IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,793

CLIFTON WINFIELD, NIGEL WINFIELD, NIKKI WINFIELD, a minor, by and through her father and next friend, MALCOLM WINFIELD and FRANK MARANO,

Petitioners,

vs.

DIVISION OF PARI-MUTUEL WAGERING, DEPARTMENT OF BUSINESS REGULATION, ROBERT M. SMITH, JR., and GARY RUTLEDGE,

Respondents.

BRIEF OF AMICUS CURIAE, ATTORNEY GENERAL OF FLORIDA

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Statement of the Case and Facts

The Respondent DIVISION is the state agency charged with regulation of the pari-mutuel wagering industry pursuant to Art. X, §7, Fla. Const., and Chapter 550, Fla. Stat. Pursuant to the authority granted in §550.02(3), Florida Statutes, the DIVISION had issued subpoenas duces tecum to various banking institutions to obtain banking records of accounts of NIGEL WINFIELD, MALCOLM WINFIELD, and various corporations. The purpose of the subpoenas duces tecum was apparently to gather financial information concerning whether the WINFIELDS have falsely reported the equitable ownership of racehorses by titling them in the names of family members and front corporations. The DIVISION gave no notice of the subpoenas to the WINFIELDS or the corporations, and asked the banks not to inform the WINFIELDS or the corporations of the investigation.

This case arose upon the Complaints of CLIFTON WINFIELD, NIGEL WINFIELD, NIKKI WINFIELD and MALCOLM WINFIELD (collectively Petitioners) for declaratory and injunctive relief against the subpoenas duces tecum. It is important to note that the corporations named in the subpoenas have not appeared as parties to the suit. The Petitioners, all individuals, alleged that the subpoenas were facially invalid, that they violated Petitioners' constitutional rights to privacy and due process, and that maintenance of the records as public records in the DIVISION's files constituted an additional violation of their constitutional right to privacy.

In consolidated proceedings before the Broward County Circuit Court, the Honorable Joseph E. Price, Jr., Judge, the DIVISION introduced evidence tending to show that NIGEL WINFIELD had been denied an occupational license by the New York State Racing and Wagering Board (A. 63-75), as well as copies of administrative complaints filed against MALCOLM WINFIELD and testimony of the DIVISION's Director. The Circuit Court found that the DIVISION had probable cause to institute the investigation, and that it had acted within its authority. The Court nevertheless granted Petitioners relief on the grounds that their constitutional privacy rights would be violated if the subpoenaed records became public records in the hands of the DIVISION pursuant to Chapter 119, Florida Statutes. The Circuit Court ruled:

> This Court, having considered said motions and having been fully advised in the premises, finds that the Defendants were acting with probable cause and within the scope of their jurisdiction and authority in obtaining these records by subpoena. The Court further finds, however, that said records, having become a part of the Defendant DIVISION OF PARI-MUTUEL WAGERING'S public files pursuant to Chapter 119, Florida Statutes, are subject to public disclosure, in possible violation of Plaintiff's rights to privacy under the Federal and Florida Constitutions . . .

(A. 129). The Court thereupon confirmed a previous interlocutory order in effect restraining the DIVISION from inspecting, copying or using the records or the information contained in them, and directing that the records be maintained under Court seal.

The DIVISION appealed this ruling to the Fourth District Court of Appeal. Petitioners did not cross-appeal the Circuit Court's ruling on the questions of probable cause, jurisdiction and authority. The Fourth District Court of Appeal ruled in favor of the DIVISION, but certified the following two questions to the Supreme Court as questions of great public importance:

1. Does Article I Section 23 of the Florida Constitution prevent the Division of Pari-Mutuel Wagering from subpoenaing a Florida citizen's bank records without notice?

2. Does the subpoenaing of all of a citizen's bank records under the facts of this case constitute an impermissible and unbridled exercise of legislative power?

The Amicus Attorney General, by way of further statement, adopts the Statement of the Case and Facts offered by Respondents.

ISSUES PRESENTED

I.

DOES ARTICLE I, § 23, FLA. CONST., PREVENT THE DIVISION OF PARI-MUTUEL WAGERING FROM SUBPOENAING A FLORIDA CITIZEN'S BANK RECORDS WITHOUT NOTICE?

A. DO PETITIONERS HAVE A SUFFICIENT REASONABLE EXPECTATION OF PRIVACY IN THE BANK'S RECORDS SO AS TO HAVE STANDING TO INVOKE THE PROTECTION OF ARTICLE I, §23, FLA. CONST.?

B. IF PETITIONERS HAVE A REASONABLE EXPECTATION OF PRIVACY IN THE BANK'S RECORDS, DOES THE STATE'S INTEREST IN OBTAINING THE RECORDS WITHOUT NOTICE ON BALANCE JUSTIFY THE USE OF THIS PROCEDURE?

C. DOES THE STATUS OF THE DIVISION'S RECORDS AS "PUBLIC RECORDS" SUBJECT TO DISCLOSURE UNDER CHAPTER 119, FLA. STAT., AFFECT THE DETERMINATION OF PETITIONERS' PRIVACY RIGHTS UNDER ART. I, §23, FLA. CONST.?

II.

DOES THE SUBPOENAING OF ALL OF A CITIZEN'S BANK RECORDS UNDER THE FACTS OF THIS CASE CONSTITUTE AN IMPERMISSIBLE AND UNBRIDLED EXERCISE OF LEGISLATIVE POWER?

ARGUMENT

I.

DOES ARTICLE I, § 23, FLA. CONST., PREVENT THE DIVISION OF PARI-MUTUEL WAGERING FROM SUBPOENAING A FLORIDA CITIZEN'S BANK RECORDS WITHOUT NOTICE?

A. DO PETITIONERS HAVE A SUFFICIENT REASONABLE EXPECTATION OF PRIVACY IN THE BANK'S RECORDS SO AS TO HAVE STANDING TO INVOKE THE PROTECTION OF ARTICLE I, §23, FLA. CONST.?

The records subpoenaed in this case are owned by the respective banking institutions from which they were subpoenaed. Accordingly, there is a significant question whether Petitioners have any reasonable expectation of privacy in those records, or, stated otherwise, whether they have standing to contest the subpoenas.[1]

It is manifest that Petitioners did not create the records in question, nor did they have either physical possession or any right of physical possession of the records. They were entitled, at best, to inspect and copy these records from the banks, but cannot claim ownership of the records.

Banks create and maintain these records not only for their own convenience, but pursuant to the requirements of

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[1]Petitioners make no claim that the records are subject to any evidentiary privilege. Absent a constitutional or statutory privilege, they have no standing to object to disclosure of evidence by other parties. Section 90.501, Fla. Stat.

federal law. In 1970 Congress enacted the Bank Secrecy Act, P.L. 91-508, 84 Stat. 118. The House Report accompanying the Act contained the following observations:

> Title I [the recordkeeping requirement] requires the Secretary of the Treasury to prescribe regulations whereby insured banks, insured institutions, and other financial institutions must maintain appropriate types of records which have, or may have, a high degree of usefulness in criminal, tax or regulatory investigations or proceedings.
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> * * *
>
> During the last decade, law enforcement agencies have found that the increasing growth of our financial institutions has been paralleled by an increase in criminal activity utilizing these institutions. Petty criminals, members of the underworld, those engaging in "white collar" crime and income tax evaders use, in one way or another, financial institutions in carrying on their affairs. According to law enforcement officials, an effective fight on crime depends in large measure on the maintenance of adequate and appropriate records by financial institutions. H.R. 15073 deals with the problem by requiring the maintenance of records by financial institutions in a manner designed to facilitate criminal, tax and regulatory investigations and proceedings.
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> * * *
>
> The importance of photocopies of checks to effective law enforcement, especially where white collar crimes are concerned, simply cannot be overestimated. The recipient of a direct or indirect bribe, for example, will make no record of his receipt of the money, and the person who wrote the check will

> take pains to see that it is totally destroyed after cancellation. In many instances, payments by check which are not necessarily illegal in and of themselves may constitute the only way that the prosecution can establish the existence of a relationship or pattern of conduct which may be essential to making its case.
>
> Finally, the maintenance of check photocopy records by banks raises no constitutional issues and poses no threat to individual liberty. As has been pointed out, banks have wide experience with maintaining these records, and the banking industry has a creditable record of maintaining their confidentiality. <u>There is nothing in this bill which would make such records any more accessible to law enforcement officers, much less anyone else, than they are now.</u>

1970 U.S. Code Cong. & Adm. News 4395, 4400 (emphasis supplied). The House Report's observations were enacted into law as a statement of Congressional findings and purpose:

> It is the purpose of this chapter to require certain reports or records where such reports or records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

12 U.S.C. §1829b. The same language appears in 12 U.S.C. §1951. It is readily apparent that the purpose for which these records are kept is to assist law enforcement with criminal, tax or regulatory investigations.

This federal legislation has been conclusively construed and enforced by the United States Supreme Court.

First, in California Bankers Ass'n. v. Shultz, 416 U.S. 21, 94 S.Ct. 1494, 39 L.Ed.2d 812 (1974), the Court sustained the Act's financial recordkeeping requirements against a variety of constitutional challenges by the banking industry. The Court, held, inter alia, that the recordkeeping requirements did not constitute an undue burden on the banking industry, nor violate due process by making the banks agents for government surveillance. Id., 416 U.S. at 45-50. The Court also rejected arguments that the statute constituted an unreasonable search or seizure in violation of the banks' or the customers' Fourth Amendment rights, id., 416 U.S. at 52-54, or self-incrimination in violation of the banks' and customers' Fifth Amendment rights, id. 416 U.S. at 55. The Court held that claims by the depositors against compelled production of the records of their accounts would have to be determined in an appropriate future case. Id., 416 U.S. at 51-52.

This precise question arose two years later in United States v. Miller, 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976). The government sought production of the records of a tax evasion suspect's bank account by grand jury subpoena, without notice to the suspect himself. The records were used to provide investigative leads and were later introduced in evidence at trial, over the defendant's objection. The Supreme Court squarely held that the subpoena and use of the records was constitutionally permissible. The Court said:

> On their face, the documents subpoenaed here are not respondent's "private papers." Unlike the claimant in Boyd, respondent can assert neither ownership nor possession. Instead, these are the business records of the banks.

Id., 425 U.S. at 440. The Court continued:

> Respondent urges that he has a Fourth Amendment interest in the records kept by the banks because they are merely copies of personal records that were made available to the banks for a limited purpose and in which he has a reasonable expectation of privacy.
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> * * *
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> We must examine the nature of the particular documents sought to be protected in order to determine whether there is a legitimate "expectation of privacy" concerning their contents.
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> * * *
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> Even if we direct our attention to the original checks and deposit slips, rather than to the microfilm copies actually viewed and obtained by means of the subpoena, we perceive no legitimate "expectation of privacy" in their contents. The checks are not confidential communications but negotiable instruments to be used in commercial transactions. All of the documents obtained, including financial statements and deposits slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinarily course of business. The lack of any legitimate expectation of privacy concerning the information kept in bank records was assumed by Congress in enacting the Bank Secrecy Act, the expressed purpose of which is to require records to be maintained because they "have a high degree of usefulness in criminal, tax and regulatory investigations and proceedings."

Id., 425 U.S. at 442-43 (citations omitted). The Court concluded:

> Many banks traditionally kept permanent records of their depositors' accounts, although not all banks did so and the practice was declining in recent years. By requiring that such records be kept by all banks, the Bank Secrecy Act is not a novel means designed to circumvent established Fourth Amendment rights. It is merely an attempt to facilitate the use of a proper and longstanding law enforcement technique by insuring that records are available when they are needed.

Id., 425 U.S. at 444-45 (footnote omitted). The Court summarily rejected the defendant's objections based on lack of notice:

> But, even if the banks could be said to have been acting solely as Government agents in transcribing the necessary information and complying without protest[5] with the requirements of the subpoenas, there would be no intrusion upon the depositors' Fourth Amendment rights.
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> * * *
>
> 5. Nor did the banks notify respondent, a neglect without legal consequences here, however unattractive it may be.

Id., 425 U.S., n. 5 at 443.

It is preeminently clear from United States v. Miller that bank records maintained by banks under the federal Bank Secrecy Act belong to the banks themselves, and that the bank's customer has no legitimate expectation of privacy in those records that would foreclose their inspection and use by a

federal investigative agency acting within the scope of its authority. The Miller holding withstood an even more severe test in United States v. Payner, 447 U.S. 727, 100 S.Ct. 2439, 65 L.Ed.2d 468 (1980), in which the Supreme Court sustained the introduction of records of a Bahamian bank, unlawfully seized from a third party, in the course of the "Operation Trade Winds" investigation. The Court reasoned that the defendant lacked standing to suppress the records because his Fourth Amendment rights could be violated "only when the challenged conduct invaded his legitimate expectation of privacy rather than that of a third party." Id., 447 U.S. at 731 (emphasis in original) (citations omitted).

These federal rulings on the scope of constitutional privacy constitute strong persuasive authority in defining Petitioners' rights under the Florida Constitution. This is particularly true because most recent expression of constitutional policy in Florida requires this Court to adhere to rulings of the United States Supreme Court in matters relating to governmental searches and seizures. See Art. I, §12, Fla. Const., as amended in 1982 (discussed below). This recent amendment should strongly influence the Court's determination of what privacy rights are guaranteed by the Florida Constitution.

Petitioners' citations of legal authorities are not nearly so persuasive. On the federal level, they rely on legislation which requires the Internal Revenue Service, in conducting a civil tax investigation, to notify the taxpayer upon

subpoena of his records from a third party recordkeeper. 26 U.S.C. §7609. This is a statutory rather than a constitutional right. In 1978 Congress provided a thorough treatment of the bank records issues in the Right to Financial Privacy Act, 12 U.S.C. §§3401-3422. This act provides for government access to bank records by administrative subpoena, search warrant or judicial subpoena. Although notice to the customer is generally required under this law, there is a specific provision for delaying said notice by court order, upon a showing that the investigative agency has jurisdiction to conduct the investigation, the records are relevant, and there is reason to believe that notice to the customer would result in obstruction of justice or otherwise jeopardize the investigation. 12 U.S.C. §3409. Under this provision, federal agencies are able to obtain bank records without contemporary notice to the bank's customer.

Petitioners' reliance on the decision in Milohnich v. First Nat'l Bank, 224 So.2d 759 (Fla.3d DCA 1969) is misplaced. That case concerned a bank that volunteered customer account information to private third parties; it never purported to deal with the banks' obligation to comply with a government investigative subpoena. See Hagaman v. Andrews, 232 So.2d 1, 8-9 (Fla. 1970) (limiting Milohnich).

Finally, Petitioners rely on a trilogy of California cases and cases from other states. These cases lack the persuasive value of United States Supreme Court decisions in interpreting rights under the Florida Constitution. See Art. I,

§12, Fla. Const. This Court may find it more persuasive that the courts in Indiana,[2] Maine,[3] Washington[4] and Wyoming[5] have rejected bank customers' privacy claims based on state law, and followed the holding in United States v. Miller.

There is a second standing issue apparent in the record, which may have been overlooked by the lower courts. Specifically, the DIVISION subpoenaed bank records of accounts of several corporations, such as Winfield Racing Stables, Inc. The corporations have not joined in this lawsuit. Moreover, they cannot invoke the protection of the constitutional right to privacy under Art. I, §23, Fla. Const., because that protection is limited to "natural" persons.

Petitioners cannot fairly require the DIVISION or the Court to disregard the corporations they have established. A person who creates a corporation is ordinarily estopped to deny its existence or effect. See §607.401, Fla. Stat. Cf. Bellis v. United States, 417 U.S. 85, 94 S.Ct. 2179, 40 L.Ed.2d 678 (1974), holding that an individual owner cannot assert a constitutional privilege against production of the financial records of a corporation, partnership or other collective entity.

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[2]Cox v. State, 392 N.E.2d 496 (Ind. App. 1979).

[3]State v. Fredette, 411 A.2d 65 (Me. 1979).

[4]Peters v. Sjoholm, 604 P.2d 527 (Wash. App. 1979), aff'd., 631 P.2d 937 (Wash. 1981), app. dismissed, cert. denied, 445 U.S. 914, 102 S.Ct. 1267, 71 L.Ed.2d 455 (1972).

[5]Fitzgerald v. State, 599 P.2d 572 (Wyo. 1979).

Accordingly, even if this Court should decline to follow Miller, it should remand the case for a determination of Petitioners' standing to assert privacy rights on behalf of the corporations involved.

B. IF PETITIONERS HAVE A REASONABLE EXPECTATION OF PRIVACY IN THE BANK'S RECORDS, DOES THE STATE'S INTEREST IN OBTAINING THE RECORDS WITHOUT NOTICE ON BALANCE JUSTIFY THE USE OF THIS PROCEDURE?

Art. I, §23, Fla. Const., hereafter called the "privacy amendment", provides as follows:

> Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

The amendment's real purpose is to introduce a "balancing test" in which individuals' privacy interests are given some consideration. Once the individual has shown a reasonable expectation of privacy in a particular matter (treated in Part I(A) above as a threshold standing requirement), then the burden shifts to the government to justify its needs for information. This Court appears to have construed the privacy amendment in exactly this fashion in a recent decision. Florida Board of Bar Examiners Re: Applicant, 443 So.2d 71, 74 (Fla. 1984). The history and constitutional context of the privacy amendment

provide further insight into the proper application of the privacy amendment in this case.

The privacy amendment was proposed by the Legislature in the 1980 session as HJR 387, and adopted by the voters in that year's general election.[6] The remarks of Professor Pat Dore before the Senate Rules Committee on May 6, 1980, illustrate the general tone of legislative discussion:

> . . . . The [Constitutional Revision] commission took the position that the right way to signal, send that figment [sic] to the courts, was to put the provision, to put the language in essentially absolute terms, recognizing and understanding that there are no constitutional absolutes. The idea was understanding that the courts will engage in a balancing process weighing the competing governmental interests against the intrusion on an individual's privacy. The importance of stating the right in absolute terms was that when the court put the right in the balance, that it would lean as a weighty fundamental important right which has the effect of increasing the burden of the government in justifying any intrusion.

(emphasis supplied) Thus the privacy amendment is properly construed to create a balancing test, in which government can justify the intrusion by an appropriate showing.

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[6]The legislative history includes the following: House Governmental Operations Committee Staff Analysis dated February 7, 1980; House Governmental Operations Subcommittee Meetings dated February 12, 1980, and March 11, 1980; House Governmental Operations Full Committee Meetings dated April 9, 1980, and April 16, 1980; House floor debate dated May 5, 1980; Senate Staff Analysis dated May 6, 1980; Senate Rules Committee Meeting dated May 6, 1980; and Senate floor debate dated May 14, 1980.

Moreover, the privacy amendment is not intended to be construed apart from the other constitutional provisions on related subjects. The amendment contains the language "except as otherwise provided herein." Senator Gordon, a proponent of the amendment, construed this language in his remarks on the Senate floor May 14, 1980. Responding to concerns that the amendment would prohibit law enforcement from wiretapping, he stated:

> . . . Now it is my opinion and the opinion of that fine constitutional lawyer who you cited [Professor Dore] that Article I, Section 12 of the constitution currently protects private communications from unreasonable interception. Electronic surveillance by law enforcement now is conducted in accordance with this provision and will continue to be controlled by it by virtue of the fact that it says except as otherwise provided herein and here is where it is otherwise provided in the constitution. It seems to me that whatever restrictions exist today, against electronic surveillance, constittional restrictions will still exist and the case law that follows, Article I, Section 12, will be the controlling case law and this will not interfere. . . .

(emphasis supplied). The amendment's language thus requires application of the well-established rule of constitutional construction that provisions on the same subject be construed together so as to give effect to each one. See Askew v. Game and Fresh Water Fish Comm'n, 336 So.2d 556 (Fla. 1976). Accordingly, the Court should harmonize the privacy amendment with the more recent amendment to the search and seizure provision, Art. I, §12, Fla. Const. (1982).

Art. I, §12, Fla. Const., relating to searches and seizures, was amended in 1982 to provide:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

(new language underlined). This constitutional provision expressly refers to individuals' "papers and effects." Because of this express reference, this provision should certainly have some bearing on the scope of privacy in financial matters under the Florida Constitution. Although each of the provisions may be relevant to the Court's determination, the express reference to "papers and effects" in the search and seizure provision suggests that it is preeminent in determining the scope of privacy in financial matters. To the extent there is any conflict between the two provisions, the amended search and seizure provision should be preeminent because it reflects the most recent

expression of the people's will. State v. Special Tax School Dist. No. 5, 107 Fla. 93, 144 So. 356 (1932). Under this reasoning, the Court should be reluctant to depart from the federal standards of financial privacy established in decisions of the United States Supreme Court.

Turning to the application of the "balancing test," there is a clear need for Florida authorities to be able to conduct financial investigations of persons suspected of economic crime without notifying the suspect of the investigation. This need arises most often in investigations under the RICO (Racketeer Influenced and Corrupt Organization) Act, Chapter 895, Florida Statutes.

The RICO Act is intended to provide criminal penalties and civil remedies in situations, all too frequently encountered, in which crime organizations have amassed substantial amounts of illegal wealth, have concealed that wealth through laundering, secret trusts, alien corporations, or fictitious names, and are using that wealth to infiltrate and dominate legitimate economic markets in business and real estate. See Legislative Findings accompanying Chapter 77-334, Laws of Florida (the RICO Act).

When a member of a crime organization learns he is under investigation, his initial reaction is often to conceal or dispose of his assets and flee. See Legislative Findings accompanying Chapter 81-141, Laws of Florida (amendments to the RICO Act). See also Report of the Attorney General's Study Commission on Money Laundering in Florida (1984) (proposing

further amendments to the RICO Act). Even injunctive orders from the courts may be insufficient to prevent the unjust retention and use of wealth. See Keidaish v. Smith, 400 So.2d 90 (Fla.2d DCA 1981).

The importance of bank records in financial investigations of white collar crime "simply cannot be overestimated." See legislative history to the federal Bank Secrecy Act, 1970 U.S. Code Cong. & Adm. News 4395, 4400.

If this Court were to hold, as a constitutional principle, that a bank customer is entitled to notice whenever a state law enforcement agency seeks access to bank records of the customer's account, then financial investigations of organized and economic crime would be seriously limited. Because notice to the suspect in the investigative stage would normally jeopardize the investigation, law enforcement would be unable to obtain financial information in this stage except in lucky instances where the suspect has publicized his ownership of an asset. Once the investigation is concluded, i.e., by arrest of the suspect, the suspect normally conceals or transfers his assets. There is, therefore, a very significant public interest in allowing law enforcement authorities conducting organized economic crime investigations to obtain bank records without notice to the customer.[7]

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[7]It is noted that records obtained in the course of active criminal investigations or civil investigations under the state RICO Act are not subject to disclosure under the Public Records law. See §§119.011(3) and (4) and 119.07(2), Fla. Stat.

In the instant case the reasonableness of the DIVISION's investigative action may largely be measured by the fact that it regulates an industry deeply affecting the public interest, i.e., horse racing and pari-mutuel wagering. The state is constitutionally authorized to regulate this industry. Art. X, §7, Fla. Const. The state's authority includes authority to issue investigative subpoenas, §550.02(3), Fla. Stat., and to exclude from any Florida pari-mutuel facility persons who have been excluded from pari-mutuel facilities in other states, §550.02(9), Fla. Stat. This Court has recognized that the state's revenue interest and the "noxious qualities of the enterprise" justify closer supervision over horse racing and pari-mutuel wagering than in other enterprises. Hialeah Race Course Inc. v. Governmental Park Racing Ass'n., 37 So.2d 692, 694 (Fla. 1949), app. dismissed, 336 U.S. 948, 69 S.Ct. 885, 93 L.Ed. 1104 (1949).

The DIVISION cannot reasonably be expected to enforce the provisions of Chapter 550, Fla. Stat., so as to penetrate the unlawful use of family members, controlled corporations and other straws to conceal financial interests unless it can conduct an appropriate financial records investigation. Although engaging in horse racing or other regulated industries does not require one to sacrifice fundamental constitutional rights, the persons so engaged, including the Petitioners, should reasonably expect the DIVISION to have authority to carry out its duties.

In summary, the State has justified its need to conduct bank records investigations without notice to the individual bank customer, in both the instant case and as a general necessity in investigating organized economic crime.

C. DOES THE STATUS OF THE DIVISION'S RECORDS AS "PUBLIC RECORDS" SUBJECT TO DISCLOSURE UNDER CHAPTER 119, FLA. STAT., AFFECT THE DETERMINATION OF PETITIONERS' PRIVACY RIGHTS UNDER ART. I, §23, FLA. CONST.?

The authorities discussed in parts (A) and (B) above establish that Petitioners' privacy rights under the Florida Constitution do not prohibit state law enforcement agencies, acting within the scope of their jurisdiction, from obtaining records of Petitioners' bank accounts without notice.

There is a separate and analytically distinct issue whether the state agency, having <u>obtained</u> those records, may thereafter <u>disclose</u> them as public records if required to do so under the Public Records Law, Chapter 119, Fla. Stat. The Circuit Court apparently assumed that the DIVISION's records were public records subject to disclosure, and held that this factor established a violation of Petitioners' privacy rights (A. 129).

Although Petitioners argued this issue extensively before the District Court of Appeal, and continue to allude to it in their initial brief before this Court, the Amicus would

respectfully point out that the District Court of Appeal did not certify this issue of "disclosural privacy" as one of great public importance.

The reason this issue should not be considered is found in the express language of the privacy amendment itself. The amendment provides, in pertinent part:

> This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

Under this express language, the privacy amendment reserves to the Legislature authority to designate records held by state agencies as "public records" and make them subject to disclosure. Accordingly, the status of the subject bank records as disclosable "public records" vel non in the hands of the DIVISION cannot form any basis for a claim that the privacy amendment is violated. See Douglas v. Michel, 410 So.2d 936 (Fla.5th DCA 1982), review pending, Case No. 61,870 (Fla. S.Ct.); Mills v. Doyle, 407 So.2d 348 (Fla.4th DCA 1981); Forsberg v. Miami Beach Housing Auth., Case No. 77-27260 (01) (Fla.11th Cir. 1978), review pending, Case No. 54,623 (Fla. S.Ct.). Petitioners' assertion that the DIVISION's investigation violates their privacy rights under Art. I, §23, Fla. Const., because its records are subject to disclosure as "public records," raises a red herring.

II.

DOES THE SUBPOENAING OF ALL OF A CITIZEN'S BANK RECORDS UNDER THE FACTS OF THIS CASE CONSTITUTE AN IMPERMISSIBLE AND UNBRIDLED EXERCISE OF LEGISLATIVE POWER?

Petitioners suggest that the instant subpoena was too broad because it encompassed all of Petitioners' bank records within specified dates.

The Amicus Attorney General acknowledges that he is bound by the record in this cause, and he may not object to this Court's considering the questions certified by the District Court of Appeal. The Amicus would respectfully suggest, on information and belief, that the question of the permissible breadth of the subpoena was not fully developed before the trial court or the District Court of Appeal. If Petitioners contend that the instant subpoena is overbroad, they should request a protective order or similar relief modifying or clarifying the subpoena, or restricting the use of the evidence furnished pursuant to the subpoena. The DIVISION would then have an opportunity to justify its demands or disclaim any inadvertent excesses. The appellate courts should be reluctant to determine this issue before the parties have developed a complete record in the trial court. See United States v. Morton Salt Co., 338 U.S. 632, 70 S.Ct. 357, 94 L.Ed.2d 401 (1950).

If the Court elects to decide this issue, then the Court's decision should be harmonious with its decision on the first certified question (Part I above). If the Court adopts the

reasoning of Amicus in Part I(A), (i.e., that the records belong to the bank under Miller, and that Petitioners have no reasonable expectation of privacy in these records), then the Court should decide that Petitioners have no standing to challenge the breadth of the subpoena. This determination would require summary dismissal of Petitioners' objections.

If the Court adopts the reasoning of the Amicus in Part I(B) (i.e., that although Petitioners may have a reasonable expectation of privacy, the state's need for the bank records justifies the procedure used), then the Court should fashion an appropriate balancing test to be applied on a case-by-case basis. The future use of investigative subpoenas to obtain bank records will not be susceptible to any simple Procrustean rule.

In making this determination, the Court should be sensitive to the needs of the investigative agencies. The investigative agency will seldom have any way to identify in advance the specific deposit slips, checks, withdrawal slips, loan records or other items it needs to investigate a particular subject. It is frequently found that individual items, which appear innocent themselves, when placed in the context of the full bank record can demonstrate a pattern of wrongdoing. A complete record may be necessary to show, for example, that an individual is the real owner of assets held in the name of a straw, or that an individual has looted a corporation solvent on its face.

An example of a situation in which a thorough financial investigation is required is United States v. Holland, 209 F.2d 516 (10th Cir. 1954), aff'd, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954). In Holland the government prosecuted the defendant for tax evasion for the year 1948, and proved its case by the "net worth" method, showing unexplained increases in the taxpayer's wealth over a period of years. The financial investigation necessary to prove this case required the government to obtain the taxpayer's tax records back to 1913 and his correspondence back to 1928 or 1929. This approach is typical of tax evasion cases. Holland, 348 U.S. at 126-27. A similar comprehensive financial investigation is often required to prove other types of economic crime, including the investment of illegally sourced funds into legitimate enterprises. See United States v. Harvey, 560 F.Supp. 1040 (S.D. Fla. 1982). If the Court adopts a rule which seriously restricts the investigative agency from obtaining a complete record, this type of investigation will not be possible.

SUMMARY AND CONCLUSION

Petitioners have no reasonable expectation of privacy in records maintained by the bank pursuant to the requirements of the Bank Secrecy Act, because those records are maintained for the purpose of assisting in criminal, tax or regulatory investigations. United States v. Miller, 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976). The recent amendment to Art. I, §12, Fla. Const., should give this federal authority considerable weight in construing the Florida Constitution.

If the Court holds that, notwithstanding Miller, Petitioners do have a privacy interest in the subject records, then the Court must fashion an appropriate balancing test. This test should accomodate the DIVISION's (and other law enforcement agencies') need to conduct financial investigations without alerting the suspect. The Court could hold that trial courts, pursuant to their general equity powers, can authorize law enforcement agencies to inspect and copy bank records without notice to the bank's customer, upon the agency's ex parte application supported by an appropriate showing that the records sought are relevant to an authorized investigation.

Finally, the agency should be able to obtain all of the bank records where such records may be relevant to an investigation within the agency's authority.

For these reasons the judgment of the Fourth District Court of Appeal should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to the following:

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