IN THE SUPREME COURT OF
THE STATE OF FLORIDA

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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.

CASE NO.: 64-793

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

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PRELIMINARY STATEMENT

Whenever reference to the Appendix is made, the symbol (A) will be used herein.

The Respondents, DEPARTMENT OF BUSINESS REGULATION, DIVISION OF PARI-MUTUEL WAGERING, will be referred to as "DIVISION"; Respondent, ROBERT M. SMITH, JR. will be referred to as "SMITH"; and Respondent, GARY RUTLEDGE, will be referred to as "RUTLEDGE". The Petitioners will be referred to by their full names except where the clarity of the context will best be served by reference to their first names only.

STATEMENT OF THE CASE AND OF THE FACTS

Pursuant to Rule 9.210(c), Florida Rules of Appellate Procedure, the Respondents accept the Statement of the Case and of the Facts contained in Petitioners' initial brief but feel that the following additional facts are important to the Court's consideration of this case.

On August 17 and December 18, 1981, the DIVISION issued, and caused to be served, a total of four (4) investigative subpoenas duces tecum upon certain Broward County banks (A.9-14). The Division's authority for issuing the aforementioned subpoenas duces tecum appears on the face of the subpoenas and is found in Section 550.02(3), Florida Statutes (1983).

The subpoenas commanded the banks to produce the account numbers, bank statements, and the deposit and checking receipts of MALCOLM WINFIELD, a licensed horse owner, MALCOLM's son NIGEL, and certain family-held corporations. Both MALCOLM and NIGEL WINFIELD were under investigation by the agency at the time that the subpoenas were issued and served for various rule and statutory infractions including the concealing of NIGEL's ownership interest in horses running under MALCOLM's name (A.55-91). NIGEL WINFIELD was a convicted felon and his alleged concealed involvement in thoroughbred horse racing was of particular concern to racing authorities in New York and Florida because of his pending indictment for fraud in a Federal Court in Tennessee (A.63-82).

The subpoenaed records were subsequently produced by the banks and, as required by Chapter 119, Florida Statutes (1983), made a part of the DIVISION's public records after administrative charges were filed. One of the cancelled checks received by the DIVISION in response to the subpoenas was payment for a horse that raced at Calder Race Course under MALCOLM's name. The check was signed by NIGEL WINFIELD (A.119).

In none of the subpoenas at issue in this case, nor at any other time, did the DIVISION request any records of CLIFTON WINFIELD, NIGEL's brother or NIKKI WINFIELD, NIGEL's daughter; or any other family member. Notwithstanding the fact that the DIVISION neither subpoenaed nor received any of their bank records, on February 28, 1983 CLIFTON and NIKKI WINFIELD joined NIGEL WINFIELD in a declaratory and injunctive action filed in Broward County, Florida, seeking return of the subpoenaed records (A.1-16). The Plaintiffs/Petitioners alleged, inter alia, that public disclosure of the subpoenaed records would violate their federal and state rights of privacy. In a subsequent suit, MALCOLM WINFIELD sought and obtained the same relief accorded to CLIFTON, NIKKI and NIGEL WINFIELD: an ex parte temporary restraining order commanding the DIVISION to turn over all copies of the records. The family-held corporations did not join in the suit and are not parties to this action.

The two (2) suits were subsequently consolidated before the Circuit Court judge who issued the initial temporary restraining

order (A.54). On March 3, 1983, a hearing was held before said judge on Petitioners' Motion to Extend the Temporary Restraining Orders and Respondents' Motion to Dissolve.

At the hearing, the Petitioners submitted no evidence in support of the injunctive relief which they had received and were requesting extended. The Petitioners did not at any time challenge the jurisdiction of the DIVISION or its probable cause to subpoena and obtain the bank records. Indeed, at various times during the hearing the Circuit Court judge acknowledged both the DIVISION'S probable cause to subpoena the records, as well as its good motive in doing so (A.104, 112).

As is clear from the transcript of the hearing (A.94-126) and the order under review (A.129-130), the Circuit Court judge did not base his decision on a balance of Petitioners' rights to privacy vs. Respondents' authority and cause to obtain the records. In fact, the Petitioners did not provide the judge with any record to make that determination. Rather, the Circuit Court judge founded his decision to deny the Motion to Dissolve and continue the temporary restraining orders on the theory that the subpoenaed bank records were entitled to "absolute privacy" from public disclosure (A.113). As is clear from the Circuit Court judge's analogy to records obtained by the F.B.I. (A.112), the judge saw no constitutional infringement in the manner in which the DIVISION received the records, only in the fact that they may later become public.

On March 9, 1983, the Circuit Court issued an order finding that the Respondents acted "with probable cause and within the scope of their jurisdiction and authority in obtaining these records by subpoena." The order concluded, however, by finding that the possible disclosure of these records to the public as required by statue may violate Petitioners' rights to privacy (A.129-130).

The Circuit Court's order was immediately appealed to the Fourth District Court of Appeal (A.127-128). The Respondents argued, inter alia, that the order under review was erroneous because having found that the DIVISION acted properly in obtaining the records, the Circuit Court could not conclude that their possible disclosure violated any of Petitioners' constitutional rights.

On January 11, 1984 the Fourth District issued its ruling reversing the order of the Circuit Court and remanding the case with instructions to transfer the matter to the appropriate venue. The Fourth District further certified two questions of great public importance to the Supreme Court of Florida. Those questions are contained in this brief as Points I and II.

POINT I

DOES ARTICLE I, SECTION 23 OF THE FLORIDA CONSTITUTION PREVENT THE DIVISION OF PARI-MUTUEL WAGERING FROM SUBPOENING A FLORIDA CITIZEN'S BANK RECORDS WITHOUT NOTICE?

ARGUMENT

A. Article I, Section 23 of the Florida Constitution by its very terms excepts contrary Constitutional Provisions from protection. This exception must incorporate Article I, Section 12 and federal case law on seizure of bank records by governmental entities.

The first issue certified by the Fourth District Court of Appeal requires that this Court determine the threshhold issue of whether Article I, Section 23 of the Florida Constitution (1980) extends a constitutional right of privacy to a bank customer over deposit slips, cancelled checks, and bank statements in the possession of a bank. If this Court determines that a customer/depositor hasn't a legitimate expectation of privacy over said records then that determination will be dispositive of this appeal.

Article I Section 23 states as follows:

> RIGHT OF PRIVACY. - 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. (emphasis added).

By its very terms, then, the right of privacy provision is: (1) made subservient to Chapter 119, Florida Statutes (1983), the

Public Records Act; and, (2) is to be read in conformity with other constitutional provisions. As Judge Glickstein stated in his concurring opinion, Article I, Section 23 of the Florida Constitution excepts privacy interests covered by contrary constitutional provisions. Judge Glickstein further notes that in this case the privacy interest asserted by Petitioners is covered by Article I, Section 12 of the Florida Constitution as amended in 1982. Division of Pari-Mutuel Wagering v. Winfield, Case No. 83-464 (Fla. 4th DCA January 11, 1984) [9 FLW 159, 160].

Article I, Section 12 states, in pertinent part:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures... shall not be violated... This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court.

There can be no doubt that the privacy interest raised by Petitioners in this appeal is precisely that interest addressed in Article I, Section 12. In Shevin v. Byron, Harless, Schaffer, Reid & Associates, 379 So. 2d 633 (Fla. 1980), decided before the enactment of Article I, Section 23 but thoroughly consistent with the privacy provision, this Court examined the right of privacy to the extent that it has been recognized under the Constitution of the United States and in Florida. The Court noted that the right of privacy has been strictly limited to three protected interests:

> an individual's interest in being secure from unwarranted governmental surveillance and intrusion into his private affairs; a person's interest in decisional autonomy on personally

> intimate matters; and an individual's interest in protecting against disclosure of personal matters.

379. So. 2d at 636.

The latter two interests set forth in Shevin, decisional autonomy and disclosural privacy, are not before this Court in the instant appeal. The first interest, "in being secure from unwarranted governmental surveillance and intrusion into his private affairs," is the very interest raised by Petitioners in this appeal (Petitioners' Brief pp. 12-13) and is the privacy interest protected by Article I, Section 12 of the Florida Constitution. "The parameters of this interest," in the words of the Shevin opinion, "have been repeatedly delineated over the year by the Supreme Court..." 379 So. 2d at 636. A review of Supreme Court and federal case law, beginning with the leading case of United States v. Miller, 425 U.S. 435 (1976), will reveal that a depositor/customer has no protected interest in the contents of records in the possession of a bank under the Florida Constitution.

In Miller, the Supreme Court held that bank records, subpoenaed by the government without notice to a depositor under investigation, did not fall within a protected zone of privacy and were not "private papers," protected by the Fourth Amendment. 425 U.S. 440. In reaching its conclusion, the Court noted that bank records "are the business records of the banks" which the depositors can assert "neither ownership nor possession." 425 U.S 440. Justice Powell, writing for the majority, cited with approval the decision of the

Court in California Bankers Ass'n v. Shultz, 416 U.S. 21 (1974), wherein the Court stated:

> [b]anks are... not... neutrals in transactions involving negotiable instruments, but parties to the instruments with a substantial stake in their continued availability and acceptance.

416 U.S. 48-49.

The Court further noted that there is no legitimate "expectation of privacy" in the contents of original checks and deposit slips in the possession of a bank. Miller, supra, at 442. This is so, even if the depositor believes that the records are confidential.

> This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.

425. U.S. 443. Since no Fourth Amendment interests of the depositor were implicated by the government's action, the Court in Miller applied the general rule:

> the issuance of subpoena to a third party to obtain the records of that party does not violate the rights of a defendant, even if a criminal prosecution is contemplated at the time the subpoena is issued.

425 U.S. 444. Thus the depositors in Miller were held to lack the requisite Fourth Amendment interest to challenge the government's action.

The Miller doctrine has been applied in the federal courts in several cases dealing with constitutional challenges to Internal Revenue Service subpoena of bank records. See. e.g., United States v. First National Bank of Black Hills, Mt. View, 626 F.2d 605 (8th Cir. 1980); United States v. Climbing Hill Savings Bank, 634 F.2d 1086 (8th Cir. 1980); United States v. Feminist Federal Credit Union, 635 F.2d 529 (6th Cir. 1980): United States v. Rhoads, 617 F.2d 1313 (8th Cir. 1980); United States v. Stuart, 587 F.2d 929 (8th Cir. 1978; and United States v. Fulton, 536 F.2d 1027 (5th Cir. 1976). The principle applied in the above cases is that

> A summons directed to a third party bank does not violate the Fourth Amendment rights of a depositor under investigation since the records belong to the bank, not the depositor.

United States v. First National Bank of Black Hills, Mt. View, supra, 626 F.2d at 607.

The right of third parties to raise a constitutional challenge to a search and seizure conducted on the premises of another was recently addressed by the Third District Court of Appeal in Cushing, v. Department of Professional Regulation, 416 So.2d 1197 (Fla. 1982). In Cushing, the court held that a physician did not have a reasonable expectation of privacy with respect to completed prescriptions in the possession of a pharmacy and that the statutorily authorized search by the Department of Professional Regulation, without a warrant, was constitutionally permissible. In doing so, the court considered an argument similar to the one raised by the Petitioners in the instant case:

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

416 So.2d at 1198. Thus at least one Florida court has recognized that the new Florida privacy provision does not extend an expectation of privacy where one previously did not exist. In line with the Miller decision, et. seq., Cushing holds that one does not have an expectation of privacy over business records in the possession of another. Cf., Adams v. State, 436 So. 2d 1132 (Fla. 5th DCA 1983) where the court concluded that one does not have a reasonable expectation of privacy under Article I, Section 23 when transacting business in a place of business open to the public.

The foregoing federal and Florida cases establish that there is no expectation of privacy in business records in the possession of another. When Article I, Section 23 is read in conformity with Article I, Section 12 as amended in 1982, it is clear that the Respondents have violated none of Petitioners' constitutional rights in obtaining these records. It follows then, that if Petitioners have no assertable right of privacy with regard to records in the possession of a bank, the Respondents could not have violated Petitioners' rights under Article I, Section 23, by failing to notify them prior to the seizure of the records.

ARGUMENT

B. Even if a bank customer/depositor has some expectation of privacy in records in the possession of a bank, said expectations is at most a minimal and does not justify a rule requiring pre seizure notice by governmental agencies.

Respondents would assert that a bank customer/depositor has no legitimate expectation of privacy over deposit slips, cancelled checks and bank statements in the possession of a bank under either the Florida or federal constitution. A finding by this Court that no such expectation of privacy exists will be dispositive of this appeal. On the other hand, if this Court concludes that a bank customer has some expectation of privacy in bank records, then respondents would assert that said expectation has only been recognized in bank-customer relationships and has never been invoked to require a state agency to provide pre-seizure notice to persons under investigation.

Petitioners' sole case authority in Florida for the existence of a bank customer/depositor's expectation of privacy in bank records is Milonich v. First National Bank of Miami Springs, 224 So.2d 759 (Fla. 3d DCA 1969). In Milonich, the plaintiff bank depositor charged that the defendant bank negligently divulged information concerning plaintiff's accounts to third parties. The complaint alleged an implied contractual duty owed by the bank to its depositor to maintain the confidentiality of the bank records. In holding than an implied duty does exist between bank and customer, the court went on to note:

> This opinion does not attempt to deal with the disclosures of a national bank relating to loan information, safe deposit rentals, general credit information between banks, disclosure required by the government or under compulsion of law or disclosure made with the express or implied consent of the customer... These issues are not before us (emphasis added).

224 So. 2d at 762. See also Hagaman v. Andrews, 232 So. 2d 1, 8-9 (Fla. 1970).

Thus the sole Florida decision relied upon the Petitioners, when considered in its entirety, hardly supports the view that there is a reasonable expectation that bank records will not be released to a governmental agency, pursuant to subpoena, without notice. At most, Milonich stands for the proposition that a person has a reasonable expectation that a bank will not indiscriminately release his account records to a private party. In any case, the banks' liability is not in issue in the case sub-judice and Milonich has no application to the constitutional right of privacy.

In addition to the Milonich decision, Petitioners make reference to the "prevailing trend" to recognize an expectation of confidentiality in private, non-governmental relationships, and cite two cases from California recognizing such an expectation with respect to agency investigations (Petitioners' Brief pp. 9,16).

Before analyzing Petitioners' cited authority in other jurisdictions, it should be noted here that while the Fourth District framed its issue in terms of the average "citizen," the "average

citizen's" records were not subpoenaed and obtained by the DIVISION. MALCOLM WINFIELD was a licensed horse owner who raced thoroughbred race horses in the State of Florida. (A.79-89) NIGEL WINFIELD is a convicted felon who, along with MALCOLM, was under investigation in New York and Florida for allegedly racing his own horses under his father's name, in violation of various statutes and rules, at the time the subpoenas were issued (A.62-89). The subpoenaed records were evidence that the DIVISION intended to introduce at an administrative hearing. The Fourth District's issue, therefore, misapprehends the parties who are rightfully before this Court, largely because the Petitioners have alleged from the beginning (A.5) and continue to allege (Petitioners' Brief p.18) that the Respondents subpoenaed the records of CLIFTON and NIKKI WINFIELD. One look at the subpoenas under review (A.9-14, 35-36) will reveal that the Petitioners have misrepresented the parties whose records were obtained from the banks by the DIVISION. While it may be tactically wise for Petitioners to make their best case by alluding to the DIVISION's obtaining records of uninvolved persons, it is not the truth. If the DIVISION received any records that make reference to CLIFTON and NIKKI WINFIELD they are the corporate records of the family-held corporations. As noted earlier, the corporations are not parties to this action and, in any event, Article I, Section 23 of the Florida Constitution which extends a right of privacy to "natural persons" does not even agruably protect the privacy rights of corporations.

The fact that the DIVISION subpoenaed the bank records of persons under investigation is important when considering the California decisions cited by Petitioners. An analysis of those decisions will reveal that they offer no support to Petitioners' argument.

Division of Medical Quality v. Gherardini, 93 Cal. App.3d 669, 156 Cal. Rptr.55 (Cal. App. 4th 1979) concerned an investigation of the California Medical Board into alleged improprieties by a licensee-doctor. The Board wanted to examine the complete medical-hospital records of five named patients of the doctor and issued and served a subpoena on the custodian of records of the doctor's hospital.

What is significant about the Gherardini decision within the context of the case sub-judice is that the California court was not concerned with the privacy interests of the doctor who was under investigation and stated that the Board's right to "reasonably regulate the licensee-doctor is not in dispute." 93 Cal. App.3d 675. It was the rights of the innocent patients which the court was scrutinizing. Thus Gherardini is distinguishable from the instant case in at least 3 respects:

1. The subpoena called for the records of a person not under investigation and it is the innocent third party that the court was interested in protecting. 93 Cal. App.3d 675.

2. The innocent third party, a patient, was protected by a traditional, and in California a statutory, privilege (patient-physician) which created a zone of privacy whose purposes are, among other things, "to preclude the humiliation of the patient that might follow disclosure of his ailments." 93 Cal. App.3d 678.

3. The information sought by the Board, the patients' medical profile, "is an area infinitely more intimate, more personal in quality and nature" than the area of financial or banking records. 93 Cal. App. 3d.678.

In Doyle v. State Bar of California, 32 Cal.3d 12, 184 Cal. Rptr.720, 648 p.2d 942 (1982) the Supreme Court of California had before it a case similar to Gherardini. In Doyle, the California Bar sought a licensed attorney's trust account records and obtained same by subpoena. Once again the court was only concerned with the privacy interests of the client and not the attorney under investigation. The court held that the Bar's procedure in obtaining these trust accounts without notice to the clients was not an unconstitutional invasion of privacy while noting that a procedure for notification of the clients prior to disclosure was preferable. Eventhough the client in Doyle expressly withheld his consent to disclosure of the financial records, the court found that good cause for disclosure "clearly existed" and that the Bar's need for the information in the conduct of its investigation overrided the client's refusal. 648 P.2d 946.

The third California case relied upon by the Petitioners is Valley Bank of Nevada v. Superior Court of San Joaquin County, 125 Cal. Rptr.553, 542 P.2d 977 (1975). The issue in Valley Bank was whether a bank had a duty to disclose to its customers the fact that loan transactions between the bank and said customers were requested in the course of civil discovery proceedings. The court held that the bank did have a duty to disclose to its customers the pendency of the request. The court found that bank customers do have an expectation of privacy with respect to financial information disclosed to banks. 542 P.2d 979.

An analysis of Valley Bank reveals that it is distinguishable from the instant case in a number of respects. First, as in Milhonich, supra, the case does not deal with disclosure required by government or under the compulsion of law. Second, Valley Bank holds that the bank is under an obligation to notify its customers of the request for financial information. Once again it must be noted that the bank's liability is not in issue in this case. Third, the records requested in Valley Bank pertained to loan applications between the bank and its customers. The issue of whether bank statements, cancelled checks and deposit slips are similarly protected was not in issue in Valley Bank. It is certainly arguable, that loan applications carry a greater expectation of privacy because they are less likely to be seen by others.

Finally, any analysis of the California cases must mention that the California privacy provision, Article I, Section 1, is

materially different than Florida's. The California provision states:

> All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life, liberty, acquiring, possessing, and obtaining property, and pursuing and obtaining safety, happiness, and privacy

By its wording, the California privacy provision is not limited to governmental action, as is Florida's. Also, unlike Florida, the privacy right in California is not made subservient to the public's right to disclosure. Finally, the California provision does not incorporate the decisions of the United States Supreme Court on the Fourth Amendment. To argue, as Appellees have, that the California cases on the state right of privacy are persuasive in interpreting the Florida Constitution is, in many respects, like "mixing apples with oranges."

Petitioners' cited cases from other states further reveals that weakness of their argument. From Alaska, Petitioners cited the decision in Ravin v. State, 537 p.2d 494 (1975) and, without mentioning it, quote a concurring opinion ostensibly stating that the enactment of a state constitutional amendment on the right of privacy was intended to broaden in scope the rights already recognized under the Federal Constitution. Ravin concerned the constitutionality of a statute prohibiting the private possession of marijuana and why it is significant in the context of this case is

not really made clear by the Petitioners. However, a subsequent Alaskan case on the state right of privacy is more analogous to the issues before this court.

In Department of Revenue v. Oliver, 636 P.2d 1156 (Alaska 1981) the court considered a state right of privacy claim by two persons who received a summons by the Alaskan Department of Revenue to produce various tax records. After noting that the claim came within the zone of privacy protected by the state provision, the court cited Ravin for the proposition that the protection given to interests under the state right of privacy was not absolute. 636 P.2d 1166. The court then balanced the individual's privacy interest against the state's and held that the state's interest prevailed. In so doing, the court noted:

> Most of the records sought by the government fall into the catagory of records in which the legitimate expectation of privacy is lowered because such records, in the course of their use, are bound to be seen by others.[22] The records demanded of the Olivers were W-2 forms or other pay records received from employers, bank statements, credit union statements, and copies of federal tax returns, all of which fall within this catagory.

636 p.2d 1167. In footnote number 22, the court cites United States v. Brown, 600 F.2d 248, 256 (10th Cir.), cert. denied, 444 U.S. 917 (1979) for the proposition that there is no legitimate expectation of privacy in cancelled checks and deposit slips; and United States v. Werner, 442 F. Supp. 238 (S.D. N.Y. 1977), holding that cancelled

checks bear no element of confidentiality because others are bound to see them in the course of their use.

Thus the Alaskan Supreme Court which the Petitioners cite in Ravin, has implicitly recognized the frivolity of Petitioners' position. Even under a broad concept of the state right of privacy, cancelled checks and deposit slips carry no expectation of confidentiality.

Other cases cited by Petitioners include Commonwealth v. DeJohn, 403 A.2d 1283 (Pa.1979) which recognized a bank customer's expectation of privacy but involved records obtained under an invalid subpoena (without proper process); Djowharzaden v. City National Bank & Trust Co., 646 P.2d 616 (Ok.App.1982) which involved a disclosure made by a loan officer to a private party of confidential information contained in a loan application; and Chames v. DiGiacomo, 612 P.2d 1117 (Col.1980) which recognized a bank customer's right of privacy to bank records but balanced that right against the State's interest in the records and found the State's interest reasonable and overriding. In none of the foregoing cases did any State adopt a hard and fast rule requiring pre-seizure notice. It should further be noted that none of the above states has a constitutional provision similar to Florida's which, when read in conformity with a sister provision, incorporates federal case law on the Fourth Amendment.

Other state courts in Indiana,[1] Maine,[2] Washington[3] and Wyoming[4] have rejected bank customers' privacy claims based on state law, and followed the holding in United States v. Miller, supra. In accordance with Article 1, Section 12 of the Florida Constitution that would appear to be the proper route for Florida to take.

In summary, the State of Florida has never recognized the right of confidentiality in bank records beyond the bank-customer relationship. Most states that have decided the issue, even Alaska under a broad right of privacy provision, have concluded that bank statements, deposit slips and cancelled checks carry no expectation of privacy under the Constitution. One State that does recognize a limited right of privacy over records in the possession of another has only recognized that right in the context of traditional physician-patient, lawyer-client relationships. Valley Bank does not concern a government induced disclosure. Finally, and most importantly, no state anywhere has recognized the right of persons under investigation to receive pre-seizure notice of records in the possession of a bank.

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1. Cox v. State, 392 N.E.2d 496 (Ind.App.1979).
2. State v. Fredette, 411 A.2d 65 (Me.1979).
3. 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 (1982).
4. Fitzgerald v. State, 599 p.2d 572 (Wyo. 1979).

ARGUMENT

C. **Article I, Section 23 was intended to prevent only unreasonable intrusions into the private lives of Florida Citizens. A constitutional requirement of pre-seizure notice in every investigation would eliminate any possibility of conducting effective investigations of numerous rule infractions.**

The Florida privacy provision was never intended to prevent reasonable intrusions into the private lives of Florida citizens. Even where a person has a legitimate expectation of privacy under one of the three (3) interests set forth in Shevin, supra, that expectation must be balanced against the State's interest in obtaining the requested information. See Florida Board of Bar Examiners Re: Applicant, 443 So.2d 71 (Fla. 1983). For this reason, and because the State's interest in keeping an investigation confidential may in many cases be strong and even compelling, a blanket rule mandating pre-seizure notice goes far beyond any reasonable interpretation of Article I, Sections 12 and 23.

The Division of Pari-Mutuel Wagering is an agency vested with police power. While the DIVISION'S powers are not unbounded, the courts of this state have recognized the noxious qualities of the pari-mutuel industry and have held consistently that the DIVISION may exercise it's power in a more arbitrary manner than those agencies whose mandate is not so essential to the public welfare. See, e.g, Solimena v. Department of Business Regulation, 402 So.2d 1240, cert. denied, 412 So.2d 470 (Fla. 3d DCA) aff'd, 412 So.2d 357(Fla. 1982); Simmons v. Division of Pari-Mutuel Wagering, 407 So.2d 259 (Fla. 3d DCA) aff'd, 412 So.2d 357 (Fla. 1982);Hialeah Race Course, Inc. v. Gulfstream Park Racing Association,

Inc., 37 So.2d 692 (Fla. 1948). Certainly an investigation into the hidden ownership of thoroughbred race horses is a matter within the jurisdiction of the DIVISION under Chapter 550, Florida Statutes (1983) and a legitimate subject of inquiry.

Notwithstanding it's broad grant of authority under Chapter 550, Florida Statutes, the DIVISION, like other governmental agencies may not revoke or suspend the license of any person engaged in the pari-mutuel industry without first complying with the due process requirements of Chapter 120, Florida Statutes (1983). And like other agencies, prior to filing administrative charges under Section 120.60, Florida Statutes, the DIVISION must first make a determination as to whether or not it has probable cause to proceed. The burden rests with the agency to prove a rule violation by substantial, competent evidence. See DeGroot v. Sheffield, 95 So.2d 912 (Fla. 1957); Section 120.68(10), Florida Statutes (1983). Without having the information it requires, the DIVISION would never be able to detect the hidden ownership of race horses or greyhounds and the infiltration of undesireable elements into the parimutuel industry.

Under current Florida law there is no requirement that an agency "reveal it's hand" prior to filing charges under Section 120.60, Florida Statutes. Section 120.62, Florida Statutes imposes no duty upon agencies to conduct their inquiries in the open. At least one recent Florida case, Garner v. Commission on Ethics, 415 So.2d 67, 68 (Fla. 1st DCA 1982) has held that there is no requirement that an investigated person be afforded a full-blown adversary type proceeding before a determination of probable cause is made.

It is not difficult to predict what would occur if this court were to establish a constitutional requirement of pre-seizure notice. Upon receiving information that an unlicensed person is involved as a hidden owner of thoroughbred race horses, the DIVISION would seek to subpoena bank records to determine whether or not there is any evidence of the hidden owner paying for training, feed or stabling expenses or whether the hidden owner is depositing purse monies into his accounts. The DIVISION would notify the hidden owner of the subpoena. The hidden owner would then move to quash the subpoena under Section 120.58(2), Florida Statutes. Assuming that the agency denies the motion, the hidden owner would then presumably, have the right to appeal that decision under Section 120.68(1), Florida Statutes. In the meantime, while the matter is pending before the courts, the fraud continues with the DIVISION being powerless to stop it, and both the hidden owner and the front have sufficient time and opportunity to make alternative arrangements. Even if the appellate court upholds the DIVISION'S right to the information, by the time the records are in the possession of the agency they are virtually useless. More likely than not, these proceedings would cover two (2) or even three (3) licensing periods, with the parties under investigation rerouting the funds into other accounts or other fronts. Witnesses who were in Florida for the winter or summer thoroughbred racing season may be unavailable. The State's interest in regulating pari-mutuels would be defeated.

The above scenario is significant in the context of this case because one of the cancelled checks received in response to the DIVISION'S subpoenas was payment for a thoroughbred race horse drawn

on NIGEL WINFIELD's account (A.119). Unless the parties under investigation are willing to come forward and confess, bank records are often the best, if not the only evidence of hidden ownership or other "white collar" rule infractions.

For the foregoing reason, no state anywhere has adopted an absolute rule requiring pre-seizure notice. The states that have considered the issue under state constitutional privacy provisions have adopted a balancing approach. (See Discussion in Argument B). Two recent Florida cases under Article I, Section 23, Florida Board of Bar Examiners Re: Applicant, supra, and In Re Guardianship of Barry, 443 So.2d 71 (Fla. 1983), have likewise balanced the state's interest against the interest of the person invoking the privacy provision. See also Doe v. Sarasota-Bradenton Florida Television Co., 436 So.2d 328,330 (Fla. 2d DCA 1983) (wherin the court, on it's own, balanced the right of privacy against the First Amendment). The right of privacy provision has been, and should continue to be, developed on a case by case basis rather than on the basis of an absolute rule which would, without question, derail important state investigations.

There is one other point raised in Petitioner's Brief which merits a brief response here. Petitioners argue that this court should consider the fact that records received by the DIVISION are later subject to public disclosure as additional reason to mandate pre-seizure notice (Petitioners' Brief pp. 16-17). This issue of "disclosural privacy" originally raised before the Fourth District is conspicuously absent from the appellate court's certified questions. The reason why the issue was not certified and not even addressed in

the court's opinion is probably because the Fourth District considered the point to be frivolous.

Petitioners' argument ignores the fact that the right of privacy contained in Article I, Section 23 is expressly made subservient to the public's right to see records of state agencies and not vice versa. Under Article I, Section 23, no person's right of privacy can defeat the public's right of access to governmental records. Since Article I, Section 23 does not recognize a right of "disclosural privacy," the law in the State of Florida has not changed since this Court held in Shevin v. Byron, Harless, Schaffer, Reid & Associates, Ltd., supra, that the right of disclosural privacy is very limited and would not prevent the disclosure of personal biographical data and evaluations of interviewed persons. See Douglas v. Michel, 410 So.2d 936, 939-40 (Fla. 5th DCA 1982), holding that the Shevin decision still controls both federal and state right of privacy issues. See also Roberts v. News-Press Publishing Co. Inc., 409 So.2d 1089, 1093 (Fla. 2d DCA 1982). The Shevin decision, in it's broadest sense, stands for the proposition that disclosure of information received in a lawful manner by a governmental agency, which is not exempted under Chapter 119, Florida Statutes, does not violate any person's right of privacy. If the DIVISION received the bank records in a lawful manner, as the Circuit Court concluded (A-129-130), then the fact that the records were later subject to disclosure did not violate Petitioners' rights under Article I, Section 23.

POINT II

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

The second question certified by the Fourth District Court of Appeal is erroneous in two respects. First, the DIVISION is not a legislative agency but an executive agency. See Section 20.16, Florida Statutes. Second, and more importantly, there is nothing in the record to support the Court's presumption that the DIVISION subpoenaed all of Petitioners' bank records.

The Respondent would submit that the DIVISION subpoenaed only those records that it became aware of during the course of it's investigation. The subpoenas were limited in time to the period in which the DIVISION had information that NIGEL WINFIELD was supporting the Winfield horse operation running under MALCOLM's name. The subpoenas were directed to the accounts of MALCOLM and NIGEL WINFIELD and to certain corporations not a party to this suit. The subpoenas requested deposit and checking information and bank statements, not trust agreements, loan applications, or other information. Finally, even the subpoena with the broadest time frame covered but a year and two months (A.11). These subpoenas were not a "witch hunt"; they were reasonably calculated to provide information about the Winfield's horse racing operation between 1980 and 1981. See Detweiler Brothers v. Walling, 157 F.2d 841 (9th Cir. 1946), cert. denied, 330 U.S.819.

The Fourth District in it's opinion suggests that the DIVISION'S subpoenas were not limited to transactions affecting horses. 9 FLW 159. One wonders how the DIVISION could have drafted

it's subpoenas duces tecum to accomplish this result. Should the DIVISION have attached a fifty (50) page appendix to it's bank subpoenas detailing all horses owned by the WINFIELDS and all thoroughbred licensees? Or should the DIVISION have asked the banks to pull only those records which are "horse racing related" and hope that bank employees are familiar with the rosters of horses racing at Calder, Hialeah and Gulfstream and can recognize the names of feed companies, trainers or backside help? To determine whether a particular check or deposit was important to the state investigation, it would require the expertise of the agency not the speculation of the bank.

Finally, the issue of overbreadth was never properly developed before the Circuit Court in the Appellate Court. As noted earlier in this brief, Petitioners offered no evidence in support of their motion to continue the temporary restraining orders. For that reason alone the restraining orders should have been reversed. See Russell v. Florida Ranch Lands, Inc., 414 So.2d 1178 (Fla. 5th DCA 1982).

Despite the fact that there is not a complete record below, this Court should consider that the Circuit Court found the DIVISION to have acted with a proper motive and acted within it's jurisdiction and authority in subpoenaing these records. There is no evidence under the circumstances of this case to justify any other finding. If this Court disagrees with Respondents' position with respect to the first certified question, and finds that the Petitioners had a legitimate expectation of privacy, then the Court should balance that expectation against the state's interest as found by the Circuit Court. Respondents submit that, under the facts of this case, the state's interest in overriding.

SUMMARY AND CONCLUSION

Article I, Section 23 of the Florida Constitution protects natural persons from unreasonable intrusions into their private lives. The section protects only legitimate expectations of privacy under one of the three (3) privacy interests set forth in the Shevin opinion.

The privacy interest asserted by Petitioners is the right to be let alone from unreasonable searches and seizures. That right is addressed in Article I, Section 12 which incorporates, by it's terms, the decisions of the Supreme Court of the United States on the Fourth Amendment. When Article I, Sections 12 and 23 are read in harmany with one another and are interpreted in light of federal case law on seizure of bank records, it is clear that Petitioners have not asserted a protected privacy right under the Florida Constitution.

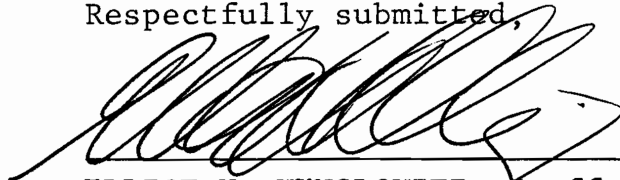
If this Court holds that Petitioners have a legitmate expectation of privacy in deposit slips, cancelled checks and statements created by and in the possession of banks, then the court should balance Petitioners' interest against the state's interest in obtaining information about persons involved in the pari-mutuel industry.

Finally, the subpoenas in question were reasonably calculated to obtain information relevant to a state investigation. The Circuit Court held that the DIVISION acted properly and within it's authority and there is nothing in the record to support a contrary finding. Both certified questions should be answered in the negative.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was this 20TH day of April, 1984, forwarded to ROBERT M. LEEN, ESQ., Leen & Schneider, Suite 501, 2450 Hollywood Blvd., Hollywood, Florida, 33020; to DAVID K. MILLER, ESQ., Department of Legal Affairs, Economic Crime Litigation Unit, The Capitol, Tallahassee, Florida, 32301; TO ERIC B. MYERS, ESQ., and SALLY M. RICHARDSON, ESQ., 1500 Edward Hall Building, Miami Center, 100 Chopin Plaza, Miami, Florida, 33131.

Respectfully submitted,



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