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Fourth Amendment Right to Privacy with Respect to Bank Records in Criminal Cases

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FOURTH AMENDMENT RIGHT TO PRIVACY WITH RESPECT TO BANK RECORDS IN CRIMINAL CASES

SUPREME COURT OF NEW YORK
NEW YORK COUNTY

People v. Lomma[1]
(decided February 1, 2012)

I. INTRODUCTION

In *People v. Lomma*, the court held that the defendant had no standing to move to quash the People's subpoena for his personal banking records in a criminal proceeding.[2] The Supreme Court of New York County based its decision on state precedent and the United States Supreme Court's seminal decision of *United States v. Miller*.[3] In *Miller*, the Court held that a criminal defendant did not have a Fourth Amendment interest in his banking records.[4] The court in *Lomma* followed a similar rationale as this issue is slowly evolving and New York has not yet given a criminal defendant a Fourth Amendment interest in his or her personal bank records. The court reasoned that given the contemporary use of technology and widespread use of online banking that requires users to create passwords, bankers should reasonably believe that a level of privacy exists to a certain extent.[5] The court emphasized in its decision that a defendant "should have a right to move to quash a subpoena duces tecum issued to a third-party bank for his personal banking records."[6] However, the court noted it was "obviously" bound to follow New York State

[1] 937 N.Y.S.2d 833 (Sup. Ct. 2012).
[2] *Id.* at 842-43.
[3] 425 U.S. 435 (1976).
[4] *Id.* at 445.
[5] *Lomma*, 937 N.Y.S.2d at 841.
[6] *Id.* at 841.

law that was in effect at the time it rendered its decision.[7] Adhering to state precedent, the court ultimately found that a banker's right to privacy with respect to their personal banking records is not something that has yet to be recognized by New York State laws.[8] Therefore, the defendant in *Lomma* had no standing to move to quash a subpoena issued for his personal bank records in connection with an ongoing criminal case.[9]

This Note addresses individuals' rights with respect to their personal bank records. By analyzing both the federal and New York State approach to this issue, many readers will be surprised to learn that their bank records held by financial institutions in New York are not as secure and confidential as they may suspect them to be. While the federal government has passed a statute granting individuals limited privacy rights to their bank records, the federal statute does not apply to state government investigations or criminal prosecutions.[10] The final section of this Note provides a suggestion on how New York should adopt similar measures taken by the federal government and several others states. New York State should look to construe its constitution to afford individuals more privacy rights to protect the sensitive information contained in their bank records or adopt a statute that does so.

II. THE OPINION

In *People v. Lomma*, the defendant owned a crane in May 2008, which collapsed while a worker on East 91st Street in Manhattan was operating it.[11] The collapse resulted in the death of the crane operator, a man working on the street below, and also seriously injured a third person.[12] The defendant, James Lomma, was the principal of the company, J.F. Lomma, Inc., which owned the crane that caused the accident.[13] Lomma was charged with manslaughter as a

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[7] *Id.* at 842.

[8] *Id.*

[9] *Id.*

[10] *See* Right to Financial Privacy, 12 U.S.C. § 3401(3) (2012).

[11] *Lomma*, 937 N.Y.S.2d at 834. There were several other defendants that were charged with similar crimes including the owner of the crane, New York Crane and Equipment Corporation, and the head mechanic at that company, Tibor Varganyi. *Id.*

[12] *Id.*

[13] *Id.*

result of the crane collapsing.[14] There were also several other defendants involved in the incident who faced similar charges.[15]

Prosecutors alleged that the collapse of the crane was the direct result of faulty repairs made by the defendant in conveniently ordering a replacement part for the crane from a company in China merely for the purpose of saving time and money.[16] According to the People, this subpar repair to a "critical part" of the machine led to the collapse of the crane.[17] The People subpoenaed Citibank to request the defendant's personal financial records for a seven month period because the prosecution planned to argue that the defendant's faulty repairs were motivated by the defendant's desire to save money.[18]

In issuing a subpoena *duces tecum* for the defendant's bank records in *Lomma*, the People failed to provide any notice or make defendant aware of the subpoena that had been issued.[19] However, this point is moot because the court later established that the defendant did not have the requisite standing required to challenge the subpoena, thus receiving notice of the subpoena would not have served much of a purpose for the defendant.[20] Nevertheless, once the defendant had learned that a subpoena had been issued for his bank records to a third-party, he moved to quash that subpoena.[21] Lomma had two central arguments in support of his view that the motion should be quashed.[22] His first argument was that the prosecution failed to inform him of the subpoena that had been issued regarding his personal accounts to Citibank.[23] The second was that the subpoena that had been issued "was not calculated to obtain relevant evidence" and should not have been granted.[24] Accordingly, the defendant's second

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[14] *Id.*

[15] *See Lomma*, 937 N.Y.S.2d at 834 ("A fourth defendant, Tibor Varganyi, New York Crane's head mechanic, previously pleaded guilty to Criminally Negligent Homicide and is awaiting sentence.").

[16] *Id.* at 834-35.

[17] *Id.* at 835.

[18] *Id.*

[19] *Id.* at 834.

[20] *Lomma*, 937 N.Y.S.2d at 842.

[21] *Id.* at 834.

[22] *Id.*

[23] *Id.* In response to the first issue raised by the defendant, the court stated that there was no argument to be made that the New York Legislature was incorrect when it provided parties in civil cases with more due process rights than criminal defendants. *Id.* at 839. Therefore, the court held, "Parties in criminal cases are not entitled to notice when a subpoena duces tecum is served on a third party." *Lomma*, 937 N.Y.S.2d at 839.

[24] *Id.* at 834.

argument, that the subpoenaed records were not relevant to his criminal charges, required him to have standing or a recognized right in the bank records in order to be able to challenge the relevancy of the records.

The central issue in *Lomma* was whether an individual, claiming a right to privacy under the Fourth Amendment, had standing to challenge a third party subpoena for personal bank records.[25] The test to determine whether an individual has standing is "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."[26] The standing doctrine requires that a plaintiff's complaint "fall within the zone of interests protected by the law invoked."[27]

First, the court in *Lomma* expressed its disappointment with the current state of the law in New York regarding notice and standing with respect to subpoenas for a party's bank records by stating:

> A party to a criminal proceeding, in the Court's view, should certainly be entitled to know if an opposing party has subpoenaed his personal financial records. Defendants in a criminal proceeding should also have a right to be heard when their personal financial records are sought. The fact that New York still has no clear rules which provide for either such notice or standing, in the Court's view, wrongfully deprives defendants of significant due-process rights which would be easy to implement and result only in the opportunity for a neutral magistrate to review whether a subpoena *duces tecum* had been lawfully issued.[28]

Notwithstanding the court's opinion that the law should protect an individual's bank records,[29] it was still bound to follow New York precedent. Therefore, the court in *Lomma* held that "the defendant has no standing to move to quash the People's subpoena to Citibank."[30]

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[25] *Id.* at 839.

[26] Allen v. Wright, 468 U.S. 737, 750-51 (1984).

[27] *Id.* at 751.

[28] *Lomma*, 937 N.Y.S.2d at 843.

[29] *See id.* at 841 ("In the view of this Court, a party, whether in a civil or a criminal proceeding, should have a right to move to quash a subpoena *duces tecum* issued to a third-party bank for his personal banking records.").

[30] *Id.* at 842.

III. FEDERAL PRECEDENT

A. Generally

The court's decision in *Lomma* was based largely on the seminal Supreme Court decision of *United States v. Miller*.[31] The focus of the Supreme Court's analysis was whether a defendant had standing under the Fourth Amendment to challenge such subpoenas.[32] In *Miller*, the Supreme Court held that there is no Fourth Amendment protection unless any government investigation intrudes into a zone of privacy.[33] The Court described the zone of privacy as "the security a man relies upon when he places himself or his property within a constitutionally protected area."[34] As will be explained below, while the Supreme Court has held that there is no constitutional right to privacy with respect to personal bank records, federal legislation has been adopted to provide bank customers with some protection.

Miller involved a defendant who was facing charges for possession of an unregistered still, and other related charges for attempting to defraud the United States Government by not paying whiskey taxes.[35] The defendant made a pretrial motion to suppress bank records, which included "checks and other bank records" related to his two accounts.[36] These documents were subpoenaed by both the Treasury Department and the Alcohol Tobacco and Firearms Bureau and were to be used in a grand jury presentation to indict the defendant.[37] The bank, which received the subpoena, failed to provide notice to the defendant that such information regarding his accounts was subpoenaed.[38] Nevertheless, the bank proceeded with producing the documents that were requested.[39]

In its opinion, the Court expressed that there was no intrusion into an area of privacy,[40] and that it was not in agreement with the lower court's ruling that the Fourth Amendment protected the bank

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[31] 425 U.S. 435 (1976).
[32] *Id.* at 441.
[33] *Id.* at 440.
[34] *Id.*
[35] *Id.* at 436.
[36] *Miller*, 425 U.S. at 436.
[37] *Id*. at 437.
[38] *Id.* at 438.
[39] *Id.*
[40] *Id.* at 440.

records.[41] The Court noted that unlike past instances where subpoenaed documents may have fallen within a zone of privacy, the bank records at issue in this case were not actually property of the individual defendant, but rather were property of the bank.[42] The Court acknowledged that the defendant therefore could not claim ownership or possession of the bank records that were being subpoenaed by the Government.[43]

B. Federal Precedent After *Miller*

1. The Right to Financial Privacy Act

In response to much criticism following the Court's decision in *Miller*, a federal statute, the Right to Financial Privacy Act ("RFPA"), was passed and limited the holding of this seminal case.[44] While limiting the holding of *Miller*, the RFPA also provides additional rights with respect to an individual whose bank records have been subpoenaed that are not found in the Constitution.[45] The RFPA provides statutory protection for individuals' bank records in the form of notice of when their records have been subpoenaed,[46] an opportunity to challenge the relevancy of any investigation involving their personal bank records,[47] and provides recourse for any failure to follow specified procedures.[48] Therefore, the RFPA created standing where the Constitution leaves bank customers with none, but it still allows for government access to financial records.[49]

Although the Supreme Court has interpreted the Constitution to not provide any standing for individuals to challenge subpoenas is-

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[41] *Miller*, 425 U.S. at 440.

[42] *Id.*

[43] *Id.*

[44] State v. Shultz, 850 P.2d 818, 831 (Kan. 1993).

[45] 12 U.S.C. § 3401 et seq.

[46] *Id.* at § 3405(2) ("A Government authority may obtain financial records under section 3402(2) of this title pursuant to an administrative subpena [sic] or summons otherwise authorized by law only if . . . (2) a copy of the subpena [sic] or summons has been served upon the customer or mailed to his last known address . . . with the following notice which shall state with reasonable specificity the nature of the law enforcement inquiry: 'Records or information concerning your transactions held by the financial institution named in the attached subpena [sic] or summons are being sought by this (agency or department) in accordance with the Right to Financial Privacy Act of 1978 . . . . ' ").

[47] *Id.* at § 3410.

[48] *Id.*

[49] Irani v. United States, 448 F.3d 507, 509-10 (2d Cir. 2006).

sued for their bank records, the RFPA has created grounds for individuals to challenge a subpoena. Section 3410 of the RFPA provides specific measures for individuals to challenge subpoenas that have been issued for their financial records.[50] To challenge any subpoena, the statute requires that there be an affidavit provided that states valid information necessary to make any opposition to a subpoena.[51] First, it must be reported in the affidavit that the individual making the motion to quash the subpoena is a customer of the particular financial institution that the subpoena was issued to.[52] Second, the affidavit must also contain the movant's reasons to believe that the financial information sought from the institution is not relevant to any type of inquiry.[53] Alternatively, the movant may state in their affidavit that there has not been substantial compliance with the statutory provisions outlined in the RFPA.[54]

The RFPA limits how access can be obtained to financial records held by institutions by making it clear that it only applies to personal bank records and not corporate bank records.[55] Therefore, the statute defines a person as "an individual or a partnership of five or fewer individuals."[56] Regardless of how the records are accessed, all financial records must be reasonably described.[57] Financial records may be obtained by customer authorization, "an administrative subpoena or summons," a search warrant, a judicial subpoena, or "a formal written request" that meets the requirements outlined by the statute.[58] Any means of disclosure beyond the methods explicitly stated in the text of the RFPA are strictly prohibited.[59]

Section 3404 of the statute gives customers of financial institutions the ability to authorize disclosure of their bank records to the

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[50] 12 U.S.C. § 3410.

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *See* 12 U.S.C. § 3401(5).

[56] 12 U.S.C. § 3401(4).

[57] 12 U.S.C. § 3402 ("No Government authority may have access to or obtain copies of, or the information contained in the financial records of any customer from a financial institution unless the financial records are reasonably described.").

[58] *Id.*

[59] 12 U.S.C. § 3403(a) ("No financial institution . . . may provide to any Government authority access to or copies of, or the information contained in, the financial records of any customer except in accordance with the provisions of this chapter.").

Government.[60] The procedure requires a customer of a financial institution to provide written authorization to both the financial institution and the government authority seeking the information in a signed and dated statement.[61] The provisions of the statute give the customer the right to revoke that authorization "at any time before the financial records are disclosed."[62] The RFPA outlines procedures for obtaining bank records by means of administrative subpoenas in section 3405 and judicial subpoenas in section 3407. In order to obtain the records there must be reasonable belief "that the records sought are relevant to a legitimate law enforcement inquiry."[63]

2. Case Law Interpretation of the RFPA

In *Hancock v. Marshall*,[64] the plaintiff filed a motion to quash an administrative subpoena that was issued by the Department of Labor for his financial records from First American National Bank.[65] The plaintiff moved to challenge the subpoena pursuant to the requirements set out in section 3410 of the RFPA statute.[66] The court denied plaintiff's application to quash the subpoena on the grounds that the information sought was irrelevant.[67] The plaintiff also made an argument to challenge the subpoena on the grounds that "consent might tend to deprive [him] of [his] rights . . . under the U.S. Constitution."[68] The court held that this was not a valid argument for relief under the RFPA.[69] The holding in *Hancock* is consistent with the Supreme Court's opinion in *Miller*, which explicitly held that an individual has no constitutional rights with respect to his bank records.[70] Therefore, individuals can only make an argument to challenge any subpoenas for their bank records based on a statute, like the RFPA, and not on the Constitution itself.[71]

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60 12 U.S.C. § 3404.
61 *Id.*
62 12 U.S.C. § 3404(2).
63 12 U.S.C. § 3405(1).
64 86 F.R.D. 209 (D.D.C. 1980).
65 *Id.* at 210.
66 *Id.*
67 *Id.* at 211.
68 *Id.*
69 *Marshall*, 86 F.R.D. at 211.
70 *Miller*, 425 U.S. at 445.
71 *Marshall*, 86 F.R.D. at 211.

The Third Circuit in *Chao v. Community Trust Co.*[72] stated, "The RFPA was enacted by Congress 'to protect the customers of financial institutions from unwarranted intrusion into their records while at the same time permitting legitimate law enforcement activity.' " [73] The Third Circuit went on to note how the RFPA "strike[s] a balance between the right of privacy of customers and the need for law enforcement agencies to obtain financial records as part of legitimate investigations."[74] The court in *Chao* also explained how the RFPA states that unless a statutory exception applies, the government cannot obtain the financial records of a customer of a financial institution unless the records are "reasonably described and . . . are disclosed in response to an administrative subpoena or summons."[75]

The Fifth Circuit in *United States v. Kington*[76] has also held that individuals do not have a Fourth Amendment interest in their bank records.[77] *Kington* involved a defendant who was formerly president of a now defunct bank.[78] In his criminal conviction he faced numerous charges that included "embezzlement, falsifying a loan application[,] . . . filing a false income tax return," and many others.[79] Prior to his indictment, the grand jury issued a subpoena for defendant's bank records.[80] The defendant challenged this subpoena, but the court ultimately held that "while it is evident that Congress has expanded individuals' right to privacy in bank records of their accounts, appellees are mistaken in their contention that the expansion is of constitutional dimensions."[81] Therefore, the Fifth Circuit followed federal precedent in finding that "the rights created by Congress are statutory, not constitutional."[82]

The Third Circuit has held that the RFPA does not apply to investigations conducted by state officials; in *Wright v. Liguori*,[83] the appellant challenged the lower court's dismissal of his complaint

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[72] 474 F.3d 75 (3d Cir. 2007).
[73] *Id.* at 80.
[74] *Id.*
[75] *Id.* (citing 12 U.S.C. § 3401(5)).
[76] 801 F.2d 733 (5th Cir. 1986).
[77] *Id.* at 737.
[78] *Id.* at 734.
[79] *Id.*
[80] *Id.*
[81] *Kington*, 801 F.2d at 737.
[82] *Id.*
[83] 445 F. App'x 469 (3d Cir. 2011).

against Wachovia bank.[84] Wright alleged that Wachovia wrongfully disclosed his financial records and violated the RFPA.[85] However, the court held that the records were disclosed to a Delaware state detective, and thus the protections of the RFPA were not implicated.[86] The court noted that the "RFPA limits the definition of 'Government authority' to any 'agency or department of the United States, or any officer, employee or agent thereof.' "[87] Since the court found that the information here was disclosed to a state official," it found accordingly that "the RFPA does not apply."[88]

It follows from the holding in *Wright* that the protections afforded by the federal RFPA do not protect individuals involved in investigations conducted by the State, such as Lomma. In addition to the Third Circuit's interpretation of the RFPA in *Wright*, the legislative history of the RFPA provides insight that the statute was not intended to affect state governments in any way.[89] "It is important to note that the scope of this title is limited to officials of federal agencies and departments and to employees of the United States. This limitation reflects our belief that legislation affecting state and local governments is the proper province of the respective state governments."[90]

3. Subpoenas for Bank Records from Foreign Bank Accounts

In *United States v. Mann*,[91] the Ninth Circuit extended the holding of *Miller* to include subpoenas for records from foreign bank accounts.[92] In *Mann*, appellant Mann and his wife were indicted on eight counts.[93] Those charges included income tax evasion, filing of false income tax returns, and failure to disclose foreign financial interests.[94] All of these charges arose from funds that were held in ap-

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[84] *Id.*
[85] *Id.* at 470.
[86] *Id.* at 470-71.
[87] *Id.* at 471.
[88] *Wright*, 445 F.App'x at 471.
[89] H.R. REP. NO. 95-1383, at 247 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9273, 9306.
[90] *Id.*
[91] 829 F.2d 849 (9th Cir. 1987).
[92] *Id.* at 851.
[93] *Id.* at 850.
[94] *Id.*

pellant's bank account at Barclays, which was located in the Grand Cayman Island.[95] At trial, appellant moved to suppress the evidence of these records that were obtained from the Barclays account.[96] Appellant based his argument on the theory that because Cayman law protected an individual's bank records from being disclosed,[97] this restriction would create a Fourth Amendment privacy interest.[98] Therefore, Mann believed that because he had a Fourth Amendment interest in his bank records, he had standing to challenge the subpoena.[99]

The Ninth Circuit in *Mann* based its reasoning on an earlier Supreme Court decision, *United States v. Payner*.[100] In *Payner*, the defendant argued that Bahamian law created an expectation of privacy with respect to his bank records.[101] The defendant in *Payner* argued that the decision in *Miller* did not apply because the bank records were in the Bahamas and Bahamian law thus applied.[102] The Court in *Payner* carefully explained how an individual's Fourth Amendment rights are violated when his own "legitimate expectation of privacy" is invaded.[103] An individual's Fourth Amendment rights are not violated if the rights of a third party are violated.[104] The Supreme Court concluded in *Payner* that the defendant lacked an expectation of privacy even though Bahamian law created an expectation of privacy by means of a statute with respect to bank records.[105] The Court reasoned that the Bahamian statute is hardly a blanket guarantee of privacy.[106] When discussing the Bahamian statute, the Court stated:

> Its application is limited; it is hedged with exceptions; and we have been directed to no authority construing its terms. Moreover, American depositors know that their own country requires them to report relationships with foreign financial institutions. We conclude that

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95 *Id.*
96 *Mann*, 829 F.2d at 850.
97 *Id.* at 851.
98 *Id.* at 851-52.
99 *Id.* at 852.
100 447 U.S. 727 (1980).
101 *Id.* at 732 n.4.
102 *Id.*
103 *Id.* at 731 (citing Rakas v. Illinois, 439 U.S. 128, 143 (1978)).
104 *Id.* at 735.
105 *Payner*, 447 U.S. at 732 n.4.
106 *Id.*

> [the defendant] lacked a reasonable expectation of privacy in the [Bahamian bank] records that documented his account.[107]

The statute in *Mann* was similar to the statute in *Payner*, so the court in *Mann* used the same reasoning as the Supreme Court in *Payner*.[108] The Cayman Islands statute provided holders of bank accounts with a privilege against disclosure.[109] However, the statute was subject to many exceptions, and the existence of these exceptions puts a bank holder on notice that his or her records could be disclosed.[110] Therefore, the Ninth Circuit in *Mann* held that the Cayman Islands statute was irrelevant and therefore appellant was afforded no additional protection under the Fourth Amendment.[111]

IV. NEW YORK STATE PRECEDENT

The court in *Lomma* also analyzed many state law cases in reaching its conclusion.[112] In *Matter of John Doe Corp I v. Blumenkopf*,[113] respondent, the Organized Crime Task Force, presented evidence to a grand jury for alleged misappropriation of trade secrets and commercial bribery involving petitioner who was the owner of two corporations.[114] The court dismissed respondent's petition to prohibit the presentation of evidence of his bank records that were obtained through an office subpoena *duces tecum.*[115] The court stated that there is "no legally cognizable interest in the records of a third party bank and, hence, [the petitioners] lack standing to complain of any illegality in subpoenaing them."[116] The court then made clear that petitioners in similar cases could not even attempt to make a valid argument to suppress any evidence of bank records because they have no legally recognized interest in them.[117]

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[107] *Id.*

[108] *Mann*, 829 F.2d 849, 852 (9th Cir. 1987).

[109] *Id.*

[110] *Id.* at 852.

[111] *Id.* at 853.

[112] 937 N.Y.S.2d 833, 839-40 (Sup. Ct. 2012).

[113] 505 N.Y.S.2d 225 (App. Div. 3d Dep't 1986).

[114] *Id.* at 226.

[115] *Id.* at 228.

[116] *Id*. at 227.

[117] *Blumenkopf*, 505 N.Y.S.2d at 227 ("The case law is equally clear, however, that petitioners have no legally cognizable interest in the records of a third-party bank and, hence,

The First Department noted that whether a defendant has the "power to move to quash" a subpoena for his or her bank records is a necessary determination that must be established before any motion to quash is addressed. In *People v. Doe*,[118] the court reversed the lower court's quashing of a grand jury subpoena to obtain bank records and denied defendant's motion to quash.[119] The District Attorney in this case actively opposed defendant's motion to quash, arguing that the defendant lacked standing because the individual did not have a possessory interest in the bank records.[120] The defendant in *Doe* argued in his motion that the records were irrelevant in regards to the grand jury's investigation.[121] The court in *Doe* reasoned that before a court can determine the merits of a defendant's motion to quash a subpoena, it is "critical" that the moving party has standing to do so.[122] In answering the question of whether a defendant has standing, the court reaffirmed the holding of *Miller* and stated, "[B]ank records, although they may reflect transactions between the bank and its customers, belong to the bank."[123] Therefore, they noted that bank customers, like the defendant in *Lomma*, have "no proprietary or possessory interests" in their personal bank records.[124] The court in *Doe* held that because standing must be assessed before the merits of any motion, they would not even assess the arguments raised by the defendant in his motion to quash the subpoena for his bank records because defendant did not have the power to challenge the subpoena.[125]

Courts have also held that defendants do not have standing when attempting to claim an error in their conviction based on the introduction of subpoenaed bank records. In *People v. Crispino*,[126] the defendant, Domenick Crispino, was convicted of several charges including grand larceny and criminal possession of forged instruments.[127] After defendant's conviction, he was sentenced to five to

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they lack standing to complain of any illegality in subpoenaing them.").

118 467 N.Y.S.2d 45 (App. Div. 1st Dep't 1983).

119 *Id*. at 46.

120 *Id.* at 45.

121 *Id.* at 46.

122 *Id.* at 45-46.

123 *Doe*, 467 N.Y.S.2d at 46.

124 *Id.*

125 *Id.*

126 748 N.Y.S.2d 718 (App. Div. 1st Dep't 2002).

127 *Id*. at 719.

fifteen years in prison.[128] The defendant was unsuccessful in trying to challenge his conviction by arguing that a trial error had occurred.[129] The defendant stated that the "prosecution abused the grand jury process in subpoenaing his bank records after an indictment had already been voted."[130] The bank records, the defendant felt, should not have been introduced at trial.[131] The court stated, "As a threshold matter, defendant has no standing to challenge the bank's production of its own records, because defendant, as a customer, has no proprietary interest in the records."[132] This case reaffirmed New York State's traditional approach to the issue of standing with respect to bank records.

Much of the court's decision in *Lomma* was based on *In re Norkin v. Hoey.*[133] *In re Norkin* laid the foundation on the issue of standing regarding challenging subpoenas for bank records in New York State. The key difference of the *In re Norkin* case and the *Lomma* case is that *In re Norkin* involved a subpoena seeking records concerning a loan from a bank to a corporation,[134] whereas in *Lomma* it was a subpoena for the defendant's personal bank records.[135]

The court in *In re Norkin* relied heavily on federal precedent found in the *Miller* case.[136] The court was mindful of the fact that although the federal government and many states have passed individual statutes that expand or limit the holding of *Miller*, New York has yet to do so.[137] Therefore, while the case provides much guidance

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[128] *Id*.

[129] *Id*.

[130] *Id*.

[131] *Crispino*, 748 N.Y.S.2d at 719.

[132] *Id.*

[133] 586 N.Y.S.2d 926 (App. Div. 1st Dep't 1992).

[134] *Lomma*, 937 N.Y.S.2d at 840.

[135] *Compare In re Norkin* 586 N.Y.S.2d at 931 (holding that petitioners did not have a recognizable confidentiality interest in the records sought by respondent because there is no such expectation of confidentiality in the context of the debtor-creditor loan relationship and therefore, petitioners did not have standing to challenge the subpoena issued to the bank for their records.), *with Lomma*, 937 N.Y.S.2d at 834 (holding that defendants have no standing to move to quash a subpoena issued for personal bank records in connection with an ongoing criminal case).

[136] *See In re Norkin*, 586 N.Y.S.2d at 929 (discussing the holding in *Miller* and the reaction by the Federal Government to the decision).

[137] *Id.* at 928 ("The Legislature of this State has not acted to provide for any privacy rights in such records, and our courts have, in the main, followed *United States v. Miller*, in holding that bank customers have no proprietary interest in the records kept by the banks with which they do business.").

on the law, at the same time there is much criticism because of the nature of the two different types of information that were being subpoenaed.

In addition to prosecutors who issue subpoenas for bank records in connection with criminal proceedings, many government agencies are also authorized to conduct such investigations. The case of *Matter of Congregation B'Nai Jonah v. Kuriansky*[138] involved a petitioner's motion to quash a subpoena from respondent, the Deputy Attorney General, for Medicaid fraud control.[139] The subpoena was addressed to the Manhattan Savings Bank and directed the bank to produce petitioner's bank records for a four-year period.[140] In response to the subpoena, the petitioner moved to quash the evidence.[141] This motion was denied because the defendant lacked standing to challenge the subpoena.[142] The court held that "it is a settled principle that a bank customer 'has no proprietary or possessory interest in bank records.' "[143]

Defendants in criminal cases have also sought to challenge subpoenas for their bank records by arguing that being forced to hand over evidence of their personal bank records violates their Fifth Amendment right against self-incrimination. The Fifth Amendment of the United States Constitution states that no individual shall be "compelled in any criminal case to be a witness against himself."[144] The New York Court of Appeals has held that a subpoena duces tecum issued to obtain the bank records of an individual cannot be considered a denial of an individual's right against self-incrimination.[145] In *Carpetta v. Santucci*,[146] the petitioner was a school custodian and received a subpoena ordering him to appear before the grand jury with his and his wife's personal bank records.[147]

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[138] 576 N.Y.S.2d 934 (App. Div. 3d Dep't 1991).

[139] *Id.* at 935. In the lower court, the petitioner's motion to quash the subpoena for his bank records was denied "because of lack of standing." *Id.* In this case, the petitioner is appealing that determination by the lower court. *Id.*

[140] *Id.*

[141] *Kuriansky*, 576 N.Y.S.2d at 935.

[142] *Id.*

[143] *Id.* (quoting People v. Doe, 467 N.Y.S.2d 45, 46 (App. Div. 1st Dep't 1983)).

[144] U.S. CONST. amend. V.

[145] *See* Carpetta v. Santucci, 42 N.Y.2d 1066, 1067 (N.Y. 1977) (holding that a subpoena deuces tecum issued to obtain bank records of an individual cannot be considered a denial of an individual's right against self-incrimination).

[146] 42 N.Y.2d 1066 (N.Y. 1977).

[147] *Id.* at 1067.

The petitioner filed a motion to quash the subpoena on the grounds that it was an unconstitutional search and seizure and a "denial of petitioner's privilege against self incrimination."[148] The Court of Appeals held that because bank records are property of the bank and not personal property of the petitioner, ordering a subpoena to produce those records is not an unconstitutional act of self-incrimination.[149]

The Supreme Court of Nassau County addressed the extent that a bank has a legal duty to protect a depositor's information from disclosure in response to a subpoena in connection with judicial proceedings. In *Daniels v. JP Morgan Chase Bank*,[150] the plaintiff sued the bank where she had several accounts after the bank responded to a judicial subpoena for her records.[151] The court recognized that New York case law has held that there is no fiduciary relationship between a depositor and a bank that would make a bank liable for disclosing confidential records to a third party.[152] The court went on to note that absent this fiduciary duty, the standard that should be applied in this case is the *Miller* holding.[153] The court made mention that there have been a few New York courts which have implied that a depositor has standing to object to a subpoena for bank records in "wholly civil proceedings between private parties."[154] While the defendant in *Lomma* relied on *Daniels* to support his motion to quash, that case is clearly distinguishable because it was a civil case. Additionally, the *Daniels* court ultimately held that "a depositor's standing to challenge a subpoena seeking third-party bank records, and accordingly, the existence of an underlying privacy interest in those records, has not been affirmatively declared in this state."[155] Therefore, as the court in *Lomma* determined, since this is a criminal proceeding there is no right to privacy with respect to defendant's bank records.

V. ANALYSIS

The *Lomma* decision will likely influence New York to establish greater privacy protections for individuals' bank records. A New

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148 *Id*.
149 *Id*.
150 No. 22575/09, 2011 WL 4443599, at *1 (N.Y. Sup. Ct. Sept. 22, 2011).
151 *Id.* at *1.
152 *Id.*
153 *Id.*
154 *Id.*
155 *Daniels*, 2011 WL 4443599 at *1.

York statute similar to the federal statute will help make customers of financial institutions feel a sense of protection when it comes to their personal financial records.[156] As the *Lomma* court also noted, such a statute would make sure that government authorities are not abusing their power to issue subpoenas for bank records.[157] However, given the fact that federal legislatures have explicitly left the duty to states to find similar statutes to the RFPA,[158] the New York legislature has the burden of imposing such a law. In doing so, New York legislatures should look to the RFPA and how other states have adopted similar statutes. Additionally, many states have found a source of protection for individuals' personal bank records in their state constitutions. In the past, New York has found that its constitution, though strikingly similar to the United States Constitution, affords individuals greater protections with respect to certain rights.[159] By following other states that have found that their constitutions grant individuals greater privacy protection than the United States Constitution does, New York would be giving individuals a fundamental privacy right with respect to their banking records.

Although the United States Supreme Court has held that an individual does not have a Fourth Amendment right with respect to an individual's personal bank records,[160] several state courts have found that similar provisions of their state constitutions grant such a right. Thus, a Pennsylvania court in *Commonwealth of Pennsylvania. v. DeJohn*[161] found that "*Miller* establishes a dangerous precedent, with great potential for abuse,"[162] and in doing so it "decline[d] to follow that case when construing the state constitutional protection."[163] Under the Pennsylvania Constitution, Article I, Section 8,[164]

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156 *See* 12 U.S.C § 3401 et seq.

157 *Lomma*, 937 N.Y.S.2d at 843.

158 *See* H.R. REP. NO. 95-1383, *supra* note 89, at 247-48 ("We believe that grave constitutional and political issue would have been raised if this title had applied to other levels of government. Several states, most notably California, have enacted Financial Privacy Statutes of their own. This is a movement which deserves both our support and our forbearance.").

159 *See, e.g.*, Islip v. Caviglia, 73 N.Y.2d 544, 574 (N.Y. 1989) ("This court has repeatedly stated that New York State offers greater freedom of speech guarantees under our State Constitution than the minimal protection afforded individuals under the Federal Constitution.").

160 *Miller*, 425 U.S. at 445.

161 403 A.2d 1283 (Pa. 1979).

162 *Id.* at 1289.

163 *Id.*

164 *See* PA. CONST. art. I, § 8 ("The people shall be secure in their persons, houses, papers

which is very similar to the language of the Fourth Amendment to the United States Constitution, the court held that unlike the federal Constitution, their state provision granted an individual the right to privacy with respect to his bank records.[165] Similarly, the state of Utah, which also has a state constitution provision that mirrors the language of the Fourth Amendment to the United States Constitution, has held that under the state constitution bank customers have the right of privacy in bank records.[166] Additionally, New Jersey has recognized that under its constitution an individual has an expectation of privacy in his or her bank records as well.[167] New Jersey has found that a greater protection exists even despite the fact that both the federal and New Jersey constitutions have "nearly identical provisions."[168] Thus, the New Jersey Supreme Court stated that " 'when the United States Constitution affords our citizens less protection than does the New Jersey Constitution, we have not merely the authority to give full effect to the State protection, we have the duty to do so.' "[169]

The State of New York should look to follow what other states across the nation have done in construing their state constitutions to afford individuals a right to privacy with respect to their personal bank records. As Justice Brennan once noted, affording individuals more protections under their state constitutions, even where the language used is identical to that of the United States Constitution, is fundamental to the concept of federalism.[170] Justice Brennan urged that state courts take initiative to decipher the meanings of their own constitution, even where they use the exact same language as the federal constitution.[171] For example, New York's equivalent provi-

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and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed by the affiant.").

[165] *DeJohn*, 403 A.2d at 1289.

[166] *See* UT. CONST. art. I, § 14 ("The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.").

[167] State v. McAllister, 875 A.2d 866 (N.J. 2005).

[168] *Id.* at 873.

[169] *Id.* (quoting State v. Hempele, 576 A.2d 793, 800 (N.J. 1990)).

[170] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977).

[171] *Id.* at 499-500 ("State courts have independently considered the merits of constitutional arguments and declined to follow opinions of the United States Supreme Court they find unconvincing, even when the state and federal constitutions are similarly or identically phrased.").

sion to the Fourth Amendment of the United States Constitution is found in Article I, Section 12 of the New York State Constitution. Given the fact that the United States Supreme Court has found that an individual has no Fourth Amendment interest in their bank records in *United States v. Miller*,[172] New York has seemed to base its reasoning in denying individuals a right to privacy for their bank records on this decision.[173] However, Justice Brennan's theory would urge New York to reconsider the merits of the Court's reasoning based on the New York Constitution. One example Justice Brennan acknowledged was the California Supreme Court's holding that under the California State Constitution, bank depositors have a legitimate expectation of privacy with respect to their bank records.[174] This process of state courts scrutinizing decisions of federal courts and interpreting their own constitutions even where they are strikingly similar to the federal Constitution, Justice Brennan argued, is what is necessary to afford individuals the protections they deserve.[175] Furthermore, Justice Brennan argued that this protection is what the framers of the Constitution intended for individuals.[176] Therefore, following Justice Brennan's theory and other state courts that have found that individuals have a greater protection under their state constitutions with respect to privacy and their personal bank records, New York should revisit this issue and alter its interpretation of Article I, Section 12 of the New York State Constitution.

Should New York not find that its state constitution affords an individual an expectation of privacy with respect to bank records, it should still look to adopt a statute similar to the RFPA. Following the decision in *Miller*, the United States adopted this statute to compensate for an individual's lack of constitutional protections under the Fourth Amendment with respect to their bank records.[177] Other

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[172] *Miller*, 425 U.S. at 445.

[173] *Lomma*, 937 N.Y.S.2d at 839.

[174] Brennan, *supra* note 170, at 501.

[175] *See id.* at 503 ("With federal scrutiny diminished, state courts must respond by increasing their own.").

[176] *See id.* ("Federalism need not be a mean-spirited doctrine that serves only to limit the scope of human liberty. Rather, it must necessarily be furthered significantly when state courts thrust themselves into a position of prominence in the struggle to protect the people of our nation from governmental intrusions on their freedoms. We can confidently conjecture that James Madison, Father of the Bill of Rights, would have approved.").

[177] *See* H.R. REP. NO. 95-1383, *supra* note 89, at 28 ("While the Supreme Court found no constitutional right of privacy in financial records, it is clear that Congress may provide protection in individual rights beyond that afforded in the Constitution.").

states have also passed statutes similar to the RFPA. For example, California passed a statute, the California Right to Financial Privacy Act,[178] which affords an individual privacy with respect to their bank records.

A statute such as the RFPA is important because it imposes limits on the Government's access to an individual's personal bank records.[179] The Court in *Irani v. U.S.*[180] stated the RFPA was " 'intended to protect the customers of financial institutions from unwarranted intrusion into their records while at the same time permitting legitimate enforcement activity.' "[181] The government may be permitted to access an individual's personal bank records, however, the government should not have unlimited access to these records.

A statute similar to the RFPA would allow for substantial privacy rights while still preventing individuals from objecting to a subpoena only to frustrate the government's investigation.[182] New York, and states which have not enacted a statute similar to the RFPA, cannot simply allow the government to casually seek an individual's personal bank records without allowing that individual to have an opportunity to challenge the subpoena. Such a statute should allow an individual to challenge a subpoena by specific measures. Thus a statute that affords an individual some protection from the government obtaining the sensitive information in his bank records would strike a balance between the needs of the government and the rights of the people against unwarranted intrusions into private matters.

VI. CONCLUSION

Most people in New York believe that when they disclose their information to banks that it will remain confidential. However, unbeknownst to many New Yorkers, the New York courts have failed to recognize any constitutional right individuals have in protecting their personal financial records.[183] Furthermore, state legislatures have not adopted any statutes to limit the power of the government in accessing these personal records. As the *Lomma* court suggested,

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178 CAL. GOV. CODE § 7470 (2012).

179 Irani v. United States, 448 F.3d 507, 509-10 (2d Cir. 2006).

180 448 F.3d 507 (2d Cir. 2006).

181 *Id.* at 510 (quoting H.R. REP. NO. 95-1383, at 247).

182 *Id.*

183 *Lomma*, 937 N.Y.S.2d at 842-43.

"[I]n the view of this court, a party, whether in a civil or a criminal proceeding, should have a right to move to quash a subpoena duces tecum issued to a third-party bank for his personal banking records."[184] Irrespective of the court's belief, it was still bound to follow state precedent, noting that "the law effectively provides no clear right for those privacy interests to even be asserted, much less recognized."[185] The *Lomma* court has even noted that although federal courts have created a statute to provide individuals with protection regarding their personal bank affairs, that "no similar protection exists under New York State law."[186] For these reasons, the *Lomma* court held that the defendant had no standing to challenge a subpoena for his personal bank records. Either the New York Legislature or the New York Court of Appeals should take effective measures to change this inadequacy of the law and grant an individual a right to privacy in his or her personal bank records.

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[184] *Id.* at 841.

[185] *Id.*

[186] *Id.* at 842.

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