

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-478

L.T. CASE NO. ID10-4933

BERND TAUBERT,

Petitioner,

v.

STATE OF FLORIDA,
OFFICE OF THE ATTORNEY GENERAL,

Respondent.

RESPONDENT'S ANSWER BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Petitioner, Bernd Taubert, sent documents that appeared to be invoices to companies that had applied for patents and trademarks, inducing them to send him money. Following a trial, he was found to be in violation of the Florida Deceptive and Unfair Trade Practices Act, and a final judgment ordered him to account for and repatriate funds he had sent to banks overseas. Mr. Taubert now contends that this order violates his Fifth Amendment privilege against self-incrimination and challenges a ruling on this subject by the First District Court of Appeal. Mr. Taubert asks this Court to invoke discretionary jurisdiction pursuant to Article V, Section 3(b) of the Florida Constitution and Fla. R. App. P. 9.030(a)(2)(A), asserting that the District Court's decision expressly construes a provision of the U.S. and Florida constitutions and expressly and directly conflicts with other district court decisions.

SUMMARY OF THE ARGUMENT

The decision of the District Court re-states long-settled legal principles. Other courts in Florida as well as federal courts have repeatedly arrived at the same conclusions. The decision does not address any unresolved or controversial questions of constitutional interpretation. As in the past, this Court should reserve the invocation of discretionary jurisdiction for matters of significance. No purpose

would be served by reviewing a case that merely reiterates established doctrines. *Rojas v. State*, 288 So. 2d 234, 236 (Fla. 1973); *Dykman v. State*, 294 So. 2d 633, 634-35 (Fla. 1973).

Mr. Taubert further contends that the decision conflicts with other district court decisions. However, the decisions cited by Mr. Taubert are either not in conflict with the decision in question at all, or are so readily distinguishable that any conflict would have to be inferred. There are no express or direct conflicts between the decisions. Mr. Taubert's jurisdictional brief also mischaracterizes important factual matters. Distortion of the facts, the law and the District Court's decision are the central themes of his presentation to this Court.

ARGUMENT

I. The District Court's decision merely re-states settled principles, and no purpose would be served by reviewing a case that reiterates established doctrines.

Mr. Taubert mischaracterizes the District Court's opinion, giving the inaccurate impression that the court reached novel and unprecedented conclusions concerning the Fifth Amendment. In fact, the court's opinion reiterated established principles, and therefore this case does not warrant discretionary review.

According to Mr. Taubert, the District Court decided that (1) his concerns about possible criminal prosecution have no merit, (2) his testimony must be

compelled even though it would be incriminating and (3) "the use of such self-incriminating evidence would necessarily constitute harmless error."¹ These conclusions are simply not reached in the District Court's opinion. Mr. Taubert acknowledges as much, repeatedly using the phrases "in effect," "in essence" or "to all intents and purposes" to introduce his fanciful interpretations of the ruling. His assertions wildly mischaracterize what the District Court actually decided.

The District Court ruled that (1) a witness may assert the Fifth Amendment privilege when he has reasonable grounds to believe that answers to questions would provide a link in the chain of evidence necessary for a criminal prosecution, (2) it is not for the witness to determine whether answers are protected, it is a decision left to the sound discretion of the trial court after considering the circumstances of the case, (3) a blanket assertion of the Fifth Amendment privilege as to all matters of inquiry is insufficient to invoke the privilege and (4) the privilege must be considered in relation to the questions asked. The court's opinion cites Florida and federal cases in support of each of these determinations.

The decision merely reiterates the principle that the protections provided by the Fifth Amendment are not automatic -- invocation of the privilege may depend on the circumstances of the case and the findings of the trial court, and invocation

¹ Mr. Taubert does not explain what appear to be contradictions in his interpretation of the decision -- namely, how the District Court could knowingly compel incriminating testimony while also believing the testimony would not be incriminating.

is not proper when the privilege is claimed without explanation as to all matters across the board. The District Court found that inquiry in the instant case would have been appropriate. The court wondered, for example, why the mere existence of funds that could be used to pay for civil penalties and/or consumer restitution is supposedly incriminating. Because Mr. Taubert had made an across-the-board assertion of the privilege and provided neither the trial court nor the appeals court with a basis for the claim, the District Court simply applied the settled principle that a blanket claim is insufficient.

By contrast, and contrary to established principles, Mr. Taubert would have this Court believe that the Fifth Amendment is all-encompassing and absolute. Because he has simply uttered the words "Fifth Amendment," he argues, all inquiry and court action must cease, even concerning matters that do not appear to be pertinent -- with the result in the instant case that the civil remedies ordered by the trial court would be eviscerated.²

II. The decision in question does not conflict expressly or directly with the district court decisions cited by Mr. Taubert.

Mr. Taubert asserts that the three district court decisions listed below expressly and directly conflict with the District Court's decision in the instant case.

² Mr. Taubert cites "facts" in support of his arguments that cannot be found in the District Court's opinion and are also untrue -- that the trial court found him to be guilty of criminal fraud and that "there is no indication that the State has any knowledge of the existence of any such assets [transferred by Mr. Taubert into overseas bank accounts]...."

He is incorrect. To the extent there is any conflict, it is not express or direct and would have to be read, with difficulty, into these decisions.

(1) *Lewis v. First Am. Bank of Palm Beach Cnty.*, 405 So. 2d 300 (Fla. 4th DCA 1981). In *Lewis*, the court opined 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" (emphasis added by Mr. Taubert in his brief). Mr. Taubert apparently cites this case to show that the *Lewis* court found an extraordinarily low standard for proper invocation of the Fifth Amendment and that those challenging it must prove that incrimination is impossible. However, the *Lewis* court made no such explicit determination, and the decision is therefore not in express or direct conflict with the instant decision. In fact, the key ruling in *Lewis* is entirely supportive. There, as here, the court addressed whether an across-the-board claim of the privilege was proper, and the *Lewis* court ruled that some questions could be directed to the defendant. Also as in the instant case, the *Lewis* court stated that deciding what answers may be incriminating requires the exercise of the trial court's discretion.

(2) *Magid v. Winter*, 654 So. 2d 1037 (Fla. 4th DCA 1995) is readily distinguishable from the instant case. There, the defendant, facing a wide-ranging and open-ended deposition, had been directed to answer any and every question that could arise. The District Court found the order too broad. Here, by contrast, only relatively narrow subject matter related to the location and return of overseas funds is at issue. Again, there is no direct or express conflict. Moreover, there as here, the court took pains to point out that the applicability of the Fifth Amendment privilege requires a question-by-question examination.

(3) *Rainerman v. Eagle Nat'l Bank of Miami*, 541 So. 2d 740 (Fla. 3d DCA 1989). Mr. Taubert asserts that *Rainerman* conflicts with the instant decision because, in identical circumstances, that court reached a different conclusion, allowing a defendant to invoke a sweeping Fifth Amendment privilege. The identical circumstances, according to Mr. Taubert, are that in *Rainerman* "there were outstanding allegations of fraud" and "the District Court's decision here [in the instant case] identifies allegations of fraud." Contrary to Mr. Taubert's assertions, the cases are not in express or direct conflict. They are readily distinguishable in many important particulars. For one thing, the defendant in *Rainerman* was in the full throes of actual criminal proceedings, whereas Mr. Taubert's claims concerning criminal charges are merely speculative. For another

thing, the District Court in the instant case has not "identifie[d] allegations of fraud" by Mr. Taubert akin to those directed at the *Rainerman* defendant. The court's opinion does state that Mr. Taubert sent out deceptive documents in violation of the Florida Deceptive and Unfair Trade Practices Act. This is not equivalent to criminal fraud, and the court does not say that it is. In fact, although it uses the word "defrauded," the court takes care to point out that all relevant proceedings concerned whether Mr. Taubert was "civilly liable." Fraud in the criminal sense requires a *mens rea* element and standard of proof never addressed in the civil proceedings or the District Court's opinion. The defendant in *Rainerman* was entirely differently situated. What is more, the nature of the Fifth Amendment claims in the two cases is sharply different. The *Rainerman* defendant was asked to address subject matter that was clearly and decisively relevant to the actual, contemporaneous criminal charges against him, whereas Mr. Taubert has not established even a tenuous connection between the order he challenges and his supposed criminal liability at some future, unknown date.

CONCLUSION

Mr. Taubert has not set forth a sufficient basis for discretionary jurisdiction. The District Court decision in question is entirely consistent with established

jurisprudence, and it does not conflict expressly or directly with decisions by other district courts.

Respectfully submitted,

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that pursuant to Florida Rule of Appellate Procedure 9.210(a) this brief has been prepared in 14-point Times New Roman font.

S/Allison Finn
Allison Finn

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the above were sent by email and U.S. mail to Kenneth G. Spillias; Lewis Longman & Walker, P.A.; 515 N. Flagler Drive, Suite 1500; West Palm Beach, Florida 33401; and Douglas Williams, 3191 Coral Way, Penthouse 200; Miami, Florida 33145; on March 29, 2012.

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