IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,950

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 RESPONDENTS ON JURISDICTION

KEVIN EMAS, ESQUIRE
Attorneys for Respondents
Fine Jacobson Schwartz Nash
Block & England, P.A.
2401 Douglas Road
Miami, Florida 33134
(305) 446-2200

TABLE OF CONTENTS

TABLE OF CITATIONS AND AUTHORITIES

STATEMENT OF THE CASE

On or about April 17, 1985, the State Attorney for the Eleventh Judicial Circuit issued a subpoena duces tecum directed to "Custodian of Records" of Wellington Precious Metals, Inc. The Subpoena was served upon Respondent Daniel Weiss. In his Motion to Quash the Subpoena, Respondent Weiss averred that he is the sole shareholder and would be the custodian of records for those documents requested in the subpoena. Respondent also averred that the act of producing the documents would tend to incriminate him, because he would, by his act of producing the documents, admit the existence of the documents and his possession of them, and would authenticate the documents.

The trial court, based on these averments, held that Respondent Weiss, as corporate records custodian, could validly raise a fifth amendment privilege where the act of production might tend to incriminate him. The trial court stated that the State Attorney's Office could compel Respondent Weiss to produce the documents by conferring immunity solely as to the act of production. The State declined to do so, arguing that there was no immunity in this case. The trial court quashed the subpoena issued in this cause. Because this question appeared to be one of first impression in Florida, the trial court suggested that this issue be decided by an appellate court.

The District Court of Appeal of Florida, Third District granted certiorari and affirmed the trial court's order insofar as it held that a custodian of corporate records may assert a personal fifth amendment privilege, but remanded to the trial court for an evidentiary hearing to determine whether the compliance with the subpoena duces tecum will be incriminating. State v. Wellington Precious Metal, Inc., 487 So. 2d 326, 327 (Fla. 3d DCA 1986). Judge Pearson concurred specially to point out that the three judges on the panel, and the two federal circuits that have addressed the issue, all agree that the custodian is permitted to resist producing corporate records upon a showing that the act of doing so would be communicative and incriminating. Id. at 328. On May 19, 1986, the District Court denied the State's Petition for Rehearing. The Petitioner's Petition for Discretionary Review followed.

ARGUMENT

I. THE DECISION OF THE DISTRICT COURT OF APPEAL DOES NOT DIRECTLY CONFLICT WITH ANY DECISION FROM OTHER DISTRICTS.

Petitioner asserts that the decision below directly conflicts with Delisi v. Smith, 423 So. 2d 934 (Fla. 2d DCA 1982); State v. Dawson, 290 So. 2d 79 (Fla. 1st DCA 1974); and Marks v. Green, 122 So. 2d 491 (Fla. 1st DCA 1960).

A. The Court below expressly found the issue to be one of first impression.

> The court below addressed the following issue:
>
> Whether the owner of a one-man corporation can be compelled to produce records of a corporation without a grant of use immunity where the act of producing may be both testimonial and incriminating.

State v. Wellington Precious Metals, Inc., 487 So. 2d 326, 327 (Fla. 3d DCA 1986) (emphasis in original). In 1984, the Supreme Court of the United States in United States v. Doe, 465 U.S. 605 (1984), held that a sole proprietor may assert a fifth amendment privilege against self-incrimination and may refuse to produce business records if the act of producing those documents would be testimonial and incriminating.

Prior to the decision by the Third District, no state appellate court in Florida had addressed the issue of whether a corporate records custodian could invoke the "act of production" doctrine. See Wellington, 487 So. 2d at 327 ("[T]he parties agree [that the issue] has never been addressed directly by the courts of this state.").

Petitioner cites to cases which were decided before the Doe Court applied, for the first time, the "act of production" doctrine. These courts obviously did not address the "act of production" doctrine; instead, they decided the issue of whether contents of corporate documents were privileged. For example, in Delisi, 423 So. 2d at 940, the court stated that: "the custodian of these records cannot object to their production on grounds of self-incrimination even when . . . the records custodian . . . might be implicated

in the criminal activity by virtue of the content of the records." This holding -- that the contents of corporate documents are not privileged -- is consistent with the decision of the court below. The Third District, in the present case, agreed that "a custodian of records has no privilege to refuse production of corporate documents even though the contents tend to incriminate him." Wellington, 487 So. 2d at 326; see also United States v. Doe, 465 U.S. 605 (1984) (applying the "act of production" doctrine, while holding that the contents of the business documents were not privileged).

The District Court below explained that the rule of law which holds that the contents are not privileged was distinct from the narrow issue it decided. Once a District Court of Appeal determines that certain case law is not controlling, Supreme Court jurisdiction will not be found in the absence of "real and embarrassing conflict." Financial Federal Savings and Loan v. Burleigh House, Inc., 336 So. 2d 1145 (Fla. 1976); Baxter v. Royal Indemnity Co., 317 So. 2d 725, 726 (Fla. 1975).

B. No express and direct conflict exists among the districts.

Even if the district court decisions, cited by Petitioner addressed the same issue as the case sub judice, the decisions are not in conflict. The court below held that an owner of a one-man corporation may not be compelled,

pursuant to a subpoena duces tecum, to produce corporate records if the act of producing the records would be testimonial and incriminating. The court in Marks v. Green, 122 So. 2d 491 (Fla. 1st DCA 1960) held that a sole owner of a corporation, which had paid tax on intangible property, was required to pay an intangible property tax on his stock in the corporation. This decision is not in conflict with the decision below, nor does it even address the same subject or issue.

In Delisi v. Smith, 423 So. 2d 934 (Fla. 2d DCA 1982), the court quashed an order which required a party to produce records pertaining to various entities, but remanded the case to the trial court to determine whether the entities were organized, formal organizations. This holding does not conflict with the decision below in the case sub judice. If a conflict between the districts can be inferred, the conflict certainly would not be direct.

Petitioner alleges that dicta in State v. Dawson, 290 So. 2d 79 (Fla. 1st DCA 1984) that a privilege against self-incrimination cannot be utilized by or on behalf of a corporation, is inconsistent with the decision below. The district court in the present case also stated that "a corporation does not enjoy the privilege against self-incrimination." 487 So. 2d 327. Therefore, the courts agreed on that issue. The issue of corporate privilege was not decided by the Third District in the instant case. Therefore,

no conflict exists among the districts, and this ground may not be utilized to involve the jurisdiction of this Court.

C. No express and direct conflict between decisions will be found merely because one decision is inconsistent with the dicta in another.

In Ciongoli v. State, 337 So. 2d 780, 781 (Fla. 1976), the court held that the alleged conflicting language among the decisions was "mere obiter dicta, and that the writ of certiorari should be discharged."

The language in Dawson, supra, which Petitioner argues conflicts with the holding below, is dicta. The court in Dawson held that an attorney practicing as a professional service corporation could assert the fifth amendment privilege against self-incrimination when documents of the professional service corporation were subpoenaed. Petitioner points to language that the privilege against self-incrimination cannot be utilized by a corporation. This language is clearly dicta, and further, does not even conflict with the decision below.

II. THE DECISION OF THE DISTRICT COURT OF APPEAL DOES NOT AFFECT A CLASS OF CONSTITUTIONAL OR STATE OFFICERS.

Petitioner argues that the court should grant jurisdiction merely because a state attorney is involved.

In Spradley v. State, 298 So. 2d 697 (Fla. 1974), the court held that a state attorney's failure to comply with discovery requirements did not vest the Supreme Court with

jurisdiction on the ground that the case affected a class of constitutional or state officers. The court rejected a rule that would have granted jurisdiction over a case whenever the decision below concerned the propriety of a prosecuting attorney's actions. The court announced the standard for determining jurisdiction over a case affecting a class of state or constitutional officers:

> A decision which "affects a class of constitutional or state officers" must be one which does more than simply modify or construe or add to the case law which comprises much of the substantive and procedural law of the state. Such cases naturally affect all classes of constitutional or state officers, in that the members of these classes are bound by the law the same as any other citizen. To vest this court with certiorari jurisdiction, a court must directly and, in some way, exclusively affect the duties, powers, validity, formation, termination or regulation of a particular class of constitutional or state officers. This may be a decision in a case in which the class, or some of its members, is directly involved as a party. It may also be in a case in which no member of the class is a party if the decision generally affects the entire class in some way unrelated to the specific facts of that case.

Spradley, 293 So. 2d at 701.

In the instant case, a state attorney is not a party to the case; nor does the decision generally affect the class of state attorneys in some way unrelated to the specific facts of the case. Therefore, this Court does not have discretion to grant jurisdiction on the ground that the decision affects a class of constitutional or state officers.

III. THE DECISION OF THE DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY CONSTRUE A PROVISION OF THE FLORIDA OR FEDERAL CONSTITUTIONS.

The District Court of Appeal clearly applied constitutional provisions to the facts of the present case. The court in Rojas v. State, 288 So. 2d 234, 236 (Fla. 1973) explained: "Applying is not synonymous with construing; the former is NOT a basis for our jurisdiction." (Emphasis in original). In Ogle v. Pepin, 273 So. 2d 391 (Fla. 1973), the court, in determining whether to grant jurisdiction to review a district court decision, stated that an opinion does not construe a constitutional provision unless it undertakes to "eliminate existing doubts arising from the language or terms of the constitutional provision." Ogle, 273 So. 2d at 392, quoting Armstrong v. City of Tampa, 106 So. 2d 407, 409 (Fla. 1958).

The settled rule is that a custodian of corporate records may refuse to produce those records if the act of producing the documents will be testimonial and incriminating. See In re Grand Jury Matter (Brown), 768 F.2d 525 (3d Cir. 1985) (en banc); In re Katz, 623 F.2d 122 (2d Cir. 1980); In re Grand Jury 83-8 (MIA) Subpoena Duces Tecum, 611 F. Supp. 16 (S.D. Fla. 1985). Petitioner claims that In re Two Grand Jury Subpoenae, 769 F.2d 52 (2d Cir. 1985) supports the proposition that the "act of production" doctrine does not apply to limit the subpoenas directed to a corporation. Petitioner misreads the decision. In Two Grand Jury Subpoenae, the court affirmed the district court's direction that the corporation appoint an

agent who is not a target to produce the corporate records, because the custodian of corporate records was not required to produce the records himself.

IV. ASSUMING ARGUENDO THAT THE SUPREME COURT HAS THE DISCRETION TO REVIEW THE DECISION, THE COURT SHOULD NOT GRANT JURISDICTION.

The case sub judice is not the type of case in which the Supreme Court should grant reveiw. Petitioner and Respondent dispute whether the case should be governed by Second Circuit decision in In re Two Grand Jury Subpoenae, 769 F.2d 52 (2d Cir. 1985) or the Third Circuit decision in In Re Grand Jury Matter (Brown), 768 F.2d 525 (3d Cir. 1985) (en banc). These two circuits disagree only on two issues. First, the court in Two Grand Jury Subpoenae argued that a custodian is not generally incriminated by his act of production. 769 F.2d at 57. The Brown court never adopted this view. In the case sub judice, the District Court has remanded the cause to the trial court for an evidentiary hearing to determine whether compliance with the subpoena duces tecum will be incriminating.

The only other issue in dispute is the method courts may employ to ensure that corporate documents are not shielded. In Two Grand Jury Subpoenae, the court felt that when a records custodian asserts his fifth amendment privilege against self-incrimination to avoid producing corporate documents, a corporation should appoint one of its employees as an agent to produce the documents. 769 F.2d at 57. The Brown court, on the other hand, held that the only means by which the

government may compel a testimonial, incriminating act of production by a custodian is to grant him use immunity as to the act of production. 768 F.2d at 528.

The determination of whether an act of production is incriminating is appropriate for trial court determination; and the determination of what procedure to follow in compelling production is properly within the province of the trial court or the District Courts of Appeal, not the Supreme Court of Florida.

CONCLUSION

Based upon the foregoing, the Respondents, Wellington Precious Metals, Inc. and Daniel Weiss, request this Honorable Court to deny Petitioners' Petition for Discretionary Review.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 23rd day of July, 1986 to: The Honorable Gerald Kogan, 1351 N.W. 12th Street, Miami, Florida 33125 and Calvin Fox, Esquire, Assistant Attorney General, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida 33128.

FINE JACOBSON SCHWARTZ NASH
BLOCK & ENGLAND, P.A.
Attorneys for RESPONDENTS
2401 Douglas Road
Miami, Florida 33134
(305) 446-2200

By: Kevin Emas
KEVIN EMAS, ESQUIRE

4789D072186/4/LMM
51170.0002

SUMMARY OF THE ARGUMENT

Petitioner's assertion that there is direct conflict among the district courts on this issue, is without merit. The decision below addresses the applicability of the "act of production" doctrine to a custodian of corporate records, an issue addressed by no other district. Furthermore, the language of other opinions, alleged by Petitioner to create a conflict with the decision below, is merely dicta.

Petitioner also mistakenly asserts that the decision below expressly affects a class of constitutional or state officers. The court may not review a decision on this ground unless the officer is a party to the case or the decision affects the class of officers in a way unrelated to the specific facts of the case. Spradley v. State, 293 So.2d 697 (Fla. 1974).

Petitioner asserts, as a final ground for review, that the decision below expressly construes a provision of the Florida or federal constitutions. Such an assertion is unsupportable; the court below applied, but did not construe, a provision of the United States Constitution.

Assuming arguendo that the court has the discretion to review the decision below, the court should not grant jurisdiction, because the issue is properly within the province of the District Court of Appeal.