OA 1-30-87

IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,950

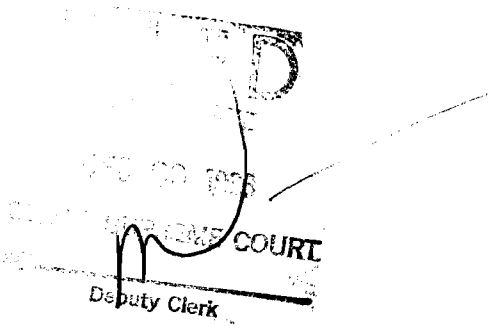
THE STATE OF FLORIDA,

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.



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ON PETITION FOR DISCRETIONARY REVIEW FROM THE THIRD DISTRICT COURT OF APPEALS

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REPLY BRIEF OF PETITIONER ON THE MERITS

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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 does not prohibit the act of producing corporate records by even a sole shareholder corporation.

IV

ARGUMENT

In Re-Grand Jury Subpoena Duces Tecum (Ackerman), 795 F.2d 904 (11th Cir. 1986), the defendant, a records custodian of a sole shareholder coporation contended as in the case at bar that he could refuse production of corporate records under **United State v. Doe,** 465 U.S. 605, 104 S.Ct. 1237, 79 L.Ed.2d 552 (1984), because the act of producting the records would incriminate him. The United States District Court for the Southern District of Florida had held the defendant in contempt for failing to produce the records. The Eleventh Circuit Court of Appeals affirmed the District Court's contempt citation and rejected the defendant's assertion of a Fifth Amendment privilege under **Doe**, explaining that **Doe** was limited on its face to non-collective and unincorporated entities:

> "Ackerman's reliance on Doe is, however, unavailing. For Ackerman succesfully to assert his fifth amendment privilege against compulsory self-incrimination, Doe must be read to implicitly reject the long-established principle that an individual cannot rely upon the privilege to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if these records might incriminate him personally.' Bellis v. United States, 417 U.S. 85, 88 94 S.Ct 2179, 2183, 40 L.Ed.2d 678, 683 (1974). Yet Doe in no way intimates

> that such an interpretation is warranted. The Court explicitly limited the issue addressed in Doe to the extent to which the Fifth Amendment privilege against compulsory self-incrimination applies to the business records of a sole proprietor.' 104 S.Ct. at 1239 (emphasis added). The Court's analysis of that issue was, moreover, largely dependent on the determination by the court of appeals that a sole proprietor acts in a personal rather than a representative capacity.' Id. at 1240. In concluding in Doe that the act of producing the subpoenaed documents had a testimonial components justifying fifth amendment protection, the Court was concerned only with an individual's assertion of his own fifth amendment privilege to resist production of his own personal records. The Court gave no indication that the decision would in any way affect the very different situation, presented here, of an assertion of a fifth amendment privilege against an order to produce documents of a collective entity."
>
> Id, at 906.

The Ackerman Court also further emphasized the policy considerations underlying the substantive law governing corporate and collective entities and emphasized that the majority of federal appeals courts concur with its precise views as to **Doe** with respect to the production of records of collective entities:

"The facts of his case forcefully demonstrate the advisability of the collective-entity doctrine. Because Ackerman might be incriminated personally by production of the documents of S & A, he is attempting as their custodian to withhold the documents from the grand jury even though he is neither named personally by the subpoena nor required to produce the documents himself. If Ackerman were to succeed in his claim, corporations and other collective entities could effectively shield documents from governmental inspection by naming as custodian the individual most likely to be incriminated by the act of their production. Grand juries and other governmental actors would then be forced to choose between granting immunity to the custodian or foregoing access to the documents. Such a result is supported neither by law nor by logic.

"In concluding that Doe does not alter the collective-entity doctrine of Bellis, we are in accord with the majority of the federal courts of appeal that have decided this issue. See In re Grand Jury Supoena, 784 F.2d 857 (8th Cir. 1986); In re Grand Jury Proceedings (Morganstern), 771 F.2d 143 (6th Cir.) (enbanc), cert. denied, U.S. _____, 106 S.Ct. 594 88 L.Ed2d 574 (1985); In re Grand Jury Subpoena (Lincoln), 767 F.2d 1130 (5th Cir. 1985); of United States v. Lang, 792 F. d 1235 (4th Cir. 1986) (privilege unavailable except in "limited circumstances"); In re Two Grand Jury Subpoena Duces Tecum, 769 F.2d 52 (2d Cir. 1985) (same). Ackerman, however, has relied extensively on In re Grand Jury Matter (Brown), 768 F.2d 525 (1985) (en banc). . ."

Id., at 906-907.

The reasoning and analysis in Ackerman is soundly based up on long standing policy regarding the production of the records of collective entities and a proper reading of the plain language of **United States v. Doe.** Therefore, most respectfully, the same analysis should obtain in the case at bar and the district court decision upholding the Respondent's claim of a Fifth Amendment privilege as a corporate records custodian must be reversed.

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 24 day of December, 1986, at Miami, Dade County, Florida.

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VI

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **REPLY 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 23rd day of December, 1986.

CALVIN L. FOX, Esq.
Assistant Attorney General

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