IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO)
FLORIDA TRAFFIC RULES)
OF COURT)

CASE NO. SC12-38

RESPONSE OF THE
CONFERENCE OF COUNTY COURT JUDGES OF FLORIDA

Judge Debra Roberts, as Chair and on behalf of the Traffic Court Rules Committee of the Conference of County Court Judges of Florida (hereinafter "Conference Committee"), files this response opposing the proposed amendment to Florida Traffic Court Rule 6.340 which would specifically provide for the first time in Florida jurisprudence that in the context of a *civil traffic infraction*, a defendant has the *constitutional* right against self-incrimination.

The proposed amendment adds the following to the Florida Traffic Court Rules: "***(d) Testimony of Accused.*** *No accused person shall be compelled to give testimony against himself or herself.*" Although the Traffic Court Rules has a specific section pertaining to *criminal traffic offenses* (Part III), the Traffic Court Rules Committee of The Florida Bar (hereinafter "Bar Committee") did not propose that the amendment be placed in that section, but rather in the section applying to "traffic infractions" (Part IV).

The Bar Committee, in its Cycle Report, urges that the "root concern" of the amendment is to "focus[] on a pro se defendant's conflict between filing affidavits or admissions and self-incrimination. To ensure pro se parties clearly understood their Amendment 5, U.S. Constitution, and Article I, Section 9, Florida Constitution, rights, the Committee elected to add subdivision (e) which states the right against self-incrimination clearly." Respectfully, however, the Bar Committee's Report is misleading in that it suggests that the Supreme Court, in adopting the proposed rule, would merely be codifying an existing constitutional privilege. However, there is no blanket constitutional privilege against self-incrimination in civil traffic court proceedings. Therefore, the Supreme Court is being asked to create a new rule-based privilege. This is a more momentous decision than the Bar Committee's Report would suggest.

Florida law has not extended a broad right against self-incrimination to a *civil traffic infraction*, which under Florida law does not implicate the possibility

of incarceration, a criminal record, or substantial loss of professional career. Indeed, the legal authorities that have addressed this issue in Florida have specifically found that no such right attaches in the context of civil infractions. *See Barwell v. City of Boca Raton*, 10 Fla. L. Weekly Supp. 591 (15th Cir. Ct. 2003) (appellate capacity); *Kaleel v. State*, 4 Fla. Supp. 2d 141 (6th Cir. Ct. 1981) (appellate capacity); Parker, *Traffic Infraction: Defendant's Right Against Self-Incrimination?*, FLA. B.J., Feb. 1979, at 94-98. *See also State v. Coupal*, 626 So.2d 1013, 1015 (Fla. 2d DCA 1993) (sanctions imposed for civil traffic infractions are "not essentially punitive in nature"). Legal authorities outside of Florida likewise support the *Barwell* rationale. *See People v. Amitrano*, 59 Misc.2d 471, 474-75, 299 N.Y.S.2d 275, 279 (N.Y. Dist. Ct. 1969) (right against self-incrimination does not extend to civil traffic infractions); *Diamondstone v. Macaluso*, 148 F.3d 113, 122 (2d Cir. 1998); *People v. Ferency*, 133 Mich. App. 526, 533-34, 351 N.W.2d 225, 227-28 (1984). Moreover, actual practice in traffic court has demonstrated no apparent "conflict between filing affidavits or admissions and self-incrimination," the rationale urged by the Bar Committee in its Cycle Report.

As noted by the appellate courts in both *Coupal* and *Barwell*, the available penalties for civil traffic infractions are not penal in nature, thus not triggering the self-incrimination protection. In *Barwell*, 10 Fla. L. Weekly Supp. at 592, the court reasoned that

> [t]he imposition of civil penalties for noncriminal traffic infractions does not necessitate the application of the privilege against self-incrimination, because the Florida Legislature intended to "decriminalize" the infractions, and the penalty is not excessively punitive so as to negate that intention. [citations omitted] Therefore, due to the fact that none of the other possible penalties the [driver] could have received are penal in nature, the right against self-incrimination does not attach to the proceeding in question.

In the great majority of cases, judges and traffic hearing officers do not question a defendant in a civil traffic case. Under Rule 6.150(a), however, a judge or traffic hearing officer may question a civil traffic defendant under "[t]he procedure prescribed by law in civil [. . .] cases." In those rare cases in which a judge or traffic hearing officer determines that questioning a civil traffic defendant is necessary, the Conference Committee believes the judge or traffic hearing officer should be able to exercise discretion to allow the questioning.

The Conference Committee also believes that this rule may unnecessarily raise a dispute of whether the Supreme Court can create a testimonial privilege

through its rule-making authority. The section of the Evidence Code which abolished common law privileges states that testimonial privileges can only come from a statute or constitutional provision:

> Except as otherwise provided by this chapter, any other statute, or the Constitution of the United States or of the State of Florida, no person in a legal proceeding has a privilege to:
>
> > (1) Refuse to be a witness.
> > (2) Refuse to disclose any matter.
> > (3) Refuse to produce any object or writing.
> > (4) Prevent another from being a witness, from disclosing any matter, or from producing any object or writing.

§ 90.501, Fla. Stat. (2011). Although the Law Revision Council Note for this statute suggests that a privilege may be created through the Supreme Court's rule-making function, *see Guerrier v. State*, 811 So.2d 852, 854 (Fla. 5th DCA), *rev. denied*, 831 So. 2d 672 (Fla. 2002), some would clearly argue that conclusion appears difficult to reconcile with the plain language of the statute. Arguably, if this Court wants to create a testimonial privilege, it may well have to work with the Legislature to create an amendment to the evidence code or some other statute.

As this Court has recently reminded us, "Article V, section 2(a), of the Florida Constitution grants this Court the exclusive authority to adopt rules of judicial practice and procedure for actions filed in this State, while the Legislature is charged with the responsibility of enacting substantive law [. . .] The distinction between substantive laws enacted by the Legislature and procedural rules governed by the Court is not always clear." *Southeast Floating Docks, Inc. v. Auto-Owners Ins. Co.*, No. SC11-285 (Fla. Feb. 2, 2012), slip op. at 6. Procedural rules are promulgated to enable a person to "enforce substantive rights." *Massey v. David*, 979 So.2d 931, 936-37 (Fla. 2008). The Bar Committee acknowledges that the existence of a right not to testify in a civil traffic matter is not "clear." As such, this amendment may well unnecessarily increase litigation before the trial courts on whether the rule violates the substantive vs. procedural demarcation.

Finally, if the State of Florida is going to expand the right against self-incrimination to all civil traffic infractions, the Conference Committee respectfully submits that it should be done pursuant to the process of this issue percolating through the appellate or legislative process by which the issue can be given due deliberation under specific sets of facts.

Respectfully submitted February ___, 2012,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by United States mail to Jill Marie Hampton, Esq., 733 W. Colonial Drive, Orlando, FL 32804-7343 this ____ day of __________, 2012.

CERTIFICATE OF COMPLIANCE

I certify that this report was prepared in accordance with the font requirements of Fla. R. App. P. 9.210(a)(2).

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