OA 1-30-87

IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,950

THE STATE OF FLORIDA,

Petitioner,

vs.

By ______ Deputy Clerk

WELLINGTON PRECIOUS METALS, INC.,
DANIEL WEISS, and The Honorable
GERALD KOGAN, Judge of the
Circuit Court of the Eleventh
Judicial Circuit in and for
Dade County, Florida,

Respondents.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

INITIAL BRIEF OF PETITIONER ON THE MERITS

JIM SMITH
Attorney General
Tallahassee, Florida

CALVIN L. FOX, ESQUIRE
Assistant Attorney General
Department of Legal Affairs
Ruth Bryan Owen Rohde Buildign
401 N.W. 2nd Avenue (Suite 820)
Miami, Florida 33128
(305) 377-5441

TABLE OF CONTENTS

	PAGE
STATEMENT OF THE CASE................................	1-3
SUMMARY OF ARGUMENT..................................	4
ARGUMENT...	5-9
CONCLUSION...	10
CERTIFICATE OF SERVICE...............................	11

TABLE OF CITATIONS

PAGE

Bellis v. United States,
417 U.S. 85, 94 S.Ct. 2179, 40 L.Ed2d
678 (1974).. 5

Delisi v. Smith,
423 So.2d 934 (Fla. 2d DCA 1982) 7

In Re Grand Matter,
768 F.2d 776 (N.J. Super. Ct. 1986)............ 7

In Re Two Grand Jury Sobpoenae Duces Tecum,
769 F.2d 52 (2nd Cir. 1985).................... 3,6
633 F. Supp. 419, at 421-422; N.3 (S.D. Fla. 1986) 7

Marks v. Green,
122 So.2d 491 (Fla. 1st DCA 1960).............. 6,7

Moe v. Kuriansky,
502 N.YS.2d 221 (Sup. Ct. 1986)................ 7

Siegel v. New Jersey Div. Of Taxation,
So6A.2d 776 (N.J Super. Ct. 1986).............. 7

State v. Barriero,
432 So.2d 138, at 140 (Fla. 3d DCA 1983)....... 5

State v. Dawson,
290 So.2d 79 (Fla. 1st DCA 1974)............... 7

State v. Wellington Precious Metals,
487 So.2d 326 (Fla. 3d DCA 1986)............... 1

United States v. Doe,
465 U.S. 605, 104 S.ct. 1237, 79
L.Ed.2d (1984)................................ 1,2,4,5,6

PAGE

Wilson v. United States,
221 U.S. 361, 31 S.Ct. 538,
55 L.Ed. 771 (1911) 5

I

STATEMENT OF THE CASE

On or about April 17, 1985, the State Attorney for the Eleventh Judicial Circuit issued an investigative subpoena duces tecum directed to the custodian of records for Wellington Precious Metals, Inc. (hereinafter "Wellington"). See, **State v. Wellington Precious Metals**, 487 So.2d 326 (Fla. 3d DCA 1986) (appended hereto). The State Attorney's subpoena sought the corporate records of Wellington and any of its corporated entities relating to the acquisition of precious metals including payroll records, financial accounts and cancelled checks. See, id. On May 3, 1985, the Respondent, Daniel Weiss, and Wellington filed a motion to quash the State Attorney's subpoena, alleging that Weiss was the "sole shareholder of Wellington and that the act of producing the corporate documents would incriminate him." See, id, at 327. The trial court granted the Respondent's motion to quash without any evidentiary hearing as to ownership or actual incrimination, reasoning that Weiss, as the custodian of records could assert a fifth amendment privilege where under **United States v. Doe**, 465 U.S. 605, 104 S.Ct. 1237, 79 L.Ed.2d (1984), where he merely alleges that production of the records "might" incriminate him. See, id.

On or about June 13, 1985, the undersigned filed a petition for certiorari from the trial court's written order in the Third District Court of Appeal, contending that **United States vs. Doe**, applies only to unincorporated "sole proprietorships" and that under Florida's corporate laws, Weiss could not both seek the advantages of a corporate structure and then hide behind the assertion of personal rights, at his convenience. See, Id. The District Court, per Ferguson, J., citing a federal case from the Third Circuit, reluctantly agreed with the trial court that **United States v. Doe,** prohibited enforcement of the Attorney's subpoena, but remanded for an evidentiary hearing as to whether Weiss would actually be incriminated by the act of producing the documents. Id., at 327-328. Judge Pearson reluctantly concurred with the court opinion explaining that the requirement of a preliminary evidentiary hearing as to incrimination was decisive:

> "Although I read the opinions of Judges Ferguson and Jorgenson as advocating functionally equivalent solutions to the same problem, I cast my lot with Judge Ferguson solely because Judge Jorgenson allows the trial court to appoint the standing for the custodian without a threshold determination that the assertion of the privilege against self-incrimination was warranted."
>
> Id.

Judge Jorgenson dissented from the court's opinion, contending that under the analysis in, **In Re Two Grand Jury Subpoenae Duces Tecum**, 769 F.2d 52 (2nd Cir. 1985), Doe does not apply herein and that the Respondents should be ordered to comply with the State Attorney's subpoena:

> "I am not persuaded by the rationale of In re Grand Jury Matter (Appeal of James Gilbert Brown), 768 F.2d 525 (3d Cir. 1985), that a corporated custodian of records may resist a proper subpoena duces tecum for production of corporate records. I think the rationale of In re Two Grand Jury Subpoenae Duces Tecum, 769 F.2d 52 (2nd Cir. 1985), represents the better view. See Also State v. Barreiro, 432 So.2d 138 (Fla. 3d DCA). rev. denied, 441 So.2d 631 (Fla. 1983). I would, accordingly, quash the order with directions to the trial court to require the production of the documents in question."

Id.

On May 19, 1986, the District Court denied the State's petition for rehearing. On October 8, 1986, this Court accepted this cause for review. Oral argument is presently set for Friday January 30, 1987.

III

SUMMARY OF ARGUMENT

The opinion in **United States v. Doe**, 465 U.S. 605, 104 S.Ct. 1237, 79 L.Ed.2d 552 (1984) is confined on its face to, "an unincorporated sole proprietorship" and therefore has been misapplied herein.

The limited lability and other advantages of Florida's corporate laws were never intended to permit the assertion of a personal privilege at the convenience of the corporation and its shareholder(s). The present opinion therefore unlawfully restricts the State Attorneys throughout Florida, prohibiting effective investigation and prosecution of all crimes; especially flimflam or fraudulent crimes, which involve a sole shareholder or closely held corporation.

IV

ARGUMENT

In **United States v. Doe**, 465 U.S. 605, 104 S.Ct. 1237, at 1239, 79 L.Ed.2d 552 (1984), the Court stated the exact application and issue upon which it ruled thus:

> "This case presents the issue whether, and to what extent, the Fifth Amendment privilege against compelled self-incrimination applies to the business records of a sole proprietorship."

In Doe the "sole proprietorship" was an individual doing business as, "an unincorporated sole proprietorship." [Emphasis added], Id. at n2. In the present cause the record only shows a corporate entity. There was no proof of a "sole proprietorship," within the meaning of Doe. This cause is therefore not controlled by Doe, but rather by the rule that there is no Fifth Amendment privilege barring the production of corporate records. See **State v. Barriero**, 432 So.2d 138, at 140 (Fla. 3d DCA 1983); see also, **Bellis v. United States**, 417 U.S. 85, 94 S.Ct. 2179, 40 L.Ed 678 (1974); **Wilson v. United States**, 221 U.S. 361, 31 S.Ct. 538, 55 L.Ed. 771 (1911). Any other position permits a defendant to make a mockery of the protection inherent in a corporate system while abandoning that system

when it appears convenient to assert personal rights. The lawful party in interest here is the corporation, which may not hide behind a shareholders rights. See **Marks v. Green**, 122 So.2d 491 (Fla. 1st DCA 1960). The trial court's order quashing the state's subpoena should therefore be reversed.

In, In Re Two Grand Jury Subpoenae Duces Tecum, 769 F.2d 52 (2d Cir. 1985) the court succinctly explained that the constitutional limitation of **United States v. Doe**, does not apply to limit subpoenas directed to corporations:

> "In the case before us the corporation is a one-man operation which appellant's attorney describes as "much akin to a sole proprietorship." As appellant sees it, to compel the corporation to produce its records is to compel appellant to act to incriminate himself because the corporation is so closely identified with appellant. Hence, appellant argues, Doe covers the present case and gives the custodian his fifth amendment privilege."
>
> "We find this argument unpersuasive. The very language of Doe limits its holding, for the first sentence of Justice Powell's opinion for the Court unmistakeably states that the issue to be decided concerns sole proprietorships rather than corporations or other collective enterprise forms: "This case presents the issue whether, and to what extent, the Fifth Amendment privilege against compelled self-incrimination applies to the business records of a sole proprietorship." Id. at 1239 (emphasis added). Nowhere in Doe is it said, or even suggested, that the privilege applies when it is corporate records that are subpoenaed.
>
> 769 F.2d at 58.

Accord, **Moe v. Kuriansky**, 502 N.YS.2d 221 (Sup. Ct. 1986); see also **Siegel v. New Jersey Div. of Taxation**, So6-A.2d 776 (N.J. Super. Ct. 1986); cf., In Re Grand Jury Subpoena, 633 F.Supp. 419, at 421-422; N.3 (S.D. Fla. 1986); contra, In Re Grand Jury Matter, 768 F.2d 525 (3d Cir. 1985) (en banc). Under Two Grand Jury Subpoenae, the present decision construing federal constitutional error should also be reversed.

The foregoing analysis is also consistent with settled precedent construing Florida's corporate laws. See, **Delisi v. Smith,** 423 So.2d 934 (Fla. 2d DCA 1982); **State v. Dawson**, 290 So.2d 79 (Fla. 1st DCA 1974); **Marks v. Green,** 122 So.2d 491 (Fla. 1st DCA 1960). In Delisi, the court held inter alia that:

> "[T]he custodian of these records cannot object to their production on grounds of self-incrimination even when the corporation or partnership is small or closely held business and the records custodian is an officer, director or partner who might be implicated in the criminal activity by virtue of the content of the records." [Emphasis added].
>
> 423 So.2d at 940.

Similarly, in Dawson the court described the "universal" principle, which the present opinion overrules:

> "Appellant has seen fit to organize a domestic corporation and own all of its outstanding capital stock. He has elected to do business through this corporate entity. The benefits of conducting one's business in such a manner are obvious and too numerous to mention in this opinion. Having so elected, Appellant is in no position to claim all benefits accuring to him by virtue of doing business as a corporation, and at the same time seek to disregard the existence of the corporate entity in order to avoid payment of tax otherwise chargeable to him... the choice of alternatives is the appellant's, but he cannot eat his cake and have it too."
>
> 122 So.2d at 493-494.

In the present case, as in Marks, the Respondent, Weiss, seeks to enjoy the benefits of forming a corporation under the laws of Florida, while at the same time hiding behind his personal privileges at his convenience. This makes a mockery of the State Attorney's subpoena powers and Florida's corporate laws as illustrated by Marks, Dawson and Delisi.

Finally this Court should also reverse where the present opinion severely restricts the subpoena power of State Attorneys throughout Florida to investigate and prosecute crimes involving sole shareholder or closely held corporations. This type of corporation is also frequently involved in flim-flam or fraudulent transactions, where because of corporate laws, the operators are immune from suit. It is the ultimate injustice to also permit the owners of these corporations

to escape criminal liability based on a personal privilege, which hitherto has been specifically excluded from use under Florida's corporate law. As plainly illustrated in Two Grand Jury Subpoenae, under federal constitutional law there is no lawful basis for such a conclusion.

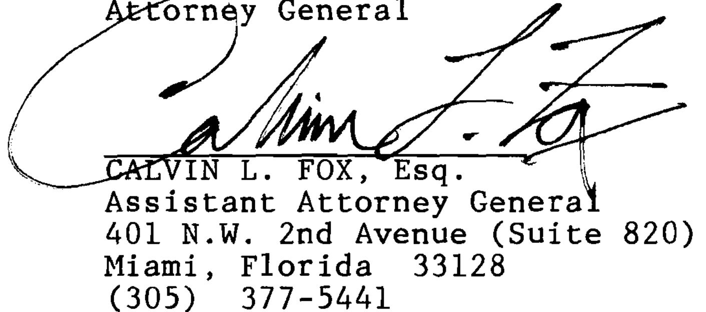
V

CONCLUSION

WHEREFORE, upon the foregoing, the Petitioner, THE STATE OF FLORIDA, prays that this Honorable Court will issue its order reversing the ruling of the Third District Court of Appeal.

RESPECTFULLY SUBMITTED, on this 30th day of November, 1986, at Miami, Dade County, Florida.

JIM SMITH
Attorney General

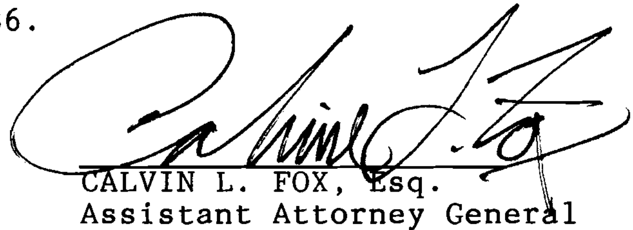


CALVIN L. FOX, Esq.
Assistant Attorney General
401 N.W. 2nd Avenue (Suite 820)
Miami, Florida 33128
(305) 377-5441

VI

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER ON JURISDICTION was served by mail upon THEODORE KLEIN, Esq., Suite 700, 777 Brickell Avenue, Miami, Florida, 33131 and The Honorable GERALD KOGAN, Judge, 1351 N.W. 12th Street, Miami, Florida 33125 on this 30 day of Nobember, 1986.



CALVIN L. FOX, Esq.
Assistant Attorney General

CLF/cda