IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,272

BERNARD SHAKTMAN, et al.

Petitioners

vs.

THE STATE OF FLORIDA

Respondent

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF RESPONDENT

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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 Fleventh 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 parties will be referred to as they appear before this Court.

Throughout the brief, the letter "R" is utilized to designate the pages of the Record on Appeal. The letter "APP" is utilized to designate the Appendix submitted with the Brief of Petitioners. All emphasis is added unless otherwise stated.

STATEMENT OF THE CASE AND FACTS

The facts of this case are essentially not in dispute. They commence with an investigation in late 1983, concerning whether Petitioner, Bernard Shaktman, then on probation from a prior bookmaking conviction, Shaktman v. State, 433 So.2d 580 (Fla. 3d DCA 1983), was still involved in such illegal activity. Physical surveillance of Shaktman resulted in observing him meeting with other individuals, known to Miami Beach Police Department officers conducting the investigation, to have had

prior arrests for bookmaking. One of those individuals, petitioner, Alfred Mart, was likewise subject to physical surveillance, which revealed his leaving his office during common bookmaking hours and arriving at the apartment where the targeted phones were located. The result of these month-long physical surveillances, as well as other intelligence information gathered, were then set forth in a fourteen-page Motion for Order Directing Southern Bell to Provide Lease Line for Pen Register Operation, sworn to by an identified law enforcement before an Assistant State Attorney. Said Motion was then presented to a Circuit Court Judge, who on November **23, 1983,** entered the Order Directing Southern Bell to Provide Information for Pen Register Operation. (APP. **24-40).**

The pen register became operational on December **6, 1983,** and continued to provide information until the Application for an Order Authorizing the Interception of Wire or Oral Communication was presented and approved on January 17, 1984. (R Vol. **3,** pp. **361-426).** Any additional relevant facts are set forth in the decision of the District Court below (APP. 1-21), and as referred to in the Argument portion of this Brief.

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I

WETHER TPIS COUFT SPOULD DECLINE TO REVIEW QUESTIONS CERTIFIED BY THE DISTRICT COURT OF APPEAL AS BEING OF GREAT PUBLIC IMPORTANCE, WHERE THE ISSUES PAVE BEEN MOOTED BY THE PASSAGE OF RECENT STATE AND FEDERAL LEGISLATION?

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WHETHER TPE APPLICATION FOR THE INTERCEPTION OF WIRE OR ORAL COMMUNICATIONS PROVIDED A SUBSTANTIAL BASIS FOR DETERMINING PROBABLE CAUSE?

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SUMMARY OF ARGUMENT

The District Court of Appeal has certified two questions as being of great public importance concerning the installation and use of pen registers. However, the recent enactment of both federal and state legislation has vitiated the significance of lower court's queries. Regarding the merits of issues raised below, pen registers in no way are violative of the Fourth Amendment of the United States Constitution or of Article I, Section 12, of the Florida Constitution. Moreover, Article I, Section 23, either affords no additional rights in the context of search and seizure, or is satisfied when a legitimate criminal investigation takes place.

Ample probable cause was demonstrated in the application for an interception of wire or oral communications. Finally, no reason exists for retreating from this Court's holding that § 849.25 Florida Statutes (1983) is constitutional.

ARGUMENT

I

THIS COUFT SHOULD DECLINE TO REVIEW QUESTIONS CERTIFIED BY THE DISTRICT COURT OF APPEAL AS BEING OF GREAT PUBLIC IMPORTANCE, WHERE THE ISSUES PAVE BEEN MOOTED BY THE PASSAGE OF RECENT STATE AMD FEDERAL LEGISLATION.

The Constitution of Florida, Article V, Section 3(b)(4), and Rule 9.030(a)(2)(A)(v) Fla.R.App.P., provide for this Court's discretionary jurisdiction on questions certified by the District Courts of Appeal to be of great public importance. Such certification by the District Court of Appeal does not vest jurisdiction in the Supreme Court, but merely affords a basis to seek review. Gilliam v. Stewart, 291 So.2d 593 (Fla. 1974). This Court has heretofore recognized that considerations of mootness will not necessarily destroy jurisdiction when the questions raised are of great public importance or likely to recur. Holly v. Auld, 450 So.2d 217 (Fla. 1984); Pace v. King, 38 So.2d 823 (Fla. 1949). Respondent suggests, however, that the issues certified below are not likely to recur, and accordingly they were improvidently characterized as being of great public importance.

The facts of this case arise from an investigation conducted in late 1983. Physical surveillances, as well as other intelligence information gathered, were set forth in a fourteen-page Motion for Order Directing Southern Bell to Provide Lease Line for Pen Register Operation sworn to by an identified law enforcement officer before an Assistant State Attorney. Said

Motion was then presented to a Circuit Court Judge, who, on November 23, 1983, entered the Order Directing Southern Bell to Provide Information for Pen Register Operation. (APP. 24-40). The pen register became operational on December 6, 1983, and continued to provide information until the Application for an Order Authorizing the Interception of Wire or Oral Communication was presented and approved on January 17, 1984. (R. Vol. 3, pp.361-426).

Petitioners' Brief at pages 21 through 23 notes the recent passage of legislation by the Congress of the United States, the Electronic Communications Privacy Act of 1986, Public Law 99-508, 100 Stat. 1848, which was approved by the President of the United States October 21, 1986, 100 Stat. 1873, and took effect ninety days thereafter. The Legislature of Florida has similarly enacted a major revision of Chapter 934 of the Florida Statutes in Chapter 88-184 Laws of Florida. Petitioners urge this Court to apply the strictures of this legislation to invalidate the Motion and Order for pen register in this case. Petitioners ignore the fact that the federal act expressly provided in section 302(b):

> SPECIAL RULE FOR STATE AUTHORIZATIONS OF INTERCEPTIONS.-Any pen register or trap and trace device order or installation which would be valid and lawful without regard to the amendments made by this title shall be valid and lawful notwithstanding such amendments if such order or installation occurs during the period beginning on the date such amendments take effect and ending on the earlier of-

(1) the day before the date of the taking effect of changes in State law required in order to make orders or installations under Federal law as amended by this title; or

(2) the date two years after the date of the enactment of this Act.

100 Stat. **1872**

The Florida Legislature has provided that Chapter **88-184** does not take effect until October 1, **1988.**

Petitioners' assertion that this **1983** application was inadequate to meet **1988** standards, is irrelevant, as by its very terms, this new legislation is inapplicable in the case at bar. Moreover, passage of Chapter **88-184** confirms the proposition that the issues will not likely recur. Indeed, after October 1, **1988,** Florida Statute § **934.31** will preclude the use of a pen register without an application in conformity with section **934.32** and an Order issued in accordance with section **934.33.** Accordingly, post-October 1, **1988,** only those individuals designated by the statute will be able to seek an order for pen register installation, and only then upon compliance with the requisite certification and showing. While the questions presented are of obvious importance to the petitioners in this case, their resolution will have applicability limited to pre-October 1, 1988 pen register applications. Issues of great public importance are no longer implicated.

II

THE MOTION, ORDER AND INSTALLATION OF PEN REGISTER IN THIS CASE VIOLATED NO CONSTITUTIONALLY PROTECTED EXPECTATION OF PRIVACY.

The District Court below has certified two separate questions to this Court. First, whether Article I, Section **23** of the Florida Constitution is implicated by the installation of a pen register. Second, if the answer to the first question is yes, has the appropriate compelling state interest been satisfied by the application such as that presented in this case. The Court below answered both of these questions in the affirmative. Respondent suggests that the prior decisions of this Court and the District Courts of Appeal, of Florida, indicate that the first question should more appropriately be answered in the negative, thereby obviating the need to reach the second. In the event the second question is reached, however, an affirmative answer is nevertheless appropriate.

Historically, it is important to recognize that a pen register is a device, the use of which has not been regulated by Florida or federal wiretap legislation inasmuch as it does not involve "the aural acquisition of the contents of a communication", as defined in Title III, 18 U.S.C. § 2510 et seq., and chapter **934,** Florida Statutes. United States v. New York Telephone Co., **434** U.S. 159, **98** S.Ct. **364, 54** L.Ed.2d **376 (1977);** P.J. v. State, **453** So.2d **470** (Fla. 2d DCA **1984);** Armstrong v. Southern Bell Tel. & Tel. Co., **366** So.2d 88 (Fla. 1st DCA **1979).** Said device neither overhears oral communication

nor even indicates whether the call was actually completed. It discloses neither the subject of the communication nor the identity of the caller or the recipient. Shaktman v. State, 13 F.L.W. 839, n. 1 (Fla. 3d PCA March 29, 1988). (APP. 4).

Likewise, it has been held by the Supreme Court in Smith v. Maryland, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979), and followed in Florida in Yarbrough v. State, 473 So.2d 766 (Fla. 1st PCA 1985), that the use of a pen register does not constitute a search within the meaning of the Fourth Amendment to the United States Constitution or Article I, Section 12, of the Constitution of Florida. The High Court in Smith reasoned that an individual does not have a legitimate expectation of privacy with regard to the numbers dialed, nor was that expectation one that society was prepared to recognize as reasonable. 442 U.S. at 742-745. Accord, State v. Valenzuela, 536 A.2d 1252 (N.H. 1987); People v. Guerra, 65 N.Y.2d 60, 489 N.Y.S.2d 718, 478 N.E.2d 1319 (1985); Hastetter v. Behan, 196 Mont. 280, 639 P.2d 510 (1982); and cases cited therein.

With the 1982 amendment to Article I, Section 12, of the Florida Constitution, the citizens have decreed that search and seizure decisions of the courts of Florida be bound by the Fourth Amendment interpretations of the United States Supreme Court. Bernie v. State, 524 So.2d 988 (Fla. 1988). But even before the constitutional amendment, this Court relied upon the authoritative pronouncement in Smith v. Maryland, and applied it in the analysis of a reasonable expectation of privacy. See, Wells v. State, 402 So.2d 402, 404 (Fla. 1981);

Shapiro v. State, 390 So.2d 344, 347 (Fla. 1980). The Supreme Court of the United States has shown no inclination to retreat from its pronouncement in Smith v. Maryland. See, California v. Greenwood, ___ U.S. ___, 108 S.Ct. 1625, 1629, 100 L.Ed.2d 30 (1988).

Petitioners urge this Court to eschew this traditional analysis of expectation of privacy in favor of a more expansive right of privacy allegedly conferred by the state constitution, and points to such treatment in cases such as People v. McKunes 51 Cal.App.3d 487, 124 Cal.Rptr. 126 (1975); State v. Hunt, 91 N.J. 338, 450 A.2d 952 (1982); People v. Sporleder, 666 P.2d 135 (Colo. 1953); Commonwealth v. Reauford, 327 Pa. Super. 253, 475 A.2d 783 (1984); and State v. Gunwall, 106 Wash.2d 54, 720 P.2d 808 (1986). Respondent suggests that petitioners cannot prevail by reliance on such precedent. The Hunt, Sporleder and Beauford decisions rely not on any separate right of privacy found in their respective state constitutions, but rather, in each instance the court decided to interpret its existing constitutional search and seizure provision more broadly than the Fourth Amendment holding of Smith v. Maryland. See also, State v. Thompson, ___ P.2d ___ (Idaho, Aug. 2, 1988). Ry constitutional amendment, Article I, Section 12, of the Florida Constitution precludes that result, and such is conceded in the Brief of Petitioners, at p. 14. The State of California has now recognized a similar result in People v. Larkin, 194 Cal.App.3d 650, 239 Cal.Rptr. 760 (1987), wherein the passage of Proposition 8 was deemed to preclude the exclusion of pen register evidence so long as Smith v. Maryland, the Fourth

Amendment and appropriate state statutes were complied with. Finally, in Gunwall, the court not only relied upon the unique wording of the Washington constitution, but also the wording of its wiretap statute, to conclude that a pen register was within the definition of "private communication transmitted by telephone" which could not be intercepted without appropriate court order. In so ruling, the court in Gunwall noted its decision to be such a departure from existing precedent so as to be given prospective application only, and to be inapplicable even to the case under review. **720** P.2d at p. 817; see also, State v. Hunt, **450** A.2d at p. **957.**

Petitioners urge this Court to accord them extraordinary protection through the utilization of the privacy provision of Article I, Section 23, of the Constitution of Florida. Prior decisions of this Court and the District Courts demonstrate such a position to be untenable. In this Court's decision in Shevin v. Byron, Harless, Schaffer, Reid & Assoc. Inc., 379 So.2d 633 (Fla. 1980), extensive discussion was presented regarding the concept of a general right of privacy. While recognizing that at that time neither the Florida nor the United States Constitutions contained any express Right of Privacy, this Court described the protected interests of privacy as encompassing three distinct areas. First, the freedom from unwarranted governmental surveillance and intrusion. Second, decisional autonomy on intimate personal matters such as marriage, procreation, contraception and the like. Third, protection against disclosure of personal matters. While the

latter two concepts were not specifically identified as existing by virtue of any particular provision of the State or Federal Constitutions, the Court made it clear that the protection embodied in the first concept was essentially that which was embodied in the Fourth Amendment and Article I, Section 12, of the Florida Constitution. 379 So.2d at p. 636 and 639.

The interplay of sections 12 and 23, of Article I, was addressed by this Court in State v. Hume, 512 So.2d 185, 188 (Fla. 1987). In rejecting Hume's claim that the recording of conversations between a defendant and an undercover officer was violative of his constitutional rights under Article I, section 12, this Court further asserted:

> We also agree with the state that our right-of-privacy provision, article I. section 23, of the Florida Constitution, does not modify the applicability of article I. section 12, particularly since the people adopted section 23 prior to the present section 12.

Obviously, this Court realized that were Article I, section 23 to provide search and seizure protection over and above that set forth in Article I, section 12, the efforts of the electorate would have been for naught.

More recently, this Court approved of the decision of the Fourth District Court of Appeal in Madsen v. State, 521 So.2d 110 (Fla. 1988). The District Court had held:

> Appellant's additional contention that recording of his conversation constituted a violation of his right to privacy embodied in article 1, section 23 of the Florida Constitution, is similarly rejected, If we were to apply the right to privacy in the manner proposed by appellant, we would effectively nullify the constitutional amendment to section 12, and this is obviously not an appropriate judicial prerogative.
>
> Madsen v. State, 502 So.2d 948, 950 (Fla. 4th DCA 1987)

In affirming that decision, this Court found no conflict with Winfield v. Division of Pari-Mutuel Wagering, 477 So.2d 544 (Fla. 1985). Necessarily then, Article I, section 23, was not implicated or was satisfied.

Legitimate criminal investigations carried on in compliance with the search and seizure provisions of Article I, Section 12, of the Constitution of Florida and appropriate statutory provisions should be held to be unaffected by the privacy provision of Article I, Section 23. Eg., Rasmussen v. South Florida Blood Service, 500 So.2d 533, 536 n.5 (Fla. 1987); Adams v. State, 436 So.2d 1132, 1133 (Fla. 5th DCA 1983); In Re Getty, 427 So.2d 380, 383 (Fla. 4th DCA 1983); Cushing v. Department of Professional Regulation, 416 So.2d 1197, 1198 (Fla. 3d DCA 1982). The first certified question should correctly be answered in the negative.

Assuming for the sake of argument that this Court agrees that Article I, Section 23, of the Florida Constitution is

implicated, the question still remains as to whether petitioners have a protectable privacy interest, and if so, whether governmental intrusion was justified. Winfield v, Division of Pari-Mutuel Wagering, 477 So.2d 544, S47 (Fla. 1985).

The privacy interest protected in Article I, Section 23, of the Constitution of Florida was never intended to provide an absolute guarantee against all governmental intrusion. Florida Board of Bar Examiners Re: Applicant, 443 So.2d 71, 74 (Fla. 1983). A legitimate criminal investigation conducted by a valid law enforcement agency, clearly serves a compelling state interest which justifies intrusion into even areas of substantial privacy. Winfield v. Division, supra,

Moreover, the underlying facts at bar in no way diminish the justification. As detailed in the Motion for Order Directing Southern Bell to Provide Lease Line for Pen Pegister Operation, (APP. 24-40). Physical surveillance had revealed a number of known bookmakers meeting periodically. One of these, petitioner, Alfred Mart, was observed on a regular basis, leaving his place of business, Alfie's Tours, Inc., at 1668 Alton Road, Miami Beach, and proceeding to Apartment #3 at 1491 Lincoln Terrace. He remained at that location during "traditional bookmaking hours", which coincided with the starting times of professional and college sporting events, and then departed. Two of the telephones in the apartment were listed in the name of Parvey Pae and the third in the name of Diane Dupree. The vast majority of the petitioners, neither resided at nor were legitimately employed at the premises, were not subscribers of

the telephone service or even identifiably intercepted in any communications and thus cannot assert any recognizable, let alone, protectable privacy interest.

Petitioners' arguments are therefore directed not to the nature of the investigation, but rather, to the means by which the investigation was accomplished. Petitioners' criticism of the failure of the officers conducting this December, 1983, pen register to utilize the standards and procedures which will first go into effect in October of 1988, is clearly invalid. Indeed, as previously noted in this Brief, existing decisions of the Supreme Court of the United States and appellate courts of Florida had rejected the contention that either a search warrant or an electronic intercept order was necessary for the installation of a pen register. No warrant requirement was imposed by the language of Article I, Section 23, or any statute existing at the time of the application in this case.

The pen register order permitted the law enforcement agency conducting a legitimate investigation into a large-scale bookmaking operation to do *so* without the interception of the contents of private communication or disruption of telephone subscriber service. It did so in a manner maintaining the only privacy interests protected by the Constitution: freedom from improper disclosure, keeping the information from becoming public except as relevant to the ultimate criminal prosecution. The second certified question is appropriately answered in the affirmative.

III

TPE APPLICATION FOR TPE INTERCEPTION OF WIRE OR ORAL COMMUNICATIONS PROVIDED A SUBSTANTIAL BASIS FOR DETERMINING PROBABLE CAUSE.

Both the Constitution of Florida, Article I, Section 12, and the Fourth Amendment to the Constitution of the United States, contain the provision that no warrant shall be issued in the absence of probable cause. These constitutional provisions are expressly engrafted into the statutory provisions authorizing the interception of wire or oral communications by Florida Statute § 934.09(3) and 18 U.S.C. § 2518(3).

This concept of probable cause is not unique to the interception of communications, but is the same type of analysis which is performed before the issuance of an arrest warrant or search warrant. Accordingly, the cases evaluating the adequacy of probable cause for the issuance of a wiretap have drawn heavily on the prior decisions of the Supreme Court relating to arrests and to searches in general. Mitchell v. State, 381 So.2d 1066 (Fla. 1st DCA 1979).

An evaluation of probable cause is determined from a reading of the application and affidavit as a whole, not from bits and pieces read in isolation. United States v. Cortez, 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981); United States v. Rupper, 693 F.2d 1129 (5th Cir. 1982); United States v. Long, 674 F.2d 848 (11th Cir. 1982); United States v. Flynn, 664 F.2d 1296 (5th Cir. 1982); United States v. Weinrich, 586 F.2d 481 (5th Cir. 1978); Rodriguez v. State, 297 So.2d 15 (Fla. 1974);

State v. Birs, 394 So.2d 1054 (Fla. 4th DCA 1981); Mitchell v. State, supra. In performing this function, the magistrate is permitted to utilize his own common sense to construe the affidavits in a realistic and non-technical manner. United States v. Harris, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971); Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); United States v. Ventresca, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965); In re De Monte, 674 F.2d 1169 (7th Cir. 1982); United States v. Hyde, 574 F.2d 856 (5th Cir. 1978); United States v. Dorfman, 542 F.Supp. 345 (N.D. Ill., 1982); Amerson v. State, 388 So.2d 1387 (Fla. 1st DCA 1980); State v. Birs, supra.

It is important to keep in mind that the magistrate is only looking for a probability of criminal behavior, not proof adequate for conviction, or even a prima facie showing of guilt. United States v. Harris, supra; Spinelli v. United States, supra; United States v. Ventresca, supra; Beck v. Ohio, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964); Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949); Amerson v. State, supra. Affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial. United States v. Harris, supra; Spinelli v. United States, supra; McCray v. Illinois, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967); Draper v. United States, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959); Mitchell v. State, supra. Probable cause does not demand a showing that the belief is more likely true than false, Texas v. Brown, 460 U.S. 730,

103 S.Ct. 1535, 75 L.Ed.2d 502 (1982); United States v. Adcock, 756 F.2d 346 (5th Cir. 1985), cert. denied, 105 S.Ct. 2329 (1985), or more likely than, or more probable than not. United States v. Peacock, 761 F.2d 1313 (9th Cir. 1985), cert. denied, 106 S.Ct. 139 (1985); United States v. Ginsberg, 758 F.2d 823 (2nd Cir. 1985), and cases cited therein.

With its decision in Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). The Supreme Court did away with any fixed or rigid formula for evaluating probable cause, in favor of an evaluation of the "totality of the circumstances." See, Massachusetts v. Upton, 466 U.S. 727, 104 S.Ct. 2085, 80 L.Ed.2d 721 (1984). The Court in Upton also noted that Gates emphasized that the task of a reviewing court is not to conduct a de novo determination of probable cause, but only to determine whether there is substantial evidence in the record supporting the magistrate's decision to issue the warrant. 104 S.Ct. at 2085. Addressing the deference which the magistrate's finding of probable cause is to be paid by the reviewing court, Gates held:

> Similarly, we have repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review. A magistrate's "determination of probable cause should be paid great deference by reviewing courts." Spinelli, supra, 393 U.S. at 419. "A grudging or negative attitude by reviewing courts towards warrants," Ventresca, supra, 380 U.S. at 108, is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant; "courts should not

> invalidate warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a common sense, manner." Id. at 109.
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> * * * *
>
> ...Reflecting this preference for the warrant process, the traditional standard for review of an issuing magistrate's probable-cause determination has been that so long as the magistrate had a "substantial basis for... conclude[ing]" that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more. Jones v. United States, 362 U.S. 257, 271 (1960). See United States v. Harris, 403 U.S. 573, 577 - 583 (1971).

Accordingly, it is stated that a magistrate's finding of probable cause is accorded considerable deference, such that it will not be overturned absent a showing of arbitrariness. United States v. Cantu, 625 F.Supp. 656 (N.D. Fla. 1985), aff'd 791 F.2d 940 (11th Cir. 1986); United States v. Kupper, supra; United States v. Long, supra; United States v. Flynn, supra; United States v. Weinrich, supra; United States v. Hyde, supra; United States v. Dorfman, supra; State v. Birs, supra; Mitchell v. State, supra.

In its most recent pronouncement on probable cause in Mew York v. P. J. Video, Inc., 475 U.S. 868, 106 S.Ct. 1610, 89 L.Ed.2d 871 (1986), the High Court reiterated its Gates pronouncements as follows:

> [T]he term 'probable cause', "...means less than evidence which would justify condemnation... It

> imports a seizure made under circumstances which warrant suspicion." [Locke v. United States, 7 Cranch 339, 348 [11 U.S. 339, 348, 3 L.Ed.2d 364] (1813).]... Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision.
>
> ...
>
> The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, ... there is a fair probability that contraband or evidence of a crime will be found in a particular place. And duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for... conclud[ing]' [Jones v. United States, 362 U.S. 257, 271, 80 S.Ct. 725, 736 4 L.Ed.2d 697 (1960)] that probable cause existed.
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> Id. 106 S.Ct. at 1615-16

Importantly, the court in P. J. Video expressly held that no higher standard of probable cause is imposed, even when dealing with the seizure of materials presumptively protected by the First Amendment. Id. 106 S.Ct. at 1615.

Petitioners' ultimate argument is that nowhere in the 63-page Application and Affidavit in support of the request for the Interception of Communications is there any sworn testimony that actual betting was observed or heard to be placed over the targeted telephones. Such a prima facie showing of guilt necessary for a conviction is simply not the standard.

The showing made in this case was held to be sufficient but the Circuit Court Judge who issued the Intercept Order. Held to be sufficient by the Circuit Court Judge who denied the Motion to Suppress. It was held to be sufficient by the three Judges of the District Court of Appeal who stated:

> ...the affidavits for the Mart wiretap meticulously detailed abundant evidence of illegal gambling activity. The Mart affidavits contained a description of the results of the police surveillance of Mart and his associates. A pattern of conduct consistent with bookmaking was manifested by Mart's routine in leaving his office during common bookmaking hours for the apartment where the telephones were located. Mart was observed exchanging manila envelopes with his associates. The pen registers recorded the vast majority of incoming calls while Mart and Sam Levanthal were in the apartment. The pen registers also revealed that outgoing calls were made to known gamblers and bookmakers as well as to sports betting lines. The pen registers disclosed an impressive volume of telephone activity shortly before the start of major sporting events. The Mart affidavits further described numerous calls from the Mart lines to DeBlasio. Considering the totality of the circumstances, the Mart affidavits clearly established probable cause that the Mart telephones were being utilized for illegal bookmaking.
>
> Shaktman v. State, supra, 13 F.L.W. at p. 841 **(APP. 12-13).**

A substantial basis for determining probable cause was presented.

IV

THIS COURT NEED NOT RECONSIDER THE CONSTITUTIONALITY OF FLORIDA STATUTE § 849.25.

On March 10, 1988, this Court decided State v. Cogswell, 521 So.2d 1081 (Fla. 1988). Cogswell relied upon the prior decisions of the Supreme Court in United States v. Batchelder, 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979), and this Court in Fayerweather v. State, 332 So.2d 21 (Fla. 1976), to uphold this same statute against this same challenge. Petitioners present no basis why that unanimous decision of this Court need be reconsidered.

CONCLUSION

Based upon the foregoing reasons and citations of authority, respondent respectfully suggests that this Court may properly decline the Petition for Discretionary Review. Moreover, even if the two questions certified by the District Court are entertained, the first question may properly he answered in the negative, thereby obviating the need to answer the second. If the second question is reached an affirmative answer to the question and affirmance of the decision below is appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent was furnished to Mel Black, Attorney for Petitioners, 2937 Southwest 27th Avenue, Suite 202, Miami, Florida 33133, on this the 1st day of September, 1988.

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