IN THE SUPREME COURT OF FLORIDA

DUANE EDWIN SUTTON,	Case No. SC04-1954
KEITH NORWOOD SMITH,	Case No. SC04-1955
JOHN R. BEIKIRICH,	Case No. SC04-1956
EDWARD ALLEN SINGLETON,	Case No. SC04-1957
JERRY WADE RHOADES,	Case No. SC04-1958
GEORGE SAMUEL DEMARCO,	Case No. SC04-1959

Petitioners,

v.

STATE OF FLORIDA,

Respondent.
_____/

On Petition for Discretionary Review of the Decision of
the Second District Court of Appeal

CONSOLIDATED REPLY BRIEF OF PETITIONERS

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I. Due Process of Law

1 A. The Right to be Free from Self-incrimination Is not Circumscribed by Criminal Proceedings

The state first seeks to argue that because the present proceedings are "civil" rather than "criminal" that the due process rights guaranteed by the Fifth Amendment to the U.S. Constitution and Article I, § 9, Florida Constitution, do not apply to the "civil" litigants here. Answer Brief at 5. The State suggests that "a civil detainee is entitled to the Fifth Amendment's privilege against self incrimination as is any other civil litigant". Answer Brief at 9. The State's assertion is not consistent with well established federal and Florida law. The liberty interest at issue here requires a high measure of due process.

In Morrissey v. Brewer, 408 U.S. 471, 481 (1972), the U.S. Supreme Court addressed application of due process of law:

> Whether any procedural protections are due depends on the extent to which an individual will be "condemned to suffer grievous loss." .... The question is not merely the "weight" of the individual's interest, but whether the nature of the interest is one within the contemplation of the "liberty or property" language of the Fourteenth Amendment. [Citations omitted].

This Court cited Morrissey in Pullen v. State, 802 So. 2d 1113, 1116 (Fla. 2001), where this Court observed that "[c]learly, an individual who faces involuntary commitment to a mental health facility has a liberty interest at stake." See also Ibur

v. State, 765 So. 2d 275, 276 (Fla. 1st DCA 2000) (involuntary commitment is a substantial deprivation of liberty at which fundamental due process protections must attach").

As this Court has explained, "[t]he deprivation of liberty which results from confinement under a state's involuntary commitment law has been termed a 'massive curtailment of liberty.'" Shuman v. State, 358 So. 2d 1333, 1335 (Fla. 1978) (quoting Humphrey v. Cady, 405 U.S. 504, 509 (1972)). "Those whom the state seeks to involuntarily commit to a mental institution are entitled to the protection of our Constitutions, as are those incarcerated in our correctional institutions." Id.; Pullen at 1117-18.

In a similar context, U.S. Supreme Court held that "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection. Addington v. Texas, 441 U.S. 418, 425 (1979). The "function of legal process is to minimize the risk of erroneous decisions." Id. See also In re Beverly, 342 So. 2d 481, 489 (Fla. 1977) ("The seriousness of the deprivation of liberty and the consequences which follow in adjudication of mental illness make imperative strict adherence to the rules of evidence generally applicable to other proceedings in which an individual's liberty is in jeopardy.")

This Court and the Florida district courts have long applied the privilege against self-incrimination to a variety of civil proceedings absent any "criminal" status in the orthodox sense. This Court specifically held that the right to remain silent applies not only to traditional criminal cases, but also to proceedings which may result in suspension or revocation of a professional license and other proceedings which are "penal" in nature. State ex rel. Vining v. Florida Real Estate Commission, 281 So. 2d 487, 489 (Fla. 1973); Kozerowitz v. Florida Real Estate Commission, 289 So. 2d 391, 392 (Fla. 1974). See discussion in Consolidated Initial Brief of Petitioners on the Merits at 9-16.

A respondent in a proceeding for civil commitment for mental health treatment pursuant to the Baker Act, §§ 394.451 et seq. Florida Statutes (2004), also faces a potential loss of liberty. By statute in such proceedings, a person may not be compelled to provide testimony against himself. § 394.467(6)(a)(2) Florida Statutes (2004).

Therefore a reasonable person must conclude that where a person's liberty is at issue, a higher standard of due process of law is required than the standard applicable in most civil matters. No contrary authority of Florida law exists to abrogate the constitutional privilege in such matters.

I B. Federal Application of the Right

Citing Allen v. Illinois, 478 U.S. 364 (1986), the State seeks to argue that the "United States Supreme Court has held that the Fifth Amendment privilege against compulsory self-incrimination is inapplicable to involuntary civil commitment proceedings". Answer Brief at 12. Therein the State is mistaken, apparently based on a failure to correctly apprehend the rule in Allen.

In Allen, the Supreme Court considered the question "whether the proceedings under the Illinois Sexually Dangerous Persons Act (Act), Ill. Rev. Stat., ch. 38, ¶ 105-1.01 et seq. (1985), are 'criminal' within the meaning of the Fifth Amendment's guarantee against compulsory self-incrimination." Allen at 365. By a 5 to 4 majority, the Court concluded that the Illinois proceedings were not "criminal", but then held that the Court's determination "that proceedings under the Act are not 'criminal' within the meaning of the Fifth Amendment's guarantee against compulsory self-incrimination does not completely dispose of this case." Allen at 374. The Court held:

> For the reasons stated, we conclude that the Illinois proceedings here considered were not "criminal" within the meaning of the Fifth Amendment to the United States Constitution, and that due process does not independently require application of the privilege. Here, as in Addington [v. Texas, 441 U.S. 418, 431 (1979),] "***[t]he essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold***"....

Allen at 375 (emphasis added). The Court did not require application of the privilege, but neither did the Court prohibit it. Thus the State is mistaken when asserting that "United States Supreme Court has held that the Fifth Amendment privilege against compulsory self-incrimination is inapplicable to involuntary civil commitment proceedings". Answer Brief at 12. In fact the Supreme Court applied the principle of federalism, allowing the states to fashion their own rules.

The Allen Court also based its decision, in part, upon the determination of the Illinois Supreme Court that "'a defendants statements to a psychiatrist in a compulsory examination under the provisions here involved may not be used against him in any subsequent criminal proceedings.' [People v. Allen, 481 N.E. 2d 690, 696 (Ill. 1985)]". 478 U.S. at 367-68. No such immunity is available in Florida law. Florida courts are without authority to grant immunity. See discussion of immunity infra at 15-21.

The State is equally mistaken in asserting that the Petitioners rely upon In re. Gault, 387 U.S. 1 (1967), for the proposition that either juvenile delinquency or civil commitment proceedings are "criminal". The opinion in Gault provides that the concept of "criminal" has been interpreted by the Supreme Court to include various proceedings which, while not criminal per se, may lead to loss of constitutionally protected freedoms. Gault at 27. That remains good law; this Court and the

Florida district courts have consistently applied the same rule. See Consolidated Initial Brief of Petitioners on the Merits at 9-16.

In Vining this Court cited to Gault, but relied upon Spevack v. Klein, 358 U.S. 511 (1967) for the precedent supporting its reasoning. In Spevack the Court addressed an action by the New York Bar against an attorney. In Vining this Court quoted Spevack:

> We said in Malloy v. Hogan [378 U.S. 1 (1964)]: "The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement – the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." 378 U.S. at 8, 84 S.Ct. at 1493, 12 L.Ed.2d at 659.
>
> In this context "penalty" is not restricted to fine or imprisonment. It means, as we said in Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106, the imposition of any sanction which makes assertion of the Fifth Amendment privilege "costly."
>
> "The threat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion to make a lawyer relinquish the privilege. The threat is indeed as powerful an instrument of compulsion as 'the use of legal process to force from the lips of the accused individual the evidence necessary to convict him. . . ." United States v. White, 322 U.S. 694, 698, 64 S.Ct. 1248, 1251, 88 L.Ed. 1542, 1546, 152 A.L.R. 1202.

Vining at 490-491. This Court concluded:

In our judgment, logic and reason demand that the rationale[1] of Spevack be applied not only to disbarment proceedings, but as well to other types of administrative proceedings which may result in deprivation of

[1] "rationale" in the printed report and the Lexis text, but "rationals" in the West CD-ROM and Westlaw text.

> livelihood. Certainly, threatened loss of professional standing through revocation of his real estate license is as serious and compelling to the realtor as disbarment is to the attorney. In succinct terms, it is our view that the right to remain silent applies not only to the traditional criminal case, but also to proceedings "penal" in nature in that they tend to degrade the individual's professional standing, professional reputation or livelihood. Spevack v. Klein, supra....

Vining at 491.

I C. Florida Application of the Right

The State argues that because the U.S. Supreme Court has receded from one of the principles announced in Gault that this Court should not apply rule in State ex rel. Vining v. Florida Real Estate Commission, 281 So. 2d 487 (Fla. 1973), Kozerowitz v. Florida Real Estate Commission, 289 So. 2d 391 (Fla. 1974), and their progeny. Answer Brief at 18. The State reasons that "[b]oth Vining and Kozerowitz base the rational of their decisions upon the U.S. Supreme Court's holding in Gault. Petitioners' improperly disregard the U.S. Supreme Court's ruling in Allen, holding that Gault is not only distinguishable in sexually violent predator civil commitment proceedings, but, is 'plainly not good law.' Allen, 478 U.S. at 373." Answer Brief at 18.

The States presumes that the rule in Allen somehow prohibits application of the right to not be compelled to testify against one's self. As discussed supra,

Allen neither requires application of the privilege, nor prohibits it. The rule in Allen leaves that determination to the states. Allen at 375.

The State then cites In re Beverly, 342 So. 2d 481, 488-89 (Fla. 1977), to argue that this Court "has expressly rejected the applicability of the Fifth Amendment privilege against self-incrimination in civil commitment proceedings under the Baker Act." Answer Brief at 19-20. The State misapprehends both this Courts opinion in Beverly and § 394.467(6)(a)(2) Florida Statutes (2004).

Peer Beverley contended that he was denied rights guaranteed by the Fifth Amendment when he was not given the warnings required in Miranda v. Arizona, 384 U.S. 436 (1966), prior to a psychiatric examination. Beverly at 488. This Court held that the rule in "Miranda applies only to 'in custody' interrogation by law enforcement officers and bars the admissibility of any statement obtained in violation of its mandate at a subsequent Criminal prosecution. The Fifth Amendment privilege is not designed to protect any disclosures which are made by a mental patient during a psychiatric examination and which will lead only to an assessment of his mental or emotional condition." Id.

Obviously a deposition by a State Attorney is not a psychiatric examination. A psychiatric patient is at liberty to speak or not speak to a physician or anyone else. No legal consequence would arise from a patient's failure to respond to a

psychiatrist's inquiries. No provision of state or federal law exists which could compel a patient to answer questions in connection with a psychiatric examination in a hospital or to even acknowledge that a psychiatrist or other person might be present. The patient would be equally free to respond at length or to turn away.

Even in the context of an assessment for involuntary civil commitment, a person has a qualified privilege to refuse to participate in a personal interview required by § 394.913(3)(c) Florida Statutes (2004):

> If the person who is subject to proceedings under this part refuses to be interviewed by or fully cooperate with members of the multidisciplinary team or any state mental health expert, the court may, in its discretion: (a) Order the person to allow members of the multidisciplinary team and any state mental health experts to review all mental health reports, tests, and evaluations by the person's mental health expert or experts; or (b) Prohibit the person's mental health experts from testifying concerning mental health tests, evaluations, or examinations of the person.

§ 394.9155(7) Florida Statutes (2004).

However in the instant cases the trial court has ordered each of the Petitioners to respond to the questions propounded by the State Attorney. Failure to comply with that order may be a contempt of court and thus may result in criminal sanctions. Fla. R. Civ. P. 1.380(b)(1).

Unlike ususal criminal defendants, the Petitioners are in the custody of the State, and may not be afforded pre-trial release under any conditions. § 394.915(5) Florida Statutes (2004). An assistant state attorney is an agent of the State charged with enforcing laws and a "state officer" in general matter of enforcement of criminal law. Johns v. State, 197 So. 791 (1940). When an assistant state attorney questions a person in custody the rule in Miranda applies. Shriner v. State, 386 So. 2d 525, 532 (Fla. 1980).

Peer Beverly was apparently a patient in a psychiatric unit at Jackson Memorial Hospital in Miami when the issue of Miranda warnings arose in connection with a psychiatric examination leading "only to an assessment of his mental or emotional condition". Beverly at 483, 488. Unlike Peer Beverly, the Petitioners are incarcerated in a state facility; an agent of the State seeks to interrogate them and the trial court has ordered them to answer. The situation of the Petitioners in the instant case is very different from that of Peer Beverly, and may therefor require a different result when applying the rule in Miranda, should that issue come before this Court.

The State's argument that "Petitioners' sweeping conclusion, unsupported by case law or logic, that '[t]he penal nature of the regulatory statutes at issue in the above cases is insignificant compared to the penal nature of § 394.910, et seq.,

Florida Statutes,' once again demonstrates Petitioners' total disregard of the current state of the law, both state and federal"[2] is difficult to understand. Is it

[2] See Consolidated Initial Brief of Petitioners on the Merits, p. 9-14.

possible that a reasonable person might actually believe that the loss of a license to practice an occupation or profession is less inimical to the rights of a free person than complete incarceration, potentially for life? See §§ 394.918, 394.919, 394.920 Florida Statutes (2004).

Vining and its progeny are indeed distinguishable from post-sentence civil commitment cases – that is exactly the point. Vining and its progeny addressed situations where there was much less impact on the defendants than exists here. Nevertheless this Court invoked the right to be free from self incrimination.

I D. The Right Applies Whenever Further Sanctions Can Be Imposed

The State's argues that the post-sentence civil commitment statute does not impose sanctions. The issue here is not whether (or not) sanctions are imposed. The issue is the impact upon the individual, and whether the compelled self-incrimination may, now or later, result in criminal sanctions.

II. Equal Protection of the Laws

The State argues that classifications created by the post-sentence civil commitment statute and the Baker Act are not suspect classifications. Apparently the State concedes that because liberty is a fundamental right a strict scrutiny analysis is required. Therefore the governmental regulations challenged herein

should be subjected to strict scrutiny and may be sustained only if found to be suitably tailored to serve a compelling state interest.

III. Right to Privacy

In the context of the right to privacy, the State cites In re Detention of Campbell, 986 P.2d 771 (Wash. 1999) and People v. Martinez, 105 Cal. Rptr. 2d 841 (Cal. App. 2001). Neither case is particularly relevant to the issue now before the Court.

The Campbell court addressed several issues; only two treat the right to privacy. Campbell argued that the trial court had violated his right to privacy by keeping the courtroom open during his trial and not sealing his court file. Campbell at 778. The court held that in Washington there is a constitutional principle that both civil and criminal case proceedings are open to the public. Campbell's right to nondisclosure of intimate personal information by the State was not a fundamental right and was subject to diminishment when there is a legitimate state interest at stake. Id. The privacy issue in the instant case has little to do with disclosure of information by the State to the public.

In People v. Martinez the court considered whether Martinez could prevent the State from examining certain records related to Martinez' treatment at Atascadero State Hospital. Martinez at 846. The issue was whether the California

right to privacy protected such records in the context of a California sexually violent predator proceeding. Martinez at 853. The court determined that the California right to privacy did not prevent the State's evaluators from considering the records

> because the privilege never attached to his communications with the treatment staff at A[tascadero] S[tate]H[ospital] or the M[entally]D[isordered] S[ex]O[ffender] evaluator." Martinez at 854. The court reasoned that "the prosecutor's examination of psychological records expressly relied upon by [the State's evaluators] constitutes at most a minimal invasion due to defendant's substantially diminished expectation of privacy concerning those records.... Here, the alleged invasion of privacy concerning defendant's psychological records did not deprive defendant of his right to counsel, implicate the impartiality of the trial judge, or lessen the prosecutor's burden of proof. Nor could it have caused a structural defect of similar magnitude that prevented defendant from receiving a fair trial."

Martinez at 851.

The issue in the instant case has much more to do with compelled disclosures by the Petitioners than with either disclosure by the State or with records. Neither Campbell nor Martinez addresses the issues in the instant case.

The State then cites to a chapter in a treatise entitled "The Sexual Predator: Law, Policy, Evaluation, and Treatment (Civic Research Institute, Kingston, New Jersey) (eds. Anita Schlank and Fred Cohen)". Answer Brief at 32. The treatise is

not in evidence, is not included in the record of this case, has not been relied upon by the Petitioners, and the cited chapter is not included as an appendix. Therefore reliance upon it is not proper.

In any event, the State uses the treatise to argue that evaluators should rely upon a laundry list of documentary records. Answer Brief at 32-33. That may or may not be good advice, but it has little to do with whether the Petitioners can properly be deposed. A clinician's assessment of what records are important may be useful to other clinicians, but has nothing to do with the law of privacy or self incrimination. Perhaps it is the State's intention to compare the Petitioners' sworn depositions to hearsay contained in records of unknown reliability and argue that any discrepancies evince a lack of veracity of the Petitioners.

The State argues that "the nature of the [Petitioners'] sexually violent acts themselves are part of the civil commitment review process needed to determine the pivotal question of whether or not a civil detainee is a sexually violent predator and whether he can control his behavior. Consequently, it is not only necessary, it is required that the court look beyond the actual conviction to the acts themselves. The Ryce Act provides that in the civil commitment process the 'court may consider evidence of prior behavior by a person who is subject to proceedings' under the Act. § 394.9155(4), Fla. Stat." Answer Brief at 40.

Thereby the State now seeks to do exactly what this Court found unconstitutional in Vining. There this Court held that § 475.30(1) Florida Statutes (1973)

> has a coercive effect in that it requires a defendant to answer allegations made against him or suffer possible loss of livelihood. The requirement that the answer be "verified" or sworn to produces an additional coercive effect in that it exposes the defendant to a possible perjury proceeding if he does not respond truthfully to the charges against him. However, we regard the latter effect of the statute as secondary in importance to the fact that the defendant is required to respond at all. ***The basic constitutional infirmity of the statute lies in requirement of a response under threat of license revocation or suspension, which amounts to compelling the defendant to be a witness against himself within the meaning of the Fifth Amendment to the U.S. Constitution and Article I, s 9 of the Florida Constitution***.

Vining at 491-492. The same is true in the instant case for the same reason, except in the instant case, unlike Vining, the State seeks to take away the Petitioners' liberty.

IV. Immunity

In the summary of the State's argument, the State suggests that "[i]t is the better of the options, to afford use and/or transactional immunity to disclosure of information in the civil commitment process, than to allow silence to prevent a true

and accurate assessment of an individual's qualifications as a sexually violent predator." Answer Brief at 3. In several parts of the State's Answer Brief, the State proposes that the Petitioners may somehow be granted immunity for their compelled testimony. The State argues that "[i]f the court then compels that information be released to the state that would otherwise be privileged, the record is clearly set regarding the creation of a grant of immunity relating to that specific question and the responses generated thereby. Answer Brief at 12.

Citing to In re Beverly, the State suggests that "to the extent any incriminating information is disclosed in discovery, the patient is granted immunity and the incriminating information may not be used in any subsequent criminal prosecution. The privilege, however, does not bar the disclosure of such information." Answer Brief at 21. The State argues that "although not in the context of a psychiatric evaluation as reviewed in Beverly the result will be the same through the proper exercise of a civil detainee's Fifth Amendment privilege." Answer Brief at 22. Therefore "if information sought by the state attorney in a civil commitment pre-trial deposition is objected to as seeking privileged information, then, the proper mechanism for review is to state the objection on the record for review and the future determination of possible immunity if the answer is compelled." Answer Brief at 23.

The State suggests that "[t]o the extent any incriminating information is compelled regarding prior uncharged criminal offenses is disclosed during the Petitioners' depositions, it is Respondent's argument that the State would be precluded from using such evidence at any subsequent criminal prosecution. Answer Brief at 52. Therein the State is mistaken.

The U.S. Supreme Court has determined that a "[c]ourt cannot compel [a person] to answer deposition questions, over a valid assertion of his Fifth Amendment right, absent a duly authorized assurance of immunity at the time." Pillsbury Co. v. Conboy, 459 U.S. 248, 256-57 (1983). However courts have no independent authority to grant the necessary immunity. See, e.g., In re Daley, 549 F.2d 469, 479 (7th Cir. 1977), cert. denied, 434 U.S. 829 (1977):

> The court may scrutinize the record to ascertain that a request for immunity is, under the statute, jurisdictionally and procedurally well-founded and accompanied by the approval of the Attorney General. Under no circumstances, however, may a federal court prescribe immunity on its own initiative, or determine whether application for an immunity order which is both jurisdictionally and procedurally well-founded is necessary, advisable or reflective of the public interest, for the federal judiciary may not arrogate a prerogative specifically withheld by Congress. [Citations omitted.]

See also United States v. Benveniste, 564 F.2d 335, 339 n.4 (9th Cir. 1977):

> It is well established that the trial court has no power to grant immunity to a witness whose testimony the

> defendant may wish to offer and the Government cannot be forced to grant such immunity.

In an opinion by then Circuit Judge Warren Burger, the D.C. Circuit Court addressed the inherent separation of powers issue:

> What Appellant asks this Court to do is command the Executive Branch of government to exercise the statutory power of the Executive to grant immunity in order to secure relevant testimony. ***This power is not inherent in the Executive and surely is not inherent in the judiciary.*** In the context of criminal justice it is one of the highest forms of discretion conferred by Congress on the Executive.... ***We conclude that the judicial creation of a procedure comparable to that enacted by Congress for the benefit of the Government is beyond our power.***

Earl v. United States, 361 F.2d 531, 534 (D.C. Cir. 1966), cert. denied, 388 U.S. 921 (1967) (emphasis added).

Likewise the separation of powers provisions of both the federal and Florida constitutions would preclude a Florida court from offering immunity. In Florida

> immunity over the State's objection interferes with the State's prosecutorial prerogative, ***thereby violating the constitutional doctrine of the separation of powers*** between the judicial and executive branches of government. Cf. Cleveland v. State, 417 So.2d 653 (Fla.1982) (court may not override prosecutor's refusal to consent to pretrial diversion of defendant, essentially a conditional decision not to prosecute); State v. Brown, 416 So.2d 1258 (Fla. 4th DCA 1982) (court may not dismiss information based on victim's expressed desire not to prosecute in face of prosecutor's desire that

prosecution go forward); State v. Jogan, 388 So.2d 322 (Fla. 3d DCA 1980) (trial court may not dismiss

> information conditioned on defendant enlisting in military where State desires to prosecute).

State v. Harris, 425 So. 2d 118, 120 (Fla. 3d DCA 1982) (emphasis added).

Moreover in Florida no authority exists for a State Attorney or other executive officer to offer immunity in a civil case. No authority for immunity existed in the common law. See United States v. Lenz, 616 F.2d 960, 962-63 (6th Cir. 1980). The common law that was in effect on 4 July 1776 continues to be the law of Florida to the extent that it is consistent with the constitutions and statutory laws of the United States and Florida. § 2.01 Florida Statutes (2004). Even where the legislature acts in a particular area, the common law remains in effect in that area unless the statute specifically provides otherwise:

> The presumption is that no change in the common law is intended unless the statute is explicit and clear in that regard. ***Unless a statute unequivocally states that it changes the common law, or is so repugnant to the common law that the two cannot coexist, the statute will not be held to have changed the common law***.

Thornber v. City of Fort Walton Beach, 568 So. 2d 914, 918 (Fla. 1990) (emphasis added, citations omitted); State v. Ashley, 701 So. 2d 338, 341 (Fla. 1997).

Therefore in Florida "immunity from prosecution must derive from a specific statutory or constitutional provision." Stancel v. Schultz, 226 So. 2d 456, 459 (Fla.

2d DCA 1969); see also State v. Schroeder, 112 So. 2d 257, 261 (Fla. 1959) ("Immunity from prosecution is a creature of statute".)

More recently the Third District Court addressed the issue in State v. Polnac, 665 So. 2d 1095, 1096-97 (Fla. 3d DCA 1996):

> In Florida, "[i]mmunity from prosecution is a creature of statute." City of Hollywood v. Washington, 384 So.2d 1315, 1319 (Fla. 4th DCA 1980); see also, Tsavaris v. Scruggs, 360 So.2d 745 (Fla.1977); State v. Schroeder, 112 So.2d 257 (Fla.1959); Fountaine v. State, 460 So.2d 553 (Fla. 2d DCA 1984), review denied, 464 So.2d 554 (Fla.1985). The Florida statute dealing with immunity from criminal prosecution is Florida Statutes, Section 914.04. See § 914.04, Fla. Stat. (1995). ***The courts have consistently adhered to the principle that immunity from prosecution under Section 914.04 may only be granted by those persons or entities named in the statute and under the precise parameters delineated in the statute.*** E.g., Randall v. Guenther, 650 So.2d 1070 (Fla. 5th DCA 1995). Accordingly, in those instances, such as the instant case, where claims of immunity do not come under the confines of Section 914.04, the courts have repeatedly struck down a litigant's claim of immunity. See Tsavaris; Randall; Fountaine; State v. Powell, 343 So.2d 892 (Fla. 1st DCA 1977). [Emphasis added].

Section 914.04 Florida Statutes (2004) gives authority to grant immunity only "upon investigation, proceeding, or trial for a violation of any of the ***criminal statutes*** of this state" (emphasis added). Unless the instant case arises out of application of a "criminal statute", no authority for provision of a grant of immunity

is available either at common law or from the statute. This Court recently held that proceeding pursuant to §§ 394.910 et seq. Florida Statutes are not "criminal". Westerheide v. State, 831 So. 2d 93, 98-101 (Fla. 2002). Of course this Court is welcome to revisit that determination.

CONCLUSION

WHEREFORE the Petitioners request this Honorable Court to reverse the decision of the Second District Court of Appeal, and require that court to either issue a writs of certiorari to quash the orders of the circuit court allowing deposition of the Defendants in connection with this cause, or to issue writs of prohibition disallowing the deposition of the Defendants in connection with this cause, or grant such other and further relief as the Court may deem reasonable, just and proper.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been furnished by U.S. Mail, postage prepaid, to the Attorney General of Florida, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607, on this 12th day of April, 2005.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this document satisfies the requirements of Fla. R. App. P. 9.100(g).

_____

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