

IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,950

FILED
By: [Signature] Deputy Clerk

THE STATE OF FLORIDA,

Petitioner,

vs.

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

BRIEF OF PETITIONER ON JURISDICTION

JIM SMITH
Attorney General
Tallahassee, Florida

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

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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 corporate 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 552 (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 v. 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 State 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 corporate 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 (2d 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 under review in its entirety and remand 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. The present petition follows.

II

QUESTION PRESENTED

WHETHER THIS COURT HAS JURISDICTION
AND SHOULD EXERCISE IT HEREIN.

III

SUMMARY OF ARGUMENT

This Court has jurisdiction in this cause, where the District Court opinion expressly affects the State Attorneys, a class of constitutional officers.

This Court has jurisdiction over this cause in that the District Court has directly construed the Florida and federal Constitutions as prohibiting the State Attorney from proceeding with her investigative subpoena in the present circumstance.

The present opinion is in direct conflict with an opinion of another district court which expressly prohibits the assertion of a personal privilege in the corporate context,

The present case is an important cause warranting the exercise of this Court's jurisdiction. The limited liability 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

THIS COURT HAS JURISDICTION AND
SHOULD EXERCISE IT HEREIN.

Under Rule 9.030 (a)(2)(A)(ii), (iii) and (iv) Florida Rules of Appellate Procedure, this Court has jurisdiction, 1.) where an opinion of a district court, expressly construes a provision of the federal or Florida Constitutions; 2.) where the opinion expressly affects a class of constitutional officers or 3.) where the opinion expressly and directly conflicts with a decision of another district court. In the present case, each of these reasons is present to enable this Court to exercise its jurisdiction.

In State v. Jenny, 424 So.2d 142 (Fla. 4th DCA 1983), the trial court had dismissed the State's prosecution because of use immunity allegedly conferred by the State Attorney's subpoena during the investigative proceedings against the defendant. The Fourth District Court of Appeal reversed the dismissal. Id., at 144-145. This Court thereupon accepted review of Jenny explaining that the cause expressly affected a class of constitutional officers:

"We have before us by petition for review State v. Jenny, 424 So.2d 142 (Fla. 4th DCA 1982), a decision which expressly affects the state attorneys, a class of constitutional officers. We have jurisdiction. Art.V, § 3(b)(3), Fla. Const."

Id., at 1352.

The present circumstance is substantially identical to that in Jenny and therefore this Court has the authority to accept jurisdiction herein.

Furthermore, under Rule 9.030(a)(2)(a)(ii) this Court has jurisdiction where an opinion of a district court, "expressly construe(s) a provision of the state or federal constitution." [Emphasis added]. If this provision of the rule has any meaning whatsoever, it must be applied to confer jurisdiction in the case at bar. The district court majority has expressly construed the Fifth Amendment and Article I, Section 9 of the Florida Constitution as limiting the State Attorney's subpoena power against sole shareholder or closely held corporations. This ruling is plainly in error. See, In Re Two Grand Jury Subpoenae Duces Tecum, 769 F.2d 52 (2d Cir. 1985). In Two Grand Jury Subpoenae, 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 unmistakably 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.

Thus, this Court not only has jurisdiction herein, but should accept jurisdiction to correct the egregious error herein in applying the Fifth Amendment and Article I, Section 9.

Finally, the present opinion is in direct conflict 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 a 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."

423 So.2d at 940.

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

"The universal rule is that the privilege against self-incrimination applies only to natural individuals and cannot be utilized by or on behalf of a corporation." [Footnote omitted].

290 So.2d at 81

The "universal" rule recited in Dawson was thus applied in Marks v. Green, supra, to prevent an individual from receiving both the benefits of being a corporation while at the same time asserting personal rights and privileges at the individual's convenience. In Marks, the defendant formed a corporation and was the sole owner of all of the corporation's outstanding capital stock. When it came time to pay taxes, however, the defendant sought to assert certain individual rights and immunities. In rejecting this position, the Marks Court explained that:

"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 accruing 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 a 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. This Court therefore has jurisdiction in this cause and should exercise its authority.

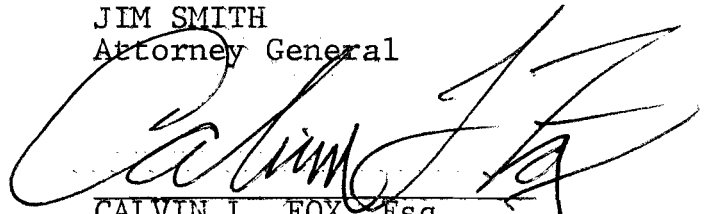
Finally, the present cause is also an important case warranting the exercise of this Court's jurisdiction. The present opinion severely restricts the subpoena power of State Attorneys throughout Florida to investigate and prosecute crimes involving sole shareholder or closely held corporations. This type of corporation is also frequently involved in flimflam 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, supra, there is no lawful basis for such a conclusion. This Court should therefore exercise its jurisdiction in this cause, which is of statewide importance.

CONCLUSION

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

RESPECTFULLY SUBMITTED, on this 15th day of July, 1986, at Miami, Dade County, Florida.

JIM SMITH
Attorney General

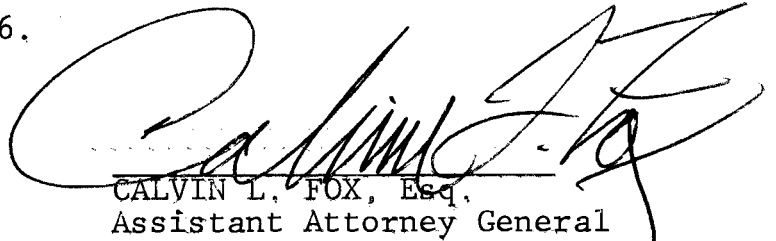


CALVIN L. FOX, Esq.
Assistant Attorney General
401 N.W. 2nd Avenue (Suite 820)
Miami, Florida 33128

(305) 377-5441

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 15th day of July, 1986.



CALVIN L. FOX, Esq.
Assistant Attorney General