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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOR THE SECOND DISTRICT

APPEAL NUMBER: 2D-01-2264

DIVISION OF ADMINISTRATIVE HEARINGS CASE NUMBER: 01-1017RU

JESSE TOCA,
1900 LAND O' LAKES BOULEVARD, #113
LUTZ, FLORIDA 33549-2920
E-MAIL: jaytee11@hotmail.com

APPELLANT/PETITIONER,

V.

HILLSBOROUGH TRANSIT AUTHORITY (HARTLINE),
MR. CLARK JORDAN-HOLMES, ATTORNEY AT LAW
C/O STEWART, JOYNER & JORDAN-HOLMES
POST OFFICE BOX 172297, TAMPA, FLORIDA 33672-0297
E-MAIL: cjholmes@sjjhlaw.com

**PETITIONER'S RESPONSE TO COURT'S ORDER TO SUPPLEMENT
PETITION FOR REVIEW OF NON-FINAL ORDER OF THE
DIVISION OF ADMINISTRATIVE HEARINGS AND PETITION
FOR WRIT OF CERTIORARI AND/OR FOR WRIT OF MANDAMUS AND/OR
FOR WRIT OF PROHIBITION AND/OR FOR OTHER
EXTRAORDINARY WRIT UNDER THIS COURT'S ALL WRITS POWER**

The Petitioner, **JESSE TOCA**, pursuant to Article I, Sections 1, 2, 3, 4, 5, 9, 13, 16, 21, and 23 of the Florida Constitution; Article V, Sections 2(a) and 3(b)(3) of the Florida Constitution; Section 120.68(1), Florida Statutes (1999) (West Supp. 2000); the First, Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution; Articles 14 and 18 of the International Covenant on Civil and Political Rights, a Treaty entered into by the government of the United States in 1992; and

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Fla.R.App.P. 9.100, hereby respectfully responds to this Court's order to supplement his petition to this Court to review the conduct of the Division of Administrative Hearings in denying the Petitioner an *ex parte* hearing *en camera* on the Petitioner's Motion to Disqualify Hartline's Attorneys and to Suppress All Information and Evidence Derived from Violation of the Attorney-Client Privilege with Request for *Ex Parte* Hearing *En Camera* Under Seal. See, II. B. 1., infra. The Petitioner further petitions this Court to issue the writ of certiorari and/or the writ of mandamus and/or the writ of prohibition and/or for the issuance of other extraordinary writ to the Division of Administrative Hearings under this Court's All Writs power. In support, the Petitioner shows:

I. THE BASIS FOR THIS COURT'S JURISDICTION

This Court has jurisdiction to review nonfinal orders entered by the Division of Administrative Hearings, a state administrative agency, pursuant to the provisions of Section 120.68(1), Florida Statutes (1999) (West Supp. 2000). See also, Fla.R.App.P. 9.100(b)-(c) and 9.190(b)(2).

The Petitioner is being irreparably harmed by the Division of Administrative Hearings' refusal to afford the Petitioner an *ex parte* hearing *en camera* on the Petitioner's Motion to Disqualify Hartline's Attorneys and to Suppress All Information

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and Evidence Derived from Violation of the Attorney-Client Privilege, which was filed with the Division of Administrative Hearings on April 18, 2001.

The Petitioner further invokes this Court's jurisdiction to issue the writ of certiorari under the authority of Rogers v. State, 742 So. 2d 827 (Fla. 2nd. DCA 1999) as well as the authority to issue writs of mandamus compelling a lower tribunal to hold an evidentiary hearing on a privilege/immunity claim under the Florida Supreme Court's 1973 decision in State ex. rel. Hough v. Popper, 287 So. 2d 282 (Fla. 1973).

Finally, the Petitioner invokes this Court's jurisdiction to issue the writ of prohibition to restrain the Division of Administrative Hearings from acting in excess of its jurisdiction by denying the Petitioner an *ex parte* hearing *en camera* on the Petitioner's Motion to Disqualify and to Suppress aforesaid. See, Article V, Sections 2(a) and 3(b)(3), Florida Constitution.

II. THE FACTS UPON WHICH THE PETITIONER RELIES FOR RELIEF

A. THE PERTINENT FACTS

The facts pertinent to this petition are:

1. On April 18, 2001, the Petitioner, pursuant to the provisions of Section 90.502(2), Florida Statutes (1999) (West Supp. 2000); Rogers v. State, *supra*; and, the First District Court of Appeal's decision in Corry v. Meggs, 498 So. 2d 508

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(Fla. 1st. DCA 1986), moved the presiding administrative law judge assigned by the Division of Administrative Hearings to Disqualify Hartline's Attorneys and to Suppress All Information and Evidence Derived from Violation of the Attorney-Client Privilege and for an *Ex Parte* Hearing *En Camera* Under Seal. In support, the Petitioner attaches a true copy of said motion as Exhibit "A" in the Appendix to this Petition.

2. The Petitioner is a party to a privileged attorney-client relationship with the law firm of Stewart, Joyner & Jordan-Holmes, inasmuch as the Petitioner has a common interest with another person who is a client of said firm ("common interest privileged union"). See, Visual Scene, Inc. v. Pelkingotn Brothers, plc., 508 So. 2d 437 (Fla. 3rd. DCA 1987); In re: LTV Securities Litigation, 89 F.R.D. 595 (N.D. Tex. 1981); Transmirra Products Corp. v. Monsanto Chemical Co., 26 F.R.D. 572 (S.D.N.Y. 1960).

3. Mr. Clark Jordan-Holmes and Ms. Karen McDonald, counsel of record for Hartline, are both members of the law firm of Stewart, Joyner & Jordan-Holmes.

4. During the course of the Petitioner's participation in common with another client of said law firm, the Petitioner has communicated and/or caused to be communicated confidential and privileged matters with such client as well as with said law

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firm. No other non-client parties or non-member of the common interest privileged union were, to the best of the Petitioner's knowledge, present during the course of any such communications.

See, Visual Scene, Inc. v. Pelkington Brothers, plc., supra;

Corry v. Meggs, supra.

5. On information and belief, Mr. Jordan-Holmes and Ms. McDonald, have disclosed to persons who are non-members of such common interest privileged union, information that was communicated by and/or on behalf of the Petitioner to a member of such common interest privileged union (as well as to members of the law firm aforesaid) that was intended to be completely in confidence.

6. On information and belief, Mr. Jordan-Holmes and Ms. McDonald, have used directly and/or indirectly and/or derivatively, information that was communicated in confidence by and/or on behalf of the Petitioner to a member of such common interest privileged union (as well as to members of the aforesaid law firm), to suit their own selfish purposes.

7. The Petitioner is seeking to stop Mr. Jordan-Holmes and Ms. McDonald from making any use(s) of such confidential and privileged communications without the Petitioner's prior informed consent. See, Rogers v. State, supra; Corry v. Meggs, supra; Visual Scene, Inc. v. Pelkington Brothers, plc., supra.

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8. The Petitioner is seeking to suppress any and all evidence derived from any and all uses of any such confidential and privileged communications without the Petitioner's prior informed consent. See, State v. Caballero, 510 So. 2d 922, 923 (Fla. 4th. DCA 1987). Cf. State v. Rutherford, 707 So. 2d 1129 (Fla. 4th. DCA 1997) (suppressing medical records obtained by state attorney in violation of defendant's right of privacy).

B. RELEVANT PROCEEDINGS BEFORE THE DIVISION OF ADMINISTRATIVE HEARINGS

1. The Division of Administrative Hearings has refused to afford the Petitioner an *en camera* hearing on the Petitioner's Motion to Disqualify Hartline's Attorney and to Suppress All Information and Evidence Derived from Violation of the Attorney-Client Privilege (Appendix, Exhibit A), because the Division of Administrative Hearings has dodged such due process requirements by: (a) entering an order recusing the original Administrative Law Judge on May 3, 2001 (Appendix, Exhibit C); and, (b) entering a final order of dismissal without addressing the Petitioner's aforesaid motion on May 29, 2001 (Appendix, Exhibit D). Such actions, on the part of the Division of Administrative hearings, constitute a departure from the essential requirements of the law that has been injurious to the Petitioner's substantial rights to protect his attorney-client Privilege under Section 90.502(2), Florida Statutes (1999) (West

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Supp. 2000). See also, Calzon v. Capital Bank, *infra*, concerning the requirements for *ex parte* review *en camera* of attorney-client privilege claims.

III. NATURE OF THE RELIEF REQUESTED

The Petitioner requests that this reviewing court enter an order compelling the Division of Administrative Hearings to hold an *ex parte* hearing *en camera* under seal on the Petitioner's Motion to Disqualify Hartline's Attorneys and to Suppress All Information and Evidence Derived from Violation of the Attorney-Client Privilege.

IV. ARGUMENT WITH CITATIONS TO AUTHORITIES

The Petitioner is prepared to disclose facts showing the existence of the confidential and privileged relationship aforesaid at an *ex parte* hearing *en camera* with all documents, including transcripts of such hearing or proceeding remaining under seal, in order to fully preserve the Petitioner's common interest attorney-client privilege.

In Calzon v. Capital Bank, 689 So. 2d 279, 280 (Fla. 3rd. DCA 1995), the Third District Court of Appeal granted Ms. Calzon's Petition for Certiorari and remanded the case to the Circuit Court for Miami-Dade County with instructions for an *in camera* investigation into Ms. Calzon's and other petitioners' claim of work-product and attorney-client privilege. Such a procedure

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enables a trial court to determine whether the attorney-client privilege exists while affording the claimant the opportunity to preserve privileged information that would be lost by a public disclosure. *Id.*

Using the procedure set forth in Calzon, supra, the Petitioner would be able to show, on the basis of a fully-developed factual record, that there is a need for a Kastigar-type adversarial evidentiary hearing to compel Hartline to show that all information and evidence it has used or intends to use in any manner whatsoever, comes from a completely independent source in all respects. See, Kastigar v. United States, 406 U. S. 441 (1972). See also, State ex. rel. Hough v. Popper, 287 So. 282 (Fla. 1973). Such a procedure would be appropriate under the circumstances in this case, because:

1. The Petitioner's constitutional and statutory rights to due process of law, including his rights to have privileged communications with his attorneys would be protected.

2. Hartline's rights to due process of law would be protected by affording Hartline the opportunity to show that all of its evidence come from a completely independent source that has not been tainted by any violations of the Petitioner's rights under the law.

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V. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof was furnished by

U S Mail on June 13, 2001, to:

Mr. Clark-Jordan Holmes, Attorney at Law
Stewart, Joyner & Jordan-Holmes
Post Office Box 172297
Tampa, Florida 33672-0297
By e-mail to: cjholmes@sjjhlaw.com
By e-mail to: ogray@sjjhlaw.com

I HEREBY FURTHER CERTIFY that a true copy hereof was
furnished on June 13, 2001, to the Division of Administrative
Hearings by fax to: 850.921.6847.

VI. CERTIFICATE OF TYPE AND FONT USED

This document was prepared using Courier New 12 Point.

/s/Jesse Toca

Jesse Toca

Petitioner

1900 Land O' Lakes Boulevard, #113

Lutz, Florida 33549-2920

E-Mail: jaytee11@hotmail.com

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APPENDIX TO SUPPLEMENT TO PETITION FOR REVIEW

1. **EXHIBIT "A"** is a true copy of the Petitioner's Motion to Disqualify Hartline's Attorneys and to Suppress All Information and Evidence Derived from Violation of the Attorney-Client Privilege with Request for *Ex Parte* Hearing *En Camera* Under Seal, which was filed on April 18, 2001, before the Division of Administrative Hearings, in the Rule Challenge Proceeding beneath the name Jesse Toca v. Hillsborough Transit Authority (Hartline), bearing DOAH Case Number 01-1017RU.

2. **EXHIBIT "B"** is a true copy of the Certificate of Indigency entered by the Division of Administrative Hearings on March 22, 2001, in the Rule Challenge Proceeding beneath the name Jesse Toca v. Hillsborough Transit Authority (Hartline), bearing DOAH Case Number 01-1017RU.

3. **EXHIBIT "C"** is a true copy of the Order of Recusal entered by the Division of Administrative Hearings on May 3, 2001, in the Rule Challenge Proceeding beneath the name Jesse Toca v. Hillsborough Transit Authority (Hartline), bearing DOAH Case Number 01-1017RU.

4. **EXHIBIT "D"** is a true copy of the Final Order of Dismissal entered by the Division of Administrative Hearings on May 29, 2001, in the Rule Challenge Proceeding beneath the name Jesse Toca v. Hillsborough Transit Authority (Hartline), bearing DOAH Case Number 01-1017RU.

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