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IN THE SUPREME COURT OF FLORIDA

THE TRIBUNE COMPANY and
JAMES TUNSTALL,

Petitioners,

v. CASE NO. 66,576

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

Respondents.

_____________________________/

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SUMMARY OF ARGUMENT

The Petitioners allege that the First Amendment gives the media the right to interrupt a criminal investigation with years of hearings and appeals before they can be compelled to give up their evidence - including the identity of the perpetrator. This is not correct, according to Branzburg v. Hayes, even if a privilege is recognized in civil cases and trials themselves. No one, from the President of the United States to the Petitioners, is above the law.

The Petitioners remaining claims center upon issues they failed to raise at trial and, in some instances, on appeal. These arguments were rejected (when presented) to the Fifth District and should not be allowed here.

Nevertheless, the assorted claims are frivolous, unsupported by either the record or the Petitioner's own cited cases.

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STATEMENT OF THE CASE AND FACTS

The State Attorney of the Fifth Judicial Circuit is investigating a criminal violation of §112.317(6), Fla.Stat.(1981). The underlying complaints, their disposition and eventual publication are irrelevant.

The crime occured when an unknown person secretly contacted James Tunstall, a reporter for the Tampa Tribune. Mr. Tunstall refuses to identify the offender because of a confidentiality agreement. Tunstall has been held in contempt.

Mr. Tunstall was afforded a hearing, as indicated in his brief. At no time did Mr. Tunstall or his attorneys object to procedures, raise any "due process" charge, challenge the constitutionality of §112.317(6) or request that Tunstall be allowed to appeal prior to being held in contempt. (R 134-138). All

of these issues were raised de novo in the District Court of Appeal except the "pre-adjudication appeal" issue, which is raised de novo here.

The State will not respond to matters de hors the record, inasmuch as they are not properly before the court. Hill v. State ___So.2d___(Fla. 1st DCA 1985) 10 F.L.W. 1335.

ARGUMENT

THE FIFTH DISTRICT DID NOT ERR IN FOLLOWING A BINDING DECISION OF THE UNITED STATES SUPREME COURT ON AN ISSUE OF FEDERAL CONSTITUTIONAL LAW

The issue of whether a newspaper reporter has a first amendment right to conceal the identity of a lawbreaker/confidential source from a criminal investigation was resolved in clear, unequivocal, terms in Branzburg v. Hayes, 408 U.S. 665 (1972). Reporters do not have such a privilege (qualified or otherwise).

The Petitioners now ask this Court to commit an error the Fifth District Court of Appeals did not; that is, to reverse (point by point) a decision of the United States Supreme Court on an issue of federal constitutional law. This simply cannot be done. Martin v. Board of County Commissioners, 364 So.2d 449 (Fla. 1978); Lockett v. Blackburn, 571 F.2d 309 (5th Circ. 1978); Smigiel v. State, 439 So.2d 239 (Fla. 5th DCA 1983).

1] Background

The Petitioners are a private media corporation (The Tampa Tribune) and its employee, James Tunstall.

In an unrecorded private conversation between Tunstall and his "source", Tunstall was provided with advance information regarding certain extant or putative Ethics Commission Complaints. By giving Tunstall this information, Tunstall's source committed a crime under §112.317(6) Fla.Stat.(1981). Receipt of this information was put to competitive use by the corporation to sell newspapers![1]

The State Attorney of the Fifth Judicial Circuit is an elected, constitutional officer whose duties (carried out through his assistants) include, pursuant to §27.04, Fla.Stat.(1957), the investigation of criminal offenses not referred to the grand jury itself. In this regard, he acts as a "one man grand jury," and as stated in Imperato v. Spicola, 238 So.2d 503,507 (Fla. 2nd DCA 1970):

> Even as the grand jury is immune from the requirement of showing materiality in compelling production of testimony and documentary evidence, so is the state attorney in his official sphere.

The Petitioners contend that they are not bound by Branzburg, that the first amendment permits reporters to withhold a lawbreaker's identity if the interests of the newspaper dictate it, and that the corporation need only cooperate with elected

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[1] The loss of a confidential source will affect The Tribune financially and competitively - a concern equal to any Constitutional claim.

officials if the media considers the crime "important enough"[2] or one which "ought to" be prosecuted.

The State submits that:

(1) Under our democratic system the police powers of the state have been delegated to elected officials, not private corporations.

(2) The United States Supreme Court is the final arbiter of Constitutional claims and;

(3) That Court has rejected any claim of "privilege."

Thus, it could fairly be stated that the real issue before this court is "Who's running this State?" Is Florida to be governed by its elected officials or a cadre of wealthy corporations who can dictate "which" laws are to be enforced - according to competitive needs. The Tribune does not, after all, enter this case with clean hands. A well placed confidential source can provide advance information which, in turn, means increased sales and profits for the paper. The Tribune cloaks its monetary motive with the mantle of the First Amendment. Suppose, however, the State Attorney was to use some legal technicality as an excuse not to prosecute a case - with the result being monetary gain for the State Attorney? Such self dealing by an elected official would lead to his removal from office. Should this Court find for the Petitioners, however, it will give them incredible powers which the people have

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[2] This precise claim was made by Amicus The Miami Herald during oral argument below.

denied their elected officials. Since no one elected the Tribune, how can this be tolerated?

2] The Concept of 'Privilege'

The concept of a reporter's "privilege," qualified or absolute, to withhold information from a criminal investigation under the rubric of the first amendment has never been recognized. In fact, the idea of "privilege" has been disfavored throughout our history.

At the time our nation was founded, the people rejected the concept of immunity from judicial process. Such a privilege had been claimed by the King, and in America, no royal privileges were to be granted; to people or corporations.

One of the first cases to reject a claim of "privilege" was United States v. Burr, 25 Fed.Case.30,34 (1807), wherein Chief Justice Marshall wrote:

> The propriety of introducing any paper into a case, as testimony, must depend upon the character of the paper, not on the character of the person who holds it.
>
> In the provisions of the Constitution, and of the statute, which give to the accused a right to compulsory process of the court, there is no exception whatever.

Various attempts to claim "privilege" over the years have similarly failed. In Committee For Nuclear Responsibility Inc. v. Seaborg, 463 F.2d 788, 794 (D.C. Cir. 1971) a claim of agency

(executive) privilege was rejected as follows:

> No executive official or agency can be given absolute authority to determine what documents in his possession may be considered by the court in its task. Otherwise, the head of an executive department would have the power on his own say so to cover up all evidence of fraud and corruption when a federal court or grand jury was investigating malfeasance in office, and this is not the law.

Perhaps the ultimate claim of executive privilege came during the so-called "Watergate" scandal. The claim of executive privilege raised by the President of the United States was rejected. United States v. Nixon, 418 U.S. 683,41 L.Ed.2d 1039 (1974).

Ironically, it was during the Watergate era that the news media, including Petitioners and the amici curiae, insisted that President Nixon turn over evidence to the special prosecutor on the grounds that "No man is above the law." A decade later, it is the same Petitioner who is covering up a crime and declaring itself "privileged" and "above the law."

The first amendment applies equally to all Americans, without affording a special class of citizenship or privilege to reporters or their employers. This only makes sense, given our nation's rejection of sovereign-privilege and executive privilege.

The notion that a reporter is "privileged" to cover up a crime committed by a "source" seems to have first been rejected

in Ex Parte Nugent, 18 Fed.Cas.471 (D.C.Cir.1848). There, a reporter was found guilty of contempt of congress for refusing to disclose the "source" who "leaked" copies of a proposed treaty with Mexico. The conviction was affirmed even though the treaty ending the Mexican War later became public. Since Nugent, no states have established a common law privilege for reporters. see Adams v. Associated Press, 46 F.R.D. 439,440 (S.D. Tex. 1969).

In holding that reporters have no special first amendment rights in criminal investigations, the courts have not acted out of hostility to the media.[3] Rather, they have acted out of respect for the public's institution, the grand jury. In Nixon v. Sirica, 487 F.2d. 700 (D.C. in 1970), for example, the court held:

> The federal grand jury is a constitutional fixture in its own right, legally independent of the executive. see United States v. Johnson, 319 U.S. 503,510,63 S.Ct. 1233, 87 L.Ed. 1546 (1943). A grand jury may, with the aid of judicial process, Brown v. United States, 359 U.S. 41, 49-50, 79 S.Ct. 539, 3 L.Ed.2d 609 (1959) call witnesses and demand evidence without executive impetus. Hale v. Henkel, 201 U.S. 43,60-65, 26 S.Ct. 370, So.L.Ed. 652 (1906). If the grand jury were a legal appendage of the executive, it could hardly serve its historic functions as a shield for the innocent and a sword against corruption in high places.

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[3] Whether the courts "traditionally" find for the media is not at issue, or even proper argument.

In Florida, of course, not every criminal case goes through the grand jury. We do, however, have the State Attorneys, as independent constitutional officers. Like grand juries, State Attorneys are charged with responsibility to investigate wrongdoing so as to serve as "a shield for the innocent and a sword against corruption in high places."

In our case, someone is leaking ethics commission complaints prematurely. The State Attorney is investigating a violation of a presumptively constitutional criminal statute. The target of the investigation is known only to the Petitioners, who stand to benefit financially from his anonymity. The public "has a right to know" who this source is and why he is leaking materials to the media. Is he acting out of emotion? Is he an employee of the agency? If so, is he receiving unlawful compensation for the leaked material, also in violation of state law? The public, again, has a "right to know." It is ironic indeed that those advocating the "free flow of information" would be parties to a cover-up in a criminal case.

3] BRANZBURG v. Hayes

It is clear that no "privilege" exists for reporters in criminal investigations at common law. The Petitioners and the Amici Curiae, while citing a large number of civil cases discuss a reporter's "limited privilege" in those cases, once again have failed to produce a single case wherein an appellate

court has affirmed any reporter's privilege in <u>criminal investigations</u>.

In <u>Branzburg v. Hayes</u>, 408 U.S. 665, 92 S.Ct. 2646 (1972) the Supreme Court squarely confronted this issue.

The Petitioners do not like <u>Branzburg</u> for a number of reasons, particularly:

(1) Its finding that reporters are the the same as regular citizens and have no special first amendment rights.

(2) Its finding that reporters, while free to <u>print</u> news under the first amendment, have no right to special <u>access</u> to information.

(3) Its finding that reporters cannot withhold the identity of a "source" who is also a lawbreaker. (In fact, this claim was labelled "frivolous").

(4) Its finding that disallowance of any privilege did not act as an unlawful "prior restraint."

(5) Its finding that subpoenas issued in a criminal investigation are <u>not to be subjected to review</u> regarding the relevance of or need for the reporter's testimony or the likelihood of a successful prosecution.

This case represents a point by point assault upon every holding in <u>Branzburg</u>. Curiously, the Petitioners have not told this Court this fact regarding their case. Indeed, the Petitioners insist that this Court should not even look at the official opinion of the Supreme Court.

The Petitioners ask this Court to pay special attention to Justice Powell's short, three paragraph "concurring opinion" (with no citations of authority) and to ignore the official opinion of the Court. The request is incredible, to say the least. To achieve their goal of special privilege, the Petitioners would reject an official opinion of the United States Supreme Court and, on the basis of a three paragraph "concurrence", have this court "reverse" the Supreme Court! The notion is nothing if not novel.

Now let the State of Florida demonstrate why the Petitioners do not want this Court to see what the official opinion says, and why, in a 50 page brief, plus amicus briefs, the media have censored out this free public opinion; contrary to their avowed concern for the "free flow of information."

The Court defined the reporters claims thusly:

> The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime: id,681-682.

The issue was answered several times throughout the opinion:

> Citizens generally are not immune from grand jury subpoenas; and neither the first amendment nor any other constitutional provision protects the average citizen from disclosing to a grand jury information that he receives in confidence. id, 682.

> It is thus not surprising that the great weight of authority is that newsmen are not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation. id, 685.
>
> Thus, we cannot seriously entertain the notion that the first amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it. id, 692.

The Petitioners at bar, citing Gadsden County Times, Inc. v. Horne, 426 So.2d 1234 (Fla.1st. DCA 1983), contend that if a reporter is to be compelled to testify, then he is entitled (unlike other citizens) to a "justification" of the state's "intrusion." The State, say the Petitioners, must satisfy a three-part test set up in Gadsden for civil cases:

(1) That the information sought is relevant to the matter being investigated.

(2) That no alternate source for the information exists.

(3) That there is a "compelling need" for the information.

The Petitioners answer their own test by saying:

(1) The name of Tunstall's source is not relevant in this investigation into the identity of Tunstall's source.

(2) The State should waste time in a criminal case exhausting nebulous leads rather than going to the source: Tunstall.

(3) There is no compelling lead because, now that they are on appeal, the Petitioners have decided that §112.317 Fla.Stat. should be challenged anyway.

What the Petitioners fail to mention, however, is that Branzburg specifically quashes the notion that such an inquiry should be held in criminal cases, stating:

> Although the newsmen in these cases do not claim an absolute privilege against official interrogation in all circumstances, they assert that the reporter should not be forced either to appear or to testify before a grand jury or at trial until and unless sufficient grounds are shown for believing that the reporter possesses information relevant to a crime the grand jury is investigating, that the information the reporter has is unavailable from other sources, and that the need for the information is sufficiently compelling to override the claimed invasion of First Amendment interests. supra at 680[4]

> Because its task is to inquire into the existence of possible criminal conduct, and to return only well founded indictments its investigative powers are necessarily quite broad. "It is a grand inquest, a body with powers of investigation and inquition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. Blair v. United States, 250 U.S. 273,282, 39 S.Ct. 468,471,63 L.Ed. 979 (1919)." supra at 688

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[4] Note the similarity in the 3 part test sought in Branzburg and the request at bar.

> Thus, in the end, by considering whether enforcement of a particular law served a "compelling" governmental interest, the courts would be inextricably involved in distinguishing between the value of enforcing different criminal laws. By requiring testimony from a reporter in investigations involving some crimes but not others, they would be making a value judgment that a legislature had declined to make, since in each case the criminal law involved would represent a considered legislative judgment, not constitutionally suspect, of what conduct is liable to criminal prosecution. supra at 706.

This specific rejection of the very test and the precise issues raised by Petitioners is not coincidental. Branzburg has been assailed by the media since its publication. The Petitioners hope, by not revealing the full holding, to induce this Court to issue a "line item veto" of every facet of Branzburg. This, again, is simply not possible.

The Branzburg decision is correct in asserting that Circuit Courts, already overburdened with filed cases, cannot become "inextricably involved" in pending investigations as well-deciding which laws "ought" to be enforced, guessing "whether anyone will be convicted," delaying criminal investigations with "alternate source" (cat and mouse) games or the like. This is especially true given Branzburg's warning that reporters are not the only people who could raise a first amendment challenge.

> Sooner or later, it would be necessary to define those categories of newsmen who qualify for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods. [CITATION] Freedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets . . . . almost any author may quite accurately assert that he is contributing to the flow of information to the public, that he relies on confidential sources of information, and that these sources will be silent if he is forced to make disclosures before a grand jury. supra, 704-705[5]

Therein lies yet another "trap for the unwary." If this Court does opt to reverse a decision of the United States Supreme Court, it will also have to decide who qualifies as a "reporter," and what qualifies as a "newspaper," "pamphlet," "leaflet" and "information." (The Branzburg Court suggests, wisely, that that task be left to the legislature).

From a practical standpoint, our criminal justice system could not function if every criminal investigation (not even a

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5 The Court (note 40) observed that criminals could set up a paper to shield criminal acticity to create a first amendment roadblock to augment their fifth amendment rights.

case, mind you) could be thwarted by first amendment claims. Imagine the gaggle of appeals over "whether a law ought to be enforced," "whether the ungiven and unknown testimony will, when heard, be relevant "(and inquiry apparently to be made without benefit of a proffer)," the existence of "alternate sources," whether the witness "qualifies" to invoke the personal rights afforded by the constitution. Years of hearings and appeals would extend investigations well beyond the statute of limitations for most crimes. (The investigation at bar has been stalled over a year already).

Can society be forced to suffer this kind of punishment to protect a competitive "edge" held by some private corporations? Indeed, setting up judicial "qualification" of first amendment claimants must result in one of two outrageous consequences:

> (1) Either special "rights" will be extended to wealthy corporations like The Tampa Tribune at the expense of all other authors (would-be competitors) such as free-lance reporters, or;
>
> (2) The constitution will be applied equally to all citizens, with resultant chaos in the criminal justice system.

While major corporations may relish the potential for "special recognition" and a special set of "rights" for their employees - thus enhancing their market position while forcing free-lance writers and small printers out of the market; the

State, and the people it represents, cannot tolerate such an abuse of the constitution for private gain.

Again, it is interesting that this problem has not been addressed by our "free flow of information" advocates.

The Petitioners do, however, waive around the banner of "repression" and, feigning an underdog role, imply that the State, if successful, will crush their ability to locate and report the news. This argument, as usual, fails to mention the official opinion in Branzburg - which rejected the suppression issue as follows:

> It has generally been held that the First Amendment does not guarantee the press a right of special access to information not available to the public generally. supra, 684
>
> But these cases involve no intrusions upon speech or assembly and no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold. supra, 681

Perhaps the most significant "omission" from the Petitioner's brief is the study reported upon by the official Branzburg opinion on the "threat" posed by compelling disclosure:

> In his Press Subpoenas: An Empirical and Legal Analysis, Study Report of the Reporter's Committee on Freedom of the Press 6-12, Prof. Vince Blasi discusses these methodological problems. Prof. Blasi's survey found that slightly more than half of the 975 reporters questioned said that they relied upon regular confidential sources for

at least 10% of their stories. Id at 21. Of this group of reporters, only 8% were able to say with some certainty that their professional functioning had been adversely affected by the threat of subpoena; another 11% were not certain whether or not they had been adversely affected. supra at 695.

Thus, contrary to the forecast of doom in Petitioner's brief, 81 to 92% of all reporters do not support the proposition advanced. Could the report on this survey be yet another reason why the Petitioners do not want this Court to read the official Branzburg opinion?

4] Related Decisions Noting The Absence of Any Privilege to Withhold Evidence From A Criminal Investigation

The Petitioners blithely allege that "this court," "every federal circuit court," "most state courts" and "three of five Florida District Courts" recognize a "reporter's privilege." Incredibly, and certainly not in keeping with the concept of "the free flow of information," the Petitioners fail to mention that:

(1) None of their cases involves a recognition that reporters have a privilege to withhold evidence of a crime.

(2) Most of their foreign decisions involve civil cases and state shield laws.

(3) No federal circuit has ever recognized a reporter's "privilege" in defiance of Branzburg.

(4) No Florida District Court has addressed the issue before this Court except the Fifth District.[6]

The claim that most states recognize a "reporter's privilege" is misleading. It has frequently been noted by state courts across the country that no "common law" privilege is recognized, inasmuch as reporters are no different than any other "mere American." see Opinion of Justices, 373 A.2d 644 (N.H. 1977); People v. Fisher, 342 NYS.2d 731 (4th Dept. 1973); State v. Buchanan, 436 P.2d 729 (9th Cir. 1968) cert.den. 392 U.S. 905; Pennington v. Chaffee, 573 P.2d 1099 (Kan.2nd DCA 1977). It is true, however, that in twenty-six states, "shield laws" have been enacted by state legislatures.[7] see Opinion of Justices, supra. Not one of these states has extended its shield law to cover grand jury or state attorney investigations.

Petitioners' claims regarding the federal circuits is also incorrect. The fact is, none of the Petitioners federal cases support any claim of "privilege" before a grand jury. For example:

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[6] Although in this Court a claim of express and direct conflict was raised to provoke review, this case was acknowledged as one "of the first impression" by the Herald sub Judice.

[7] The 26 states span every federal circuit, and are: Alabama, Alaska, Arizona, Arkansas, California, Delaware, Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee.

The Petitioner's cited case of Riley v. Chester, 612 F.2d 708,14 (3rd Cir. 1979), while discussing the Pennsylvania shield law, made the following salient observation:

> The limitation imposed by the Court in Branzburg v. Hayes on the ability of a journalist to refuse to disclose information is not applicable to the facts in this case.

Riley only proceeded to affirm the effect of the Pennsylvania shield law in a civil case. How, then, can Petitioners rely on this case? Would they have us treat it as they'd have us treat Branzburg (i.e. cite it but not read it)?

The Petitioner also cites to In re Petroleum Products Antitrust Litigation, 680 F.2d 5,9 (2nd Cir. 1982), which discusses the justice department's guidelines (shield rule) but, unfortunately for Petitioners, also states:

> Indeed, this case represents a less compelling need for disclosure than Branzburg v. Hayes, supra, because we are dealing with a civil action rather than questioning by a grand jury.

The State asks why the Petitioners did not reveal this passage to the Court - or are we also to ignore this?

Moving on to another federal circuit, the Petitioners cite Carey v. Hume, 492 F.2d 631, 636 (D.C. Cir. 1974). Once again, the Petitioners deleted the following key passages:

> The troublesome legal issue of the compelled disclosure by a journalist of his sources of information gave rise to this interlocutory appeal (28 U.S.C. §1292(b) from the District Court. It comes to us in the context of a civil action for libel, as contrusted with the criminal setting in which the Supreme Court has most recently examined the question and sustained compulsion. Branzburg v. Hayes.
>
> Hopefully anticipating a different result in Branzburg, appellant was content to present the case to us upon the theory that the First Amendment left no room, under any circumstances, for compelling a newsman to identify his source. That is clearly not the law after Branzburg with respect to criminal proceedings.
>
> There are no federal statutes emboyding a testimonial privilege for newsmen, nor has congress made any special privilege on this score for the District of Columbia.

In United States v. Criden, 633 F.2d 346 (3rd Cir. 1980) the court again noted the absence of any reporter's privilege in Branzburg situations, as did federal courts in Zerilli v. Smith, 656 F.2d 701 (D.C. Cir. 1981); Bruno & Stillman v. Globe Newspapers Co., 633 F.2d 583 (1st Cir. 1980); In re Possible Violations, 564 F.2d 567 (D.C. Cir. 1977).

The Petitioners other cited federal cases either addressed state shield laws or unrelated issues (such as a judge's right to exclude the press from a public trial).

It simply is not correct to say that any federal circuit has not acknowledged the supremacy of Branzburg in situations involving criminal investigations.

4(a) Florida Cases

The Petitioners cite a number of Florida cases which they allege limit the Branzburg case by recognizing a reporter's privilege and by compelling the state to "justify" any subpoena to any reporter in the course of a criminal investigation.

Let us start with the so-called "test."

The "three part test" the Petitioners would use to obstruct criminal investigations is the one set out in Gadsden County Times, Inc. v. Horne, 426 So.2d 1234 (Fla. 1st DCA 1983) (hereafter "Gadsden").

The Gadsden opinion, however, clearly distinguishes civil cases, like itself, from criminal cases. The "qualified privilege" recognized in Gadsden is a privilege for reporters in civil cases only, with Branzburg serving to limit the privilege.

It is odd that the First District's "Gadsden" test, as mentioned before, seems to lift a hypothetical "test" right out of Branzburg and promulgate it for Florida when, in fact, Branzburg used the "test" as an example of inquiries courts should not make.

Gadsden refers back to another civil case decided by this Court; Morgan v. State, 337 So.2d 951,54 (Fla. 1976). This Court distinguished Morgan from Branzburg as follows:

> The present case differs from Branzburg in that the grand jury before whom petitioner appeared was not investigating a crime. A grand jury is ordinarily under no obligation to announce the purpose of any investigation it undertakes, but here the prosecution stipulated in the trial court that the contempt charge was predicated on petitioner's refusal to answer questions asked in the course of an investigation of a violation of §905.24, Fla.Stat.(1975). In keeping with the stipulation, we are bound to conclude that the grand jury was not investigating a criminal matter because §905.24, Fla.Stat.(1975) does not make criminal the conduct it prescribes.

The Fifth District was advised by the amici curiae (who also conducted oral argument for the Petitioners) that this case, inasmuch as it involved a criminal investigation, was "one of the first impression" in Florida. The amici are correct. No Florida court other than the Fifth District has addressed this narrow issue.

The Fifth District, noting that Morgan excepted itself from Branzburg because it was not a criminal case, followed Branzburg.

No "conflict," express, direct or other, can be said to exist in a case of the first impression which follows a federal decision on an issue of federal law, which this Court deemed

"factually distinguishable" from the case which is now cited as providing "conflict." (In other words, this case was incorrectly accepted for discretionary review.) Gadsden and Morgan do not apply in the context of criminal investigations - period.

The Petitioners, however, cite to a covey of Circuit Court decisions which they feel should control.

Again, however, all we seem to have are civil cases, not criminal investigations. see Coira v. Dee Poo Hospital, 48 F.Supp. 105 (malpractice); Hendrix v. Liberty Mutual Ins., 43 F.Supp. 137 (Personal Injury); Harris v. Blackstone Developers, 41 F.Supp. 1974) (which holds reporters do not have a privilege in criminal cases but suggests a need to eliminate "alternate sources"); Schwartz v. Almart, 46 F.Supp. 165(slip and fall); Spiva v. Francover, 38 F.Supp. 49 (dispute over pilot's license); Carr v. State, 46 F.Supp. 195 (inmate suit for transfer).

The only criminal cases even arguably close do not address the issue at bar.

In State v. Stoney, 42 F.Supp. 194 (1974) the Circuit Court ordered a reporter to comply with a defendant's subpoena after being led to utilize a "test" to see if compliance was necessary. The subpoena was a subpoena for trial, not a grand jury, and the materials sought were statements from a known witness (the victim) sought merely for impeachment. The case is not analogous.

In State v. Petrantoni, 48 F.Supp. 49 (1978) again a defendant subpoenaed reporters to testify to their telephone conversations with herself to bootstrap, if necessary, her own testimony at trial. Again, no analogy can be drawn.

The Petitioners go on to cite to a pair of District Court opinions, both from the Second District, which allegedly "support" a reporters right to obstruct justice. The Tribune Co. v. Greene, 440 So.2d 484 (Fla. 2nd DCA 1983) involves the right of a reporter in the context of a criminal trial, not a criminal investigation. The desired testimony was merely cumulative to the State's case against a known defendant!

The Greene case does not even mention Branzburg!

One would hope, since the same counsel represented the Petitioners in Greene, Stoney and this case, that counsel could recognize the difference between a criminal investigation (where a reporter is concealing the identity of a criminal) and a trial involving known evidence and a known defendant. But apparently that is not so. The Second District obviously knows the difference, however, since it does not mention Branzburg in Greene or in Johnson v. Bently, 457 So.2d 507 (Fla. 2nd DCA 1984), another civil case. Again, the amicus Miami Herald also seems to know the difference, since it correctly labelled this case as "one of the first impression" in Florida. Only the Petitioners seem confused.

This brings us to the claim that "three of five" District Courts disagree with the Fifth. The First District does not, since Gadsden is factually distinguishable and says so; the Second District does not, since Morgan and Greene specifically distinguish themselves from Branzburg (or do not mention it at all); the Third District's decision in Laughlin v. State, 323 So.2d 691 (Fla. 3rd DCA 1975) does not, since no grand jury or criminal investigation was involved there either, and the Fourth District assuredly does not. see Satz and Neal v. News and Sun Sentinel, ___So.2d___(Fla. 4th DCA 1985) 10 F.L.W. 1683 (issue avoided, but court refuses to let reporter withhold evidence of a crime, specifically rejecting any "qualified privilege").

Since the Fifth District decided an issue of federal Constitutional law in accordance with a United States Supreme Court decision squarely on point, and since every federal circuit and every state decision has acknowledged the correctness of that same opinion (as they must), the Petitioners cannot assert that the District Court erred.

In the limited area of criminal investigations, by a grand jury or a prosecutor (under §27.04), there is no privilege extended to withhold the name of a lawbreaker just because he feeds "tips" to a reporter. Returning to Branzburg:

> The preference for anonymity of those confidential informants involved in actual criminal conduct is presumably a product of their desire to avoid to

> escape criminal prosecution, and this preference, while understandable, is hardly deserving of constitutional protection. It would be frivolous to assert - and no one does in these cases - that the first amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news source to violate valid criminal laws.
>
> Thus we cannot seriously entertain the notion that the first amendment protects a newsman's agreement to conceal the criminal conduct of his source." supra, 691-92 (emphasis added)

The Petitioners have induced this Court to review a case "of the first impression", with which no state or federal court disagrees, involving a claim of privilege labelled "frivolous" and unworthy of "serious consideration" by the Supreme Court (as final arbiter of this issue) in order to create a rule obstructing grand jury and state attorney investigations by creating a "test" which the Supreme Court has said Courts should never impose.

This honorable Court is thus being asked to reverse a decision of the United States Supreme Court on an issue of federal constitutional law, and, by judicial fiat, to construct for the benefit of a private corporation a legal "privilege" which it obviously cannot squeeze out of the legislature (or obtain by other democratic processes).

If this Court is even considering such a drastic step, the following consequences must be factored into any "judicial shield law."

(1) Florida's separation of powers doctrine.

(2) The effect of hearings and appeals upon the swift apprehension of criminals. (This case has delayed detection and arrest over a year).

(3) Suspension of all statutes of limitations during the pendancy of appeals.

(4) The definition of "who qualifies" to raise a special first amendment claim, since all citizens, however employed, have the same rights.

(5) What is a "reporter", or a "writer."

(6) What is a "newspaper" - and what about the "equal protection" rights of pamphleteers, "shopper" editors, authors and freelancers?

(7) How will uniformity of judicial decisions regarding the "likelihood of conviction" or "whether the law ought to be enforced" be maintained to guarantee equal protection under the law to all suspects.

As stated by the Supreme Court, the decision as to whether society wants to open this "Pandora's Box" is one best left to the legislature.

As stated by the Washington Post - no man is above the law. Even if he works for the Tampa Tribune.

ISSUE II

THE PETITIONERS ARE NOT ENTITLED TO RELIEF ON THEIR REMAINING GROUNDS

The Petitioners' remaining claims are legally and factually unsupported and, in most instances, were not preserved in the lower court. Some of them, in fact, were not even raised in the Fifth District.

1] Whether Tunstall's Alleged Privilege Was Overcome

There is no reporter's privilege to obstruct a criminal investigation. While Florida has recognized a civil case "privilege," the two primary cases, Gadsden and Morgan, both specifically recognize that Branzburg controls in criminal investigations. (That is why Gadsden and Morgan do not conflict with this case).

The record reflects that the Circuit Judge was never apprised of the self-imposed limitations of Morgan and Gadsden, and was not read the controlling official opinion in Branzburg. This resulted in an erroneous "Gadsden" hearing. The only error sub judice was in holding the hearing, not the outcome.

The inapplicability of the "Gadsden" test in the context of a criminal investigation is obvious to everyone, including the Petitioners. It does not take an evidentiary hearing to conclude that the "identity" of an offender is "relevant" or to figure

out that when a confidential communication passes between two people - and the source does not want his identity revealed - the only way of identifying the source is by asking the person he secretly contacted. It does not take an evidentiary hearing to figure out that the State has a compelling need to locate and identify a lawbreaker in a criminal investigation, it being difficult to try a criminal case in the absence of a defendant.

The Petitioners would have us belabor the obvious with a de novo hearing on the "Gadsden" test.

First, they dispute "whether" the trial Court made any findings of fact, claiming the Court "purported to make factual determinations" (P.24) but "signed that order, apparently without even reviewing it in advance." (p. 24). The record does not support this unwarranted attack on the personal integrity of Judge Huffstetler.

In addition, the Petitioners were not entitled to a more detailed order. LaValle v. Della Rose, 410 U.S. 690 (1973). As long as the record supports even a perfunctory order, the cause will not be reversed. Wainwright v. Witt, ___US___,105 S.ct. 844 (1985).

This brings us to the record itself, and a collateral claim of a "due process" violation.

As it stands, the record consists of the unrebutted testimony of prosecutor Hank Hendry, given at the insistence of the Petitioners, into the status of his investigation. Mr. Hendry is the investigating prosecutor under §27.04 and is qualified to

assess and report on the status of his own work. Although some cross examination was attempted by the Petitioners, it was ineffectual. The judge was not offered any evidence, any witnesses and precious little argument by the Petitioners in opposition to Mr. Hendry's testimony.[8] Since, even when both parties to a case call witnesses, a trier of fact is free to accept or reject (even unrebutted) testimony, and since that decision is not subject to review, the record supports the finding of the court. Tibbs v. State, 397 So.2d 1120 (Fla. 1981) Affd. 102 S.ct. 2211 (1982).

Tunstall, et.al, claim they are entitled to trial de novo based upon New York Times v. Sullivan, 376 U.S. 254 (1964). The Times case merely states that questions of "sufficiency" will be reviewed by federal courts. That is also true in Florida, but the difference between sufficiency under Sullivan and weight under Tibbs is amply stated. Sufficiency refers to the "existence" of evidence, while "weight" addresses how the evidence showed have been treated.

The Petitioners unsupported personal attack on counsel is an attack upon his credibility (an issue of weight) rather than the "existence" of his testimony. Using Sullivan as a standard for review, the Petitioners lose.

Next, however, Petitioners demand de novo review based upon the effect of this case on the news gathering process. Branzburg has already addressed the issue:

---

[8] The state rejects the Petitioners claim that Hendry testified "to put Tunstall in jail." Hendry testified to get Tunstall to reveal his source. By refusing to obey the law, Tunstall subsequently put himself in jail.

> We are admonished that refusal to provide a first amendment reporter's privilege will undermine the freedom of the press to collect and disseminate news. But this is not the lesson history teaches us. As noted previously, the common law recognized no such privilege. supra at 699

Of course, Branzburg also held that the first amendment does not give reporters a special right of access to information. It only applies to dissemination of information received. (Which is why Tunstall is not himself charged with any violation of §112.317(6), we suppose).

The State will not address, and renews its objection, to any discussion of non-record matters. The place for making a record is the trial court, not this court. Hill v. State, ___So. 2d___(Fla. 1st DCA 1985) 10 F.L.W. 1335.

2] The Constitutionality of §112.317(6) Fla.Stat. (1981)

Despite obtaining two hearings in Circuit Court on their Gadsden claim, the Petitioners never once suggested, implied or asserted that §112.317(6) is unconstitutional.

The issue was raised de novo in the District Court and was properly rejected as waived. Contrary to the claim at page 27 of Peitioners' brief, "both sides" have not "tenaciously pursued the issue to this Court." The State told the District Court the argument was "improper" and the Court agreed. We never sought review in this Court of a procedurally defaulted issue. The

representation by Petitioners is in error. In any event, we cannot "stipulate" to litigation of de novo claims and "create" a basis for review.

The Petitioners were represented by competent counsel who never alleged that §112.317(6) was unconstitutional. Now, however, Petitioners say the issue is vital, if not central, to our case. If that is true - why was this "vital" argument never raised? Can it be said that competent counsel overlooked the "central" issue at bar?

In truth, the Gadsden test, as litigated, was satisfied. The Petitioners thought of the constitutional issue later, and simply want to induce review. The reason why counsel did not argue the issue is simple: Tunstall lacks standing to raise a constitutional claim on behalf of a third party. The Petitioners realize this but have raised the claim anyway.

"Error," even "constitutional error" is waived if not preserved by timely objection and argument setting forth the facts and precise legal theory supporting the objection. "Implied" arguments or arguments which can be "extrapolated" from other arguments are not preserved for appellate review. Wainwright v. Sykes, 433 U.S. 72 (1977); Engle v. Isaac, 456 U.S. 107 (1982); Brown v. State, ___So.2d___(Fla. 1985) 10 F.L.W. 343; Steinhorst v. State, 412 So.2d 332 (Fla. 1982); State v. Jones, 377 So.2d 1163 (Fla. 1969).

The rubric of "fundamental error" cannot save the Petitioners. The issue before the Circuit Court, and this Court, is "must a reporter comply with an investigative subpoena;" not the challenged

statute. The question of "privilege" is capable of independent resolution without getting into the question of whether some "third party" "ought" to be prosecuted sometime after Tunstall testifies. The prosecution of some third person is irrelevant here.

Suppose Tunstall, as a reporter, received a confession to a murder from a killer the police had not yet captured. Now, suppose the murder and the confession took place before Furman. Could Tunstall refuse to disclose the name of the murderer until he, on the killer's behalf, litigated the constitutionality of the capital punishment statute? Just because the crime here is less serious does not change the principle involved, for Branzburg directs us that courts should not delay a criminal investigation with hearings on the likelihood of a conviction. (We should also note that while §112.317(6) is involved now, further investigation could lead to other charges - a court which killed the investigation before any charges were even filed would be obstructing the function of a constitutional officer by forcing him to elect, prior to any arrest and prior to completing his investigation, what the final charge will be.).

At this time no one has been charged with any crime. Neither Tunstall nor his source have standing to challenge §112.317(6) at this moment. see Rakas v. Illinois, 439 U.S. 128 (1978); State v. Rivera, 400 So.2d 22 (Fla. 4th DCA 1981).

In United States v. Salvucci, 448 U.S. 83, 65 L.Ed.2d 619 (1980), for example, Salvucci lacked standing to contest the

"unconstitutional" search of a co-defendant's mother's apartment even though, as a defendant himself, he faced prosecution. A litigant must, to have standing, show a violation of his rights, not someone else's. Therefore, if Tunstall's source finds that §112.317(6) violates his rights under the first amendment, it is up to the source, not Tunstall, to raise the issue after that source is actually charged under the statute and an actual case or controversy is before a court.

The Petitioners counter by alleging standing under Craig v. Boren, 429 U.S. 190 (1976) and Trushin v. State, 425 So.2d 1126 (Fla. 1982).

Trushin obviously does not apply, since Trushin was an actual defendant. As such, Trushin had standing and, on appeal, could argue constitutionality de novo on the theory that his success would under the crime non-existent. Tunstall lacks standing because neither he nor his source, as yet, can challenge a statute neither is charged with violating. Even so, Trushin limits the right to de novo argument to the "facial constitutionality" of a statute rather than its constitutionality "as applied."

The Petitioners, even if graced with standing, must limit their de novo attack to the facial validity of §112.317(6) Fla. Stat. As we know, they have chosen to attack the statute on the theory that it imposes a "prior restraint" on the mere access to news.

In Times Film Corp. v. Chicago, 365 U.S. 43,81 S.ct. 391 (1961) the Supreme Court held that the term "prior restraint" was not a "self wielding sword." The mere fact that a law may

impose a "prior restraint" does not make the law facially unconstitutional. This simple fact is overlooked by the Petitioners at bar, along with their failure to recognize the difference between a restraint on publication (which involves the first amendment) and a restraint on access to news, which does not always involve the first amendment. Branzburg, Estes v. Texas, 381 U.S. 532 (1966); Zemel v. Rusk, 381 U.S. 1 (1966); Miami Herald Pub. Co. v. Krentzman, 435 U.S. 968 (1978); In re. Express News Corporation, 695 F.2d 807 (5th Cir. 1982); Miami Herald Pub. Co. v. Collazzo, 392 So.2d 333 (Fla. 3rd DCA 1976).

Therefore, given the fact that the Petitioners did not bother to litigate this issue at trial, as well as the fact that there is no facial invalidity to the statute, as well as the fact that, as yet, no one is charged with violating the statute (and maybe no one will be) and as well as the fact that "prior restraints on mere news "gathering" are not unconstitutional per se - or under the first amendment, it is easy to see why the Petitioners have no right to argue the point.

If this investigation leads to an arrest and a charge under the challenged statute, the source, with the media as amici curiae, can litigate the issue of the constitutionality of §317.

To clear up one remaining misstatement by the Petitioners, Craig v. Boren, 429 U.S. 190 (1976) does not vest "standing." In that case, two Oklahoma statutes interacted to limit the sale of beer to males at an age in which females could drink. The statutes were directed to vendors. Mr. Craig, a "minor" male, brought a sex discrimination claim, joined by one Whitener as a vendor and

thus the object of the statutes. Whitener faced more than economic injury, he faced prosecution. These facts are deleted from Petitioners' brief because they show that the Petitioners indirect claim of competitive "injury" (to its news gathering ability) do not vest it with standing.

Without ceding "standing" the State feels compelled to clarify other errors in Petitioners brief regarding the statute.

The statute is alleged to be unconstitutional for punishing "truthful speech." The "speech" being punished is that of the source, not the Petitioners. The Petitioners lack of standing to argue this issue on behalf of the source is obvious. Tribune Co. v. Rudd, 415 So.2d 65 (Fla. 1st DCA 1982)

In Garner v. Fla. Commission on Ethics, 415 So.2d 67,69 (Fla. 1st DCA 1982) the court, citing Fadjo v. Coon, 633 F.2d 1172 (5th Cir. 1981) addressed the non-disclosure/ disclosure ramifications of §112.324 Fla. Stat. (the provision for which §112.317 provides punishment) as follows:

> Although the Fifth Circuit Court of Appeal has determined there is a federal constitutional right of disclosural privacy, a balancing standard rather than the compelling state interest standard is used to measure the challenged action. (emphasis added)

The restraint involved here is merely a slight delay, necessitated by a need to protect public officials from cranks or political opportunists. The restraint is of very short duration, and clearly can survive any balancing test. It is not, as some

might argue, a grand scheme to cover up misconduct.

Note that the absence of a "compelling state interest" test in these cases reinforces the inapplicability of the Gadsden "compelling need test."

The case of Landmark Communications Inc. v. Virginia, 435 U.S. 829 (1978) is not on point. The Petitioners fail to represent the following holding by the Court:

> The narrow and limited question presented is whether the First Amendment permits the criminal punishment of third persons who are strangers to the inquiry, including the news media, for divulging or publishing truthful information regarding confidential proceedings of the Judicial Inquiry and Review Commission. We are not here concerned with the possible applicability of the statute to one who secures the information by illegal means and thereafter discloses it. We do not have before us any constitutional challenge to a state's power to keep the Commission's proceedings confidential or to punish particiapte for breach of this mandate.
>
> Finally, as the Supreme Court of Virginia held and appellant does not dispute, the challenged statute does not constitute a prior restraint. (emphasis added) id, 837.

Our case does not involve full closure, as Landmark does, but just a temporary delay in disclosure - which Landmark recognizes as proper and as a practice in 47 states, the District of Columbia and Puerto Rico. (see Landmark, id, at 834). Also,

Landmark addresses media liability - our case does not. The State asks why the Respondents' dedication to the "free flow of information" did not include disclosure of these facts? Or is this case to be "edited" a la Branzburg?

Our statute only restricts the timing of disclosure, a kind of distinction noted in Landmark as different from the Virginia statute's impact. It must also be noted again that the Tribune, et.al, are not being charged with §112.317(6) - unlike Landmark.

Equally irrelevant and premature is the Petitioner's argument as to whether their source falls within §112.317 because of the lack of proof the source disclosed "his" intention to file a complaint. This is a highly egregious claim, since we do not have the name of the source we do not know whether this source reported on "his" intention or his complaint or not - now do we! The contention is pure nonsense.

Finally, the carefully edited discussion of the Attorney General's opinion fails to mention that the opinion discussed arguments in favor of, as well as against, the statute; and fails to mention that the statute's constitutionality was merely discussed as a caveat, with no final decision of this office being rendered. This office is charged with the responsibility to defend the constitutionality of legislative enactments and cannot, by law, unilaterally strike them. The State resents the omissions.

ISSUE III

TUNSTALL WAS AFFORDED DUE PROCESS

While Tunstall discussed the prospects of appeal with the Court, he never objected on due process or any other grounds when adjudicated and sentenced. Once again, we have a case where errors by counsel are being "shifted" to the state, probably to avoid malpractice liability. This rubric was condemned in State v. Meyer, 430 So.2d 440,443 (Fla. 1983). There is no excuse for counsel's failure to raise this claim at trial and his failure to raise the claim in the Fifth District. How long must the State put up with de novo claims? Does the "first amendment" give special rights to the emedia? If so - then it is the public, not the Petitioners' corporate juggernaut, who are being deprived of due process.

The first amendment does not give reporters a right to "stay" a subpoena while they appeal their claim of "privilege", as noted in New York Times v. Jascalevich, 4 Med.Law Rptr. 1002 (1978). Thus, even if Tunstall had asked for leave to appeal (and he did not) he was not entitled to a stay so he could do so.

The fact is, if Tunstall believed he was entitled to a stay, he should have at least asked for it. If dissatisfied with the quality of the evidence he should have prepared and presented his own. He, after all, requested these hearings, not the state. "Due process" is not violated when one is afforded a full and

fair hearing, Stone v. Powell, 428 U.S. 465 (1976), but happens to lose.

Perhaps Mr. Tunstall should petition for relief from any sentence on the theory of incompetence of counsel, for failing to preserve the record, prepare and present evidence, argue "vital" questions and handle his appeal competently and without resort to de novo argument and non-record materials - but that issue is not before us. What is before us is a claim that Tunstall was "denied" due process. Clearly Tunstall was afforded due process - he just failed to take advantage of it.

CONCLUSION

The assorted claims raised by the Petitioner are devoid of any basis in law. In addition, most of the Petitioners' claims are not properly before this court, having never been raised at trial or on appeal.

WHEREFORE, the Petitioners must not be afforded a further opportunity to obstruct justice, no matter "who" they are.

Respectfully submitted,

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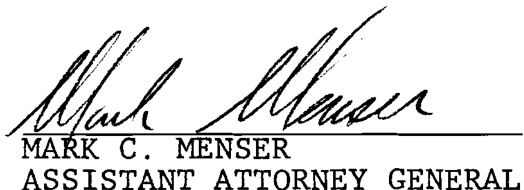
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of Respondent has been furnished by United States Mail to HOLLAND & KNIGHT, Julian Clarkson, Gregg D. Thomas, Steven L. Brannock, Mike Piscitelli, Post Office Box 1288, Tampa, Florida 33601, this 13th day of August 1985.



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