

O/A 11-485

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IN THE SUPREME COURT  
OF FLORIDA

CASE NO. 66,576

THE TRIBUNE COMPANY  
AND JAMES TUNSTALL,

Appellants,

vs.

THE HONORABLE L.R. HUFFSTETLER, JR.  
AND THE STATE OF FLORIDA

Appellees.

\_\_\_\_\_  
ON REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL  
\_\_\_\_\_

BRIEF OF AMICUS CURIAE, NEWS AND SUN-SENTINEL COMPANY

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PRELIMINARY STATEMENT

The Amicus Curiae, NEWS AND SUN SENTINEL COMPANY, hereby adopts the Preliminary Statement filed in the Initial Brief of Appellants.

STATEMENT OF THE CASE AND FACTS

The Amicus Curiae, NEWS AND SUN SENTINEL COMPANY, hereby adopts the Statement of the Case and Facts contained in the Initial Brief of Appellants.

## ARGUMENT

This case involves the issuance of an investigatory Subpoena by the State Attorney for Pasco County. This case does not involve the issuance of a Grand Jury Subpoena. The distinction between a State Attorney's Subpoena and a Grand Jury Subpoena as they relate to a journalist's qualified privilege against compelled testimony is crucial to the resolution of this case and for this reason, this Amicus Curiae Brief will deal with this single issue.

In Tribune v. Huffstetler, 463 So.2d 1169 (Fla. 5th DCA 1984), the case under review by this Court, the District Court specifically recognizes that a State Attorney's Subpoena and a Grand Jury's Subpoena have a fundamental distinction:

[t]he case of Branzburg v. Hayes, 408 US 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972) is almost squarely on point, the principal difference being that Branzburg involved an inquiry by the grand jury as opposed to a state attorney's investigation, which is involved here.

The Fifth District Court of Appeal then completely ignores that this "principal difference" was the dispositive element in the Branzburg case, and decides the case without further regard to such a "principal difference" and without regard to established First Amendment principles of adjudication.

The distinction between a Grand Jury Subpoena and a State Attorney's Subpoena cannot be glossed over, for it formed the bedrock of the decision in Branzburg:

[T]he sole issue before us is the obligation of reporters to respond to grand jury subpoena as other citizens do and to answer questions relevant to an investigation into the commission of crime.

408 U.S., at 682.

There is a vast difference, both in historical foundation and modern application, between the Grand Jury function in American society and that of an investigation by a State Attorney.

First and foremost, the Grand Jury in American jurisprudence is accorded absolute secrecy for its investigations.<sup>1/</sup> The historical reason underlying this grant of absolute secrecy can be traced to the Grand Jury's origins and reason for existence, as a "barrier between the king and the rights of the subject." 38 C.J.S. Grand Juries Section 1. See, also, Sawyer v. State, 113 So.736, 741 (Fla. 1927). As such a barrier with absolute secrecy, the Grand Jury enabled citizens to disclose information about their government or others without fear of subsequent disclosure.

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<sup>1/</sup> In Florida, the rule of secrecy is codified at F.S. 905.24 (1983). The Federal Rules of Criminal Procedure have codified this rule of secrecy in Rule 6. See 6(e), General Rule of Secrecy.



This Court recognized the importance of such secrecy in Grand Jury proceedings, when it stated:

[S]ecrecy in the work of the grand jury is more than a tradition, however ...

[W]itnesses appearing before a grand jury must be free to tell what they know, without fear of having to answer elsewhere for their testimony. ...

The grand juror's deliberations, like their voting, remain secret to this day, as far as the record shows. There is no indication that any grand jury witness' testimony has ever been disclosed. (emphasis added).

Morgan v. State, 337 So.2d 951 (Fla. 1976). See, also: In Re Tierney, 328 So.2d 40 (1976) (the questions propounded by the Grand Jury concerning "leaks" related directly to the sanctity and integrity of the Grand Jury function ...).

This absolute secrecy is the philosophical foundation of why testimony before a Grand Jury can be, under only the most limited circumstances, compelled from a reporter.

The guarantees provided to a witness in an appearance before a Grand Jury simply do not apply to investigations initiated by a State Attorney. The State Attorney, under the theory of open government (of which Florida is the leading proponent), has no

absolute secrecy accorded his investigations. Pursuant to Florida Statute 119.07(3)(d)<sup>2/</sup>, his files are closed to public view only during an "active criminal investigation." Once that investigation is closed, the information contained within is presumed open.

Even during such an "active criminal investigation," portions of the State Attorneys' file may be opened to public inspection. The Public Records Act, Florida Statutes 119.011(3)(c), specifically enumerates certain types of information which may not be withheld even during an "active investigation":

Florida Statutes, Section 119.011(3)(c):

(c) "Criminal intelligence information" and "criminal investigative information" shall not include:

1. The time, date, location, and nature of a reported crime;
2. The name, sex, age, and address of a person arrested or of the victim of a crime except as provided in s. 119.07(3)(h);
3. The time, date, and location of the incident and of the arrest;
4. The crime charged;

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2/ Florida Statute 119.07(3)(d):

(d) Active criminal intelligence information and active criminal investigative information are exempt from the provisions of subsection (1).

5. Documents given or required by law or agency rule to be given to the person arrested; and

6. Information and indictments except as provided in s. 905.26.

Additionally, Florida Statutes 119.07(2)(a) states that the State Attorney, when an active criminal investigation exemption is asserted "shall delete or excise from the record only that portion for which an exemption is asserted and shall produce for inspection and examination the remainder of such record."

Specific judicial procedures have also developed which require that there be no blanket closure of "active" files, but that "public" information be segregated from "active criminal investigation" matter and be disclosed. This disclosure occurs even during the pendency of the "active investigation". Thus, even if a court determines that there is an active criminal investigation and some records may be exempt, it should order an in camera inspection of the documents to determine which are exempt from the application of the exemption itself.<sup>3/</sup>

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<sup>3/</sup> In Donner v. Edelstein, II, 423 So.2d 367 (Fla. 3rd DCA 1982), the Third District Court of Appeal held that a circuit court confronted with a valid public records request under Chapter 119, Florida Statutes, and a claim that certain records fall within one or more exemptions, would be "directed to examine in camera the documents." See, also: Miami Herald Publishing Co. v. City of North Miami, 420 So.2d 653, 654 (Fla. 3rd DCA 1982).

The Appellees may argue that a State Attorney serves the same function as a Grand Jury, and therefore, should be accorded similar Subpoena powers. While the Fourth District Court of Appeal, in dictum, has stated that "in 1934 a prosecuting attorney of the court, became, in effect, a one-man grand jury." Widener v. Croft, 184 So.2d 444 (Fla. 4th DCA 1966), cert. denied without Opinion, 192 So.2d 486 (Fla. 1966), analysis of that case demonstrates it is inapplicable to the Fifth District's Opinion in Huffstetler, supra. A State Attorney's Subpoena and a Grand Jury's Subpoena are not the same thing when the case involves a Subpoena served on a nonparty journalist asserting their constitutional privilege against compelled disclosure.

Croft is inapposite because it did not involve a Subpoena served on a nonparty journalist as here, but concerned whether testimony given before a County solicitor could be inquired into upon the taking of a deposition by a defendant in a civil action for malicious prosecution. Consequently, there was no analysis or discussion of the journalist's qualified privilege against compelled testimony which is the issue on review in this case.

The only Florida case found which cites Croft supports the Amicus Curiae's analysis that Croft is limited to its facts and is therefore inapplicable here. City of Miami Beach v. Town, 375

So.2d 866 (Fla. 3rd DCA 1979), like Croft, concerned what questions could be asked at a deposition, but did not involve a Subpoena served on a nonparty journalist asserting a qualified privilege against compelled disclosure.

Amicus Curiae respectfully submits that a Grand Jury Subpoena and a Subpoena issued by a State Attorney cannot be treated as the same thing when a First Amendment freedom is implicated, yet that is what was done by the Fifth District Court of Appeal in Huffstetler, supra.

It has only been in extremely limited situations, that the reporter's qualified privilege against compelled disclosure has not been honored.<sup>4/</sup>

In the pre-Branzburg decision in Clein v. State, 52 So.2d 117 (Fla. 1950), this Court affirmed a journalist's conviction for contempt for refusing to divulge to a Grand Jury investigating gambling activities the source of certain information he had

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<sup>4/</sup> Even in situations where a journalist has witnessed a crime that is under investigation by a Grand Jury, the State must demonstrate an "overriding interest" to obtain the privileged testimony from a journalist. If there are any other witnesses available, those alternative sources must be exhausted. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980). (Richmond was not technically a reporter's privilege case but as Justice Burger emphasized, the press functions "as surrogates for the public", 448 U.S. 573, and concluded that the First Amendment interest of the press may be infringed only on the basis of an "overriding interest articulated in findings ...," 448 U.S. 581. Richmond thus confirms the constitutional basis of the reporter's privilege.

printed in his paper regarding such activities. See, also: In Re Tierney, supra.

However, in this Court's post-Branzburg decision, Morgan, supra, this Court reversed a journalist's contempt conviction, finding that "the grand jury before whom petitioner appeared was not investigating a crime" and therefore, did not come within the limited holding in Branzburg.<sup>5/</sup> This Court specifically emphasized that the United States Supreme Court in Branzburg had "limited its holding to grand juries good faith investigations of crime." Morgan, supra at 954.

The Fourth District Court of Appeal in In Re Tierney, supra, also stressed the limited nature of the holding in Branzburg, supra, when it cited the case for the proposition that the United States Supreme Court had given the individual States wide latitude in adopting reportorial privileges:

[T]he Branzburg court, however, was careful to point out that the state legislatures are free "to fashion their own standards in light of

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<sup>5/</sup> It is of interest to note that the Second District Court of Appeal distinguished Morgan's first contempt conviction from her second, on the ground that the first contempt conviction was reversed because the State Attorney had questioned the journalist while in the second contempt conviction, Morgan had refused to answer questions asked in the presence of the grand jury.

the conditions and problems with respect to the relations between law enforcement officials and press in their own areas" and that the court would be powerless "to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute. (emphasis added).

338 So.2d at 44, 45.

Branzburg itself mandates a strict limitation of it's holding to the facts of the case. The Fourth District Court of Appeal in In Re Tierney recognized this when it noted that Branzburg stood for the principle that:

[d]ifferent circumstances might 'pose wholly different issues for resolution under the First Amendment.'

That recognition, that the Branzburg holding as to a reporter's duty to appear before a Grand Jury investigating a crime and give testimony, is strictly limited to its facts and that different circumstances do represent different issues for resolution, has been strongly endorsed and followed by the courts of this State, including this Court in Morgan, supra.<sup>6/</sup>

The qualified reportorial privilege that has developed in this State is based upon the United States Supreme Court's discussion in Branzburg and the balancing test suggested by Justice

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<sup>6/</sup> See: Main Brief of Appellants at Pages 14-20 for discussion of and citation to State and Federal case law upholding the reporter's qualified privilege against compelled disclosure.

Powell in his concurring Opinion. It must be remembered that a greatly divided court handed down the Branzburg decision. The Opinion became a majority only upon Justice Powell's concurrence, which emphasized the limited nature of the case. Perhaps this is the underlying reason why courts have been reluctant to extend Branzburg past its limited holding.

The Fifth District Court of Appeal has presented no reason to extend the Branzburg holding in its opinion, and that holding should be rejected.

The First District Court of Appeal has cogently stated the compelling reasons for a qualified privilege against compelled testimony, and its reasoning, Amicus Curiae submits, should be adopted by this Court. In Gadsden County v. Horne, 426 So.2d 1234 (Fla. 1st DCA 1983), the First District relied upon this Court's post-Branzburg decision of Morgan, supra, to hold that:

[F]inally, our own Supreme Court has interpreted Branzburg in accord with Riley and has recognized that a qualified privilege exists in Florida to protect confidential sources from forced disclosure. In Morgan v. State, 337 So.2d 951 (Fla. 1976), the reporter published information from a grand jury presentment prior to its official release. The source of that information was, admittedly, a member of the grand jury whose identity the reporter refused to disclose even in the face of criminal contempt. In reversing the Second District's affirmance of the criminal contempt conviction and sentence, the Supreme Court receded from its prior position that no "privilege of confidential communication" existed to prevent compelled disclosure of



confidential sources. Id. at 953. The Florida court recognized that '[t]he United States Supreme Court has now sanctioned the view that the First Amendment affords 'some protection for seeking out the news.' 337 So.2d at 953 (citing Branzburg, 408 U.S. at 681, 92 S.Ct. at 2656, 33 L.Ed.2d at 639). Finding that a newsgathering privilege which would protect against the disclosure of confidential sources exists in Florida, the Court stated that:

no such privilege can amount to an absolute right to an unimpeded flow of information in all places and at all times. Application of the privilege in a given case involves 'the striking of a proper balance.'

Morgan, supra, at 954.

The "striking of a proper balance" involves the balancing test used routinely when a reporter asserts their qualified privilege against compelled testimony:

1. Is there a clear necessity for the reporter's testimony?
2. Have all alternative sources of information been exhausted?
3. Is the desired information relevant to a crucial issue in the case?

United States v. Cuthbertson, 651 F.2d 189, 195 (1981), cert. denied, 102 S.Ct. 604 (1981).

This privilege can be overcome only in the most limited circumstances. This case does not present any of the limited circumstances under which a reporter's testimony can be compelled. The Fifth District Court of Appeal has presented no reasons in its

opinion why the well reasoned First Amendment principles contained in the case law should be abandoned in this circumstance.

CONCLUSION

The trial court below did not "strike the proper balance" and the Fifth District Court of Appeal stands alone in this State in its interpretation of Branzburg and the qualified reportorial privilege. It is incumbent upon this Court to reverse the contempt conviction of JAMES TUNSTALL.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the fore-  
going Brief of Amicus Curiae, NEWS AND SUN SENTINEL COMPANY, has  
been provided by United States mail to all parties noted on the  
attached Service List, this 9<sup>th</sup> day of July, 1985.

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