IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,798

CLIFTON WINFIELD, SECOND WINFIELD
MIKE WINFIELD, a minor, by and
through Her Father and Next Friend,
MALCOLM WINFIELD and FRANK ROMANO,

Petitioners,

vs.

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

Respondents.

FILED
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Chief Deputy Clerk

FOR DISCRETIONARY REVIEW OF DECISION
OF THE DISTRICT COURT OF APPEAL
OF FLORIDA, FOURTH DISTRICT

AMICUS CURIAE BRIEF OF
ATLANTIC NATIONAL BANK OF FLORIDA

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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, GARY M. SMITH, JR., and GARY RUTLEDGE,

Respondents.

FOR DISCRETIONARY REVIEW OF DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

AMICUS CURIAE BRIEF OF ATLANTIC NATIONAL BANK OF FLORIDA

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INTRODUCTION

Atlantic National Bank of Florida ("Atlantic National Bank") appears herein as amicus curiae. Atlantic National Bank is the fifth largest bank in Florida, with deposits in excess of $2.5 billion. Atlantic National Bank has over a hundred branches in forty-three cities and sixteen counties throughout Florida, and services over 300,000 customers.

Atlantic National Bank was served with over 600 subpoenaes of its customers' banking records in 1983 alone. While many of these subpoenas originated in civil proceedings, the vast majority were issued by state or federal governmental agencies pursuant to statutory authority.

Atlantic National Bank will address only the first question certified by the Fourth District Court of Appeal herein, viz:

> Does Article I, Section 23 of the Florida Constitution prevent the Division of Parimutuel Wagering from subpoenaing a Florida citizen's bank records without notice?

Because of the potential impact on the banking industry of this Court's determination of this certified question, Atlantic National Bank seeks to present its concerns which Atlantic National Bank believes are shared by many other financial institutions in Florida.

While Atlantic National Bank agrees with the Fourth District Court of Appeal's holding that Article I, Section 23 does not affect the power or procedure required to subpoena

bank records, Atlantic National Bank is concerned that any opinion by this Court to the contrary be reached with a full appreciation of its impact on Atlantic National Bank and other Florida financial institutions.

For example, there is currently pending in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida, civil litigation brought by petitioners herein against the three banks (including Atlantic National Bank) whose records were seized pursuant to the very same subpoenas at issue in this case.[1/] In that litigation, plaintiffs seek to recover compensatory and punitive damages from the banks as a result of their compliance with the subpoenas at issue herein. Because of these and other claims against financial institutions which may arise from any imposition of a blanket notice requirement prior to the production of bank records pursuant to a subpoena, Atlantic National Bank submits that any notice requirement should be

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1/ Nigel Winfield, individually, as Trustee, as the next friend of Nikki Winfield, a minor, and as an officer and/or director of W.J.C. Inc., International Airmotive Corporation, Inc., and Winfield Racing Stables, Inc.; Malcolm H. Winfield, individually, as Trustee, and as officer and or director of Winfield Racing Stables, Inc.; Nikki Winfield, a minor; Clifton R. Winfield, individually and as Trustee; W.J.C. Inc., a Florida corporation; and International Airmotive Corporation, Inc., a Florida corporation, and Winfield Racing Stables, Inc., a Florida corporation vs. Transflorida Bank f/k/a Transamerica Bank of Florida, a Florida banking corporation; Landmark First National Bank of Fort Lauderdale, a national banking corporation, and Atlantic National Bank of Broward, a national banking corporation, Case No. 83-03156 CH.

applied only to the governmental agency subpoenaing bank records, and any notice requirement should be only prospective in application.

ARGUMENT

I. ARTICLE I, SECTION 23 OF THE FLORIDA CONSTITUTION DOES NOT PREVENT THE DIVISION OF PARI-MUTUEL WAGERING FROM SUBPOENAING A FLORIDA CITIZEN'S BANK RECORDS WITHOUT NOTICE TO SUCH FLORIDA CITIZEN.

The gravamen of petitioners' position herein is that Article I, Section 23 of the Florida Constitution expanded the right to be free from unreasonable searches and seizures protected by Article I, Section 12 of the Florida Constitution and the Fourth Amendment of the United States Constitution. This proffered interpretation of Section 23 flies in the face of black letter law governing statutory and constitutional interpretation. A statute dealing specifically with a subject takes precedence over another statute covering the same subject in general terms. Adams v. Culver, 111 So.2d 665 (Fla. 1959); State v. Young, 357 So.2d 416 (Fla. 2d DCA 1978). The rules of statutory construction also apply to constitutional interpretation. State v. Keller, 191 So. 542, 545 (Fla. 1939). Section 12, dealing with searches and seizures, is therefore the applicable constitutional provision, rather than Section 23 of Article I of the Florida Constitution.

That Section 23 was not intended to impact upon the vast body of case law interpreting the Fourth Amendment of

the United States Constitution and Article I, Section 12 of the Florida Constitution is also manifest in the provision itself. Section 23 protects the right to be let alone and free from governmental intrusion "except as otherwise provided herein."[2/] See Jackson, Interpreting Florida's New Constitutional Right of Privacy, 33 U.Fla.L.Rev.580 (1981); Cope, To Be Let Alone; Florida's Proposed Right of Privacy, 6 Fla.St.U.L.Rev. 671, 732, 768-69 (1978).

Petitioners' contention that Article I, Section 23 somehow created additional protection to be free from investigatory searches and seizures has been regarded as frivolous by at least one court in Florida. In Cushing v. Dept. of Professional Regulation, Board of Dentistry, 416 So.2d 1197 (Fla. 3d DCA 1982), the Department of Professional Regulation conducted a statutorily authorized warrantless search of a pharmacy which revealed several suspect prescriptions written by Cushing. Cushing's attack on the search was rejected out of hand because he had no reasonable expectation of privacy with respect to the completed prescriptions in the possession of the pharmacy. Finding also that the search was constitutionally permissible, the court concluded:

> Finally, we regard as frivolous the appellant's argument that the result as to either the search or the evidentiary issue is changed or even effected by the right of privacy provision of the Florida Constitution. Article I, Section 23, Florida Constitition (1980).

2/ "'Herein' refers to the entire constitution." Article XI, Section 12(a), Florida Constitution.

Id. at 1198. Moreover, without resort even to Section 12, Section 23 has been construed not to impact upon government investigatory activities conducted in accordance with statutory authorization. In In re Getty, 427 So.2d 380 (Fla. 4th DCA 1983), the court quickly dismissed a witness' complaint that the state attorney's questioning of her pursuant to Florida Statutes §27.04 violated her right to privacy.

> Appellant's interpretation of the new constitutional provision, if adopted, would vitiate the authority of each state attorney, pursuant to Section 27.04, and that of assistant state attorneys acting thereunder in accordance with section 27.181(3). We find such interpretation to be tortuous and untenable. The voters of Florida hardly intended to surrender their personal safety in an effort to protect their privacy.

Id. at 383.

In the context of searches and seizures, the voters of Florida have clearly indicted that they did not intend for Section 23 to create any additional protection from searches and seizures by their subsequent amendment of Section 12. In 1982, Section 12 was amended to limit its protection to that afforded under the Fourth Amendment of the United States Constitution which, of course, determines the minimal permissible standards for reasonable searches and seizures.3/

3/ In 1982, Article I, Section 12 was amended by the addition of the following:

> This right shall be construed in conformity with the 4th Amendment to the United States

Footnote 3/ continued on next page.

It is beyond dispute that bank records are not protected from government seizure under Article I, Section 12 of the Florida Constitution or the Fourth Amendment of the United States Constitution. United States v. Miller, 425 U.S. 435 (1976). Petitioners concede as much in their brief. Understandably, petitioners have not cited any Florida case in which Article I, Section 23 has been construed to enlarge the protection afforded from unreasonable searches and seizures under Article I, Section 12. Instead, petitioners rely upon a perceived "prevailing trend" toward protecting bank records from disclosure to the government. In support of this "prevailing trend", petitioners cite a 1969 Florida decision holding that a bank had an implied duty not to disclose information negligently, willfully, or maliciously, concerning its depositors' accounts, Milohnich v. First National Bank of Miami Springs, 224 So.2d 759 (Fla. 3d DCA 1969), and a post-amendment Florida decision involving electronic listening devices which did not even mention Article I, Section 23, State v. Sarmiento, 397 So.2d 643 (Fla. 1981).

The Milohnich decision has been expressly construed by this Court as inapplicable to government subpoenas of

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Continuation of Footnote 3/.

> 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.

records. Hagaman v. Andrews, 232 So.2d 1, 8 (Fla. 1970). Petitioner's reliance on Sarmiento is similarly misplaced. In that case, this Court held that under Article I, Section 12, a person enjoys a reasonable expectation of privacy that conversations in his home will not be overheard by persons outside the home by means of electronic bugs. A statute authorizing the warrantless interception of a private conversation conducted in the home was therefore held unconstitutional. In its opinion, this Court noted that such a search was constitutional under the Fourth Amendment of the United States Constitution, but held that the citizens of Florida had provided themselves with a broader protection from governmental searches and seizures under Article I, Section 12 of the Florida Constitution. As stated above, Article I, Section 23 was not even mentioned in the opinion, much less relied upon. Implicit in its opinion, therefore, is this Court's recognition that Article I, Section 23 does not impact upon governmental searches and seizures.

Additionally, Sarmiento has been strictly limited to its facts, see, e.g., Hill v. State, 422 So.2d 816 (Fla. 1982); Morningstar v. State, 428 So.2d 220 (Fla. 1982); Williams v. State, 420 So.2d 404 (Fla. 1st DCA 1982); and the broader protection construed therein to be afforded by Article I, Section 12 is no longer a concern due to the subsequent amendment to Section 12. See note 3, supra.

Petitioners' reliance upon cases from other jurisdictions to support an obligation to notify the customer

prior to subpoenaing his bank records is equally unavailing. In both Djowharzadeh v. City National Bank and Trust Co. of Norman, 646 P.2d 616 (Okla. Ct. App. 1982) and Peterson v. Idaho First National Bank, 367 P.2d 284 (Idaho 1961), for example, the courts held only that there was an implied contractual duty between the bank and its customers to not voluntarily disclose banking records. Neither case involved subpoenas, and the court in Peterson indicated that disclosure pursuant to a lawful subpoena was excepted from the duty of confidentiality. Id. at 290.

Those cases cited from other jurisdictions relying upon constitutional provisions protecting the right to privacy have little value to this Court in construing the Florida Constitution. In Ravin v. State, 537 P.2d 494 (Alaska, 1975), for example, the court held that a constitutional right to privacy amendment precluded the state from regulating the use of marijuana in the home,[4/] a result properly rejected in Florida. Maisler v. State, 425 So.2d 107 (Fla. 1st DCA 1983). In Charnes v. DiGiacomo, 612 P.2d 1117 (Colo. 1980), and Commonwealth v. DeJohn, 403 A.2d 1283 (Pa. 1979), the courts relied upon the state constitutional counterparts to the Fourth Amendment of the United States Constitution to create protection of bank records from government seizure. In Florida, this result is foreclosed by the express provi-

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4/ That same court has, however, found no right to privacy in checking or saving account records. State v. Oliver, 636 P.2d 1156 (Alaska 1981).

sions of Article I, Section 12 of the Florida Constitution and United States v. Miller, 425 U.S. 435 (1976). See p. 5-6, supra.

In Valley Bank of Nevada v. Superior Court, 542 P.2d 977 (Cal. 1975), the California Supreme Court held that a plaintiff bank in a civil suit could not refuse to produce banking records of non-party customers which were relevant to the defenses asserted in that suit. The court held that sufficient protection of the privacy interests of bank customers would be provided by requiring the plaintiff bank to take reasonable steps to locate the customer, inform him of the discovery proceedings, and give him a reasonable opportunity to interpose objections and seek appropriate protective orders. This decision was based on a balancing of the right of civil litigants to discover relevant facts against the right of bank customers to maintain reasonable privacy regarding their financial affairs. Id. at 979. The court's decision was expressly limited to civil discovery proceedings and made to depend upon the particular facts of the civil proceeding in which discovery is sought.

> The variances of time, place, and circumstance which may invoke application of the foregoing principle cannot be anticipated, but in evaluating claims for protection of bank customers, the trial courts are vested with the same discretion which they generally exercise in passing upon other claims of confidentiality. (citations omitted). We have previously expressed those considerations which, among others, will affect the exercise of the trial court's discretion. They include ". . . the purpose of the

> information sought, the effect that disclosure will have on the parties and on the trial, the nature of the objections urged by the party resisting disclosure and ability of the court to make an alternative order which may grant partial disclosure, disclosure in another form, or disclosure only in the event that the party seeking the information undertakes certain specified burdens which appear just under the circumstances."

Id. at 980.

Indeed, in In re Vescovo Special Grand Jury, 473 F.Supp. 1335 (C.D. Cal. 1979), the court discussed Valley Bank and noted that:

> It is less than clear whether the California courts would require a bank to notify a depositor prior to providing bank records in response to a federal grand jury subpoena.

Id. at 1336, n. 1. Vescovo, moreover, points to the dilemma placed on a bank by any judicially created duty of notification. In Vescovo, the bank was served with a grand jury subpoena of one of its customer's bank records, along with a letter from a Special Attorney for the United States Department of Justice stating that the existence of the request for records should not be disclosed for ninety days because to do so could constitute a violation of the federal obstruction of justice statute. See also In re East National Bank of Denver, 517 F.Supp. 1061 (D. Colo. 1981). The court held that Federal Rules of Criminal Procedure 6(e) prohibited the imposition of an obligation of secrecy on a grand jury wit-

ness, and therefore refused to decide whether there was a conflicting notification requirement.

That the notification requirement established in Valley Bank, supra, does not apply to all subpoenas of bank records is clarified in People v. Muchmore, 92 Cal. App. 3d 32, 154 Cal. Rptr. 488 (Cal.Ct.App. 1979). In Muchmore, the court refused to apply the Valley Bank requirement of notification to a subpoena of bank records of a customer who had written insufficient funds checks. Distinguishing Valley Bank on its facts, the court stated:

> However, here we deal with a criminal, not a civil matter; it is a situation where the police have sufficient information to warrant the filing of a crime report based upon a belief fraud has been committed on the bank through the account in question. . . . There is no need under such circumstances to notify the customer in advance; any objections he might have to disclosure are secondary to the interests of society.

Id. at 490. While Muchmore may be distinguished factually from the case sub judice, it is a distinction without a difference. Although the investigation conducted by the Division of Pari-mutuel Wagering into the financial affairs of petitioners is not technically a criminal investigation, the interests of society in the effectiveness of such an investigation are at least as great.

> Authorized gambling is a matter over which the state may exercise greater control and exercise its police power in a more arbitrary manner because of the noxious qualities of the enterprise as distinguished from those enterprises not affected with a public interest and those

> enterprises over which the exercise of the police power is not so essential for the public welfare.

Hialeah Race Course, Inc. v. Gulf Stream Park Racing Ass'n. Inc., 37 So.2d 692 (Fla. 1948), appeal dismissed, 336 U.S. 948 (1949). Because of their participation in the enterprise, any objections petitioners might have to disclosure of their bank records are secondary to the interests of society in the control of participants in pari-mutuel enterprises.

In Board of Medical Quality Assurance v. Gherardini, 93 Cal. App. 3d 669, 156 Cal. Rptr. 55 (Cal. Ct. App. 1979), cited by petitioners, the court held only that the Board had made no showing of relevance, materiality, and a compelling state interest sufficient to justify issuance of a court order compelling production of hospital records. The case has no bearing on petitioners' position herein because not only did the court fail to address any notification requirement, but the privacy interests with which the court was concerned were those of the patients, who were not the target of, and, so far as the record showed, were unconnected with, any investigation of suspected wrongdoing by the hospital. In Doyle v. State Bar, 648 P.2d 942 (Cal. 1982), the court commended the Bar for attempting to notify and obtain the consent of a client whose trust account records were sought in an investigation of his attorney. The court held, however, that where such consent was withheld, disclosure could

be ordered upon a showing of good cause. The "good cause" relied upon was the client's prior complaint to the Bar about the attorney's failure to disburse settlement procees. None of the aforementioned cases support petitioners' attempt herein to establish a notification requirement upon the Division of Pari-Mutuel Wagering prior to subpoenaing the bank records of persons involved in the pari-mutuel industry.

As their final argument, petitioners would have this Court adopt a rule limiting a state agency's ability to subpoena bank records because the records are public records pursuant to Chapter 119 of the Florida Statutes. But this suggestion has the tail wagging the dog. When Article I, Section 23 was adopted, it contained an express protection for the Public Records Act.

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

Article I, Section 23, Florida Constitution. To use this recognition of the continued importance of the Public Records Act as a justification for construing the very same amendment to prohibit the acquisition of the records in the first place is beyond the bounds of the most innovative of constitutional interpretation schemes. By the clear mandate of the constitutional provision, petitioners' rights under Article I, Section 23 must be considered without regard to the effect of the Public Records Act.

In summary, Atlantic National Bank believes the Fourth District Court of Appeal reached the proper result. Article I, Section 23 does not apply to require notice prior to subpoenaing bank records. Any provision for notification prior to subpoenaing bank records, however attractive, must be addressed by the Legislature, just as Congress did regarding federal agencies in 12 U.S.C. §3401-§3422 and 26 U.S.C. §7609.

II. EVEN IF ARTICLE I, SECTION 23 WERE CONSTRUED TO IMPOSE A DUTY OF NOTIFICATION PRIOR TO SUBPOENAING A FLORIDA CITIZEN'S BANK RECORDS, SUCH DUTY SHOULD BE IMPOSED ON GOVERNMENT AND NOT THE PRIVATE SECTOR.

Atlantic National Bank agrees with the Fourth District Court of Appeal's holding that Article I, Section 23 of the Florida Constitution did not create any expanded privacy interest in bank records. However, any contrary ruling by this Court should be made with a full appreciation of its impact on the banking industry in Florida. Since Article I, Section 23 of the Florida Constitution prohibits only governmental intrusion into a person's private life, any expanded right of privacy should limit only the government intrusion, and not the actions of private third parties who have simply complied with the governmental mandate. If this Court is inclined to read into Article I, Section 23 of the Florida Constitution a new limitation of

the subpoena power, Atlantic National Bank respectfully urges that care should be taken not to impose thereby additional duties on private third parties who dutifully would comply with the subpoena.

This result is required under the constitutional provision itself, which only speaks to governmental intrusions.

> Every natural person has the right to be let alone and free from governmental intrusion into his private life. . . .

Article I, Section 23, Florida Constitution (emphasis added). Rules of constitutional construction mandate that the provision creates only a right with regard to governmental intrusion, rather than a general right to be let alone and a specific right to be free from governmental intrusion. See Cope, To Be Let Alone: Florida's Proposed Right of Privacy, 6 Fla. St. U.L. Rev. 742 (1978); Jackson, Interpreting Florida's New Constitutional Right of Privacy, 33 U. Fla. L. Rev. 575 (1981). First, the provision speaks only of one right, rather than a series of rights. Second, since the right to be let alone obviously includes the right to be free from governmental intrusion, the latter provision would be superfluous. The only construction which gives meaning to each provision as required in construing a constitutional provision[5/] is one in which the phrase "free from governmental

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5/ See Miami Shores Village v. Cowart, 108 So.2d 468, 471 (Fla. 1958).

intrusion" is a limitation on the right to be let alone. Thirdly, the drafters of the provision clearly intended that it apply only to governmental intrusion, for the Committee initially proposed an additional part mandating that the Legislature protect against intrusion by others. Fla. C.R.C., Ethics, Privacy and Elections Committee Minutes 4-5 (Nov. 21, 1977); Cope, supra at 727. This second part was deleted by the Commission because the Legislature already possessed the power to protect rights of privacy from private intrusion. Transcript of Fla. C.R.C. proceedings 30-33, 183-192 (Mar. 17, 1978); 1 Transcript of Fla. C.R.C. proceedings 75-80 (Mar 8, 1978); Cope, supra at 736. Consequently, Article I, Section 23, by its terms limits only governmental intrusion, and should not be construed to place additional duties on the private sector. Any additional duty of notification construed by this Court to arise out of Article I, Section 23 should therefore be placed squarely on the shoulders of the governmental agency issuing the subpoena and not on the responding entity, in this case the banks.

Any decision by this Court which may be construed to place a duty of notification on the private sector, rather than the governmental body issuing the subpoena, will place an unreasonable burden on not only the banking industry, but on every other entity whose ongoing business activity requires the maintenance of records on its customers which may be deemed confidential. Without attempting to exhaustively

list the industries affected by such a burden, doctors, hospitals, health maintenance organizations, pharmacies, hotels, motels, cleaners, telephone companies, telegraph companies, employment agencies, health clubs, seamstresses, tailors, travel agencies, savings and loan associations, credit card companies, loan companies, credit bureaus, bookstores, and video clubs come immediately to mind. Although some of these industries are currently governed by statutory schemes protecting the confidentiality of the records maintained on their customers,[6/] these statutory schemes inevitably place the burden of protecting that confidentiality on the governmental body attempting to subpoena the records.

Atlantic National Bank alone receives approximately six hundred subpoenas a year. Any requirement that the subpoenaed entity notify the customer, obtain the consent of the customer, or otherwise assure its customers the opportunity to contest the subpoena before complying with each of these subpoenas, would place an unreasonable burden on Atlantic National Bank. The return dates on the subpoenas vary from a few days to several weeks, but average in the neighborhood of one to two weeks. The particular subpoenas involved in this case, for example, required production of the requested documents six (6) days after service. The

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6/ Hospital records, for example, are expressly protected from disclosure without the consent of the patient except pursuant to court order. Fla. Stat. §395.017.

time required to notify the customer and determine whether he or she would consent to or contest the subpoena would, in many cases, foreclose Atlantic National Bank from complying with the subpoena, and place it in jeopardy of having to defend against contempt charges. Were Atlantic National Bank unable to locate or obtain the consent of the customer, Atlantic National Bank would be further burdened by having to seek in the courts protection from the subpoenas. Multiplied by the number of financial institutions doing business in Florida, the impact of such a requirement on the financial industry alone is staggering. Add to this the effect on the other private businesses which would be required to go through the same procedures, and the impropriety of imposing the notification requirement on the private sector is manifest.

Finally, the particular dilemma presented to the private sector by subpoenas which instruct the recipient not to notify the customer remains unresolved. In Vescovo, discussed supra at p. 10, the court avoided the problem by holding that Federal Rues of Criminal Procedure 6(e) prohibited the imposition of an obligation of secrecy on a bank subpoenaed by a grand jury. This result was followed in In re East National Bank of Denver, 517 F.Supp. 1061 (D. Colo. 1981). The Florida Statutes, however, contain no such prohibition against an obligation of secrecy. To place upon the private sector the burden of determining which horn of the dilemma to embrace is both unreasonable and unnecessary to

the right sought to be protected by Article I, Section 23. Any requirement of notification prior to subpoenaing bank records should therefore be placed squarely upon the governmental entity issuing the subpoena, and not upon the private sector which is purportedly being compelled by legal process to produce the requested documents.

A review of the case law from other jurisdictions reveals scant authority for placing the obligation of notification on the private sector. In Valley Bank, discussed supra, the duty of notification was placed on the bank where it was a party to the civil case in which the records were sought. But this result has not been expanded to include non-party banks served with subpoenaes. In In re Vescovo, discussed supra, the court noted that it was less than clear whether California law required a bank to notify a customer prior to responding to a grand jury subpoena. Only in In re East National Bank of Denver, discussed supra, did the court state in dicta that the bank might have a duty to notify a customer whose records were subpoenaed. This dicta appears to rest upon an incorrect interpretation of Valley Bank. The federal statutes which were enacted in 1978 to limit the subpoena power of federal agencies place the duty of notification on the federal agency and provide civil remedies against the agency in the event that an invalid subpoena is issued. 12 U.S.C. § 3417. The private sector is thereby immunized

from any duty to notify a customer prior to producing documents pursuant to an administrative subpoena.

It is respectfully submitted that the burden of any additional protections from the subpoena power of state agencies which this Court deems encompassed in Article I, Section 23 should not be visited upon the private sector.

III. EVEN IF ARTICLE 1, SECTION 23 WERE CONSTRUED TO IMPOSE A DUTY OF NOTIFICATION PRIOR TO SUBPOENAING A FLORIDA CITIZEN'S BANK RECORDS, THE DUTY SHOULD BE IMPOSED PROSPECTIVELY ONLY.

Any application of Article I, Section 23 of the Florida Constitution to require notice to the customer prior to subpoenaing bank records should be prospective only. The few jurisdictions which have construed a constitutional right of privacy provision to require notice have also held that this newly created constitutional right should apply only to records seized after the decision recognizing the right became final. People v. Kaanehe, 559 P.2d 1028 (Cal. 1977); Athearn v. State Bar, 571 P.2d 628 (Cal. 1978).

In Burrows v. Superior Court, 529 P.2d 590 (Cal. 1974), the California Supreme Court held, for the first time, that the acquisition of bank records, without summons or subpoena, from a bank which voluntarily turned over the records, constituted an illegal search and seizure and ordered the

records suppressed.[7/] In People v. Kaanehe, 559 P.2d 1028 (Cal. 1977), the court held that the expectation of privacy in bank records, recognized for the first time in Burrows, did not apply to seizures which took place before the Burrows decision became final.

In reaching its decision, the Kaanehe court relied upon the three-prong test set forth by the United States Supreme Court in Stovall v. Denno, 388 U.S. 293 (1967).

> Whether a judicial decision establishing new constitutional standards is to be given retroactive effect is customarily determined by weighing the following factors: "(a) the purpose to be served by the new standards, (b) the extent of reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of retroactive application of the new standards."

Kaanehe, 559 P.2d at 1034.

If Article I, Section 23 were to establish the right to notice when bank records are subpoenaed, its purpose must be to provide a bank customer with a means of stopping a possibly illegal seizure of the records by government agencies before such seizure occurs. To apply this new standard retroactively would not further such purpose, but would severely impact the administration of justice by foreclosing

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7/ This decision, incidentally, was based in part upon the Fifth Circuit's opinion in United States v. Miller, 500 F.2d 751 (5th. Cir. 1974), which was subsequently reversed by the United States Supreme Court. United States v. Miller, 425 U.S. 435 (1976).

the use of documents which were otherwise legally obtained and for which the notice would therefore have been unavailing.

If as in Kaanehe, the expectation of privacy in bank records is a decision which the courts apply only prospectively, the right to prior notice so that a bank customer can prevent the seizure of the bank documents should also be applied only prospectively. Petitioners still have available to them the remedy of injunctive relief to have the documents returned if this Court determines that the seizure was illegal for reasons other than the mere lack of notice. To apply any notice requirement established herein retroactively to invalidate the subpoenas would not further the purpose of any heretofore unknown notice requirement, but rather would result in a windfall to petitioners. Additionally, petitioners may receive an unwarranted recovery in their civil suit against, inter alia, Atlantic National Bank.

That a requirement of notice prior to subpoenaing bank records should be applied only prospectively was recognized by the California Supreme Court in Athearn v. State Bar, 571 P.2d 628 (Cal. 1978). In Athearn, a lawyer was suspended from the practice of law by the Disciplinary Board of the State Bar. In the course of its investigation, that Board had, without prior notice, subpoenaed the lawyer's bank records. The Athearn court stated that under California law Valley Bank of Nevada v. Superior Court, 542 P.2d 977 (1975), discussed supra at p. 9-10, established a bank customer's

right to notice and opportunity to be heard when his bank records are subpoenaed. However, even the Athearn court refused to apply the rule because the seizure at issue occurred before Valley Bank became final.

Any notice requirement which this Court may establish should therefore be for prospective application only.

CONCLUSION

With regard to the seizure of bank records by an administrative agency authorized by statute, Article I, Section 23 of the Florida Constitution does not add any protection to that already existing under the Fourth Amendment of the United States Constitution and Article I, Section 12 of the Florida Constitution. Therefore, this Court should answer the first certified question in the negative. If this Court decides otherwise, it is respectfully submitted that any notification requirement should be placed on the governmental entity, rather than the bank, and that the rule should be applied only prospectively.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 16th day of April, 1984 to:

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