IN THE SUPREME COURT OF FLORIDA

PAULINE ZILE,

Petitioner,

vs. CASE NO: 93,289

STATE OF FLORIDA,

Respondent.

_____/

PETITIONER'S REPLY BRIEF

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CERTIFICATE OF FONT AND SIZE

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

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I. SECTION 914.04, FLA. STATUTES IS UNCONSTITUTIONAL BECAUSE IT VIOLATES PETITIONER'S FLORIDA CONSTITUTIONAL RIGHTS AGAINST SELF-INCRIMINATION AND RIGHTS TO PRIVACY

Analyzing State Constitutional law and public policy considerations, Petitioner maintains that Florida's use/derivative use immunity statute violates her Constitutional right against self-incrimination and right to privacy under Article I, Section 9 and 23, Fla.Constitution. Initial Brief ("I.B.") at ppg. 6-36. The State's conclusory responses do not adequately respond to the Constitutional deficiencies of Section 914.04 that Petitioner's authorities and arguments have emphasized.

Petitioner does not question the rule of statutory construction that directs this Court, "whenever possible" ("e.a.")(emphasis added), to construe doubts about the Constitutional validity of a statute in favor of upholding the law. Halifax Hospital Medical Center v. News-Journal Corp., 724 So.2d 567, 570 (Fla. 1999); State v. Stalder, 630 So.2d 1072, 1076 (Fla. 1994), quoting Firestone v. News-Press Publishing Co., 538 So.2d 457, 459-60 (Fla. 1989). However, such discretion to resolve such doubts "should be exercised with restraint". Halifax Hospital, supra (e.a.). This Court cannot uphold Section 914.04 against Petitioner's Constitutional challenges because this law cannot be given "a fair construction consistent with the U.S. and Florida Constitutions". State v. Globe Communications Corp, 648 So.2d 110, 113 (Fla. 1994)(e.a.); State v. Elder, 392 So.2d 687, 690

(Fla.1980). Upholding Section 914.04 would require prohibited judicial "rewriting" or "varying" of the Statute's language. Halifax Hospital, supra; Doe v. Mortham, 708 So.2d 929, 934, n.12 (Fla. 1998), quoting Stalder, 630 So.2d, supra at 1076 (other citations omitted); Globe Communications, supra.

The State argues that this Court has "generally construed" Article I, Section 9, Fla.Const. to provide the same scope of protection as the Fifth Amendment. A.B., at ppg. 8-12 This conclusion selectively ignores significant cases where this Court has rejected Federal construction for an independent and broader interpretation of rights under Article I, Section 9. E.g., Hoggins v. State, 718 So.2d 761, 766-762 (Fla. 1998)(where this Court determined that Art. I, Section 9 provided independent basis to prevent impeachment of a defendant's testimony by pre-Miranda silence at or around time of arrest, rejecting State's argument to interpret issue consistent with Federal cases admitting such testimony under Fifth Amendment); Allred v. State, 622 So.2d 984, 987 (Fla. 1998)(this Court rejected State's argument that Florida should follow Schmerber v. California, 86 S.Ct. 1826 (1966), finding that admission of DUI suspect's reciting alphabet out of order without Miranda warnings violated Article I, Section 9); State v. Guess, 613 So.2d 406, 407 (Fla. 1992)(this Court rejected Federal position in Arizona v. Fulminante, 111 S.Ct. 1246 (1961) as "irrelevant" and concluded that I, 9 provided independent basis for

prior state court rulings that failure to allow defendant to testify as to voluntariness of confession outside jury's presence was not harmless error); Haliburton v. State, 514 So.2d 1088, 1090 (Fla. 1987)(where this Court found as a matter of State Constitutional law that under Article I, Section 9, law enforcement's failure to inform in-custody suspect that attorney was at police station and wished to speak to him or allow attorney to do so violated defendant's Florida Constitutional due process rights); State v. Kinchen, 490 So.2d 21, 22 (Fla. 1985)(this Court rejected Federal case law test for evaluating impermissible comments on a defendant's silence, concluding that "serious" nature of this error required a test that "offer[s] more protection to defendants").

Several of the State's cases did not involve any issue or detailed analysis of Article I, Section 9 or its scope compared to the Fifth Amendment. Christmas v. State, 632 So.2d 1368, 1370-1371 (Fla. 1994); Bonifay v. State, 626 So.2d 1310, 1312 (Fla. 1993); Henry v. State, 613 So.2d 429, 431 (Fla. 1997); Parker v. State, 611 So.2d 1224, 1227 (Fla. 1992); Gore v. State, 599 So.2d 978, 981, n.2 (Fla. 1992). In the decisions in Hoggins, 718 So.2d, supra, at 766-773; Owen v. State, 696 So.2d 715, 719, 720 (Fla.1997) and Sapp v. State, 690 So.2d 581, 586 (Fla. 1997), this Court compared the relative scope of the State and Federal Constitutional rights involved by analyzing Florida law; treatment

of the issue in other states, and public policy interests. Under this type of analysis, I.B. at 16-36, Section 914.04 does not meet state Constitutional parameters.

The State focuses on the purpose of Section 914.04 as an aid in securing evidence and facilitating prosecution of "all culpable parties" if the State can demonstrate a source independent of the immunized information. A.B., at 14, 15. The actual function of Section 914.04 is not to punish all that are "culpable", but to enable the State to make an informed choice to immunize (and possibly not prosecute) one individual in order to more successfully prosecute others. Kastigar v. United States, 92 S.Ct. 1653, 1657 (1972); Tsavaris v. Scruggs, 360 So.2d 745, 749, 752 (Fla. 1977). An inherent aspect of an immunity statute is that the Government makes an accommodation to obtain a benefit that the Government decides is more valuable. State v. Soriano, 684 P.2d 1220, 1233 (Or. App. 1984); State v. Munoz, 702 P.2d 981, 990 (N.Mex. 1985); quoting, United States v. Hossbach, 518 F.Supp. 759, 773 (E.D. Pa. 1980). Transactional immunity and/or some form of "use/derivative use immunity plus", I.B., at 31-36, would not frustrate this purpose or put any undue burden on the State. I.B., at 30, 31.

The State's argument minimizes the compelling and exalted fundamental interests and components of the Constitutional guarantees against self-incrimination. E.g., Murphy v. Waterfront

Commission of New York Harbor, 84 S.Ct. 1594, 1596, 1597 (1964)(other citations omitted)(Supreme Court described values encompassed by the protection against self-incrimination to include an “unwillingness” to “subject” a suspect to the “trilemma of self-accusation, perjury or contempt” by compelling information from his or her mouth; promotion of a criminal justice system that is “accusatorial” and not “inquisitorial”; a fear that self-incrimination would be the result of “inhumane treatment and abuse”; fairness and privacy interests; and a “realization that the privilege, while sometimes `a shelter to the guilty', is often `a protection to the innocent.'"); Traylor v. State, 596 So.2d 957 (Fla. 1992); In The Matter of Grand Jury Proceedings of Joseph Guarino, 516 A.2d 1063, 1069 (N.J. 1986).

Federal and state cases have similarly stressed the overriding importance of these values and rights compared to the underlying benefits of immunity to law enforcement. United States v. North, 910 F.2d 843, 861 (D.C. Cir. 1990)("North I")(where panel observed that while adherence to the Fifth Amendment and the requirements of a Kastigar hearing might be time-consuming for the Government, and might result in the inability to prosecute-"... perhaps a guilty defendant...the very purpose of the Fifth Amendment under these circumstances is to prevent the prosecutor from transmogrifying into the inquisitor, complete with that office's most pernicious tool----the power of the state to force a person to incriminate

himself. As between the clear constitutional command and the convenience of the government, our duty is to enforce the former and discount the latter"); (e.a.); United States v. North, 920 F.2d 940, 945-946 (D.C. Cir. 1991)("North II")(Where panel stated that "institutional cost" in creating "perhaps an insurmountable barrier" to the prosecution of an immunized witness…. "cannot be paid in the coin of a defendant's Constitutional rights. That is simply not the way our system works".); People v. Vallejos, 883 P.2d 1269, 1274, 1277 (N.Mex. 1994); State v. Thrift, 440 S.E. 2nd 341, 352, n.12 (S. Car. 1993)(while transactional immunity might result in preventing prosecution, South Carolina Supreme Court concluded that it "…would be far more devastating an injury to our system of justice if the rights against self-incrimination were tramelled in the process"); Commonwealth v. Swinehart, 664 A.2d 957, 969 (Pa. 1995); State v. Strong, 542 A.2d 866, 872, (N.J. 1988)(both states imposed "clear and convincing evidence" burden on Government in significant part because of importance of preserving self-incrimination rights).

The State's reliance on out of state cases upholding the validity of use/derivative use immunity statutes, A.B., at 16-17, only confirms the persuasiveness of Petitioner's arguments and authorities. State v. Ely, 708 A.2d 1332, 1337-1338 (Vt. 1997); see also State v. Gonzalez, 825 P.2d 920, 933 (Ct.App.Alaska 1992), aff'd., 853 P.2d 526 (Alaska 1993)(where intermediate appeals court

concluded that "…the decisions in the four states that have declined to follow Kastigar [all cited in Petitioner's Initial Brief] are by far better reasoned and more persuasive than decisions from states following Kastigar which, at best, tend to be conclusory…"); Gonzalez, 825 P.2d., supra at 933-934, n.8. Other than those decisions in Ely, supra; Swinehart, supra and Strong, supra (which Petitioner analyzed at length in her Initial Brief at 8, 9, 15, 31-36), the State's authorities are mere conclusory ratifications that Kastigar only requires use/derivative use immunity. e.g., Gajedas v. Holum, 515 N.W. 2d 444, 450 (N.D. 1994); People v. Johnson, 507 N.Y.S.2d 791, 792, 793 (S.Ct., NY County 1986); In re: Caito, 459 N.E. 2nd 1179, 1183, 1184 (Ind. 1984); ex parte Shorthouse, 640 S.W. 2nd 924, 927, 928 (Tex.Ct. Crim. App. 1982).

The State concludes that Petitioner's out-of-state authorities invalidated their use/derivative use immunity statutes for reasons "other than post-Kastigar findings that their state constitutions require more than the federal constitution." A.B., at 17-18. To the contrary, several states relied, at least in part, on post-Kastigar findings that their State Constitutional provision was broader in scope and therefore required a broader form of immunity as the Constitutionally commensurate "exchange" for statutorily compelled immunized testimony. Thrift, 440 S.E. 2nd supra, at 351 (where South Carolina Supreme Court stated that pre-Kastigar case

rule should continue to "govern" the issue, based on 1993 overview of law); State v. Gonzalez, 853 P.2d 526, 530, n.4 (Ala. 1993); State v. Soriano, 684 P.2d, supra at 1232, 1232-1233; 1233, n.9; Attorney General v. Colleton, 444 N.E. 201, 915, 918-921 (Mass. 1982); State v. Miyasaki, 614 P.2d. 915, 921-922 (Hawaii 1980).

The State maintains that because witness' statements are documented "at least to some extent in law enforcement records", and grand jury materials can be reviewed under seal, Section 914.04 is Constitutionally defensible. A.B., at 19; 19, n.2. Section 914.04 does not compel the State to keep records or documentation of any kind and does not address, let alone guarantee access by a witness-defendant to grand jury records. Compare Ely (where Vermont statutory and non-statutory requirements include these features). While Petitioner gained access to grand jury records under seal this did not occur until the appeal phase. This left trial counsel unable to ascertain or analyze whether Petitioner's immunized statement was properly used in the grand jury process. Since Respondent concedes that the Kastigar rules apply at the grand jury stage, it is a critical deficiency that Section 914.04 does not authorize an indicted witness to properly and fully evaluate, at a pre-trial stage, whether the State violated her rights against self-incrimination when it indicted her.

The State itself concedes that some witness statements are

only available “to some extent”, leaving open the fact that other such statements or information critical to a Kastigar inquiry are not. Furthermore, the State has wholly failed to address the problem of “faded memories” that creates further Constitutional difficulties in the use/derivative use immunity context. I.B., at 20-21; United States v. Poindexter, 951 F.2d 369, 376 (D.C. Cir. 1991), citing and quoting North I, 910 F.2d at 860-861.

The State has also not adequately addressed the fact that Section 914.04 does not require that the State provide or keep contemporaneous documentation of who has or obtains knowledge of immunized information; who they learned it from; how and when that occurred; who they told about it or discussed it with; how and when that happened, and how this information was considered and used by each such person, directly and indirectly. Kastigar. Even assuming arguendo that knowledge of immunized statements does not necessarily mean illegal use was made of this knowledge, it does not necessarily guarantee that such use did not occur. Without requiring the State to maintain the necessary information, a witness-defendant is left in the dark to determine if a legitimate Kastigar challenge exists or not.

These problems do not concern mere exposure or speculation about use. A.B., at 20-22. While knowledge by a prosecutor of immunized statement may not absolutely require that prosecutor to withdraw per se, A.B., at 21, 22 and cases cited therein, the State

cannot dispute the substantial consensus, even amongst its own cited authorities, that some reliable segregation process be instituted by prosecutors and that the absence of such a procedure substantially undermines the prospect that a witness-defendant's rights against self-incrimination were protected. I.B., at 26,27, and cases cited; United States v. Harris, 973 F.2d 333, 337, 338 (4th Cir. 1992); United States v. Crowson, 828 F.2d 1427, 1429, 1430, n.4 (8th Cir. 1987); State v. Beard, 507 S.E. 2nd 688, 697 (W.Va. 1998). The inherent difficulty with mere use/derivative use immunity is that in reality, Section 914.04 cannot assure a witness-defendant that she will be able to fully and accurately find out whether or not illegal use was made of her immunized information against her. The statute's deficiencies in this regard are even more prominent when dealing with illegal use by the State in planning, strategy and/or all other aspects of trial and case preparation and mental analysis of information. I.B., at 24-26. Much of this type of use does not appear in documents available to a witness-defendant.

The State suggests that Florida's Constitutional rights of privacy are not implicated because this right encompasses the compulsion of testimony but not its use. A.B. at 25. This distinction is not meaningful. The meaningful aspect of Section 914.04's "loosening of lips", Tsavaris, is the use of such forcibly disclosed information. Disclosure and use are interrelated

components that implicate the right to privacy. see Murphy, 84 S.Ct. at 1598, n.6 (compulsion and use of testimony are each "facets" of the right against self-incrimination that are "interrelated"). If compelled disclosure implicates the right to privacy, use of such disclosed information is similarly included.

The State further claims that Petitioner essentially waived her privacy rights by her false report that her daughter had disappeared. A.B., at 26. This viewpoint suggests that the commission of a criminal act invites invasion of a person's innermost thoughts, particularly self-incriminating ones, and would render both the right to privacy and the right against self-incrimination meaningless. Inclusion within Florida's right to privacy does not correspondingly exclude such information from the scope of Florida's self-incrimination protections.

II. JOHN ZILE'S STATEMENT TO POLICE WAS MOTIVATED, INFLUENCED AND OTHERWISE DIRECTLY AND INDIRECTLY DERIVED FROM PAULINE ZILE'S IMMUNIZED STATEMENT, REQUIRING REVERSAL OF PETITIONER'S CONVICTIONS AND DISMISSAL OF CASE AS KASTIGAR VIOLATION

In her Initial Brief, Petitioner argued that John Zile's statement was motivated illegally, directly and indirectly, by Pauline Zile's immunized statement, and his arrests based on her statement. I.B., at 37-49. The State's response concedes the facts that substantiate this conclusion, yet illogically disputes their significance.

The State acknowledges that John Zile, who had previously

refused to speak with police, "reconsidered" (A.B., at 35) and asked to speak to police upon facing charges and being booked for aggravated child abuse, within a very short time of being informed that his wife had made a statement. A.B., at 32-37. While Petitioner disputes some of the State's specific time references, the State has at least conceded that Mr. Zile's arrest for aggravated child abuse motivated him to talk and give a statement. The State nevertheless tries to disconnect these facts from the legal conclusion that inevitably flows from them.

Pauline Zile's statement created the basis for Mr. Zile's arrest for aggravated child abuse. I.B., at 39-43. The State agrees this arrest motivated him to speak to police. Mr. Zile's statement was then used to focus upon, investigate, prosecute and convict Pauline Zile. Id. The clear conclusion is that illegal indirect use was made of Pauline Zile's statement, it motivated Mr. Zile to talk, and this resulted in criminal penalties against Mrs. Zile --- a classic Kastigar violation. I.B., at 43-46.

As the motive for giving his statement, the State relies on Mr. Zile's "belief" that he had not committed premeditated murder. A.B., at 35. This "fact" cannot be read in a vacuum, but as the culmination of a continuing set of circumstances, occurring within a very short time after Mr. Zile was made aware his wife had provided a statement to police, and almost contemporaneously with arrests based on what Mrs. Zile had told police. I.B., at 41-43.

The State speculates that police could have charged John Zile with aggravated child abuse, if not murder, when he first arrived at the police station on October 27, 1994, but that police waited to charge him until after Mrs. Zile's statement because police were "busy" taking her statement and because Mr. Zile had refused to speak to them. A.B., at 37. If the State had enough information to charge John Zile when he first arrived at the police station, prior to Mrs. Zile's statement, police and prosecutors would not have needed her statement at all and therefore would not have granted her immunity. Separate officers were available to take Mrs. Zile's statement and place Mr. Zile under arrest. This speculation further demonstrates that the State's reason for not arresting Mr. Zile at the outset of his arrival for either child abuse or murder was that there was insufficient evidence to do so until Mrs. Zile's statement was made.

CONCLUSION

Based on the arguments and authorities herein and in Petitioner's Initial Brief, Petitioner respectfully requests that this Court declare Section 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 by mail upon Melynda Melear, Assistant Attorney General, 1655 Palm Beach Lakes Blvd. Suite 300 West Palm Beach FL 33401 this 17th day of May, 1999.

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