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Criminal Procedure - New Mexico Denies Fifth Amendment Protection to Corporations: John Doe and Five Unnamed Corporations v. State ex rel. Governor's Organized Crime Prevention Commission

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CRIMINAL PROCEDURE—New Mexico Denies Fifth
Amendment Protection to Corporations:
John Doe and Five Unnamed Corporations
v. *State ex rel. Governor's Organized*
Crime Prevention Commission

I. INTRODUCTION

In *John Doe & Five Unnamed Corps. v. State ex rel. Governor's Organized Crime Prevention Commission*¹ the New Mexico Supreme Court held that a corporation does not qualify as a "person" for purposes of Fifth Amendment immunity under the Organized Crime Act.² The court reached its decision based upon the rules of statutory construction and interpretation. The decision in this case moves New Mexico case law in line with the United States Supreme Court's standards, as represented in *Braswell v. United States*.³ Under this standard, a corporation cannot avail itself of a claim of Fifth Amendment immunity.⁴ Nor can a corporate custodian claim Fifth Amendment immunity with regard to the production of corporate records, no matter how personally incriminating.⁵ This note analyzes the case and explores the implications of the decision.

II. STATEMENT OF THE CASE

On August 25, 1989, the Governor's Organized Crime Prevention Commission ("Commission") issued an administrative subpoena duces tecum to John Doe.⁶ The Commission requested the production of business documents from John Doe and Five Corporations of which he was sole owner and shareholder. The Commission issued the subpoena pursuant to section 29-9-5(C) of the Organized Crime Act⁷ in connection with an investigation of the infiltration of organized crime and racketeering into the pornography business.⁸

John Doe appeared before the Commission as directed, but refused to respond to questions or to produce the subpoenaed documents on the

1. 114 N.M. 78, 835 P.2d 76 (1992).

2. See N.M. STAT. ANN. §§ 29-1-1 to -15 (Repl. Pamp. 1990).

3. 487 U.S. 99 (1988).

4. *Id.* at 116.

5. *Id.*

6. *John Doe & Five Corps.*, 114 N.M. at 78-79, 835 P.2d at 76-77.

7. Section 29-9-5(C) of the Organized Crime Act states in relevant part:

The [C]ommission is authorized to:

(4) . . . subpoena witnesses, compel their attendance before the commission and require them to produce before the commission any books, records, documents or other evidence relevant or material to an investigation

N.M. STAT. ANN. § 29-9-5(C).

8. *John Doe & Five Corps.*, 114 N.M. at 79, 835 P.2d at 77.

grounds that his Fifth Amendment rights would be violated. The Commission initiated proceedings to enforce the subpoenas in the First Judicial District Court of New Mexico. The court entered an order enforcing the subpoenas on November 6, 1990.⁹ Subsequently, John Doe produced a small box of documents. The Commission found these documents to be inadequate and issued more specific subpoenas to John Doe and the Five Corporations on April 19, 1991.¹⁰

John Doe and the Five Corporations filed a petition to quash, modify, or extend the subpoenas as provided in the Organized Crime Act.¹¹ The court quashed the subpoena directed to John Doe.¹² The court upheld the subpoenas directed to the corporations, however, stating that "the evidentiary privilege against self-incrimination of the Fifth Amendment of the United States Constitution, analogous portions of the New Mexico Constitution, and NMSA 1978, [section] 29-2-9, applies only to 'natural persons' and does not apply to corporations."¹³ The court ordered John Doe to produce the subpoenaed documents and records for inspection by the Commission.¹⁴

John Doe appealed the trial court's ruling regarding the Five Corporations.

III. ANALYSIS OF THE CASE

The court determined that the issue in this case involved "both a limitation on the investigatory power of the Commission and an investigatory tool that gives the Commission discretionary power to grant immunity."¹⁵ Specifically, the court examined whether a corporate entity was entitled to the right against self incrimination accorded "natural persons" under the United States and New Mexico Constitutions.¹⁶ If a corporation had a right against self-incrimination, the Commission would be required to extend immunity to the corporation in order to compel the production of evidence.¹⁷

9. *Id.*

10. *Id.*

11. Section 29-9-5(C)(4) of the Organized Crime Act states in relevant part:

At any time before the return date of the subpoena, the person subpoenaed may file a petition to set aside the subpoena, modify the subpoena, or extend the return date thereon in district court of any county in which the person is subpoenaed to appear and the court upon showing of good cause may set aside the subpoena, modify it or extend the return date of the subpoena

N.M. STAT. ANN. § 29-9-5(C)(4).

12. *John Doe & Five Corps.*, 114 N.M. at 79, 835 P.2d at 77.

13. *Id.*

14. *Id.*

15. *Id.* (citing *In re Investigation No. 2 of the Governor's Organized Crime Prevention Comm'n*, 93 N.M. 525, 527, 602 P.2d 622, 624 (1979) (referring to N.M. STAT. ANN. § 29-9-9)).

16. See also U.S. CONST. amend. V; N.M. CONST. art. II, § 15.

17. N.M. STAT. ANN. § 29-9-9(A) provides:

If, in the course of any investigation or hearing conducted by the commission pursuant to the Organized Crime Act [29-9-1 to 29-9-17 NMSA 1978], a person refuses to answer a question or questions or produce evidence of any kind on the ground that he will thereby be exposed to criminal prosecution or penalty or

The legislature did not explicitly define the personal status of a corporation in the Organized Crime Act. Because the definition of "person" may include corporations, the status of corporations under section 29-9-9(A) of the Organized Crime Act¹⁸ is not clear.¹⁹ To clarify this ambiguity, the court examined the Organized Crime Act using the rules of statutory construction and interpretation in order to determine whether the legislature intended that corporations be considered "persons" for purpose of the Organized Crime Act.²⁰

The court used three interpretative schemes to determine the intent of the legislature in establishing the Organized Crime Act. First, the court examined the statute to determine that the intended purpose of the Organized Crime Act would be impaired by a grant of immunity to corporations.²¹ Second, the court looked to United States Supreme Court rulings denying personal status and immunity to corporations.²² The court "presumed that the legislature knew about the existing law and did not intend to enact a law inconsistent with any existing law."²³ Finally, the court looked to the Racketeering Act,²⁴ enacted after the Organized Crime Act, to determine that the legislature was aware of its option to define a corporation as a person, but had chosen not to do so.²⁵

A. Purpose of the Organized Crime Act

A corporation may be accorded the same status as a natural person under the law in some instances.²⁶ The appellant asserted that the Five Corporations were entitled to the Fifth Amendment protection accorded to a natural person.²⁷ The court proceeded to use rules of statutory construction and interpretation to determine whether the legislature in-

forfeiture, the commission may order the person to answer the question or questions or produce the requested evidence and confer immunity as provided in this section.

A person receiving a grant of immunity from the Commission "shall be immune from having such responsive answer given by him or such responsive evidence produced by him, or evidence derived therefrom used to expose him to criminal prosecution or penalty of forfeiture . . ." *Id.* § 29-9-9(B).

18. *Id.* § 29-9-9(A) (dealing with immunity from criminal prosecution).

19. "There is ambiguity in Subsection 29-9-9(A) because 'person' may be extended to include a corporation." *John Doe & Five Corps.*, 114 N.M. at 80, 835 P.2d at 78.

20. *Id.* at 79-81, 835 P.2d at 77-79. In making this determination the court quoted *Methola v. County of Eddy*, 95 N.M. 329, 333, 622 P.2d 234, 238 (1980): "Where there is ambiguity in statutory language and the meaning is not clear, the courts must resort to construction and interpretation. Any time rules of construction are applied, the overriding concern of the Court is to determine legislative intent." *Id.* at 79-80, 835 P.2d at 77-78 (citations omitted).

21. *Id.* at 80, 835 P.2d at 78.

22. *Id.*

23. *Id.* (citing *Quintana v. New Mexico Dep't of Corrections*, 100 N.M. 224, 227, 668 P.2d 1101, 1104 (1983)).

24. See N.M. STAT. ANN. §§ 30-42-1 to -6 (Repl. Pamph. 1989).

25. *John Doe & Five Corps.*, 114 N.M. at 81, 835 P.2d at 79.

26. E.g., N.M. STAT. ANN. § 30-42-3(B) (Repl. Pamph. 1989). The New Mexico legislature has defined person to include corporations for the purpose of the Racketeering Act.

27. *John Doe & Five Corps.*, 114 N.M. at 79, 835 P.2d at 77.

tended that a corporation should be defined as a person for purposes of the Organized Crime Act.²⁸

The court first looked to the Organized Crime Act to determine the intent of the legislature in its creation of the Commission. The purpose of the Commission, as defined by the legislature, "is to forestall, check and prevent the infiltration and encroachment of organized crime into public and private affairs within New Mexico"²⁹ In order to accomplish this purpose the Commission may disseminate "testimony and other evidence . . . to law enforcement agencies . . . as [it deems] proper"³⁰

If the Commission deems it proper, this could include the dissemination of evidence to be used in the prosecution of those involved in organized crime. The ability to provide evidence to law enforcement agencies leading to indictments for organized crime-related offenses logically furthers the purpose of the Commission to "forestall, check and prevent the infiltration and encroachment of organized crime" into New Mexico.³¹

If corporations were accorded Fifth Amendment protection under the Organized Crime Act, the Commission would be forced to provide immunity in order to compel the production of incriminating evidence from a corporation, or forego access to the evidence completely. Either option would limit the power of the Commission in carrying out its legislatively mandated purpose.

In interpreting the intent of the legislature, the court stated that "remedial legislation generally is liberally construed to facilitate and accomplish the intent and purpose"³² The court further stated that "[a]llowing a corporation through its representatives to refuse to produce documents . . . would impede the Commission's power, contrary to the purpose of the [Organized Crime] Act."³³

B. Related United States Supreme Court Decisions

In a further effort to determine the intent of the legislature, the court looked at the historical background in which the Organized Crime Act was promulgated.³⁴ In particular, the court looked to the United States

28. *Id.*

29. N.M. STAT. ANN. at § 29-9-4 (Repl. Pamph. 1990).

30. *Id.* at § 29-9-5(D).

31. *Id.* at § 29-9-4.

32. *John Doe & Five Corps.*, 114 N.M. at 80, 835 P.2d at 78. In support of the decision to construe the provisions of the Organized Crime Act to facilitate and accomplish the intent and purpose of the legislature in its passage, the court cited *Stratton v. Gurley Motor Co.*, 105 N.M. 803, 808, 737 P.2d 1180, 1185, *cert. denied*, 105 N.M. 781, 737 P.2d 893 (1987). For additional support, the court quoted NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 58.06 (Temp. Pamph. 5th ed. 1992): "A statute is strictly construed when its letter is narrowed to exclude matters which if included would defeat the policy of the legislation and produce results which do not conform to its purpose." *John Doe & Five Corps.*, 114 N.M. at 80, 835 P.2d at 78.

33. *John Doe & Five Corps.*, 114 N.M. 80, 835 P.2d at 78.

34. *Id.* The court stated that "[i]t is appropriate to look to the history and background of the Act when determining legislative intent." *Id.* (citing *Monroe v. Wall*, 66 N.M. 15, 18, 340 P.2d 1069, 1070 (1959)). Furthermore, the court held that "[t]he statute must be interpreted as the legislature understood it at the time it was passed." *Id.* (citing *Pan Am. Petroleum Corp. v. El Paso Natural Gas Co.*, 82 N.M. 193, 196, 477 P.2d 827, 830 (1970)).

Supreme Court's interpretations that also restricted claims of Fifth Amendment protection by corporations.

The court first cited *Hale v. Henkel*,³⁵ in which the United States Supreme Court held that a corporation's records are not entitled to Fifth Amendment protection.³⁶ In *Hale*, the custodian of the corporate records refused to provide subpoenaed records in conjunction with a Sherman Act³⁷ investigation. The Sherman Act contains an immunity provision³⁸ similar to the immunity provision of the Organized Crime Act.³⁹ The custodian of the corporate records was accorded immunity under the statute, but the Court refused to extend the immunity to the corporation.⁴⁰ The *Hale* Court based this decision on the personal nature of Fifth Amendment immunity, preventing a person from invoking immunity to protect a third party.⁴¹ The New Mexico Supreme Court concluded its analysis of *Hale* by summarizing the United States Supreme Court's decision on the issue of corporate immunity as follows: "Just as a person cannot assert the privilege on behalf of a third person, a corporate officer cannot assert the privilege on behalf of a corporation."⁴² In subsequent cases, this concept has been expanded to disallow the claim of personal immunity by the natural person serving as the custodian of corporate records.⁴³ It has also been extended to other collective entities which are

35. 201 U.S. 43 (1906).

36. The Court in *Hale* stated:

[A] corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose.

Id. at 74-75.

37. 15 U.S.C. §§ 1 to 7 (1973).

38. The *John Doe & Five Corps.* court quoted the Sherman Act immunity provision from *Hale* as follows: "[N]o person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said acts." *John Doe & Five Corps.*, 114 N.M. at 80, 835 P.2d at 78 (quoting *Hale v. Henkel*, 201 U.S. 43, 66 (1906)).

39. N.M. STAT. ANN. § 29-9-9.

40. *Hale*, 201 U.S. at 69-70.

41. The *Hale* Court stated:

The right of a person under the Fifth Amendment to refuse to incriminate himself is purely a personal privilege of the witness. It was never intended to permit him to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person.

Id.

42. *John Doe & Five Corps.*, 114 N.M. at 80, 835 P.2d at 78 (citing *Hale v. Henkel*, 201 U.S. 43, 69-70 (1906)).

43. *Wilson v. United States*, 221 U.S. 361 (1911). The Court reasoned that if the custodian were allowed to defeat a subpoena directed at the corporation by way of claim of his own Fifth

not incorporated, such as unions and partnerships.⁴⁴ Furthermore, the United States Supreme Court has held that the size of the corporation does not alter the lack of privilege.⁴⁵

The *John Doe & Five Corps.* court then looked to *Braswell v. United States* for additional insight into the historical background of the Organized Crime Act.⁴⁶ The facts in *Braswell* are similar to those in the *John Doe & Five Corps.* case. In both cases, the natural person appellant was sole shareholder in the corporations whose records were subpoenaed.

Braswell came in the wake of two other United States Supreme Court cases, *Fisher v. United States*⁴⁷ and *United States v. Doe*,⁴⁸ in which the act of production immunity was established. Act of production immunity is grounded in the concept that the production of corporate records have a testimonial aspect independent of the contents of the records.⁴⁹ The natural person appellant in *Braswell* asserted that he was entitled to production immunity if he produced the subpoenaed records.⁵⁰ The *Braswell* Court disagreed, quoting *United States v. White*⁵¹ for the proposition that a custodian assumes "the rights, duties and privileges of the artificial entity or association of which they are agents or officers and they are bound by its obligations . . . even though production of the papers might tend to incriminate them personally."⁵²

The *Braswell* Court recognized that the production of corporate records does have a testimonial aspect.⁵³ A total grant of immunity from prosecution would, however, have serious consequences "if the Government has any thought of prosecuting the custodian . . ."⁵⁴ The Court proceeded to develop a process by which, in the event that the custodian is prosecuted for offenses arising from the act of production, the fact that he produced the documents would be withheld from the jury.⁵⁵ The

Amendment privilege, then access to corporate records would effectively be denied. "[T]he custodian has no privilege to refuse production [of the records] although their contents tend to incriminate him." *Id.* at 382.

44. See *United States v. White*, 322 U.S. 694 (1944).

45. See *Bellis v. United States*, 417 U.S. 85 (1974) (involving a law firm partnership consisting of three persons). The Court stated that "[i]t is well settled that no privilege can be claimed by the custodian of corporate records, regardless of how small the corporation may be." *Id.* at 100.

46. See *Braswell v. United States*, 487 U.S. 99 (1988). For a more in-depth analysis of this case, see Scott D. Price, Note, *Braswell v. United States: An Examination of a Custodian's Fifth Amendment Right to Avoid Personal Production of Corporate Records*, 34 VILL. L. REV. 353 (1989), and Timothy W. Barbow, Note, *Braswell v. United States: Using the Corporate Fiction to Deny an Individual his Fifth Amendment Rights*, 12 GEO. MASON U. L. REV. 405 (1990).

47. 425 U.S. 391 (1976).

48. 465 U.S. 605 (1984).

49. "Compliance with the subpoena tacitly concedes the existence of the papers . . . their possession or control by the [custodian, and] . . . would indicate the [custodian's] belief that the papers are those described in the subpoena." *Fisher*, 425 U.S. at 410.

50. 487 U.S. 99 (1988).

51. 322 U.S. 694 (1944).

52. *Braswell*, 487 U.S. at 110-11 (quoting *United States v. White*, 322 U.S. 694, 669 (1944)).

53. *Id.* at 111.

54. *Id.* at 117.

55. *Id.* at 118.

Court reasoned that while the jury was free to assign the act of production to the custodian, it might also reasonably assign the act to another individual, thus protecting the custodian from the incriminating nature of the act of production.⁵⁶

Finally, as cited in a footnote by the New Mexico Supreme Court, the *Braswell* Court proposed a possible exception.⁵⁷ Where the custodian is the sole employee and officer of the corporation, and the jury would inevitably conclude he produced the record, immunity for the act of production may apply.⁵⁸ This scenario was not raised in either case, so the outcome of such a situation is still in question.

C. *The Racketeering Act*

For additional support for the proposition that the legislature purposely withheld Fifth Amendment protection to corporations under the Organized Crime Act, the *John Doe & Five Corps.* court looked to the establishment of the Racketeering Act in 1989.⁵⁹ In the Racketeering Act, corporations are defined as persons.⁶⁰ The court reasoned that "[k]nowing that the definition of 'persons' was extended to corporations in the Racketeering Act, the legislature could have enacted an immunity section in that Act or amended Section 29-9-9 to include immunity to corporations."⁶¹ The court concluded by stating that the legislature did not define corporations as persons in the Organized Crime Act, and that the court was "powerless to do that for them."⁶²

The *John Doe & Five Corps.* court held that "the evidentiary privilege against self-incrimination of the Fifth Amendment of the United States Constitution, New Mexico Constitution article XI [sic], [section] 15, and NMSA 1978, Section 29-9-9, does not apply to appellant corporations or John Doe in his representative capacity."⁶³ The court concluded by affirming "the district court's Final Order Denying Petition to Quash, Modify or Extend Subpoenas issued on July 9, 1991."⁶⁴

V. IMPLICATIONS

In light of the supreme court's reliance on *Braswell v. United States*,⁶⁵ the decision in *John Doe & Five Corps.* would seem to negate any claim of Fifth Amendment immunity for the production of corporate records. A custodian of corporate records accepts the position along with the rights and duties of the corporation.⁶⁶ This includes a waiver of Fifth

56. *Id.*

57. *John Doe & Five Corps.*, 114 N.M. at 81 n.1, 835 P.2d at 79 n.1 (citing *Braswell v. United States*, 487 U.S. 99, 118 n.11 (1988)).

58. *Braswell*, 487 U.S. at 118 n.11.

59. N.M. STAT. ANN. § 30-42-1 to -6 (Repl. Pamph. 1989).

60. *Id.* § 30-42-3(B).

61. *John Doe & Five Corps.*, 114 N.M. at 81, 835 P.2d at 79.

62. *Id.*

63. *Id.*

64. *Id.*

65. 487 U.S. 99 (1988).

66. *Id.* at 110-11.

Amendment immunity regarding the production of corporate records, regardless of how personally incriminating they might be.

Attorneys, when advising clients of the benefits and duties of incorporation, should also advise clients of the collateral loss of Fifth Amendment privilege by the custodian of the corporate records. This is especially important when the custodian is also the sole owner and shareholder of the corporation. In this instance, the production and contents of the records can only be attributed to the custodian. If the records are personally incriminating the custodian will have no access to Fifth Amendment immunity if the records are subpoenaed under the Organized Crime Act and similar statutes.

VI. CONCLUSION

In *John Doe & Five Unnamed Corps. v. New Mexico ex rel. Governor's Organized Crime Prevention Commission*, the New Mexico Supreme Court has clarified the Fifth Amendment status of corporations for purposes of the Organized Crime Act. Corporations, as "creature[s] of the State,"⁶⁷ are limited to the rights and duties defined by the State. Unless expressly defined as "persons" by the legislature, the New Mexico Supreme Court has determined that corporations do not have access to Fifth Amendment immunity.⁶⁸ The court found that to determine otherwise would impair the power of the Organized Crime Act contrary to the intent of the legislature.⁶⁹

By extension, the natural person serving as the custodian of the corporate records cannot claim Fifth Amendment immunity with regard to the production of the subpoenaed corporate records.⁷⁰ In accepting the duties of the custodian of the corporate records, the custodian also accepts the same "rights, duties and privileges of the artificial entity . . ."⁷¹ These duties include the production of subpoenaed corporate records without access to Fifth Amendment immunity, "even though production of the papers might tend to incriminate [him] personally."⁷²

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67. *Hale*, 201 U.S. at 74.

68. *John Doe & Five Corps.*, 114 N.M. at 81, 835 P.2d at 79.

69. *Id.*

70. *Id.*

71. *Braswell*, 487 U.S. at 110 (citing *United States v. White*, 322 U.S. at 669).

72. *Id.* at 110-11.