IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,272

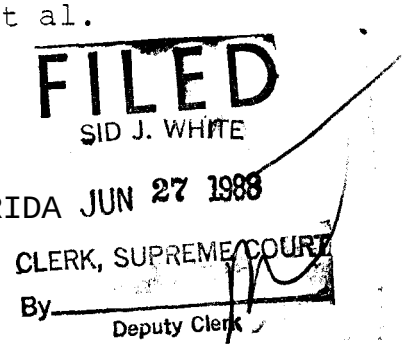
BERNARD SHAKTMAN, et al.

Petitioners

vs.

THE STATE OF FLORIDA

Respondent



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ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF PETITIONERS

MEL BLACK
2937 S.W. 27th Avenue
Suite 202
Miami, Florida 33133
(305) **443-1600**
Attorney for Petitioners

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INTRODUCTION

The Petitioners, Bernard Shaktman, John J. DeBlasio, Alfred Mart, Sam Levanthal, Lewis Allen Mart, Alan Scott Tabb, Milton Julius Shapiro, Eli Lee Shapiro, Robert Simon, Stuart Levanthal, Nicholas Sklaroff, Lawrence Levine, Stanley Lawrence, Nick Satin, Reuben Goldstein, and Lawrence Sokoloff were the defendants in the trial court, the Circuit Court for the Eleventh Judicial Circuit of Florida in and for Dade County, and the Appellants in the District Court of Appeal of Florida, Third District. The Respondent, the State of Florida, was the prosecution in the trial court and the Appellee in the District Court of Appeal. In this brief the Petitioners will be referred to as "Defendants," and the Respondent as the "State."

Throughout the brief, the letter "R" is utilized to designate the pages of the Record on Appeal. The letter "T" is utilized to designate the Transcript. The letter "A" is utilized to designate the Appendix filed herewith. All emphasis contained within quotations is added unless otherwise stated.

This consolidated brief is filed on behalf of all Petitioners.

STATEMENT OF THE CASE

The Defendants were charged on November 13, 1984, with the crimes of conspiracy to RICO 895.03(3)(4), RICO, conspiracy to commit bookmaking, and bookmaking. A motion to suppress all information gathered by the State from use of a pen register was filed on April 18, 1985. (V-II-274). The Defendants filed a motion to suppress evidence derived from electronic surveillance and search warrant on May 28, 1985, which was adopted by all defendants. (V-II-283). Additionally, Defendants Shaktman and DeBlasio filed a motion to suppress evidence of all intercepted conversations. (V-II-129-258). After an evidentiary hearing on the motion to suppress, the court announced an order on March 29, 1986, denying the motion to suppress evidence. (V-V-1122).

All Defendants entered pleas of no contest and reserved their right to appeal the pretrial rulings on the consolidated Motion to Suppress Evidence obtained through Electronic Surveillance and execution of search warrant filed on behalf of all Defendants. As agreed by the State, each of the foregoing rulings is dispositive of the within cause in that if the defendants succeed on the appeal, there would be no further basis for prosecution. (V-V-1187). The Defendants were all sentenced to various terms ranging from probation to four years incarceration. (R-1124-1187).

A timely notice of appeal was filed by the Defendants. The District Court of Appeal of Florida, Third District, issued its decision affirming the judgment of the trial court on March 29,

1988. (Appendix p.1-21, Tab #1). The Defendants timely invoked the discretionary review jurisdiction of this Court. (Appendix p.22-23, Tab #2). The basis for the invocation of this Court's jurisdiction was a certification by the District Court of Appeal that its decision passed upon questions of great public importance, to-wit:

> (1) WHETHER ARTICLE I, SECTION 23, OF THE FLORIDA CONSTITUTION IS IMPLICATED WHEN A LAW ENFORCEMENT AGENCY INSTALLS A PEN REGISTER DEVICE ON THE TELEPHONE OF AN INDIVIDUAL?
>
> (2) IF THE ANSWER TO (1) IS YES, THEN IS THE COMPELLING STATE INTEREST TEST SATISFIED IF THE LAW ENFORCEMENT AGENCY INVOLVED IN THE INSTALLATION HAS FOUNDED SUSPICION AND MEETS THE CRITERIA ESTABLISHED BY SECTIONS 119.011 (3)(a),(b),(c) AND 119.011(4)?

[Opinion, Shaktman v. State, #86-1527 et seq (Fla 3rd DCA March 29, 1988) p.12, Appendix p.12]

QUESTIONS PRESENTED

(1) WHETHER ARTICLE I, SECTION 23, OF THE FLORIDA CONSTITUTION IS IMPLICATED WHEN A LAW ENFORCEMENT AGENCY INSTALLS A PEN REGISTER DEVICE ON THE TELEPHONE OF AN INDIVIDUAL? [As Certified]

(2) IF THE ANSWER TO (1) IS YES, THEN IS THE COMPELLING STATE INTEREST TEST SATISFIED IF THE LAW ENFORCEMENT AGENCY INVOLVED IN THE INSTALLATION HAS FOUNDED SUSPICION AND MEETS THE CRITERIA ESTABLISHED BY SECTIONS 119.011 (3)(a),(b),(c) AND 119.011(4)? [As Certified]

(3) WHETHER WIRETAP APPLICATIONS BASED PRIMARILY UPON INCREASED PHONE ACTIVITY DURING SPORTING EVENTS FAIL TO ESTABLISH PROBABLE CAUSE?

(4) WHETHER FLORIDA STATUTE 849.25 VIOLATES THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE UNITED STATES AND FLORIDA CONSTITUTIONS?

STATEMENT OF FACTS

Trial Court Proceedings

During October of 1983, Detective Thomas Moran, Miami Beach Police Department, was furnished information by an unnamed individual that Bernard Shaktman was engaged in illegal gambling activities. (T-89). The Miami Beach Police Department proceeded to conduct an investigation of Shaktman which ultimately led to an investigation of Alfie Mart and others. (T-96).

During the investigation, the officers followed Shaktman to Barney's Cafe on Alton Road, Miami Beach, Florida, where they observed Shaktman talking to Alfie Mart and overheard parts of the conversation. The police surveillance of that meeting concentrated on the activities of Bernard Shaktman who was on probation for bookmaking stemming from a 1978 arrest. Shaktman was observed meeting with Alfie Mart and Norman Rothman on October 12, 1983.

The investigation thus began with surveillance but soon expanded to the use of pen registers which continued until January 17, 1984. The pen registers were initiated on the basis of a motion stating the reasons that officers suspected evidence of illegal activity would be discovered. The motion was "sworn" before an Assistant State Attorney who does not appear to be a notary or deputy clerk. The State Attorney, Janet Reno, did not sign the motion. The Application for pen register is attached as Appendix p. 24-40 (Tab #3).

Likewise, there was no Order actually authorizing the use of the pen register. The only order signed was one directed to Southern Bell to provide information and lease lines to the officers. There was no order specifying the type of information to seize, no time limitation on the seizure, no finding that probable cause or reasonable suspicion existed to believe evidence would be obtained, no designation of executing party, and no provision for making return.

On January 17, 1984, a wiretap authorization was obtained for telephone numbers 672-5764, 672-5988 and 673-0908, located at 1491 Lincoln Terrace, Miami Beach. (T-26-28). The application for wiretap authorization was primarily based upon the claim that the pattern of increased pen register activities preceding sporting events and pen register information showing calls to sports information services and other "known" bookmakers amounted to probable cause to believe that bookmaking was being conducted on the phones. The only factual allegations, other than pen register analysis, were the "bits and pieces of conversation" overheard at Barney's Cafe on October 12, 1983, a recitation of past criminal history of the targets, and surveillance of the targets entering and leaving the apartment and business where the phones were located.

The pen register information is the central theme of the claims of probable cause in the Application. The allegations regarding pen register activity are summarized as follows:

1. That the pen register revealed numerous telephone calls during hours preceding the starting times of professional and collegiate sporting events.

2. That the pen register showed that telephone calls were made to a sports publication journal which gives out the odds and point predictions on professional and college sporting events via a recorded message.

3. That on December 6, 1983, there were two outgoing calls to a telephone listed to Leonard Goldberg, who was identified as a bettor during a court authorized wiretap in 1981--the contents of the conversation were unknown.

4. That a total of six calls were made from a telephone in the apartment in question to phone number 861-3174 utilized by John DeBlasio, an individual who was at the same time under investigation for alleged bookmaking activities by Metro Dade Police Department.

5. Pen register activity on December 6, 1983, revealed the following:

(a) Between 4:34 p.m. and 11:08 p.m., 105 phone calls were registered on phone line 673-0908; 41 calls were outgoing and 64 calls were incoming. During the time that Mart or Levanthal or both were inside the apartment 102 of those calls were registered.

(b) Seventeen calls were made to "Sportslines." This service supplies the caller with up-to-the-minute information on

professional sporting events. Two calls were placed to Lee Shapiro.

(c) Also on December 6, 1983, 68 calls were registered between 4:46 p.m. and 8:11 p.m. on phone line 672-5988. Nine were outgoing and 59 were incoming. One of the outgoing calls was to a phone number registered to Robert Gallub.

(d) Also on December 6, 1983, 24 calls were registered on phone line 672-5764. Five were outgoing and 19 were incoming. Twenty-two of the 24 calls were registered during the time Mart or Levanthal or both were present inside the apartment. Two of the outgoing calls were to a phone registered to Leonard Goldberg.

(e) Pen register activity through January 8, 1984, continued to reveal an unusual amount of phone activity. The professional football conference playoffs began on December 31, 1983. The following illustrates the phone activity for the three phones in Apartment 3: December 31, 1983 -- 310 calls of which 265 were incoming; January 1, 1984 -- 358 calls of which 326 were incoming. The Cotton Bowl, Fiesta Bowl, Rose Bowl, Orange Bowl and Sugar Bowl were played on Monday, January 2, 1984. Pen register activity for that day revealed a total of 709 calls.

Appellate Proceedings

Defendants asserted on appeal that the trial court had erred in refusing to suppress the evidence obtained through electronic surveillance pursuant to the "Mart" wiretap and/or the pen register. The Third District Court of Appeals held the first claim,

based on the lack of probable cause for the "Mart" wiretap, did not constitute grounds for reversal: "We conclude that the wiretap applications contained the requisite information to provide probable cause for electronic surveillance of the Mart and DeBlasio telephones. (A-14).

The court further held that the trial court's failure to suppress the wiretap and pen register information because the pen register was an illegal warrantless search did not constitute grounds for reversal: "We find no merit in the appellants' arguments that the use of pen registers abridged their constitutional rights." (A-3,4). The appellate court analyzed the effect of Article I, Section 23 of the Florida Constitution and concluded that the right of privacy recognized by the Florida Constitution imposed a limitation on the use of pen registers notwithstanding the lack of such a limitation arising from the Fourth Amendment of the United States Constitution or Article I, Section 12 of the Florida Constitution. The Court found that the right of privacy merely required that the law enforcement agency have "founded suspicion" and meet the criteria of § 119.011(3)(a)(b)(c) and § 119.011(4), Florida Statutes. The appellate court did not hold that Article I, Section 23 imposed requirements of warrant or other judicial authorization and supervision.

The Third District Court of Appeals certified the following questions to The Florida Supreme Court as being of great public importance:

(1) WHETHER ARTICLE I, SECTION 23, OF THE FLORIDA CONSTITUTION IS IMPLICATED WHEN A LAW

ENFORCEMENT AGENCY INSTALLS A PEN REGISTER DEVICE ON THE TELEPHONE OF AN INDIVIDUAL?

(2) IF THE ANSWER TO (1) IS YES, THEN IS THE COMPELLING STATE INTEREST TEST SATISFIED IF THE LAW ENFORCEMENT AGENCY INVOLVED IN THE INSTALLATION HAS FOUNDED SUSPICION AND MEETS THE CRITERIA ESTABLISHED BY SECTIONS 119.011 (3)(a),(b),(c) AND 119.011(4)?

SUMMARY OF ARGUMENT

I.

Although pen registers are not subject to a warrant requirement or judicial scrutiny under the Fourth Amendment, they do intrude on a person's privacy as protected by Article I, Section 23 of Florida's Constitution. Florida's Right to Privacy Amendment was enacted by the voters to create protections against government encroachments into their private lives made possible by increasingly sophisticated investigative techniques. This protection of informational privacy provides greater protection than the Fourth Amendment. Moreover, 18 U.S.C. § 3121-3126, enacted after this case arose, imposes judicial restraint on use of pen registers.

A telephone caller has an expectation that dialing of phone numbers will be free from government intrusion. Because a phone is essential to communication in a complex society, the automatic disclosure of dialing information to the phone company as a result of using phone company equipment does not destroy the right of privacy in this information. Other states with right to privacy provisions have decided that those privacy provisions impose warrant requirements and other judicial regulation on pen registers.

II.

Under prior right to privacy cases, the standard for determining the specific limitations on pen registers is the two-prong test of determining whether there is a compelling state interest

in the information and whether the method of collection of the information is the least intrusive means. The Court of Appeals is mistaken in its decision, sub judice, that the least intrusive means test is satisfied merely if the intrusion is done by a criminal law enforcement investigator who has "founded suspicion." Judicial supervision of pen registers is critical to prevent abuse of the investigative tool. The Legislature and Congress have recently declared that public policy requires judicial authorization and supervision as well as time limitations, and disclosure prohibitions on pen registers in order to achieve the least restrictive intrusion.

111.

Probable cause cannot be based upon the mere fact that persons with prior records of bookmaking arrests, convictions or connections are seen together and entering premises where pen register phones show increased activity at times of sporting events. Reliance upon past criminal records as an element of probable cause is both unreliable and violative of case law. Mere increased pen register activity does not support a conclusion that bookmaking is taking place.

IV.

For purposes of preserving the record, the Petitioners assert that § 849.25 of the Florida Constitution is unconstitutional.

ARGUMENT

I. ARTICLE I, SECTION 23, OF THE FLORIDA CONSTITUTION IS IMPLICATED WHEN A LAW ENFORCEMENT AGENCY INSTALLS A PEN REGISTER DEVICE ON THE TELEPHONE OF AN INDIVIDUAL

This case is one of first impression in Florida. The opinion of the Court of Appeals clearly recognizes that the right of privacy established in Article I, Section 23 is alive and well. The Third District Court of Appeals interpreted the Right of Privacy to impose limitations on the circumstances and manner in which pen register information is obtained. These limitations are in addition to the search and seizure provisions of Article I, Section 12 as read through the lens of United States Supreme Court Fourth Amendment interpretation. The Petitioners agree with this general conclusion by the appellate court. However, the Petitioners disagree with the conclusions by the Court of Appeals that a warrant and/or judicial supervision is not required.

As a prelude to the wiretap application, the Miami Beach police officers applied on November 23, 1983, for an order directing Southern Bell to provide lease lines for a pen register on the "Mart" phones. (R-531-544). The officers did not seek a warrant authorizing seizure of trap and trace information. The Magistrate merely directed Southern Bell to provide cable and pair information to the police. (R-546-547). **There was no order specifying the type of information to seize, no time limitation**

on the seizure, no finding that probable cause or reasonable suspicion existed to believe evidence would be obtained, no designation of executing party, and no provision for making return or periodic reports to an authorizing court. The wiretap applications for the Mart phones included detailed analysis of the pen register information. The Mart tap was based almost exclusively upon the pen register analysis.

The Petitioners concede that the use of a pen register in the instant case without a court order did not violate Article I, Section 12 of the Florida Constitution or the Fourth Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Smith v. Maryland, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979).[1]

The use of the pen register in this case, however, was in violation of Article I, Section 23 of the Florida Constitution in that it permitted the trapping and tracing of telephonic information without a warrant. That section, as amended November 2, 1982, provides that the citizens have a right to be let alone and free from governmental intrusions in their private life.

Article I, Section 23 of the Florida Constitution provides:

> 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 right of access

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[1] This use of pen registers without court order, however, has effectively been overruled by 18 U.S.C. 3121 et seq. and S.B. 585, Laws of Florida, 1988, both of which are discussed in Point II of this brief.

> to public records and meetings as provided by law. (1980).

The United States Constitution has no similarly guaranteed constitutional right of privacy. The United States Supreme Court has made it absolutely clear that the states, not the federal government, are responsible for the protection of personal privacy. Winfield v. Division of Pari-Mutuel Wagering, 477 So.2d 544 (Fla. 1985); Katz v. United States, 389 U.S. 347 (1967).

The manner in which this Court has evaluated Article I, Section 23 favors the conclusion that the right of privacy is affected when police use a pen register or trap and trace. The opinion of the appellate court below provides cogent analysis of the relationship between prior rulings of this Court on Article I, Section 23 and the pen register issue in this case:

> We find that the appellants' interests in the numbers dialed from the Mart telephones fall within the zone of privacy protected by section 23. Our reading of Rasmussen, 500 So.2d 533 (Fla. 1987), buttresses our determination that the warrantless use of pen registers in an ongoing criminal investigation involves the privacy safeguards ensured by section 23. In Rasmussen, the court observed:
>
> > The proceedings of the Constitution Revision Commission reveal that the right to informational privacy was a major concern of the amendment's drafters .... [A] principal aim of the constitutional provision is to afford individuals some protection against the increasing collection, retention, and use of information relating to all facets of an individual's life.
>
> Id. at 536. Moreover, "[t]he drafters of the amendment rejected the use of the words 'un-

> reasonable' or 'unwarranted' before the phrase 'governmental intrusion' in order to make the privacy right as strong as possible." Winfield, 477 So.2d at 548. "The citizens of Florida opted for more protection from governmental intrusion when they approved article I, section 23, of the Florida Constitution." Id. See also Riley v. State, 511 So.2d 282, 288 (Fla. 1987)("Our own right to privacy amendment, article I, section 23, Florida Constitution, was meant to protect against governmental encroachments on privacy made possible by increasingly sophisticated investigative techniques."). cert. granted __U.S.__, 108 S.Ct. 1011, __L.Ed.2d __ (1988). The gathering of telephone numbers through the use of a pen register is, in our view, one of the sophisticated investigative techniques for collecting information which the drafters of the right of privacy amendment contemplated.

A telephone caller has an expectation that dialing of phone numbers will be free from government intrusion. Because a phone is essential to communication in a complex society, the automatic disclosure of dialing information to the phone company as a result of using phone company equipment does not destroy the right of privacy in this information

Article I, Section 23 of the Florida Constitution is similar to the right to privacy protection of other state constitutions. These provisions have led other states to conclude that pen registers intrude on the right to privacy and are therefore subject to judicial supervision. In its decision of People v. Sporleder, 666 P.2d 135 (Colo. 1983), the Colorado Supreme Court wrote:

> A telephone subscriber such as the defendant has an actual expectation that the dialing of telephone numbers from a home telephone will be free from governmental intrusion. A telephone is a necessary component of modern life. It is a personal and business neces-

> sity indispensable to one's ability to effectively communicate in toady's complex society. When a telephone call is made, it is as if two people are having a conversation in the privacy of the home or office, locations entitled to protection under Article 11, Section 7, of the Colorado Constitution. The concomitant disclosure of the telephone company, for internal business purposes, of the numbers dialed by the telephone subscriber does not alter the caller's expectation of privacy and transpose it into an assumed risk of disclosure to the government. ...[I]t is somewhat idle to speak of assuming risks in a context where, as a practical matter, the telephone subscriber has no realistic alternative.
>
> ...Any use the telephone company might make of such information for its own internal accounting purposes is far different from government evidence gathering. ...
>
> ....
>
> ...Telephone companies are in the business of providing telephone subscribers with the equipment necessary for electronic communication in today's world. The government, in contrast, investigates for the purpose of prosecuting persons for criminal offenses. The expectation that information acquired by the telephone company will not be transferred, without legal process, to the government for use against the telephone subscriber appears to us to be an eminently reasonable one.

The holding in Sporleder echoed an earlier holding by the New Jersey Supreme Court in State v. Hunt, 450 A.2d 950, 31 Cr.L.2454 (1982). There the court held that the New Jersey Constitution granted a telephone subscriber a constitutionally protected privacy interest in the telephone company's home toll billing records for the subscriber's telephone.

The appellate court below in the case sub judice cited several other cases which nave specifically held that the use of a pen register without a warrant violates the state constitutional right to privacy: People v. McKunes, 51 Cal. App. 3d 487, 124 Cal. Rptr. 126 (1975); Commonwealth v. Beauford, 475 A.2d 783 (1984); State v. Gunwall, 106 Wash.2d 54, 750 P.2d 808 (1986)(en banc).

II. THE COMPELLING STATE INTEREST TEST IS NOT SATISFIED IF THE LAW ENFORCEMENT AGENCY INVOLVED 15N THE INSTALLATION HAS FOUNDED SUSPICION AND MEETS THE CRITERIA ESTABLISHED BY SECTIONS 119.011(3)(a),(b),(c) AND 119.011 (4)?

As shown above, the Article I, Section 23 Right to Privacy acts as a limitation on the use of pen registers. The more challenging task lies in determining what are those limitations. The Court of Appeals opined that the only limitations were: (1) that the governmental body intruding into the right to privacy of telephone calling information must be a law enforcement body as defined in §§ 119.03 and 119.04, Florida Statutes,[2] and (2) that that agency be possessed of "founded suspicion"[3] that criminal activity will be discovered by the pen register.

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[2] The use of the Public Records law to define which law enforcement agencies can use pen registers is confusing. The Public Records law merely outlines what agencies can refuse to disclose criminal intelligence. The Petitioners suggest that a more meaningful and logically related statute to define the types of governmental agencies that can utilize pen registers is found in the Security of Communication Statute, § 934.02(6) and (10), Florida Statutes. Both the Public Records and Security of Communications Statutes include essentially the identical law enforcement groups. However, the definition under Security of Communication was determined by the Legislature to be the groups with a compelling interest in intercepting communications.

[3] The Petitioners assume that the term "founded suspicion" is interchangeable with "reasonable suspicion." The Petitioners accept the "founded suspicion" quantum of proof as the appropriate standard for initiating pen registers. When compared to an actual wiretap which requires probable cause, a pen register is a comparatively modest intrusion into the privacy of citizens. Accordingly, a lesser level of verified suspicion would be appropriate for the lesser intrusion. Compare Florida v. Royer, 460 U.S. 491 (1983)[no restraint]; Terry v. Ohio, 392 U.S. 21 (1968) [investigative detention requires reasonable suspicion], and Dunaway v. New York, 442 U.S. 200 (1979)[arrest requires probable cause].

The Petitioners strongly feel that additional limitations are constitutionally and statutorily required.

In Winfield v. Division of Pari-Mutuel Wagering, 477 So.2d 544, 547 (Fla. 1985), this Court defined the standard for review in assessing a claim of unconditional governmental intrusion into privacy rights under Article I, Section 23:

> The right of privacy is a fundamental right which we believe demands the compelling state interest standard. this test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a **compelling state interest and accomplishes its goal through the use of the least intrusive means.** See Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); In re Estate of Greenberg, 390 So.2d 40 (Fla. 1980).

This two-prong test, to-wit: "compelling state interest'' plus "lease intrusive means" was analyzed by the appellate court below as follows:

> The state has a compelling interest in investigating and apprehending the principals of large-scale bookmaking operations. A pen register is one of the least intrusive methods of obtaining information about such suspects. If the legislature had intended to require that search warrants accompany pen register used, it could easily have included pen registers in the list of definitions.

This analysis completely devalues the meaning of the "least intrusive means'' requirement. The requirement that law enforcement officers use the least intrusive means in order to obtain the desired information is designed to regulate the investigative techniques so that they do not unnecessarily invade privacy. The District Court of Appeals analysis fails to consider several

aspects of intrusion from the use of pen registers which are eminently preventable. For instance, the rule propounded by the appellate court does nothing to limit the duration of the use of a pen register or the disclosure of the results of a pen register to non-law enforcement persons. Moreover, the doctrine propounded by the court of appeals completely eschews any judicial supervision or approval prior to the commencement **of** the pen register. The requirement of judicial supervision or approval would have the practical law enforcement benefit of making sure that pen registers were not initiated without a determination that founded suspicion existed. this would prevent wholesale misuse of pen registers. Moreover, a requirement that state attorneys sign the application for pen registers would ensure that the highest level of law enforcement has approved the invasion of the right of privacy, thereby demonstrating the compelling state interest.

The court of appeals seemed to rely upon the fact that pen registers were not enumerated in § 934.02 of the Florida Statutes as proof that the legislature did not consider pen registers to be intrusive. This conclusion is belied by the fact that the Florida Legislature has recently passed a 'pen register and trap-and-trace device' law, to-wit: Senate Bill 585 and House Bill 1653 (1988 Regular Session). (Copies of the Bills were unavailable at the time of the drafting of this brief.)

Furthermore, in 1986 (admittedly after the date of the pen register in this case), the Congress enacted a general prohibi-

tion on pen register and trap-and-trace device use unless a court order was first obtained. 18 U.S.C. § 3121-3126. The statutes contain the following limitations on the intrusion imposed by a pen register:

(a) the application must be made by an attorney for the government,

(b) the application must be made under oath,

(c) the application must be made to a court of competent jurisdiction,

(d) the application must contain the identity of the attorney or law enforcement officer making application and the identity of the law enforcement agency conducting the investigation,

(e) the applicant must certify that the information likely to be obtained is relevant to an ongoing criminal investigation,

(f) the pen register court must determine that the law enforcement officer has certified that the pen register is relevant to an ongoing criminal investigation,

(g) the court must enter an order which must identify the person whose phone is subject to the pen register, the person who is the subject of the criminal investigation, and the physical location of the phone line,

(h) the order must identify the offense to which information is being sought,

(i) the order must limit the authorization to a period of 60 days, subject to extension of up to 60, and finally,

(j) the order must prohibit, and the statute does prohibit, disclosure of the information obtained by the pen register intrusion into the person's privacy.

These statutory limitations on the intrusion are the very type that meet the "least intrusive means" requirement of the test set forth by this court in Winfield, 477 So.2d 544 (Fla. 1985).

In determining the least intrusive means, this Court cannot ignore the compelling fact that the legislature has in fact enumerated restrictions which are far more protective than those outlined by the court of appeals in its opinion. Clearly, if these restrictions are adopted by this Court, the pen register which was employed in this case will be invalidated, and the subsequent wiretap would also be invalidated.

111. WIRETAP APPLICATIONS BASED PRIMARILY UPON INCREASED PHONE ACTIVITY DURING SPORTING EVENTS FAIL TO ESTABLISH PROBABLE CAUSE

As will be demonstrated herein, the 63 page affidavit submitted in support of the Mart order fails to provide a "substantial basis" upon which a neutral magistrate could properly find probable cause. Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)(proper analysis is totality of the circumstances). Analysis of the lack of probable cause is guided by Murphy v. State, 402 So.2d 1265 (Fla. 3d DCA 1981) where the affidavit for surveillance is practically indistinguishable from the case at bar.

The affidavit in support of the application, in the instant case contains no information obtained through the use of confidential informants or prior co-conspirators. In fact, the application is devoid of any allegation that any actual betting activity was observed or that police even had hearsay information that betting was going on. Moreover, there is no allegation that a bet was ever placed at any time over any of the telephones sought to be intercepted. The Affidavit basically asserts that because the phones are used heavily before sporting events and because the targets (a few of whom have prior gambling convictions) are on the premises during the increased phone activity, one should conclude that the phones are being used in bookmaking.

Although the application lists Mart, Levanthal, and DeBlasio as targets, DeBlasio was never seen at Apartment #3. Mart was observed entering Apartment #3 on November 9, 10, 11, 12, 13, 14,

17 and 19. Levanthal was seen on November 11, 13, 14, 19 and 20--**some two months prior to the Application (and prior to the installation of the pen register).** During the period of the pen register, Mart and Levanthal were seen entering or exiting Apartment #3 from December 6-13, 1983, some 35 days before the application. Neither Mart nor Levanthal were **ever actually seen entering Apartment #3 from December 14, 1983, onward,** although the affiant had "observed cars" registered to Mart or Levanthal parked "in close proximity" to 1491 Lincoln Terrace on unspecified days.

The lack of probable cause becomes self-evident when one reviews the affiant's own summary of facts which is contained in the Affidavit (pages 49 and 51) Subsection V. The following are the salient points of the summary prepared by the Affiant:

1. "Surveillance activity described in this affidavit has shown that Alfred Mart has met with individuals who have bookmaking arrest pasts and have been intercepted in court authorized wire intercept investigations." As noted above, the meetings involved innocuous conversations.

2. "Affiant known from their experience in the investigation of bookmaking that bookmakers establish contacts with other bookmakers in furtherance of their illegal business and that these contacts or friendships continue many years."

3. That the pen register equipment "has provided information indicating that there is a marked increase in telephone activity and in some instances, almost all telephone activity is

occurring during the period when the affiant feel that bookmakers commonly conduct their illegal business (i.e. before sporting events). These time periods being times when Alfred Mart, Sam Levanthal and others were observed at 1491 Lincoln Terrace, Apartment 3."

There is no allegation that would preclude a conclusion that the phone activity was for a lawful purpose such as a legitimate business. Moreover, this conclusion of increased phone activity during sporting events is not borne out by the facts alleged. For example, the affiant reports that on December 6, 1983, the first day of operation of the pen register, there were **105** incoming and outgoing calls on 673-0908 between 4:34 p.m. and 11:14 p.m. This time period is only 6 3/4 hours out of the day. **There is no report of the other 17 1/4 hours for comparison to determine if there is actually increased activity over the rest of the day. Nor is there any allegation as to any sporting event on December 6, 1983, that would be a point of reference.** Most importantly, the Affiant admits on page 21 of the Affidavit that only "62 of the 105 calls occurred during the approximate hours when a bookmaker would be accepting wagers, as specified prior in this affidavit." This increase in activity is not so enormous or sufficiently related to identified sports events as to permit a reasonable inference of bookmaking.

4. "That outgoing telephone calls are being made to telephone numbers listed to individuals who have been arrested for gambling/bookmaking related charges or have in the past been

intercepted during court authorized wire intercept investigations dealing with bookmaking." This allegation advances the Orwellian concept that a call to someone who has been **arrested** at some time in the past is proof that the caller is presently engaged in criminal activity, i.e., if you telephone a person who was previously arrested but not convicted, you are thereby proven guilty even though the person you called is still presumed innocent.

5. "The pen register equipment shows numerous outgoing calls being made to various prerecorded and live voice sports information services in various states within the continental United States." These sports information services give predictions of outcomes of upcoming sporting events in terms of odds or point advantages and give post-game final scores. The sports information services do not take bets. As acknowledged by Detective Moran, non-betting sports fans can utilize these services. (T-100).

6. "that Alfred Mart has been named and/or intercepted in court authorized wire intercepts over the years."

7. "That in the opinion of the affiant, bookmakers rarely cease their illegal activity as a result of an arrest or conviction, and they usually return to their illegal activity as soon as a new location or "office" unknown to the police, can be established." This opinion seeks to establish probable cause on the basis of **who** the target is rather than upon **evidence** of **what** he did. Under the Affiant's theory, **once a person was accused of bookmaking, he would be subject to wiretap at the whim of police**

for the rest of his life regardless of whether there was any fact showing present bookmaking activity.

8. **"The affiant has been unable to obtain any oral evidence necessary in order to convict the individuals suspected at the present time of bookmaking."**

The Affidavit in this case is remarkably similar to the affidavit in Murphy v. State, 402 So.2d 1265 (Fla. 3d DCA 1981). the Murphy affidavit also consisted of a recitation of the target's prior activities and a summary of pen register surveillance showing increased phone activity around the time of sporting events, calls to other suspects, and calls to sporting betting lines. The Murphy affidavit even contained an incriminating fact not found in the case at bar, to-wit: an anonymous tip that Murphy headed a big money sports betting operation.

In Murphy, the 'Third District Court of Appeals reversed a bookmaking conviction because the affidavit for wiretap application was insufficient to establish probable cause as required by § 934.09, Florida Statutes. The factors alleged in the Murphy affidavit, according to the Court of Appeal, established **no more than articulable suspicion** that the Murphy phone was being used for a gambling operation. A noted by Judge Pearson writing for the Third District Court of Appeals:

> There is not the slightest reason to conclude that Murphy, against whom the intercept order was directed, was the user of the tapped phone unless we are willing, which we are not, to elevate his sixteen-year-old gambling conviction, the two cars registered to a Helene Murphy, that fact that the phone was registered in his name, and the unreliable

> anonymous tip into probable cause. While the other tenuous or stale information **supports the suspicion that the phone itself was being used for a gambling operation, it does no more than that. The probable cause required by Section 934.09, Florida Statutes (1979), has not been shown.** See Kodriquez v. State, 297 So.2d 12 (Fla. 1974).
>
> Reversed with directions to vacate the conviction of the defendants.

What the investigators did in the case sub judice was take the theory and elements of evidence found to be insufficient in Murphy and extend it by volume rather than by quality. For example, instead of merely conducting pen register surveillance for a period of three days in Murphy, the police officers in this case have monitored the telephone activity for approximately six weeks. The results were identical in type; different in volume. Likewise, physical surveillance which was conducted in Murphy was conducted at a greater extent and length of time in the instant case. However, the pen register and physical surveillance in the case at bar merely produced more of the same type of data that was found wanting in Murphy. It produced no evidence that tended to incriminate more directly than the insufficient evidence in Murphy.

Needless to say, the pen register devices did not reveal to investigators the **contents** of the telephone calls. Rather, the affiants would have the issuing judge believe upon a mere numerical analysis that the affiant's conclusion must be credited. This conclusion is patently insufficient. The pen register revealed telephone volume on each day of the week. Affiants

conveniently explained that there were sporting events seven days a week. A close examination of "all sporting'' schedules for the time period would reveal "sporting events" occurring almost 24 hours a day. Affiants conveniently chose to report events known to them at the times there was greater telephone activity. In other words, the event did not necessarily dictate the phone usage, but the phone usage dictated the affiants' designation of a "sporting event." The Affidavit is fatally flawed in that it fails to demonstrate a reasonable probability that the defendants were involved in offenses which were the subject of the investigation.

The facts in the case at bar are even less incriminating than in Murphy because, unlike Murphy, the telephones were not registered to Mart, nor was there any tip indicating Mart was conducting a gambling operation on the telephones.

The investigation in Murphy was initiated by an anonymous phone caller who told police that "Murphy was operating a big money sports betting operation at his unlisted phone." (R-1099).

Although Mart was seen entering Apartment 3, the affiant himself indicates that there is an unknown resident of the premises. (As indicated by phone use when Mart is not present at pages 16 and 17 of the Affidavit, an "unknown male may reside in Apartment 3"). Therefore, there is no factual nexus of Mart to the alleged phone activity and thereby no inference as to his involvement in the crime for which electronic surveillance was sought.

The elements for probable cause present in the Mart application are best compared with those present in the Murphy application on the chart which is reproduced on the following page.

To a great extent, the Affidavit is based upon the theory that if some of the targets with criminal pasts are seen together, they are probably involved in crime. Probable cause by association was discussed by the court in People v. Pomponio, 393 N.E.2d 480, 487, 47 N.Y.2d 918, 919 (N.Y.App. 1979) wherein the court held that the activities, while suspicious, did not rise to the level of probable cause. The affidavit held to contain insufficient probable cause essentially stated:

> [T]hat Larry Centore, whose home phone was to be tapped, had a prior criminal record for assault and robbery and one unresolved charge of gambling; that he met regularly with persons who also had criminal records including some gambling convictions; that on three or four occasions some of thee individuals visited Centore at his home but the regular meetings occurred at a local restaurant where, on occasion, one or more of these persons was seen carrying brown paper bags, newspapers, or brief cases.

Additionally, as noted by another court, "defendant's ancient gambling transgressions cannot be used to bolster the officer's observations to a point where probable cause is established." People v. Germano, 458 N.Y.S.D. 713 (A.D.1983).

The courts in narcotics cases have dealt with situations where association with persons of unsavory pasts or known prior illegal activity does not rise to the level of probable cause to conduct a present search. The test is proven present activity,

MURPHY (14 Pages)	MART (63 Pages)
/DESCRIPTION OF AFFIANTS/	
Affiants trained in gambling investigations (pp. 1-4)	Affiants trained in gambling investigations (pp. 1-4)
/INITIATION OF INVESTIGATION/	
Tip RE: Large $ sports betting operation at specified phone number (p.4)	Police eavesdrop portions of conversations RE: betting, possibly legal (p.5)
/BACKGROUND OF TARGETS/	
Prior arrests Phone number at bookie's house (p.6)	Prior arrests (pp. 6-7)
/TOLL RECORDS/	
Study of 9 months shows increase when football starts (p.5)	None
/SPORTS INFORMATION CALLS/	
Horse racing information (p.5)	Sports information (pp. 22, 26, 27)
/PEN REGISTER/	
12/28--12/30 (3 days) a) increased phone activity before sporting events b) calls to Romano (bookie talk 4 years before) (p.7)	12/06--01/08 (33 days) a) increased phone activity before sporting events b) calls to Shapiro, Golub, Goldberg (bookie investigation 10 years before--no Indictments) c) call to Eisenberg--name on mailbox with Shaktman d) call to Klein--billed to Deblasio # that Elias had called (pp. 21-48)
/SUBSCRIBER INFORMATION/	
Registered in Murphy's name	Registered in Diane Dupree and Harvey Rae names
/SURVEILLANCE/	
Target's car at residence during increased phone activi	Target not at residence for 35 days before application

not what transpired in the ancient past, when determining the criminal implications of a meeting between citizens.

The Second District Court of Appeal in McClure v. State, 358 So.2d 1187-88 (Fla. 2d DCA 1978) dealt with a situation with the stopping of a car after the occupants had departed from the apartment of a well known drug dealer. Those facts are certainly worse than the instant case. The court in reversing stated:

> As we have noted many times before, an investigatory detention is valid only when a police officer had a reasonable or founded suspicion of the presence of criminal activity. Foss v. State, 355 so.2d 225 (Fla. 2d DCA 1978); Lower v. State, 348 So.2d 410 (Fla. 2d DCA 1977); Lewis v. State, 377 So.2d 1031 (Fla. 2d DCA 1976). Clearly, then Officer Wakowiak's detention of appellant was improper. **While appellant's stare was most certainly annoying to Wakowiak, neither it nor the fact that appellant had visited a person alleged to be a drug dealer could serve as the basis for a founded suspicion of criminal activity.** See Vollmer v. State, 377 So.2d 1024 (Fla. 2d DCA 1974).

If leaving the apartment of a well-known drug dealer was insufficient to justify a brief investigatory detention, then it is frivolous to contend that the facts in the instant case can somehow be catapulted to the much higher level of probable cause. The officers were basing their decision not on known facts in this specific case, but instead were basing their decision on experience and training in what they know to be the norm. (T-99). In other words, on what normally happens as opposed to what happened in this case.

The Supreme Court in Ybarra v. Illinois, 100 S.Ct. 338, 340-42, 444 U.S. 85, 62 L.Ed.2d 238 (1979) resolved a similar issue

of search due to presence and association. In Ybarra a search warrant was issued for "[T]he Aurora Tap Tavern" and the officers proceeded to search each of the customers present in the tavern,. The officers then proceeded to search Ybarra a second time.

The Supreme Court in reversing held:

> It is true that the police possessed a warrant based on probable cause to search the tavern in which Ybarra happened to be at the time the warrant was executed. But, a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. ...

The Supreme Court in Sibron v. State of New York, 88 S.Ct. 1889, 1902, 392 **U.S.** 64 (1968) also dealt with a situation involving association with a known drug addict. The Court stated:

> The officer was not acquainted with Sibron and had no information concerning him. He merely saw Sibron talking to a number of known narcotics addicts over a period of eight hours. It must be emphasized that Patrolman Martin was completely ignorant regarding the contents of these conversations, that he saw nothing pass between Sibron and the addicts. So far as he knew, they might indeed "have been talking about the World Series." The inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security.

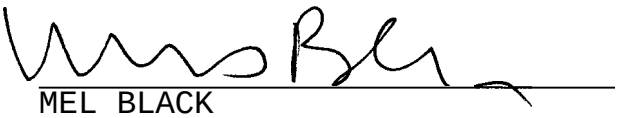
IV. FLORIDA STATUTE 849.25 VIOLATES THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE UNITED STATES AND FLORIDA CONSTITUTIONS

Petitioners acknowledge that this Court recently upheld § 849.25, Florida Statutes, against claims that it violates the equal protection and due process clauses of the United States and Florida Constitutions. State v. Cogswell, 521 So.2d 1018 (Fla. 1988). The Petitioners reassert the claim without elaboration in order to voice their disagreement with the Cogswell decision and to preserve this issue for review in other forums.

CONCLUSION

Based upon the foregoing, the Appellants request this Court to answer Question Number (1) certified by the District Court of Appeals in the affirmative and Question Number (2) in the negative and to quash the decision of the Court of Appeal of Florida, Third District, affirming the decision of the trial court and to remand with directions to suppress the evidence seized from either the pen register or the "Mart" wiretap, or in the alternative, to dismiss the prosecution because of the unconstitutionality of the Statute.

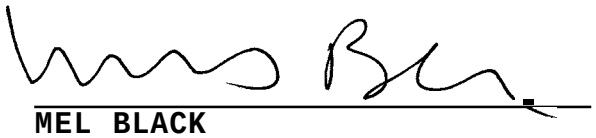
Respectfully submitted,



MEL BLACK
2937 S.W. 27th Avenue
Suite 202
Miami, Florida 33133
(305) 443-1600
Attorney for Appellants

CERTIFICATE OF SERVICE

I Hereby Certify that a copy of the foregoing was mailed to Michele Crawford, Assistant Attorney General, Suite 829, 401 N.W. Second Avenue, Miami, Florida 33128, on this the 24th day of June, 1988.



MEL BLACK