TOURO COLLEGE
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Touro Law Review

Volume 22
Number 1 *New York State Constitutional Decisions: 2006 Compilation*

Article 23

November 2014

Court of Appeals of New York, In the Matter of Nassau County Grand Jury Subpoena Duces Tecum Dated June 24, 2003 "Doe Law Firm" v. Spitzer

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COURT OF APPEALS OF NEW YORK

In the Matter of Nassau County Grand Jury Subpoena Duces Tecum Dated June 24, 2003 "Doe Law Firm" v. Spitzer[1] (decided May 3, 2005)

On September 22, 2003, the Nassau County Court denied the defendant law firm's application[2] to quash the subpoena duces tecum issued on behalf of a Nassau County grand jury.[3] On appeal, the law firm argued that the grand jury subpoena requiring production of the firm's financial records violated the "individual partners' state and federal right against compelled self-incrimination."[4] Upon review, the court affirmed the decision of the appellate division[5] and concluded that the individual partners of a law firm could not invoke the state or federal constitutional privilege against compelled self-incrimination.[6]

"On June 25, 2003, the [New York State] Attorney General issued a subpoena duces tecum . . . commanding the custodian of records of appellant law firm to appear before the grand jury."[7] The subpoena also mandated that the custodian produce and provide

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[1] 830 N.E.2d 1118 (N.Y. 2005).

[2] *Id.* at 1122.

[3] *Id.* at 1120.

[4] *Id.* at 1121. U.S. CONST. amend. V states in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself." N.Y. CONST. art. I, § 6 provides in pertinent part: "No person shall be . . . compelled in any criminal case to be a witness against himself or herself."

[5] *Id.* at 1127.

[6] *Doe Law Firm*, 830 N.E.2d at 1125.

"documents relating to the firm's personal injury cases handled from January 1, 2001 to June 24, 2003."[8] The documents included, but were not limited to: books of records, financial records, retainer agreements, payments for services provided, "records of any and all payments made to medical practitioners and facilities," records of debt, and "the names of all present and past Associate Attorneys and Partners."[9]

Approximately three weeks after the issuance of the grand jury subpoena, the defendants submitted an order to show cause and moved to quash the subpoena.[10] The defendants argued that the grand jury subpoena violated the "individual partners' state and federal rights against compelled self-incrimination."[11] The defendants also contended that the subpoena violated "the law firm's and individual partners' rights against unreasonable search and seizures and the attorney-client privilege."[12] In addition, the law firm argued that the subpoena was "unduly burdensome and overbroad and that the statements filed with the Office of the Court of Administration were confidential . . . and thus not subject to disclosure."[13] Finally, the defendants stated that if provided the opportunity, they would submit a privilege log for in camera

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[7] *Id.* at 1120.

[8] *Id.*

[9] *Id.* at 1120-21.

[10] *Id.* at 1121.

[11] *Doe Law Firm,* 830 N.E.2d at 1121.

[12] *Id.* Pursuant to *Priest v. Hennessy*, 409 N.E.2d 983, 986 (N.Y. 1980), "no attorney-client privilege arises unless an attorney-client relationship has been established." The Court of Appeals of New York added that the relationship arises when the client contacts his or her attorney for legal advice or service. *Id.* at 986. Notably, the payment of legal fees does not constitute an attorney-client relationship that would sustain a claim of privilege. *Id.* at 987.

inspection to "determine the availability of the claimed privileges."[14] The Nassau County Court denied the law firm's application on September 22, 2003.[15] The appellate division affirmed on May 24, 2004.[16]

The United States Supreme Court's decision in *United States v. White* set forth the circumstances under which an entity could not invoke the constitutional privilege against compelled self-incrimination.[17] In *White*, "the District Court of the United States for the Middle District of Pennsylvania issued a subpoena duces tecum to Local No. 542, International Union of Operating Engineers."[18] The subpoena required that the union produce "copies of its constitution and by-laws and . . . work-permit fees, including amounts paid . . . and the identity of the payors."[19] The "assistant supervisor" appeared before the grand jury and refused to produce the documents "upon the ground that they might tend to incriminate Local Union 542, International Union of Operating Engineers, [himself] as an officer thereof, or individually."[20] The district court cited the supervisor for contempt.[21]

The court of appeals reversed the decision of the district court and held that "the records of an unincorporated labor union were the

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[13] *Dow Law Firm*, 830 N.E.2d at 1121.
[14] *Id.* at 1121-22.
[15] *Id.* at 1121.
[16] *Id.* at 1122.
[17] 322 U.S. 694, 699 (1944).
[18] *Id.* at 695.
[19] *Id.*
[20] *Id.* at 696.
[21] *Id.*

property of all of its members"[22] and that if the supervisor believed that the records would incriminate him, he could refuse to produce such documents.[23] The United States Supreme Court then accepted the Government's petition for writ of certiorari, and sought to determine the validity of the union officer's claim of his constitutional privilege against self-incrimination.[24]

In *White*, the United States Supreme Court concluded that the constitutional privilege against self-incrimination was afforded only to "natural individuals."[25] Moreover, the Court stated that the Fifth Amendment could not be invoked by an artificial entity such as a corporation.[26] To support its conclusion, the Court reasoned that the "papers and effects which the privilege protects must be the private property of the person claiming the privilege."[27] The Court added that when the individual is acting as an officer on behalf of an organization, and the documents are held in a representative capacity, the right to invoke the personal privilege against self-incrimination is eliminated.[28]

In *Bellis v. United States*, the Supreme Court examined "whether a partner in a small law firm may invoke his personal privilege against self-incrimination to justify his refusal to comply with a subpoena requiring the production of the partnership's

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[22] *White*, 322 U.S at 696.
[23] *Id.* at 697.
[24] *Id.* at 697-98.
[25] *Id.* at 698.
[26] *Id.* at 699 (citing Hale v. Hinkel, 201 U.S. 43, 50 (1906)).
[27] *White*, 322 U.S. at 699 (citing Boyd v. United States, 116 U.S. 616, 631-32, (1885)).
[28] *Id.* (citing Wilson v. United States, 221 U.S. 361, 384 (1911)).

financial records."[29] Four years after the petitioner joined another law firm, the district court issued a subpoena, requiring all records from the partnership of Bellis, Kolsby and Wolf in his possession.[30] Bellis appeared before the grand jury, but refused to produce the documents and invoked his Fifth Amendment privilege against compelled self-incrimination.[31] Following the hearing, "the court held that the petitioner's personal privilege did not extend to the partnership's . . . records."[32] Upon a second refusal to produce the documents, the district court held Bellis in contempt.[33] The appellate court, relying upon the reasoning presented in *White*, affirmed the decision of the lower court.[34] Then, the Supreme Court granted certiorari to interpret the Fifth Amendment privilege in this instance.[35]

Relying upon the United States Supreme Court's decision in *White*, the *Bellis* Court reasoned that the individual who acted on behalf of an organization could not exercise his or her personal right to invoke constitutionally afforded privileges.[36] In support of its conclusion, the Court stated that an artificial entity such as a corporation or partnership "can only act . . . through its individual officers and agents, recognition of the individual's claim of privilege with respect to financial records of the organization would undermine

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[29] 417 U.S. 85 (1974).
[30] *Id.* at 86.
[31] *Id.*
[32] *Id.*
[33] *Id.* at 87.
[34] *Bellis*, 417 U.S. at 87.
[35] *Id.*
[36] *Id.* at 90 (citing *White*, 322 U.S. at 699).

the unchallenged rule that the organization itself is not entitled to claim any Fifth Amendment privilege."[37] The Court frequently referred to the discussion in *White* and stated that allowing representatives to invoke the privilege afforded by the Federal Constitution would "largely frustrate legitimate governmental regulation of such organizations."[38] The *Bellis* Court also relied upon the statements made by Justice Murphy in *White*:

> Were the cloak of the privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible. The framers of the constitutional guarantee against compulsory self-disclosure, who were interested primarily in protecting individual civil liberties, cannot be said to have intended he privilege to be available to protect economic interested of such organizations so as to nullify appropriate governmental regulations.[39]

The *Doe Law Firm* court also made reference to New York State case law that dealt with the privilege against self-incrimination.[40] The New York Court of Appeals' decision in *Friedman v. Hi-Li Manor Home for Adults* also supported the conclusion that the constitutional guarantee against compelled self-incrimination pertained only to natural individuals and not artificial entities such as partnerships or corporations.[41] In *Friedman*, the

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[37] *Id.*

[38] *Id.*

[39] *Bellis*, 417 U.S. at 91 (citing *White*, 322 U.S. at 700).

[40] *Doe Law Firm*, 830 N.E.2d at 1124.

[41] 366 N.E.2d 1322, 1326 (N.Y. 1977). In *Friedman*, the Attorney General requested the records of administration, management and funding for private proprietary homes for adults.

Court of Appeals of New York stated, "the constitutional guarantee against compulsory self-disclosure, concerned primarily with protection of individual civil liberties, is not to be interpreted to insulate economic or other interests of organizations, incorporated and unincorporated, when to do so would be to frustrate appropriate governmental regulation."[42]

Similarly, the New York Court of Appeals' decision in *In re Grand Jury Subpoena Duces Tecum Dated December 14, 1984, Y., M.D., P.C., v. Kuriansky*, refused to extend the constitutional right against self-incrimination to artificial entities and stated that complying with the subpoena did not violate the Fifth Amendment privilege.[43] The court added that the custodian or representative of corporate records did not have the right to refuse to produce such records, even though the corporate records might incriminate the custodian personally.[44]

In order to determine whether the subpoena violated the individual partners' rights under compelled self-incrimination, the Court of Appeals of New York, in *Doe Law Firm*, utilized the distinctions drawn in *White* between a natural individual and an entity such as a corporation or union and looked to the capacity in which

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Id. at 1324.

[42] *Id.* (citing *White*, 322 U.S. at 700). In arriving at its decision, the court reasoned that the "operation of such facilities are matters concerning the public peace, public safety and public justice of the State of New York." *Id.* at 1324.

[43] 505 N.E.2d 925, 930 (N.Y. 1987) (citing *Bellis*, 417 U.S. at 88). In *Kuriansky*, the Deputy Attorney General requested records from practicing psychiatrists during the course of an investigation for "fraudulent Medicaid practices." *Id.* at 927-28. The records required by the subpoena included: patients' charts, evaluations and treatment services. *Id.* at 927.

[44] *Id.*

the appellant law firm's records were held.[45] The court found that appellant law firm's records were held in a representative capacity and therefore, the individual partners were not entitled to invoke the privilege against compelled self-incrimination.[46]

Furthermore, the *Doe Law Firm* court considered whether the holding in *Bellis* should be adopted in New York.[47] In particular, the Court of Appeals of New York looked at the Supreme Court's three-pronged test in *Bellis* to determine if the "law firm engaged in organizational activity, so as to preclude any Fifth Amendment claim."[48] The *Bellis* Court considered whether the organization existed as an independent entity, was a well-structured association and "maintained a distinct set of organizational records."[49] The court adopted the *Bellis* three-pronged test and held "that an individual partner of a law firm, whose firm was served with a subpoena duces tecum seeking the production of firm records, cannot rely upon the constitutional privilege against compelled self-incrimination."[50] In *Doe Law Firm*, the court added that the recognition of a claim to privilege would "substantially undermine the . . . rule that an organization itself is not entitled to claim any Fifth Amendment

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[45] *Doe Law Firm*, 830 N.E.2d 1122-27.

[46] *Id.* at 1125.

[47] *Id.* at 1123.

[48] *Id.* at 1123 n.6 (quoting *Bellis*, 417 U.S. at 92-93).

[49] *Id.*

[50] *Doe Law Firm,* 830 N.E.2d at 1124-25. The Court of Appeals also cited to *Sigety v. Hynes,* 342 N.E.2d 518, 523 (N.Y. 1975), which concluded that a nursing home was not a small, family operated business but rather "a particular type of organization [that] has a character so impersonal in the scope of the membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents." *Id. Sigety* also suggested that a small family partnership or sole proprietorship *may* be treated differently under the Fifth Amendment right against compelled self-incrimination. *Id.*

privilege, and largely frustrate . . . governmental regulation."[51]

The *Doe Law Firm* court also compared the present case to other situations where the New York courts have contrasted the rights of the private individual with the interests of organizations.[52] Upon further examination of the facts in both *Friedman* and *Kuriansky*, the New York Court of Appeals reasoned that an attempt by a firm or organization to avoid the production of documents either required by law or governmental regulation was not a valid exercise of the privilege against self-incrimination.[53]

As affirmed by federal[54] and state[55] courts, both the Fifth Amendment to the United States Constitution and the New York State Constitution article I, section 6 grant the privilege against compelled self-incrimination to natural persons in being. This right is afforded to the person and protects that individual from testifying against himself in a criminal prosecution.[56] The *Doe Law Firm* court found that extension of this federal and state constitutional right to partnerships, corporations or any other artificial entity would undermine regulatory measures taken by the government to police organizational entities.[57] In issuing this decision, the Court of Appeals of New York reasserted its prior holdings in *Friedman* and

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[51] *Id.* at 1125 n.8 (quoting *Bellis*, 417 U.S. at 90). In order to reach its conclusion, the court stated that a partnership such as the defendant law firm is "an association of two or more persons to carry on as co-owners of a business for profit." *Id.* The court continued by stating that the privilege against self-incrimination is personal and protects private property, not the records of a partnership. *Id.*

[52] *Id.* at 1124-25.

[53] *Id.*

[54] *See White*, 322 U.S. 694; *Bellis* 417 U.S 85.

[55] *See Kuriansky* 505 N.E.2d 925; *Friedman*, 366 N.E.2d 1322.

[56] *See* U.S. CONST. amend. V; N.Y. CONST. art. 1, § 6.

Kuriansky and adopted the federal standards set forth in both *White* and *Bellis*.

In conclusion, both the Federal Constitution and the New York State Constitution grant the right against compelled self-incrimination to individuals.[58] In the current case, the court invoked the provisions provided in both the United States Constitution and the New York State Constitution and refused to grant such privileges to partnerships.[59] In addition, the court found that there was "no material textual difference" between the relevant sections of article I, section 6 of the New York State Constitution and the Fifth Amendment of the Federal Constitution.[60] The court stated that the "identity of language [of these provisions] also supports a policy of uniformity between State and Federal courts."[61] In response to the policy of uniformity, the Court of Appeals of New York concluded that the New York State Constitution affords "no greater right against self-incrimination" than the Federal Constitution.[62]

By refusing to grant the same privilege to the appellant law firm, the Court of Appeals of New York prohibited refusal by artificial entities to produce records and statements required by a

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[57] *Doe Law Firm*, 830 N.E.2d at 1125 (quoting *Bellis* 417 U.S. at 90).

[58] *See* U.S. CONST. amend. V; N.Y. CONST. art. 1, § 6.

[59] *Doe Law Firm*, 830 N.E.2d at 1125.

[60] *Id.* at 1123.

[61] *Id.* at 1124 (quoting People v. P.J. Video Inc., 501 N.E.2d 556, 561, (N.Y. 1986)). The court in *P.J. Video* suggested, however, "If the language of the State Constitution differs from that of its Federal counterpart, then the court may conclude that there is a basis for a different interpretation of it." 501 N.E.2d at 560. Additionally, the court stated that the state constitution may recognize rights "not enumerated in the Federal Constitution." *Id.*

[62] *Id.* at 1124.

grand jury subpoena.[63] In order to successfully protect constitutional rights granted to individuals and effectively monitor the business activities of organizations, the court of appeals emphasized that the right against compelled self-incrimination could not be extended to partnerships.

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[63] *Id.* at 1124-25.

RIGHT TO TRIAL BY JURY

United States Constitution Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

New York Constitution aticle I, sction I:

No member of this state shall be . . . deprived of any rights or privileges secured to any citizen thereof, unless by . . . the judgment of his peers . . . .