequently, despite having already known that he was the target of the investigation, the witness suddenly agreed to provide authorities information about his relationship with the defendant. Prior to that time, the witness had never mentioned the defendant.

The witness' defense attorney stated that his client's cooperation was because his client had exposure in federal court. The prosecutor did not discount that the witness' sudden cooperation was a result of learning about the defendant's testimony.

The circumstances in Lehrmann differ from those in the instant case, because although the defendant had been a focus of investigation, that investigation did not include allegations relating to the defendant. The defendant, as part of a parallel investigation, provided additional information which formed the basis for separate charges. In fact, the defendant provided the authorities with an incriminating conversation involving the witness which included admissions by the witness.

In this case, on the other hand, Zile was already a prime suspect in the case on which Petitioner was questioned. Zile had no reason to believe that the Petitioner provided the officers with new information, and knew that Petitioner could not have provided the police with recorded admissions. Specifically, Zile was not presented with the explicit content of what Petitioner said, unlike the witness in Lehrmann who not only participated in the conversation but who also reviewed the entire contents of that conversation.

In United States v. Kurzer, 534 F. 2d 511 (2nd Cir. 1976), the witness had refused to cooperate with authorities even after indictments had been filed. The witness' attorney had asked to be kept abreast of any new information in the investigation, though, and the witness was later told that others with whom he had done business had "spilled the beans" concerning his illegal schemes. At this point, the witness said that he felt that "the goose was

up," so he agreed to cooperate.

In this case, John Zile had no idea what Petitioner had told the officers. When the officers approached Zile to talk, they did not first inform him that he was being formally charged. And, Zile never indicated that he was talking because he felt that any new information that the officers might have received sufficiently sealed the case.

As noted above, the court in Kurzer remanded the case so that the State could have the opportunity to establish that the witness talked to authorities because of the government's case against him notwithstanding the defendant's statement. The court in State v. Strong, 542 A. 2d 866, 876 (N.J. 1988) also remanded the case for a determination as to whether the defendant's compelled testimony motivated the witness to cooperate. In Strong, the witness reviewed a copy of the transcript of the defendant's immunized grand jury testimony before seeking to assist the authorities. See also United States v. Rinaldi, 808 F. 2d 1579 (D.C. 1987)(on remand, court to consider testifying witness' motivation; witness confronted with new facts just learned from defendant).

In United States v. Helmsley, 941 F. 2d 71, 83, (2nd Cir. 1991), the court explained that its holding in Kurzer was that where the grant of immunity compels testimony that angers a target of the investigation and causes the target to implicate the immunized witness by testimony that would not otherwise be given,

then a Fifth Amendment violation occurs. In this case, the detectives did not use the fact of Petitioner's immunized statement to anger Zile. They did not even mention the fact of immunity. Rather, they just informed Zile that they had an idea of what happened.

There was no indication that Zile was angered, or even surprised as in the above cited cases, that Petitioner had spoken to the officers. Zile mentioned neither Petitioner nor her statement. When he did talk, Zile focused on explaining what he had done instead of accusing Petitioner.

In his statement [8], Zile said that in the living room of his apartment, he struck the victim several times on the buttocks and flipped his fingers against her lips, not only hitting her lips but also her cheeks (T. 228). The victim's lip bled (T. 275). Zile indicated that his actions were in response to the victim defecating on the floor (T. 272-273). Zile said that he put his hand over the victim's face because she was crying (T. 273). The victim went into an epileptic fit and started regurgitating(T.228).

Zile said that he tried CPR and put the victim in a bath of cold water in an effort to revive her (T. 229-231). He stated that he was afraid to take the victim to the hospital because of the bruises to her buttocks, the cut to her lip, and the bruise on the side of her face (T. 233). He said that he put the victim's body

[8] It was not introduced as evidence at trial.

in the closet [on Friday night] and kept it there until Monday night (T. 227, 232-233). He said that he purchased a shovel and a big blue tarp at Home Depot, wrapped the victim's body, and buried her behind a K-Mart in Tequesta (T. 235-240). He threw the shovel off the "Old Burn bridge" (T. 240-241).

Zile relayed prior incidents in a two week period of time during which he had hit or "whacked" the victim's buttocks several times and hit her buttocks with a belt (T. 264, 266, 267). He stated that he and Appellant had thought up the Swap Shop missing person report to explain the victim's disappearance (T. 269-271).

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities, the decision of the District Court of Appeal should be AFFIRMED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to, Richard G. Bartmon, Esquire, Bartmon & Bartmon, P.A., 1515 N. Federal Highway, Suite 300, Boca Raton, FL 33432 on April ___, 1999.

_____
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