IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

vs. CASE NO. 64,793

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

Respondents.

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PETITIONERS' REPLY BRIEF

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INTRODUCTION

In this Reply Brief the DIVISION OF PARI-MUTUEL WAGERING, DEPARTMENT OF BUSINESS REGULATION, GARY M. SMITH, JR., and GARY RUTLEDGE, will be collectively referred to as RESPONDENTS. The Attorney General of Florida, who has appeared as Amicus Curiae, will be referred to as ATTORNEY GENERAL, and the Atlantic National Bank of Florida, who has appeared as Amicus Curiae, will be referred to as ATLANTIC BANK. The Petitioners, CLIFTON WINFIELD, NIGEL WINFIELD, NIKKI WINFIELD, MALCOLM WINFIELD and FRANK MARANO, unless specifically identified, will be collectively referred to as PETITIONERS.

I

RESPONDENTS acknowledge that in Shevin v. Byron, Harless, Schaffer, Reid & Associates, 379 So2d 633 (Fla. 1980), this Court recognized that the interests protected by the emerging right of privacy included:

> ...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. Shevin v. Byron, et al, supra at 636.

However, RESPONDENTS appear to give little force and effect to the third recognized privacy prong, i.e., confidentiality, and instead have directed all of their arguments to the first prong, i.e., an individual's interest in being secure from unwarranted governmental surveillance and intrusion into his private affairs. Despite RESPONDENTS' assertion to the contrary, not only do PETITIONERS argue that RESPONDENTS' conduct constituted an unwarranted governmental intrusion into their private affairs, but also the PETITIONERS submit that their interest in avoiding public disclosure of personal matters is very much at issue.

In Whalen v. Roe, 429 US 599, 97 S.Ct. 869 51 L.Ed2d 64 (1977), the Court reviewed a challenge to the State of New York's drug

prescription reporting statute. In upholding the statute's constitutionality, the Court analyzed the privacy interests involving disclosure of personal confidential matters and the area of decisional autonomy. Sensitive to the potential invasion of admittedly confidential information (prescriptive medication), and the patient's obvious interest therein, the Court was clear to point out that the chances of public disclosure presented by the program were unlikely and remote. Whether the Court would have upheld the statute if, as in the case sub judice, disclosure by virtue of the Public Records Act, Chapter 119, was mandatory and certain, rather than unlikely and remote, is subject to debate.

During the same term in which Whalen was decided, the Court was again asked to review the constitutionality of a statute, i.e., the Presidential Records and Materials Preservation Act, against a claim of confidentiality under the constitutional right of privacy. In Nixon v. Administrator of General Services, 433 US 425, 97 S.Ct. 2777, 53 L.Ed2d 867 (1977), the Court found that the President had a legitimate expectation of confidentiality in recorded conversations that took place while he was in office. In its decision the Court traced the right of privacy, finding that its roots stemmed from both the Constitution and common law. Concedely, the privacy right declared in Nixon was bottomed, in part, upon the office Mr. Nixon held as Chief Executive when the

conversations took place; however, later courts and commentators have read Nixon as authority for the vitality of an emerging confidentiality privacy interest in contexts outside Fourth Amendment analysis. Plante v. Gonzalez, 575 F2d 1119, 1132-3 (5th Cir. 1978); Pollard v. Cockrell, 578 F2d 1002 (5th Cir. 1978); See, Gerety, Redefining Privacy, 12 Har. Civ.R. Civ.L. Rev. 233 (1977).

II

When reviewing privacy claims against governmental disclosure, the courts have formulated a balancing test weighing privacy interest on one had as against the public's need for disclosure on the other. While the Supreme Court has warned against giving heightened attention to cases involving new "fundamental interests", San Antonio Independent School District v. Rodriguez, 411 US 1, 33-34, 93 S.Ct. 1278, 36 L.Ed2d 16 (1973), it is clear that something more than mere rationality must be demonstrated:

> ...at the same time, scrutiny is necessary. The Supreme Court has clearly recognized that the privacy of one's personal affairs is more protected by the Constitution. Something more than mere rationality must be demonstrated. Plante v. Gonzalez, supra, at 1134.

In Plante v. Gonzalez, supra, the Fifth Circuit Court of Appeal upheld the constitutionality of financial disclosure under Florida's Sunshine Amendment, Article IX, Section 3, Florida Constitution, as against several State office holder's claim of confidentiality in

in their financial affairs. The Court acknowledged that financial privacy is a matter of serious concern. However, the amendment dealt solely with the financial disclosure of elected officials and not those who did not seek public office. Thus, a significant factor in upholding the law's constitutionality was the fact that those required to make disclosure voluntarily sought the status of office holder and that the public had a legitimate reason to know the financial affairs of those who sought their vote. While this reasoning may be applicable to PETITIONER, Malcolm Winfield, none of the other PETITIONERS had ever been licensed to race in the State of Florida and other than PETITIONER, Nigel Winfield, none of the other PETITIONERS had even engaged in the racing industry.

It appears unlikely that the Fifth Circuit would have upheld the constitutionality of a statute which compelled financial disclosure over a claim of privilege and confidentiality by a citizen who did not voluntarily avail himself of a certain status, i.e, office holder, racing license, liquor license, or the like.

> ...Otherwise public disclosure requirements such as Florida's could be extended to anyone in any situation. Plante v. Gonzalez, supra, at 1134.

Likewise, in striking the balance in favor of the constitutionality of the Presidential Recording and Materials Preservation Act, the

Court in Nixon acknowledged the invasion of privacy to be potentially troubling; however, because of the limited nature of the disclosure, a simple screening by a curator, and the lack of any viable alternative, the Court concluded that privacy interests had to give way to the public's interests and since the statute's invasion of the President's privacy rights was accomplished in the least possible intrusive manner, it was constitutional.

III

PETITIONERS are sensitive to the ATTORNEY GENERAL's concern regarding the gathering of information by prosecuting agencies of the State in their capacity as one-man grand juries or in conjunction with a duly constituted grand jury. However, the undisclosed gathering of records by prosecuting agencies and grand juries, without notice to the depositor, although repugnant to some, does not present the potential for abuse and harm which is presented by the actions of RESPONDENTS.

The ATTORNEY GENERAL has accurately pointed out in his brief that records obtained in the course of active criminal investigations or civil investigations under the State's RICO Act, are not subject to disclosure under the State's Public Records Law. Brief of

Amicus Curiae, ATTORNEY GENERAL, p.19, fn.7. Therefore, such records will never find their way into the public domain during the investigative stage and if a formal criminal charge or civil RICO action is filed, there are means by which the depositor/defendant can limit disclosure to the public during the course of the proceedings. See, Rule 1.280(c), Florida Rules of Civil Procedure, and Rule 3.220(i), Florida Rules of Criminal Procedure.

IV

The RESPONDENTS have placed great emphasis on the Supreme Court's decision in United States v. Miller, 425 US 435 96 S.Ct. 1619 48 L.Ed2d 71 (1976), for the proposition that there can be no reasonable expectation of privacy in banking records and therefore there should be no requirement that RESPONDENTS give pre-seizure notice to PETITIONERS. While the Court in Miller did not find that the depositor had the requisite Fourth Amendment interest to challenge the validity of government procured subpoenas used to obtain banking records, it is important to bear in mind the context in which Miller came before the Court. Miller was appealing his criminal conviction upon the grounds, inter alia, that his banking records had been illegally seized during the course of a criminal investigation and therefore under the exclusionary provision of the Fourth Amendment they should have been suppressed as evidence at trial.

Miller never discussed whether an independent privacy interest may exist in such records outside the Fourth Amendment and separate and apart from the criminal context. Nor was the holding in Miller cast as absolutely as has been urged by RESPONDENTS and the ATTORNEY GENERAL. Specifically, in Miller the Court pointed out that:

> ...We are not confronted with a situation in which the Government, through "unreviewed executive discretion", has made a wide-ranging inquiry that unnecessarily "touches upon intimate areas of an individual's personal affairs". California Bankers Association v. Schultz, at 78-79, 39 L.Ed2d 812, 94 S.Ct. 1494 (Powell, J., concuring). Here the Government has exercised its powers through narrowly directed subpoenas duces tecum subject to the legal restraints attendant to such process. United States v. Miller, supra at 444, note 6.

In no way can the subpoenas duces tecum issued by RESPONDENTS be viewed to be narrowly directed to the subject matter under investigation. The subpoenas were broad and far ranging requests, unlimited in their scope or the information sought. Furthermore, with the exception of PETITIONER, Malcolm Winfield, none of the individuals whose records were obtained were ever under licensure by RESPONDENTS. One must speculate as to how Miller might have been resolved had the government subpoenas been labeled "fishing expeditions" and "witch hunts" as characterized by the Fourth District Court of Appeal in its opinion below.

V

The RESPONDENTS also placed great emphasis upon this Court's decision in Cushing v. Department of Professional Regulation, 416 So2d 1197 (Fla. 1982). In Cushing, this Court found that Cushing (a physician) had no reasonable expectation of privacy in various documents (medical prescriptions), which Cushing had given to patients who in turn had delivered those documents to a third party (a pharmacist) to be filled. PETITIONERS submit that this decision was obviously correct because nothing within the written prescription contained any private information about Cushing. Had the Court been faced with the question of whether the patients whom Cushing had given the prescriptions who, in turn, had given the prescriptions for filling to a pharmacist, had a legitimate expectation of confidentiality that the prescriptions would not be disclosed, without notice, to governmental authorities and made public records in a non-criminal investigation, it is submitted that the case would have been more akin to Whalen v. Roe, supra, and that a more detailed analysis regarding the patients' privacy interests would have been appropriate. In any event, Cushing is clearly distinguishable because the information contained within the written prescriptions did not contain any confidential information about Cushing, only his patients. In the case sub judice, all of the information contained in the banking records specifically

contained confidential information about the financial affairs of PETITIONERS.

VI

One last point should be made. Neither RESPONDENTS nor the ATTORNEY GENERAL nor ATLANTIC BANK seem to recognize that financial information about an individual may tell much about an individual's private affairs, lifestyle, political persuasion, moral attitudes and the like. By sifting through financial records an inquiring governmental official or a member of the public at large by virtue of the Public Records Law, could determine any aspect of an individual's life for which payment may be made by check or negotiable instrument. Concedely, memberships, associations and beliefs are revealed only tangentially, but they must be taken into consideration in the balancing process where seizure is tantamount to public disclosure.

CONCLUSION

That the RESPONDENTS have violated PETITIONERS' reasonable expectation of confidentiality and privacy in their banking records. In a non-criminal context both the United States Constitution and the Florida Constitution have recognized a right of confidentiality. That the unbridled exercise of discretion by RESPONDENTS in issuing subpoena duces tecums without any reasonable limitations upon individuals who in all but one case were not even participants in the industry regulated by RESPONDENTS, is repugnant to the provisions of Article I, Section 23 of the Florida Constitution and this Court should quash the decision of the Fourth District Court of Appeal and remand with instructions to reinstate the trial court's restraining order.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief was forwarded this 29th day of June, 1984, to ELLIOT H. HENSLOVITZ, ESQ., Department of Business Regulation, Division of Pari-Mutuel Wagering, 1350 N.W. 12 Avwnue, Room 332, Miami, Florida, 33136; to JIM SMITH, ESQ., Attorney General, c/o DAVID MILLER, ESQ., Assistant Attorney General, and JOHN MILLER, ESQ., Assistant Attorney General, Department of Legal Affairs, RICO Section, The Capitol, Tallahassee, Florida, 32301; and to ERIC B. MEYERS, ESQ., and SALLY M. RICHARDSON, ESQ., Attorneys for ATLANTIC BANK, 1500 Edward Ball Building, Miami Center, 100 Chopin Plaza, Miami, Florida, 33131.

Respectfully submitted,

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