QA 1-30-87

IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,950

STATE OF FLORIDA,

Petitioner

v.

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

Respondents.

ON PETITION FOR DISCRETIONARY REVIEW

ANSWER BRIEF OF RESPONDENTS ON THE MERITS

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STATEMENT OF THE CASE

The following facts are different from, or in addition to, the statement of the case in Petitioner's brief:

On April 17, 1986, an investigative subpoena duces tecum, directed to the custodian of records of Wellington Precious Metals, Inc. ("Wellington") was served upon Daniel Weiss. Mr. Weiss filed a motion to quash the subpoena, averring that he is the sole shareholder of Wellington, and that he would be the person to produce the documents sought by the subpoena. He also averred that the act of production would incriminate him, by admitting the existence of the documents and his possession by him, and would authenticate the documents.

The state, at the hearing on the motion to quash, did not contest Daniel Weiss' averments. Rather, the state contended that he could not raise a fifth amendment privilege because the subpoena sought corporate records. (T. 4).[1]

The trial court, based upon the uncontested averments of Daniel Weiss, and based upon United States v. Doe, held that Weiss could raise his fifth amendment privilege where the act

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[1]The transcript of the proceedings in the trial court is attached as an appendix to the brief and shall be cited to as "(T.)."

of production might tend to incriminate him. The trial court suggested that the state could obtain the documents simply by conferring immunity upon Daniel Weiss for the act of production. The state declined to do so, arguing that no issue of immunity was involved in this cause. (T. 6-7).

The District Court of Appeal of Florida, Third District, affirmed the trial court's quashal insofar as it held that a custodian of corporate records may assert a fifth amendment privilege to the act of production; the court remanded the cause for an evidentiary hearing to determine the incriminating impact which production would have upon Daniel Weiss. State v. Wellington Precious Metals, Inc., 487 So.2d 326, 327 (Fla. 3d DCA 1986). The state's petition for review followed.

SUMMARY OF ARGUMENT

The narrow issue is whether a sole shareholder of a corporation may validly assert his fifth amendment privilege to prevent him from producing corporate records, where his act of production would have testimonial and incriminating aspects.

The "act of production" doctrine of United States v. Doe, 465 U.S. 605, 104 S.Ct. 1237, 79 L.Ed.2d 552 (1984) is applicable to a sole shareholder of a corporation. The technical form of the entity is not as significant as the incriminating impact which the act of production has on the individual producing the documents. If the act is testimonial and incriminating, the act is privileged as to that person, regardless of the nature of the entity, and regardless of the non-privileged contents of the documents.

The state can obtain production of the documents by conferring limited immunity for the act of production, or by requesting the court to appoint a third party to produce the documents.

ARGUMENT

THE SOLE SHAREHOLDER OF A CORPORATION MAY VALIDLY RAISE HIS FIFTH AMENDMENT PRIVILEGE TO RESIST HIS PRODUCTION OF CORPORATE DOCUMENTS WHERE THE ACT OF PRODUCTION WOULD HAVE BOTH TESTIMONIAL AND INCRIMINATING ASPECTS.

The issue presented in this case is whether the "act of production" doctrine adopted in United States v. Doe, 465 U.S. 605, 104 S.Ct. 1237, 79 L.Ed.2d 552 (1984) applies to the sole shareholder of a corporation upon whom a subpoena duces tecum is served requesting him, as custodian, to produce corporate documents.

A proper analysis begins with Hale v. Henkel, 201 U.S. 43, 26 S. Ct. 370, 50 L.Ed. 652 (1906). An officer of a corporation was served with a subpoena duces tecum, and directed to produce corporate records. He was given immunity which covered the act of producing the documents. The United States Supreme Court held that the officer could not raise a fifth amendment privilege on behalf of himself, because he was immunized. It further held that the officer could not assert the privilege on behalf of the corporation, finding that a corporation has no fifth amendment privilege against self-incrimination.

In Wilson v. United States, 221 U.S. 361, 31 S. Ct. 538, 55 L.Ed. 771 (1911), the Court held that a corporate

officer could not prevent production of corporate documents on the ground that the contents would incriminate him. This decision was based up on the fact that, since the documents were of the corporation, their contents were not "testimonial" as to the officer, even if he prepared them. Wilson, 221 U.S. at 378.

In United States v. White, 322 U.S. 694, 64 S. Ct. 1248, 88 L.Ed. 1542 (1944), the Court held that an officer of an unincorporated organization could not raise a fifth amendment to the contents of the organization's papers and documents. The Court spoke in terms of a "collective entity", and stated that if the entity is separate and apart from the individual members, and embodies their common interests only, the privilege cannot be invoked on behalf of the organization or its representatives. White, 322 U.S. at 701.

The Supreme Court built upon the "collective entity" doctrine in Bellis v. United States, 417 U.S. 85, 94 S. Ct. 2179, 40 L.Ed. 2d 678 (1975), applying it to records of a partnership. Bellis, like the other cases, addressed the applicability of the privilege to the contents of records in various situations.

The issue of incrimination by production was first addressed in Fisher v. United States, 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976). In Fisher, attorneys were subpoenaed to produce tax documents accountants on behalf of

individual taxpayers. The attorneys refused to comply, claiming that compliance would violate the taxpayer's right against self-incriminatin.

The Supreme Court disagreed, holding that the attorneys, not the taxpayer were being required to produce the documents. Therefore, no compulsion nor self-incrimination existed as to the taxpayer, and thus no fifth amendment privilege.

However, the Court's analysis did not stop there. The Court acknowledged that the attorney-client privilege could apply; therefore, if the documents could not be obtained from the client by subpoena, they could not be obtained from the attorney by subpoena. Id. at 405. The Court raised the question of what incriminating testimony within the meaning of the fifth amendment, is compelled by a subpoena duces tecum. Id. at 409. For the first time, the Court recognized that the actual production of documents could implicate fifth amendment interests, separate and apart from the contents of the documents:

> Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It would also indicate the taxpayer's belief that the papers are those described in the subpoena. The elements of compulsion are clearly present, but the more difficult issues are whether the tacit averments . . . are both "testimonial" and in "incriminating" for purposes of applying the Fifth Amendment.

Fisher, 425 U.S. at 410 (citation omitted).

Although the Court ultimately found that there was insufficient testimonial self-incrimination by production of the requested documents, the Court distinguished between the incriminating impact of the contents of a document and the act of producing it. The Court required that a separate analysis be made of both aspects of a documentary subpoena.

This concept was addressed again in United States v. Doe, 465 U.S. 605, 104 S.Ct. 1237, 79 L.Ed.2d 552 (1984). Doe, the owner of several sole proprietorships was served with a subpoena duces tecum, seeking business records. Doe challenged the subpoena alleging that the act of producing the documents would incriminate him in violation of his fifth amendment. The district court, finding that the act of production would be testimonial and incriminating, quashed the subpoena. The Court of Appeals for the Third Circuit affirmed holding, inter alia, that the owner's act of producing the documents would have "communicative aspects of its own." United States v. Doe, 680 F.2d 327, 335 (3d Cir. 1982). The United States Supreme Court affirmed that portion of the judgment which held that the act of production was privileged. Doe, 465 U.S. at 617.

The Court held that the compelled production of the business documents, if incriminating to the person producing them, is privileged by the fifth amendment. The Supreme Court reaffirmed the principle espoused in Fisher, stating that:

> Although the contents of a document may not be privileged, the act of producing the document may be. A government subpoena compels the holder of the document to perform an act that may have testimonial aspects and an incriminating effect.

Doe, 465 U.S. at 612.

The question presented here -- and not squarely decided in Doe -- is whether the act of production doctrine can apply to the sole shareholder of a corporation who, as custodian of records, is subpoenaed to produce corporate documents. The case law demonstrates, with logic and fairness, that the rationale of Doe applies with equal force to the situation presented in this cause.

The state contends that the act of production doctrine can never apply to a corporation. The state seeks support for its position from Bellis and White. However, neither of these cases requires a contrary result. Bellis and White stand for the proposition that a collective entity has no fifth amendment privilege, since such a privilege applies only to persons. Therefore, a representaive cannot refuse to produce documents of a collective entity on the ground that the contents of the documents may incriminate him. Respondent has no quarrel with that holding, for the issue here involves the incriminating impact which Daniel Weiss' own act of production has upon him, regardless of the documents' contents and regardless of the

nature of the business entity. Mr. Weiss did not assert a fifth amendment privilege on behalf of Wellington, but rather on behalf of himself. Respondents do not contest the teachings of Hale and Wilson that the contents of corporate documents are not "testimonial" as to the corporate agents or officers. Respondent Weiss does not seek to prevent the eventual production of the documents, but rather seeks to avoid any incriminating impact resulting directly from his own testimonial act of producing the documents. None of the cases prior to Fisher and Doe even considered the potential incriminatory and testimonial aspects of the act of production. Rather, their rationale turned upon a conclusion that the contents of corporate records have a corporate identity distinct from the individual members. Therefore, there can be no self-incrimination nor testimonial results flowing from a revelation of those contents.

We must therefore turn to Doe itself and examine its rationale and the appellate decisions expounding upon it. In Doe, the government sought records of a sole proprietor. The state clutches to this distinction in an effort to draw attention away from the underpinnings of the Doe Court's decision.

Doe recognized and reaffirmed the principle that, even if the contents of a document are not privileged, the person who is to produce those documents may assert a fifth amendment

privilege where the act of production would have testimonial and incriminating effect. Doe, 465 U.S. at 612. See also Fisher, 461 U.S. at 410. The focus is therefore not on the nature of the entity from which documents are sought, but instead on the incriminating impact which production would have on the person producing the documents. To say that the Doe rationale is limited to individuals or persons holding personal records is to unnecessarily limit the holding of Doe and ignore the plain purpose of the fifth amendment. The nature of the entity is not dispositive of the application of the fifth amendment. The inquiry must necessarily focus on the facts which underlie a claim of self-incrimination.

For example, the custodian of records for Florida Power & Light may not prevail in pressing a fifth amendment privilege to the act of producing FP&L's documents -- but not simply because he works for a corporation. Rather, it is grounded upon a factual determination that, as custodian of hundreds of thousands of documents, his possession and production of said documents as custodian would not be likely to create any substantial and real incriminating impact. See Doe, 465 U.S. at 614 n.13. In the absence of this factual predicate, the assertion of a privilege cannot be sustained. Therefore, while the nature of the entity may be a relevant factor, it alone is not determinative of the right to assert

the privilege to the act of production. The Doe court expressly recognized that the determination of whether the production is testimonial or incriminating must be made on a case-by-case basis, which, contrary to the state's desire, belies any purported intent by the Court to establish a bright-line rule. Doe, 465 U.S. at 613.

In the case at bar, Mr. Weiss is a sole shareholder of a small corporation. He has averred that he is the only person who, in response to the subpoena, could produce the documents sought. He has averred that the act of production would incriminate him personally, by acknowledging the existence of the documents, possession of them by him, and by acknowledging his belief that the documents produced are the documents sought by the subpoena. Surely, the possible incriminating impact of the act of production is greater upon Daniel Weiss than it would be upon the custodian of records for Florida Power & Light.[2]

The federal decisions succeeding Doe are split on the issue of its application in the corporate arena. Courts of

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[2]Although the state contends that there is no incriminating impact to the act of production of corporate records, the state has refused even to consider granting immunity as to the act of production. (T. 6-7). Conferring immunity would extinguish the incriminatory threat and result in production of the documents. The obvious question arises: if the state contends that there is no incriminating effect by the act of producing corporate records, why is it unwilling to confer immunity as to the act of production or to seek appointment of a third party to produce the documents?

Appeal for the Third,[3] Fourth,[4] Fifth,[5] and Ninth[6] Circuits have held that the rationale of Doe is applicable to corporations or partnerships. The Second,[7] Sixth,[8] Eighth,[9] Tenth,[10] and Eleventh[11] Circuits have held Doe inapplicable to collective entities.

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[3]In Re Grand Jury Matter (Brown), 768 F.2d 525 (3d Cir. 1985); In Re Grand Jury Empanelled 3-23-83, 773 F.2d 45 (3rd Cir. 1985).

[4]United States v. Lang, 792 F.2d 1235 (4th Cir. 1986).

[5]In Re Grand Jury Subpoena (Lincoln), 767 F.2d 1130 (5th Cir. 1985) (applying Doe to partnership records but not to corporate records).

[6]United States v. Malis, 737 F.2d 1511 (9th Cir. 1984).

[7]United States v. Sancetta, 788 F.2d 67 (2d Cir. 1986); In Re Two Grand Jury Subpoenae Duces Tecum, 769 F.2d 52 (2d Cir. 1985).

[8]In Re Grand Jury Proceedings (Morganstern), 771 F.2d 143 (6th Cir. 1985).

[9]In Re Grand Jury Subpoena (85-W-71-5), 784 F.2d 857 (8th Cir. 1986).

[10]In Re Grand Jury Proceedings (Vargas), 727 F.2d 941 (10th Cir. 1984).

[11]In Re Grand Jury Subpoena Duces Tecum (Ackerman), 795 F.2d 904 (11th Cir. 1986). But see In Re Grand Jury 83-8 (MIA) Subpoena Duces Tecum, 611 F.Supp. 16 (S.D. Fl. 1985).

The decision cited most often for the proposition that Doe applies to corporate custodians is In Re Grand Jury Matter (Brown), 768 F.2d 525 (3d Cir. 1985). In Brown, the sole owner of a corporation asserted a fifth amendment privilege to a grand jury subpoena directing him to produce his corporation's records. He was adjudged in contempt and appealed. The Third Circuit reversed the district court's judgment of contempt, holding that a custodian cannot be compelled to produce corporate recores absent a grant of immunity or a finding that there is no likelihood of incrimination. Brown, 768 F.2d at 528.

The Brown court rejected the identical narrow construction of Doe which the state has proposed in its brief:

> The government urges that the holding in United States v. Doe does not control because in Doe the records were those of a sole proprietorship, while in this case they belong to a professional corporation. That argument misses the point of the Court's analysis in Fisher and Doe. Those cases, consistent with Schmerber v. California, make the significant factor, for the privilege against self-incrimination, neither the nature of the entity, nor the contents of documents, but rather the communicative or noncommunicative nature of the arguably incriminating disclosures sought to be compelled.

Brown, 768 F.2d at 528.

The Brown Court properly focuses upon the impact of production and refuses to adopt an overly-simplistic rule which fails to recognize the natural and logical extension of Doe.

The state quotes extensively from In Re Two Grand Jury Subpoenae Duces Tecum, 769 F.2d 52 (2d Cir. 1985), for its position that a person has no fifth amendment privilege to avoid production of corporate records. However, the Second Circuit in that case recognized that, if the person's act of production incriminated him, he would not be required to produce the corporate records:

> When a corporation is asked to produce records, some individual, of course, must act on the corporation's behalf. Usually this will not create any self-incrimination problem, for an employee who produces his corporation's records "would not be attesting to his personal possession of them but to their existence and possession by a corporation." Yet even if the situation is unusual and a corporation's custodian of records would incriminate himself if he were to act to produce the company's records, this still does not relieve the corporation of its continuing obligation to produce the subpoenaed documents. In such a situation the corporation must appoint some other employee to produce the records, and if no existing employee could produce records without incriminating himself by such an act, then the corporation may be required to produce the records by supplying an entirely new agent who has no previous connection with the corporation that might place him in a position where his testimonial act of production would be self-incriminating.

Two Grand Jury Subpoenae, 769 F.2d at 57, (quoting In Re Grand Jury Subpoenas Duces Tecum, 722 F.2d 981, 986 (2d Cir. 1983)) (emphasis added).

Therefore, the very case which the state relies so heavily upon is the very case which supports Daniel Weiss'

position. A person has a fifth amendment right to refuse production of subpoenaed corporate document if it is shown that the act of producing those documents will be testimonial and incriminating. The fact that the person can validly assert the privilege does not mean that the documents will never be produced; Respondent has never suggested such relief. However, the documents will not be produced by that person. This is what the Second Circuit has held, and in consistent with Doe and the Circuits following Doe.[12]

This reasoning was affirmed United States v. Sancetta, 788 F.2d 67 (2d Cir. 1986). While recognizing no fifth amendment right of a corporation to resist production of its records, it acknowledged the potential incriminating impact of production by one of its employees, and held that

> an individual stockholder, as any other representative of a collective entity, may assert that the act of production incriminates him. If his personal claim is successful the records must be produced by another.

Sancetta, 788 F.2d at 75.

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[12]Even several cases holding Doe inapplicable to corporations have recognized the threat of incrimination which inheres in the act of producing documents, including corporate documents. These cases hold that, "if the government later attempts to implicate the [corporate] custodian on the basis of the act of production, evidence of that fact is subject to a motion to suppress." In Re Grand Jury Proceedings (Morganstern), 771 F.2d 143 (6th Cir. 1985); See also, In Re Grand Jury Subpoena (85-W-71-5), 784 F.2d 857 (8th Cir. 1986). This proposition appears to undercut the strict holding of these opinions that no fifth amendment privilege under such circumstances.

This is the rationale behind the "act of production" doctrine. Petitioner appears to be laboring under the misconception that a fifth amendment claim is being raised, on behalf of the corporation, as to the contends of the records. However, no such contention has ever been made by Daniel Weiss or Wellington. Quite simply, the crux of the case is that Daniel Weiss has asserted that he cannot produce the documents because such an act will tend to incriminate him. The state has declined to confer immunity upon him for the act of production, and there is no other person within the company who can produce the documents.

Absent any immunity, (and assuming the state is sincerely seeking documents, rather than an incriminating testimonial act by Mr. Weiss), the only viable solution would be for the trial court to appoint a third-party to produce the documents. In fact, this was one of the very methods suggested by Judge Pearson in his concurring opinion in State v. Wellington Precious Metals, 487 So.2d 326, 327 (Fla. 3d DCA 1986). It is also the procedure adopted in In Re Grand Jury Subpoenas Duces Tecum Served Upon 22nd Avenue Drugs, 633 F. Supp. 419 (S.D. Fl. 1986), one of only three Federal Florida cases addressing the issue. In that case, the district court, although declining to resolve the very question at bar, devised a method to achieve production without threat of incrimination. The corporate documents would first be turned over to counsel. The court then ordered the corporation to appoint

third-party representatives to secure the documents and produce them to the government. 22nd Avenue Drugs, 633 F. Supp. at 423. It suggested that, alternatively, it could order the Clerk of Court to sequester the records for production, or even direct the Secretary of State, as corporate agent, to produce the documents. These alternatives, if accompanied by safeguards to prevent the actual custodian from providing testimony as to the source, or the manner in which the documents were provided to him, (and thus negating the entire purpose of the procedures), would effectively satisfy the state's subpoena while protecting fifth amendment rights.

Although the court in 22nd Avenue Drugs chose not to decide the applicability of Doe to corporate custodians, it was decided in In Re Grand Jury 83-8 (MIA) Subpoena Duces Tecum, 611 F. Supp. 16 (S.D. Fl. 1985). The material facts are the same as the present case: subpoenas were served upon two corporate officers in their representative capacities, seeking production of corporate documents of AGH Investments Corporation. They refused, alleging that the act of production would incriminate them.

The Honorable Judge Aronovitz, framed the issue:

> In light of Fisher, if the two subpoenas were issued to Martin and Hernandez in their individual and personal capacities, it is clear that since AGH (its corporate identity aside) is a third party, Martin and Hernandez could not invoke the Fifth Amendment with respect to the contents of the records, but would be afforded Fifth Amendment protection as to the act of

> production and compliance with the subpoena. The only real question which is presented, then, is whether that Fifth Amendment protection is somehow negated simply because Martin and Hernandez have been served in their capacities as representatives of a corporation, rather than in their individual and personal capacities. A review of the relevant cases reveals that it is not so negated.

Grand Jury 83-8, 611 F. Supp. at 22 (emphasis added).

The court then reviewed the Supreme Court cases touching upon this issue, and concluded that the fifth amendment was properly invoked by the corporate custodian:

> [W]here the official's act of producing the documents might have "testimonial" and "incriminatory" elements with respect to the business official in his individual and personal capacity . . . the Court must carefully consider whether compliance with the subpoena would implicate the Fifth Amendment. This is true even if the subpoena is addressed to the official in his representative capacity because in accepting his duties as officer or custodian of records, a person does not thereby waive the rights and privileges which are guaranteed by the Fifth Amendment.

Grand Jury 83-8, 611 F.Supp. at 24.

This case, like Brown, espouses the more well-reasoned position that the act of producing corporate documents may implicate fifth amendment rights of the custodian, regardless of the inapplicability of the privilege to the entity or to the contents of the document.

While concedely there are cases which hold that a custodian of records has no fifth amendment right to the act of production, the analysis in those cases is flawed. A custodian

is not seeking to create a corporate fifth amendment right, which is how many courts apparently interpret the custodian's assertion of a privilege to the act of production. See, e.g., In Re Grand Jury Proceedings (Morganstern), 771 F.2d 143 (6th Cir. 1985). The "collective entity" rule, established in Bellis v. United States, 417 U.S 85, 94 S. Ct. 2179, 40 L.Ed. 2d 678 (1974), has been cited as ostensible support for the holding that the act of production doctrine does not apply to corporate custodians. However, the collective entity rule states that since there is no fifth amendment privilege to protect the contents of corporate documents, a representative of that corporation, as representative, has no fifth amendment privilege as to the contents of those corporate documents. That is because there can be no self-incrimination from a document which is owned by, and prepared for, an entity. See Bellis, 417 U.S. at 89. This does not mean and was not intended to mean that a person, by becoming an agent or employee of a corporation, loses his fifth amendment rights against compelled self-incrimination. In Re Grand Jury 83-8 (MIA) Subpoena, 611 F. Supp. at 24. While the documents are not his, (and thus the contents hold no testimonial or self-incrimination aspects), the act of production by him might have testimonial and incriminating aspects. That is what the act of production doctrine is designed to protect, regardless of the entity involved.

Contrary to the state's contentions, therefore, Wellington's choice to incorporate does not constitute a waiver, by its officers or agents, of their personal rights against self-incrimination. While it means that the company itself has no fifth amendment right, it does not extinguish the rights conferred upon the individuals who make up that corporation. Therefore, neither Marks v. Green, 122 So.2d 491 (Fla. 1st DCA 1960), nor Delisi v. Smith, 423 So.2d 934 (Fla. 2d DCA 1982) is applicable. The State of Florida certainly has a legitimate interest in regulating corporations and preventing frustration of investigations into alleged criminal activity by business entities. However, the application of Doe does not impede these interests, and represents a balancing of those interests with a person's fundamental right against self-incrimination.

Delisi, which was decided prior to Doe, held that a corporate custodian cannot raise a fifth amendment privilege to the contents of the corporation's documents. Delisi, 423 So.2d at 940. Delisi was based upon a straightforward application of Bellis; Respondents do not dispute that holding, and Delisi does not even raise, much less discuss, the possible incrimination involved in production of the documents. It is now fully recognized that although the contents of records may not be privileged, the act of production may be. Fisher, 425 U.S. at 410. This is what distinguishes Delisi from the case at bar.

It is therefore clear that a corporate custodian may validly assert his fifth amendment privilege where his custodial act of producing corporate documents may incriminate him.

CONCLUSION

A person has a fifth amendment privilege against compelled self-incrimination. While a corporation or collective entity enjoys no such privilege, a person who is employed by, or an agent of that corporation does not, by his association, sacrifice that privilege. The well-reasoned case law following United States v. Doe makes it clear that a corporate custodian of records has a legitimate fifth amendment privilege to prevent his production of corporate documents where the act of production has testimonial and self-incriminating aspects. The state has various avenues, such as immunity or third-party designation, which will attain the objective of production, while ensuring no resulting incrimination from the act of production.

WHEREFORE, Respondents, DANIEL WEISS and WELLINGTON PRECIOUS METALS INC., pray this Honorable Court to affirm the judgment of the Third District Court of Appeal.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Respondents was furnished by mail this 25th day of November, 1986, to Calvin Fox, Assistant Attorney General, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida 33128; and The Honorable Gerald Kogan, 1351 N.W. 12th Street, Miami, Florida 33125.

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