IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-478

L.T. CASE NO.: 1D10-4933

BERND TAUBERT,

Petitioner,

v.

STATE OF FLORIDA,
OFFICE OF THE ATTORNEY GENERAL,

Respondent.
_____/

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS[1]

This was an appeal of a final judgment finding Petitioner in violation of the Florida Deceptive and Unfair Trade Practices Act, Chapter 501, Part II, Florida Statutes. Respondent, State of Florida, filed a complaint under the Act accusing Petitioner of receiving payments based on phony invoices that his company sent to over 1,000 corporations. As described by the First District Court of Appeal in its opinion (App. 1-2):

> The order on appeal directed appellant to repay each of the defrauded consumers, totaling $2,587,771.29, and to pay civil penalties in the amount of $2,116,500. In addition, the order directed appellant to repatriate all foreign assets and to provide an accounting within 90 days of all assets located outside the country.

The District Court's opinion was filed December 30, 2011. (Appendix). Timely motion for rehearing was denied by the District Court on February 10, 2012. Timely notice of intent to invoke this Court's discretionary jurisdiction was filed with the District Court on March 9, 2012.

SUMMARY OF THE ARGUMENT

In ruling that the Petitioner was not denied his privilege against self-incrimination under the Fifth Amendment of the United States Constitution and the Declaration of Rights of the Florida Constitution by the trial court's order requiring

[1] The facts set forth in this brief are only those found in the Opinion of the First District Court of Appeal. See *Reaves v. State*, 485 So.2d 829, 830 (Fla. 1986).

him to disclose, repatriate and provide an accounting of all assets held overseas by him or on his behalf, the District Court construed (improperly, we submit) those provisions of the federal and state constitutions, thus establishing this Court's discretionary jurisdiction. Though the District Court's opinion itself states that there existed evidence of fraud during the civil trial at issue, instead of viewing this as a clear indication that the Petitioner had reasonable grounds to believe that the compelled testimony and production would furnish a link in the chain of evidence to prove a crime against him, the District Court pointed to this evidence as a basis for finding that the compelled testimony and production from Petitioner would not be incriminating inasmuch as there was already evidence of potential criminal activity. In effect, the District Court applied the harmless error doctrine that is intended to apply only after a criminal conviction has occurred, when the reviewing court can determine whether the improperly obtained evidence could have affected the outcome of the trial. There exists no basis in law for the District Court's holding.

In addition to construing federal and state constitutional provisions, the District Court's opinion conflicts with decisions of other District Courts of Appeal which stand for the proposition that a trial court cannot require individuals to answer questions or provide testimony against themselves unless it is perfectly clear that the testimony or production cannot possibly have a tendency to

incriminate them. Here, the District Court placed an improper burden on the Petitioner in conflict with the principle enunciated in the cases discussed hereafter.

ARGUMENT

I. This Court should exercise its discretionary jurisdiction to review the First District Court of Appeal's decision pursuant to Article 5, Section 3(b)(3), Florida Constitution, and Fla. R. App. P. 9.030(a)(2)(A)(ii), in that the District Court's opinion expressly construes provisions of the state and federal constitutions in a manner inconsistent with the protections contained therein.

Before the District Court, Petitioner argued that the portion of the trial court's order directing him to repatriate all assets held by him or on his behalf overseas, as well as documents reflecting them, and to provide an accounting of those assets, could provide a link in the chain of evidence that could lead to criminal charges against him in violation of the Fifth Amendment of the U.S. Constitution and Article I, Section 9 of the Florida Constitution. The District Court rejected this argument. In so doing, the District Court expressly construed (erroneously, we assert) these provisions of the federal and state constitutions, thus providing this Court with discretionary jurisdiction to review that opinion. See *Sigler v. State,* 881 So.2d 14, 19-20 (Fla. 4th DCA 2004).

There are several aspects of the District Court's opinion that are troublesome, not only with respect to the decision's impact on Petitioner, but also

with respect to its precedential impact on future cases implicating the privilege against self-incrimination.

To fall within the protections of the Fifth Amendment[2] three things must be shown: (1) compulsion, (2) a testimonial communication or act, and (3) incrimination. See *In re: Grand Jury Subpoena Duces Tecum dated March 25, 2011: United States of America v. John Doe,* _____ F. 3d _____ (11th Cir., Case Nos. 11-12268 & 11-11542, February 23, 2012) (slip op. 12). Compulsion is clear in this matter given that the directive to Petitioner is in the trial court's final order. Similarly, the District Court did not rest its decision on any claim that the trial court's order does not constitute the compelling of a testimonial communication or act. Given the accounting requirement of the order, and the fact that there is no indication that the State has any knowledge of the existence of any such assets or documents, a claim that the order does not compel a testimonial communication or act could not stand. See *United States v. Hubbell,* 530 U.S. 27, 120 S. Ct. 2037 (2000); *In re: Grand Jury Subpoena Duces Tecum dated March 25, 2011: United States of America v. John Doe*, *supra.*

In essence, the District Court's opinion rests entirely on its determination that the element of incrimination was not sufficiently present to bring into force Petitioner's protection under the Fifth Amendment and the Declaration of Rights.

[2] For ease of reference, all references herein to the Fifth Amendment shall also apply to the Florida Declaration of Rights.

In so ruling, the District Court misconstrued the breadth of these constitutional protections and the proper invocation of them.

The law is clear that if an individual has *reasonable grounds* to believe that the compelled testimony or testimonial act of production would furnish a link in the chain of evidence needed to prove a crime against him, the privilege may be invoked. See *Magid v. Winter,* 654 So.2d 1037, 1038-1039 (Fla. 4th DCA 1995); *Rainerman v. Eagle National Bank of Miami,* 541 So.2d 740 (Fla. 3d DCA 1989). Also, it need not be certain, or even probable, that a criminal prosecution would be brought or that the witness' answers would be introduced in a later prosecution. The individual need only show "a realistic possibility that the answers will be used against him." *Magid v. Winter*, *supra* at 1039; *Meek v. Dean Witter Reynolds, Inc.*, 458 So.2d 412, 414 (Fla. 4th DCA 1984). Put another way, the privilege against self-incrimination should be sustained unless it is "perfectly clear" that the individual "is mistaken" and that the compulsory order, if complied with, "cannot possibly have the [t]endency to incriminate." *Hoffman v. United States*, 341 U.S. 479, 488 (1951).

Reasonable or well-founded fear is demonstrated by the language of the District Court's opinion itself. First, the District Court states that Petitioner was accused by the State of receiving payments "based on phony invoices his company sent to over 1,000 corporations." (App. 1) It then says that Petitioner "was accused

of defrauding corporations with phony invoices for over $2,000,000. . .” (App. 7) These two statements alone reflect the potential for criminal prosecutions for, at the least, theft and mail fraud. See *e.g.* Fla. Stat. §§812.014, 817.034 and 817.061; 18 U.S.C. 1341. Moreover, given the amount of money that the District Court identifies as having been received by Petitioner’s company in this endeavor and the obvious implication that some or all of it was sent overseas and remains in the possession of Petitioner, potential wire fraud (18 U.S.C. 1343) and criminal tax law violations (26 U.S.C. 7201 *et seq*.) are not merely fanciful fears of Petitioner’s.

The District Court dismisses these concerns first by asserting that Petitioner “offers no further explanation…as to how the requested action could lead to self-incrimination.” (App. 7) As noted in the cases cited above, the District Court has misconstrued the extent of the burden on Petitioner to demonstrate a realistic fear of self-incrimination and possible criminal prosecution. See also, *Lewis v. First American Bank of Palm Beach County,* 405 So.2d 300 (Fla. 4th DCA 1981).

In the District Court’s opinion (App. 7-8), the court takes the view that the repatriation and accounting would not “incriminate appellant **further**,” that “the existence of money in an international account does nothing to **further** incriminate appellant,”[3] and that “[t]here is no indication of why the production of these items would bear on appellant’s potential criminal liability for defrauding consumers **over**

[3] It is to be recalled that the trial court’s order goes beyond money in overseas accounts to include <u>all</u> of the Petitioner’s assets, and documents reflecting same.

and above the evidence already presented at trial regarding his guilt." In resting its decision on the proposition that because there was other evidence of Appellant's possible criminal guilt presented at trial, and that requiring Appellant to produce evidence and statements that could provide a link in the chain of additional evidence of his guilt would merely be cumulative, the District Court has misapprehended the purpose, reach and scope of the constitutional privilege against self-incrimination.

In essence, the District Court has determined that even if compelled testimony and production here were to provide a link in the chain of evidence used to bring criminal charges against Petitioner, the use of such self-incriminating evidence would necessarily constitute harmless error in any such criminal proceeding, based on the evidence already presented in this civil case. Such a cavalier approach to such a fact intensive and legally debated issue as the harmless error doctrine as applied to the violation of defendants' constitutional rights[4] cannot properly be the basis of the denial of those rights in this civil proceeding. Appellant respectfully submits that the existence *vel non* of other incriminating evidence of potential criminal activity does not strip him of his constitutional privilege not to

[4] See, for example, the extensive discussion of this issue in *Mansfield v. Secretary, Department of Corrections*, 601 F. Supp. 2d 1267, 1299-1311 (M.D. Fla. 2009), a criminal case in which this Court's thoughtful harmless error determination in a Fifth Amendment violation situation was nonetheless set aside by writ of habeas corpus.

incriminate himself and that the District Court's decision ignores this salient principle of constitutional law.

Finally, the District Court's citation of *United States v. Sellers*, 848 F. Supp. 73, 77 (E.D. La. 1994), far from supporting its construction of the constitutional provisions at issue here, in truth demonstrates the error of its analysis. In *Sellers* the issue was whether the forced repatriation of "tainted assets" belonging to the defendants, *that were known to the government and had been frozen by it*, violated the defendants' Fifth Amendment protection. The court said "no," subject to an order *limiting the government's use of the evidence* in future criminal proceedings, *i.e.*, in essence, granting the defendants immunity. The Order in the present case provides no such limitation or protection.

In sum, the District Court's opinion misconstrues the meaning, breadth and proper application of the state and federal constitutional privileges against self-incrimination in such a way that it is important for this Court to accept review of the decision.

II. This Court has discretionary jurisdiction to review the District Court's decision pursuant to Article 5, Section 3(b)(3) of the Florida Constitution and Fla. R. App. P. 9.030(a)(2)(A)(iv) because the decision expressly and directly conflicts with decisions from other District Courts of Appeal.

While it is true that the District Court did not identify a direct conflict of its decision with any other decisions of this Court or other District Courts of Appeal,

the discussion of the facts and the legal principles which the District Court applied demonstrates conflict with the cited cases. See *Ford Motor Company v. Kikis*, 401 So.2d 1341, 1342 (Fla. 1981). For all intents and purposes, the facts set forth in the following cases are substantially similar to those presented here and the principles enunciated are in conflict with the principles applied by the District Court below. Those cases and principles are as follows:

(a) *Rainerman v. Eagle National Bank of Miami, supra* (inquiry into individual's assets and financial obligations where there were outstanding allegations of fraud "suggest that revelations in the discovery could furnish a link in ongoing and future criminal proceedings".). The District Court's decision here itself identifies allegations of fraud against Petitioner yet, in conflict with *Rainerman*, refuses to uphold Petitioner's privilege against self-incrimination.

(b) *Lewis v. First American Bank of Palm Beach County, supra* and *Meek v. Dean Witter Reynolds, Inc., supra.* Both of these cases stand for the principle that a trial court cannot require a witness to answer unless it is perfectly clear that the testimony or production cannot *possibly* have a tendency to incriminate him. In the present case, the District Court would require "further explanation" from the Petitioner as to "how the requested action could lead to self-incrimination", rather than addressing the "realistic possibility" that the actions would be self-incriminating.

(c) *Magid v. Winter, supra*. This case also addresses the burden which must be satisfied to demonstrate a proper invocation of the privilege against self-incrimination, in conflict with the District Court's opinion below. In addition, the District Court's upholding of a repatriation order that requires production and accounting for **all** assets and **all** documents reflecting such assets, "even those which may incriminate the witness" (*id.* at 1039) is overbroad and a departure from the essential requirements of law. The failure of the lower court's orders to so limit the compulsive testimony (the accounting) and testimonial act of production (repatriation of assets and identification of them) conflict with the principle of law enunciated in *Magid*.

CONCLUSION

Discretionary jurisdiction lies with this Court because the First District Court of Appeal's decision expressly construes the privilege against self-incrimination provisions of the state and federal constitutions and, further, conflicts with decisions of other Florida district courts of appeal. This Court should exercise its discretion to grant review of the present case to not only address the impact on the present petition, but also the lack of clarity and confusion that the District Court's opinion creates as a matter of precedent.

Respectfully submitted,

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that pursuant to Florida Rules of Appellate Procedure 9.210(a), this brief has been printed in Times New Roman with 14 point font.

Kenneth G. Spillias

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by U.S. Mail and Electronic Mail to ***Allison Finn, Esq.***, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs PL-01, The Capitol, Tallahassee, Florida 32399-1050, allison_finn@oag.state.fl.us, this ___day of March, 2012.

Kenneth G. Spillias