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IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,195

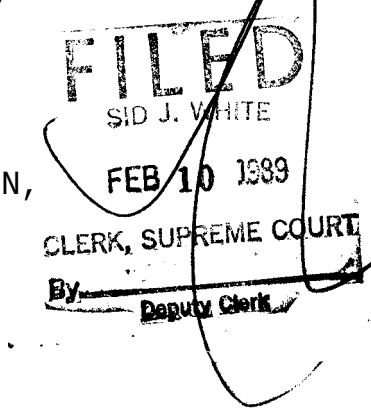
THE MIAMI HERALD PUBLISHING COMPANY, a division of Knight-Ridder, Inc. and JOEL ACHENBACH,

Petitioners,

vs.

ARISTIDES MOREJON,

Respondent.



ON APPLICATION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

The Respondent, ARISTIDES MOREJON, is the defendant in the pending cause in the trial court and the Petitioners, The Miami Herald and Joel Achenbach, were the unsuccessful movants in the trial court and petitioners in the Third District Court of Appeal. The symbol "R" will refer to the record filed in this court, and the symbol "A" will refer to the petitioners' appendix in the district court, which is part of the record but which has been separately paginated by the clerk. The respondent's appendix in the district court has been paginated by the clerk as 39-90 of the record ("R").

STATEMENT OF THE CASE AND FACTS

The defendant, Aristides Morejon, stands charged with a narcotics offense entailing a fifteen year mandatory minimum sentence in the event of conviction (A. **66, 115-116;** § 893.135(1)(b)(3), Fla.Stat. **(1985)).** Mr. Morejon maintains, as he did below, that a valid consent to search luggage, which search gave rise to the instant charge, was not obtained by the arresting officers, and that said luggage was searched in violation of his Fourth Amendment rights (A. **14-17, 168).** A hearing on Mr. Morejon's motion to suppress has not yet been held: it pends resolution of the question presented herein (A. **167-171).** [The defendant remains incarcerated, as he has continuously been from the date of arrest, because indigent and unable to post bond.]

On the morning of October 2, **1986,** defendant Aristides Morejon and co-defendant Pablo Lana were arrested in a public concourse at the Miami Airport and charged with trafficking in cocaine, by Metro-Dade police officers John Facchiano, Claude Noreiga and Connie Mallia (A. **30, 63-66, 114, 160).** The officers' testimony is that a voluntary consent to search luggage was obtained (A. **61, 108-109, 154-156).** Observing the event and taking notes was a Miami Herald reporter, Joel Achenbach, who was present by prearrangement with police (A. **31-34, 36-37, 54-55, 68, 78, 86-89, 104, 106-107, 144-146, 160).** There were no other witnesses (A. **168;** R. **85).** On December **14, 1986,** the Herald in its Sunday Tropic Magazine published an article authored by Mr. Achenbach, which article referred to, and included certain

details of, the arrest and search herein (A. 31-34, 144-145, 173-174).

In a discovery response filed pursuant to Fla.R.Crim.P. 3.220, Mr. Achenbach was listed by the prosecution as a witness having information which might be relevant to the offense charged (R. 85). Based upon this discovery response and upon the depositions of the officers which established that Mr. Achenbach was standing a few feet away during the arrest and search, taking notes, a subpoena duces tecum was issued on behalf of Mr. Morejon to him for deposition (A. 31-34, 54-55, 78, 104, 106-107, 144-146, 160). A motion to quash the subpoena was filed by the Herald and Mr. Achenbach, and after a hearing occurring on the dates of June 23 and 25, 1987 (R. 40-84; A. 241-266), the trial court ruled that there was no First Amendment privilege which would permit Mr. Achenbach to refuse to testify about the material events, i.e., the airport search and arrest, which he had personally observed (A. 167-171). The court accordingly denied the motion to quash. [The trial court alternatively concluded that, even if a privilege were held to attach, such privilege was overcome by a considered weighing of the respective interests involved (A. 170)]. A stay of enforcement of the subpoena was entered pending completion of appellate review (A. 170-171).

Upon the Herald's and Achenbach's petition for common-law certiorari, the panel of the Third District Court of Appeal (Judges Hubbart, Pearson and Ferguson), unanimously held that no First Amendment privilege existed which would permit Mr.

Achenbach to refuse to testify about his eyewitness observations of the undisputedly material airport arrest and search. Miami Herald Publishing Co. v. Morejon, 529 So.2d 1204 (Fla. 3d DCA 1988).

At the core of the Third District's holding is the recognition that:

> [Journalistic privilege] has utterly no application to information learned by a journalist as a result of being an eyewitness to a relevant event in a subsequent court proceeding, such as the police arrest and search of a defendant in a criminal case. Indeed, no court in Florida or, to our knowledge, in the country, has ever extended the news journalist's qualified privilege to such an extreme as to include such eyewitness testimony: we decline to be the first court to so hold. Just as any other private citizen is expected to give his eyewitness testimony to such relevant events in subsequent court proceedings, so, too, a journalist, as a citizen, is expected to give similar testimony. The fact that the journalist is on a newsgathering mission when he or she witnesses such a relevant event cannot change this result because the ability of the journalist to gather and report on the witnessed event is not substantially threatened by requiring the disclosure of what was seen in a subsequent court proceeding, and thus no substantial free-press interests are imperiled. Moreover, the fact that it is inconvenient for a journalist to respond to a witness subpoena and give his eyewitness testimony is of no constitutional significance; all persons who witness such events are equally inconvenienced by having to respond to such witness subpoenas, and a journalist occupies no privileged position in this respect from any other person in the community. [citations omitted]

Id. at 1208.

The court certified for review by this court the following question as one of great public importance:

> [W]hether a news journalist has a qualified privilege under the First Amendment to the United States Constitution, as interpreted by the Florida Supreme Court in Morgan v. State, 337 So.2d 951

(Fla. 1976) and Tribune Co. v. Huffstetler, 489 So.2d 722 (Fla. 1986), to refuse to divulge information learned as a result of being an eyewitness to a relevant event in a criminal case -- i.e., the police arrest and search of the defendant -- when the journalist witnesses such event in connection with a newsgathering mission.

Id. at 1205.

This court's discretionary jurisdiction was timely invoked by notice filed on October 12, 1988.

SUMMARY OF ARGUMENT

At common law, there was no reporter's privilege even as to confidential sources or information, and the United States Supreme Court has rejected the contention that there is a First Amendment reporter's privilege as such, as distinct from the recognition that First Amendment interests ought to be taken into account in the issuance and enforcement of judicial process. The court has long and consistently held that every citizen has a duty to testify in judicial proceedings, and this is particularly true in criminal proceedings.

A claim of First Amendment reporter's privilege becomes significantly diluted when non-confidential rather than confidential information is sought, particularly in a criminal case. Neither of this court's two decisions on the issue suggests that if a reporter's privilege is recognized, it should extend beyond the context of confidential information or sources, and neither of the decisions suggests a rigid test in determining whether a privilege when recognized should be held to prevail or be overcome. Moreover, like any other privilege, the burden is initially placed on the party asserting it. In this context, that means a showing both that the party asserting it is entitled to claim it, and that a confidential source of information is implicated and that the impact of disclosure on the free flow of information is more than speculative.

The Florida Legislature has enacted a restrictive statute regarding privileges, and has declined to enact a reporter's privilege. That declination should be given deference,

particularly where non-confidential information or materials are involved.

Finally, the case for privilege is at its weakest when eyewitness observations are involved; to the respondent's knowledge, each court which has ruled on the question has held that there is no privilege in such circumstances.

ARGUMENT

WHERE NO FIFTH AMENDMENT CLAIM OF COMPELLED SELF-INCRIMINATION IS INVOLVED, NEITHER A REPORTER NOR ANY OTHER MEMBER OF SOCIETY HAS A CONSTITUTIONAL PRIVILEGE, FIRST AMENDMENT OR OTHERWISE, TO REFUSE TO TESTIFY TO EYEWITNESS OBSERVATIONS RELEVANT TO A CRIMINAL PROCEEDING.

> "Are men of the first rank and consideration – are men high in office – men whose time is not less valuable to the public than to themselves – are such men to be forced to quit their business, their functions, and what is more than all, their pleasure, at the beck of every idle or malicious adversary, to dance attendance upon every petty cause? Yes, as far as it is necessary, they and everybody. ... Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach, while a chimney-sweeper and a barrow-woman were in dispute about a halfpennyworth of apples, and the chimney-sweeper or the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No, most certainly."

The Works of Jeremy Bentham 320-321 (J. Bowring ed. 1843), quoted in Branzburg v. Hayes, 408 U.S. 665, 688 n. 26, 92 S.Ct. 2646, 2660, 33 L.Ed.2d 626 (1972).

The Petitioners have renewed before this Court an argument, rejected by both lower courts, of a broad-based claim of reporter's privilege with an accompanying reflexive application of a strict three-part test in all circumstances, without differentiating such significantly different contexts as civil versus criminal; confidential information or sources as compared with non-confidential information as compared with eyewitness observations or physical evidence of crime; or pertinent authority bearing on the source of a privilege or lack thereof, i.e., constitution, statutory shield provision, rule of evidence, or, as in Florida, the legislative declination to enact a

reporter's privilege and express non-recognition of privilege unless grounded in a constitutional provision. For the reasons which will be developed herein, the petitioner's sweeping argument in this case must be flatly rejected.

NO COMMON-LAW REPORTER'S PRIVILEGE

At common-law, there was no journalist's or reporter's privilege, even as to information obtained in confidence. In Clein v. State, 52 So.2d 117 (Fla. 1950), a reporter authored two published stories which referred in detail to testimony given before the Dade County grand jury as to gambling and attempted bribery, and a pending indictment. Id. at 117-118. The reporter was, as a result, issued a subpoena by the grand jury which was seeking information about the apparent breach of secrecy of its proceedings. Id. at 118. The reporter responded to the subpoena and submitted to interrogation by the grand jury, but refused to answer those particular questions seeking the source of his information. Id. at 118-119. In upholding the judgment of contempt and thirty-day sentence imposed upon the reporter, this court held:

> Members of the journalistic profession do not enjoy the privilege of confidential communication, as between themselves and their informants, and are under the same duty to testify, when properly called upon, as any other person.

Id. at 120.

See also, Branzburg v. Hayes, 408 U.S. 665, 685-686, 92 S.Ct. 2646, 2659, 33 L.Ed.2d 626 (1972):

> At common law, courts consistently refused

> to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury. ... These courts have applied the presumption against the existence of an asserted testimonial privilege, [citation omitted], and have concluded that the First Amendment interest asserted by the newsman was outweighed by the general obligation of a citizen to appear before a grand jury ~~or at~~ trial, pursuant to a subpoena, and give what information he possesses.

Id. (Citing numerous cases, including Clein v. State, for the proposition) (emphasis supplied).

As noted in Branzburg, n. 29, 408 U.S. at 690, 92 S.Ct. at 2646, and by the Florida courts in a variety of contexts, see, e.g., Hoyas v. State, 456 So.2d 1225, 1228 (Fla. 3d DCA 1984) (attorney-client privilege), all privileges are an "exception to the general duty to disclose", an obstacle "to the investigation of the truth" and "to the administration of justice", and "ought to be strictly confined within the narrowest possible limits consistent with the logic of [their] principle." See 8 J. Wigmore, Evidence §§ 2192, 2291 (McNaughton rev. 1961).

UNITED STATES SUPREME COURT -- BRANZBURG v. HAYES -- NO FIRST AMENDMENT REPORTER'S PRIVILEGE

In Branzburg v. Hayes, (Justice White authoring the opinion for the court joined by Chief Justice Burger, Justice Blackmun, Justice Rehnquist, with Justice Powell concurring), the court held in consolidated cases of reporters from whom state or federal grand juries sought compelled disclosure of confidential sources or confidential information, that absent harrassment or a bad faith purpose the First Amendment does not provide either an

absolute or a conditional First Amendment privilege to refuse to testify. 408 U.S. at 690, 702; 99 S.Ct. at 2661, 2667.

Justice Powell's concurring opinion has been the subject of sufficient gloss and misinterpretation that it bears repeating in full:

> I add this brief statement to emphasize what seems to me to be the limited nature of the Court's holding. The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources. Certainly, we do not hold, as suggested in Mr. Justice STEWART's dissenting opinion, that state and federal authorities are free to "annex" the news media as "an investigative arm of government." The solicitude repeatedly shown by this Court for First Amendment freedoms should be sufficient assurance against any such effort, even if one seriously believed that the media – properly free and untrammeled in the fullest sense of these terms – were not able to protect themselves.
>
> As indicated in the concluding portion of the opinion, the Court states that no harrassment of newsmen will be tolerated. If a newsmen believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.*

> In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection.
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> * It is be remembered that Caldwell asserts a constitutional privilege not even to appear before the grand jury unless a court decides that the Government has made a showing that meets the three preconditions specified in the dissenting opinion of Mr. Justice Stewart. To be sure, this would require a "balancing" of interests by the court, but under circumstances and constraints significantly different from the balancing that will be appropriate under the court's decision. The newsman witness, like all other witnesses, will have to appear: he will not be in a position to litigate at the threshold the State's very authority to subpoena him. Moreover, absent the constitutional preconditions that Caldwell and that dissenting opinion would impose as heavy burdens of proof to be carried by the State, the court – when called upon to protect a newsman from improper or prejudicial questioning – would be free to balance the competing interests on their merits in the particular case. The new constitutional rule endorsed by that dissenting opinion would, as a practical matter, defeat such a fair balancing and the essential societal interest in the detection and prosecution of crime would be heavily subordinated.

408 U.S. at 709-710, 92 S.Ct. at 2671.

Thus, in no uncertain terms, Justice Powell rejected the three-part test proposed by the Branzburg dissent, and rejected the idea of a presumptive privilege, as distinct from a case-by-case adjudication and balancing of the competing constitutional and societal interests.

In rejecting the position urged by the petitioners herein, even as to confidential materials, the court in In re Grand Jury Proceedings (Storer Communications, Inc. v. Giovan), 810 F.2d 580 (6th Cir. 1987), pertinently observed:

> [The reporter] insists, however, that when his reading of Justice Powell's concurring opinion is superimposed upon Justice White's majority decision, the government is required to make "a clear and convincing showing of relevancy, essentiality, and exhaustion of non-media sources" for obtaining the information before he can be compelled to testify. In arguing that this amounts to a "qualified privilege," Stone relies heavily upon the dissenting opinion of three justices in Branzburg, and upon opinions from other circuit courts.
>
> Because we conclude that acceptance of the position urged upon us by [the reporter] would be tantamount to our substituting, as the holding of Branzburg, the dissent written by Justice Stewart (joined by Justices Brennan and Marshall) for the majority opinion, we must reject that position.
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> . . . .
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> ... Justice Powell's concurring opinion is entirely consistent with the majority opinion, and neither limits nor expands upon its holding, but ..., instead, it responds to what Justice Powell perceived as an unwarranted characterization of that holding by Justice Stewart.
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> Perhaps Justice Powell's use of the term "privilege" has proved too great a temptation for those inclined to disagree with the majority opinion. In the sense that the balancing referred to by Justice Powell, when instigated by a reporters' seeking to protect a confidential source, may result in a denial to a party of the use of evidence which is reliable, one is reminded of the invocation of a "privilege," as contrasted with an "exclusion" which prohibits the introduction of evidence which is unreliable or calculated to mislead or prejudice. But, this balancing of interests should not then be elevated on the basis of semantical confusion, to the status of a first amendment constitutional privilege. [footnote omitted].

Id. at 583-584, 585-586.

See also, In re Farber, 98 N.J. 259, 394 A.2d 330, 334 (N.J.

1978), cert. denied ~~sub nom~~. New York Times v. New Jersey, 439 U.S. 997, 99 S.Ct. 598, 58 L.Ed.2d 670 (1978) ("We do not read Justice Powell's opinion as in any way disagreeing with what is said by Justice White."); Zurcher v. Stanford Daily, 436 U.S. 547, 568-569, 98 S.Ct. 1970, 1983, 56 L.Ed.2d 525 (1978) (Powell, J., concurring) ("If the Framers had believed that the press was entitled to a special procedure, not available to others, when government authorities required evidence in its possession, one would have expected the terms of the Fourth Amendment to reflect that belief."); Herbert v. Lando, 441 U.S. 153, 178, 99 S.Ct. 1635, 1650, 60 L.Ed.2d 115 (1979) (Powell, J., concurring) ("I agree with the Court that the explicit constitutional protection of First Amendment rights in a [defamation] case ... should not be expanded to create an evidentiary privilege.").

OTHER UNITED STATES SUPREME COURT CASES - DUTY TO TESTIFY

In a broad assertion of the existence of a "standard" First Amendment analysis, the Petitioners selectively cite (e.g., id. at 23, 26) a number of United States Supreme Court decisions which have nothing whatever to do with the issues presented by this case. Contrary to the characterization of Petitioners, the United States Supreme Court has repeatedly emphasized, in a variety of contexts and over assertions of First Amendment or other constitutional privileges, that every citizen has a duty to testify in judicial proceedings. In Blair v. United States, 250 U.S. 273, 39 S.Ct. 468, 63 L.Ed.2d 979 (1919), the court stated:

> [T]he giving of testimony and the attendance upon court or grand jury in order to testify

> are public duties which which every person within the jurisdiction of the government is bound to perform.... The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public .... [It is a duty which is] onerous at times, yet so necessary to the forms and modes established in our system of government(.)

Id., 250 U.S. at 281-283.

The duty to testify has been held paramount to claims by a witness of fear for his life and the lives of the members of his family, Piemonte v. United States, 367 U.S. 556, 81 S.Ct. 1720, 6 L.Ed.2d 1028 (1961), and it has been held to overcome claims of undue burden and sacrifice, New York v. O'Neill, 359 U.S. 1, 79 S.Ct. 564, 3 L.Ed.2d 585 (1959). In O'Neill, an Illinois resident, while vacationing in Florida, was served a subpoena to appear before a New York grand jury. The Supreme Court, in rejecting the witness' claim of a right not to appear, stated:

> [A] citizen cannot shirk his duty, no matter how inconvenienced thereby, to testify in criminal proceedings and grand jury investigations. ... There is no constitutional provision granting relief from this obligation to testify(.)

Id., 79 S.Ct. at 571.

Historically, justices of the United States Supreme Court sitting on circuit cogently stated the point:

> The constitution gives to every man, charged with an offence, the benefit of compulsory process, to secure the attendance of his witnesses. I do not know of any privilege to exempt members of congress from the service, or the obligations, of a subpoena, in such cases. United States v. Cooper, 4 Dall. 341, 1 L.Ed. 859 (1800) (Chase, J., sitting on Circuit).

"That the president of the United States may be subpoenaed,

and examined as a witness, and required to produce any paper in his possession, is not contraverted." United States v. Burr, 25 Fed. Cas. pages 187, 191 No. 14,654 (C.C. Va. 7). Yet he "may have sufficient motives for declining to produce a particular paper, and those motives may be such as to restrain the court from enforcing its production." A letter to the President "may relate to public concerns" and not be "forced into public view." Id. at 192. But where the paper is shown "to be essential to the justice of the case," "the paper [should] be produced, or the cause be continued." Id. (Chief Justice Marshall, presiding in the trial of Aaron Burr).

Of course, in rejecting even a conditional First Amendment privilege for newspersons in Branzburg v. Hayes, Justice White's opinion for the court, joined by Chief Justice Burger, Justice Blackmun, and Justice Rehnquist, with Justice Powell concurring, stated:

> 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. Citizens generally are not constitutionally 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 has received in confidence. [footnote omitted] The claim is, however, that reporters are exempt from these obligations because if forced to respond to subpoenas and identify their sources or disclose other confidences, their informants will refuse or be reluctant to furnish newsworthy information in the future. This asserted burden on news gathering is said to make compelled testimony from newsmen constitutionally suspect and to require a privileged position for them.

* * *

> We are asked to create another [privilege] by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do. [footnote omitted]

408 U.S. at 682, 690, 92 S.Ct. at 2657, 2661.

> The privilege claimed here is conditional, not absolute; given the suggested preliminary showings and compelling in need, the reporter would be required to testify. Presumably such a rule would reduce the instances in which reporters could be required to appear, but predicting in advance when and in what circumstances they could be compelled to do so would be difficult. Such a rule would also have implications for the issuance of compulsory process to reporters at civil and criminal trials.

408 U.S. at 702, 92 S.Ct. at 2667.

See also, United States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974):

> We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.
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> . . . .
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> It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced.

418 U.S. at 709, 711, 94 S.Ct. at 3108, 3109 (holding that even executive privilege asserted by president in tape recordings and documents, based on confidentiality, must yield to subpoena issued in relation to pending criminal prosecution).

Nor have any United States Supreme Court decisions which deal with the specific question of the judicial system's need for evidence in the slightest respect suggested that the "least restrictive means" analysis urged by the petitioners, unquestionably applicable in other contexts such as free expression or access cases, applies or applies in the way the petitioners assert. For instance, in Herbert v. Lando, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979), the court held that in a defamation action even by a public figure, the First Amendment does not bar direct inquiry into the editorial processes, thoughts, opinions, mental impressions, and conclusions of those responsible for publication.

In Zurcher v. Stanford Daily, 436 **U.S.** 547, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978), the court held that there was nothing offensive to the First Amendment in a search, pursuant to valid warrant and thus by definition without notice, for criminal evidence at the location of a third-party newspaper, stating:

> Neither the Fourth Amendment nor the cases requiring consideration of First Amendment values in issuing search warrants, however, call for imposing the [presumptive requirement of a subpoena unless impracticable] ordered by the District Court. Aware of the long struggle between Crown and press and desiring to curb unjustified official intrusions, the Framers took the enormously important step of subjecting searches to the test of reasonableness and to the general rule requiring search warrants issued by neutral

> magistrates. They nevertheless did not forbid warrants where the press was involved, did not require special showings that subpoenas would be impractical, and did not insist that the owner of the place to be searched, if connected with the press, must be shown to be implicated in the offense being investigated.

436 U.S. at 565, 98 S.Ct. at 1981.[1]

THIS COURT'S DECISIONS: MORGAN v. STATE AND TRIBUNE CO. v. HUFFSTETLER

This court has on two occasions subsequent to Branzburg passed upon the question of press privilege. Neither case is dispositive of the instant one.

In Morgan v. State, 337 So.2d 951 (Fla. 1976), a newspaper article was published under a reporter's byline setting forth a synopsis of a sealed grand jury presentment. Id. at 952. On appeal from an initial contempt citation for failing to disclose the source of the information to the state attorney, the Second District Court of Appeal held that the statute in question, providing for the secrecy of grand jury proceedings, did not include a penal provision and that therefore the subject matter of the state attorney's investigation did not relate, as required, to a violation of criminal law. The conviction was reversed. Id. at 952. Prior to that reversal, the reporter had been held in contempt a second time for failure to answer

[1] The petitioners would undoubtedly persist in their characterization of Zurcher as being "overruled" by Congress, but it must observed both that the legislation is merely one of a statutory preference for subpoenas, see n. 13, infra p. 48, and that the court's resolution of the constitutional issues is controlling insofar as pertinent to the issues presented herein.

questions in the presence of the grand jury.

The contempt conviction for the latter refusal was upheld by the second district. Upon review, this Court initially discussed the decision in Clein v. State, 52 So.2d 117 (Fla. 1950), and noted, without expressly approving or disapproving, the conclusion in both the decision therein quashed, and of the parties before it, that Clein had been superseded by Branzburg. Id. at 953. It may be observed that the notion of supersession is somewhat puzzling, inasmuch as Clein was among the decisions cited by the Supreme Court in the development of its own holding. Branzburg, 408 U.S. at 685, 92 S.Ct. at 2659. In any event, after discussing Branzburg, this Court observed of the statute under which the contempt citation had been upheld that the sole cognizable interest sought to be vindicated was avoiding the possibility of injury to private reputation: "These contempt proceedings were not brought to punish violation of a criminal statute and were not part of an effort to obtain information needed in a criminal investigation." Id. at 956. Thus, Morgan is not controlling in the instant context.

Similarly, although in Tribune Co. v. Huffstetler, 489 So.2d 722 (Fla. 1986), in applying an approach of "striking the balance" between protection of confidential sources and enforcement of a criminal statute, i.e., that which proscribes disclosure of the filing of an ethics complaint, it was held that as in Morgan, the principal interest sought to be vindicated was a private interest in reputation, and that in the particular balance a press privilege prevailed. The limited nature of the

holding was explicitly stated:

> The issue is whether a reporter, subpoenaed in a state attorney's investigation, has a qualified privilege against revealing the identity of a source whose information violated Section 112.317(6), Florida Statutes (1981). Weighing the limited and qualified privilege that a reporter has to protect his sources of information against the public interests in prosecution for a violation of this particular statute, we hold that the reporter's privilege prevails.

Id. at 722-723 (emphasis supplied).[2]

Recognizing that these decisions are narrow in scope and flexible in approach, the Petitioners have invited this court both to extend the limited and qualified privilege across the board -- to nonconfidential as well as confidential sources or information, to published as well as unpublished information, and even to eyewitness observations of crime in a public place -- and to accompany the broad privilege with a rigid three-part test. The invitation should be carefully considered and expressly declined.

FLORIDA DISTRICT COURT OF APPEAL DECISIONS

As can be gleaned, although not readily, from the Brief of Petitioners (at 17-20), the Florida District Court of Appeal decisions fall at various points along the spectrum of possible holdings regarding the existence, scope and application of

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[2] The Amicus Tribune Co. asserts that "(i)n both Huffstetler and Morgan, this Court extended the privilege to encompass journalists who possessed sole knowledge of the very commission of a crime." (Amicus, Brief at 8). If true, and as to this the Amicus should be taken at its word, then perhaps re-examination of the particular balancing and case outcomes is appropriate.

a reporter's privilege. The decision below and that in Satz v. News and Sun-Sentinel Co., 484 So.2d 590 (Fla. 4th DCA 1985), rev. denied, 494 So.2d 1152 (Fla. 1986) found no privilege in, respectively, eyewitness observations or photographs in a criminal context. In re Tierney, 328 So. 40 (Fla. 4th DCA 1976) found no privilege with respect to confidential sources in the investigation of a grand jury leak. While the Petitioners question the validity of Tierney because decided before this Court's decision in Morgan, the controlling distinction is that Morgan found the leak to involve a non-criminal matter, see 337 So.2d at 954, whereas Tierney did involve a criminal matter, see 328 So.2d at 42. (Compare § 905.24 with § 905.27, Fla.Stat. (1975)). Each of these decisions logically rejects application of the three-part test.

Gadsden County Times, Inc. v. Horne, 426 So.2d 1234 (Fla. 1st DCA 1983), rev. denied, 441 So.2d 631 (Fla. 1983), which pronounced a presumptive privilege and three-part test, did not purport to go beyond the limited context there involved of confidential sources and a civil case. Id. at 1240-1241. Kridos v. Vinskus, 483 So.2d 727 (Fla. 4th DCA 1986) was not even a case involving reporter's privilege, but rather that of an off-duty, uninvolved police officer subpoenaed as an expert witness by a criminal defendant. Id. at 728. In discussing the arguments raised against the subpoena, the court observed in passing the three-prong test pronounced in Gadsden County Times, Inc. and noted that it was limited to civil cases. Id. at 729.

The decisions in Geyelin v. Pinellas County, 497 So.2d 999

(Fla. 2d DCA 1986) and Laughlin v. State, 323 So.2d 691 (Fla. 3d DCA 1976), cert. denied, 339 So.2d 1170 (Fla. 1976), do not warrant discussion because of their summary nature.

The proposition of privilege was broadly stretched in Johnson v. Bentley, 457 So.2d 507 (Fla. 2d DCA 1984), applying it to non-confidential, unpublished photographs of an automobile accident, and in Tribune Co. v. Green, 440 So.2d 484 (Fla. 2d DCA 1983), rev. denied, 477 So.2d 886 (Fla. 1984), applying it in a criminal case to non-confidential, published sources of information. The justifiability of the latter extension is particularly questionable.

Limitations of space do not permit extensive discussions of Waterman Broadcasting of Florida, Inc. v. Reese, 523 So.2d 1161 (Fla. 2d DCA 1988) and CBS, Inc. v. Cobb, 13 FLW 2483 (Fla. 2d DCA Nov. 7, 1988), emergency petition denied, No. 73,276 (Fla. Nov. 5, 1988), albeit in upholding disclosure, both signify the extensive litigation necessary to obtain even non-confidential information necessary to the prosecution or defense of a first-degree murder case.

Finally, in Carroll Contracting, Inc. v. Edwards, 528 So.2d 951 (Fla. 5th DCA 1988), in the first instance of its reaching a claim of privilege, the Fifth District questioned "(w)hether there is a First Amendment protection against requiring [a] newspaper to produce" nonconfidential photographs and photographs of an auto accident. Id. at 954. It did not reach the question though, because it found a sufficient basis to overcome any privilege. Id. at 954. The Respondent does not agree with the

Petitioner's assertion that the Carroll Contracting court considered each of the elements of the three-part test: to the contrary, the court simply gave a reasonable consideration to the respective interests involved. Id. at 954.

THE FLORIDA LEGISLATURE: DECLINATION TO ENACT A SHIELD STATUTE, AND EXPRESS STATUTORY LIMITATION ON PRIVILEGES GENERALLY

When Branzburg was decided in 1972, seventeen states provided some form of statutory protection of a news reporter's confidential sources. Id., n. 27, 408 U.S. at 689, 92 S.Ct. at 2660-2661. Since Branzbura, in addition to those of the seventeen jurisdictions which have expanded their protections in response, nine additional states have enacted shield laws extending a newsperson's privilege. See, e.g., In Re Contempt of Wright, 108 Idaho 418, 700 P.2d 40, 44 n. 1 (Idaho 1985) and In re Roche, 381 Mass. 624, 411 N.E.2d 466, 474 n. 13 (Mass. 1980) (collecting jurisdictions).

In Florida, the legislature has declined to enact any reporter's privilege,[3] and to the contrary has enacted a

[3] In each of the four legislative sessions following Branzburg, bills were introduced in the Florida legislature to amend the evidence code and establish some form of newsperson's privilege -- 1973: S.B. 104; 1974: S.B. 536: 1975: H.B. 1307 and companion S.B. 1151; 1976: H.B. 1307 and companion S.B. 443, which generated a committee substitute. None were enacted. The 1976 committee substitute (House Judiciary - Civil) for S.B. 443 would have established a privilege and 3-part test substantially identical to that argued by the Petitioners herein. Unless the asserted privilege and 3-part test are considered etched in constitutional stone, which is highly doubtful to say the least, the legislature's declination to adopt them should be given deference. Cf. Mayo v. American Agricultural Chemical Co., 101 Fla. 279, 133 So. 885, 887 (1931); ("The omission on final enactment of a clause of the original 'bill is strong evidence that the Legislature did not intend that the statute should (Cont'd)

restrictive statute regarding privileges. The Florida Evidence Code, § 90.501, Florida Statutes (1987) provides:

> Privileges recognized only as provided:
>
> Except as otherwise provided by this chapter, any other statute or the Constitution of the United States or of the State of Florida, no person in a legal proceeding has a privilege to:
>
> (1) Refuse to be a witness.
>
> (2) Refuse to disclose any matter.
>
> (3) Refuse to produce any object or writing.
>
> (4) Prevent another from being a witness, from disclosing any matter, or from producing any other object or writing.

Thus, unlike federal courts (many decisions of which the Petitioners have relied upon at some length), which are granted case by case flexibility under Rule 501 of the Federal Rules of Evidence to develop rules of privilege, "the courts of Florida are statutorily forbidden to do so." Marshall v. Anderson, 459 So.2d 384, 386 (Fla. 3d DCA 1984) (holding state courts precluded from adopting academic testimonial privilege).

~~See also~~, Procter & Gamble Co. v. Swilley, 462 So.2d 1188 (Fla. 1st DCA 1985) (ruling in accord with Marshall as to lack of authority to create an academic privilege, and also holding, ~~inter alia, i~~n product liability action no corporate privilege to

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require that which was purposely omitted.") State ex rel. Finlayson v. *Amos*, 76 Fla. 26, 79 So. 433 (1918). ("There is no authority for a department of the government charged with the execution of a law, to restore a provision which the Legislature strikes from the act when in progress of its passage. Whatever the Legislature does within its constitutional authority, no other department of the government may change, modity, alter, or amend.")

refuse to disclose research furnished corporation by independent researchers it retained, notwithstanding promise to disclose researcher's data in-house only); State v. Castellano, 460 So.2d 480 (Fla. 2d DCA 1984) (despite promise of confidentiality by Citizens Dispute Settlement Program mediator to parties, including victim, of confidentiality of communications, and notwithstanding assertion that program was investigatory arm of state attorney, no legal basis under § 90.501 to create privilege, and criminal defendant could subpoena such mediator: "If confidentiality is essential to the success of the [dispute settlement] program, the Legislature is the proper branch of government from which to obtain the necessary protection."); Hope v. State, 449 So.2d 1319 (Fla. 2d DCA 1984) (upholding criminal contempt judgment against father, granted use immunity, for refusal to testify before grand jury against son; as great the value of the son-father relationship as traditionally recognized, the legislature has not recognized such a privilege in the evidence code): Girardeau v. State, 403 So.2d 513, 514 (Fla. 1st DCA 1981), pet. ~~for rev~~. dism., 408 So.2d 1093 (Fla. 1981) (noting, with respect state legislator's claim of privilege to refuse to testify in grand jury investigation of crime: "Section 90.501 of the recently adopted Florida Evidence Code ... specifically provides for the non-existence of any privilege in a legal proceeding to refuse to be a witness, to disclose any matter, or produce any documents or writings, except as provided by the Code, any other statutes, or the Constitution of the United States or of the State of Florida. Neither the Code, the

statutes, nor either Constitution expressly provides for a legislative privilege as claimed by appellant.").

As cogently observed in Marshall, 459 So.2d at 386 n. 7:

> It should be noted that, consistent with the complete divergence between the federal rule and § 90.501, virtually the entire federal law of privilege is based upon the common law rather than either rule or statute. Thus, while the familiar attorney-client and husband-wife privileges, as well as others, were adopted by the legislature in §§ 90.502-.506, their equivalents, which were contained in Proposed Federal Rules of Evidence 503 et seq., were not approved by Congress.

It may be further noted that, as a jurisprudential matter, notwithstanding the fact some of the federal court decisions cited by the Petitioners are acknowledgedly couched only in First Amendment terms, Federal Rule 501 nevertheless provides an important authoritative underpinning. The cases are additionally distinguishable on the further grounds discussed herein.

PRIVILEGE, THE THREE-PART TEST AND BURDEN

The question of whether there should be a privilege (and the circumstances in which, if there should be, it should apply) is a distinct one from the balancing process or test by which it is to be determined whether a privilege once held to apply should prevail or be held to be overcome in the particular circumstances. Since it is demonstrable from the results that obtain in different jurisdictions and in various circumstances that the very question of the existence of a reporter's privilege (and, if it exists, its scope) is far from constitutionally settled but rather is a dynamic and ongoing inquiry, the

evaluative process in weighing any privilege in a particular instance is even more constitutionally indeterminate.[4] Put differently, if the constitution does not unequivocally dictate or require the application of a reporter's privilege, a fortiori it does not dictate the asserted three-part test or any other particular test, and the courts that have found some form of privilege have used a variety of formulations.

For instance, in State v. Sandstrom, 224 Kan. 573, 581 P.2d 812 (Kan. 1978), cert. denied ~~sub nom.~~ Pennington v. Kansas, 440 U.S. 929, 99 S.Ct. 1265, 59 L.Ed.2d 485 (1979) addressing the far more protection-warranting context of confidential sources or information, the Kansas Supreme Court has observed:

> Courts applying Branzburg to criminal cases have generally concluded that the proper test for determining the existence of a reporter's privilege in a particular criminal case depends upon a balancing of the need of a

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[4] In Massachusetts, as in Florida, the legislature has declined to enact a reporter's privilege. Even in the absence of a statutory counterpart to Florida's restrictive § 90.501, (see In Re Roche, 381 Mass. 624, 411 N.E.2d 466, 474 n. 13 (Mass. 1980)), the Massachusetts Supreme Court, in declining to establish a qualified reporter's privilege, has pertinently observed that:

> Among the proponents of the privilege, there is ... considerable disagreement concerning the specifics of a reporter's privilege. Among these points of disagreement are: who and what information should be covered by the privilege; whether the privilege should apply with equal force in civil and criminal cases, and, if not, how it should differ; what "balancing test" should be used to determine whether the disclosure of otherwise privileged information can be compelled; in what circumstances the privilege is waived; whether procedural concerns should be addressed in such a rule, and, if so, which ones and how.

In Re Promulgation of Rules Regarding Protection of Confidential News Sources, 395 Mass. 164, 479 N.E.2d 154, 157 (Mass. 1985).

> defendant for a fair trial against the reporter's need for confidentiality. [citing a number of cases, including Morgan v. State].
>
> Whether a defendant's need for the confidential information or the identity of its source outweighs the reporter's privilege depends on the facts of each case. As a general rule, disclosure has been required only in those criminal cases where it is shown the information in possession of the news reporter is material to prove an element of the offense, to prove a defense asserted by the defendant, to reduce the classification or gradation of the offense charged, or to mitigate or lessen the sentence imposed. When the information sought has a bearing in one of these areas, the newsperson's privilege must yield to the defendant's rights to due process and a fair trial.

581 P.2d at 815.

Moreover, as to burden, the lower court's placement is in accord with a number of decisions both in jurisdictions with shield protections and those without: Rosato v. Superior Court, 51 Cal.App.3d 190, 218, 124 Cal.Rptr. 427, 445 (Cal.Ct.App. 5th Dt. 1975), cert. denied, 427 U.S. 912 (1976) (broad shield provision; "[T]he burden is upon the person claiming the privilege to show that the testimony may tend to lead to that source."); In Re Promulgation of Rules Regarding the Protection of Confidential News Sources, 479 N.E.2d at 159 (non-shield jurisdiction; "[T]hose seeking to prevent disclosure sought by valid requests must make some showing that the asserted damage to the free flow of information is more than speculative or theoretical.")

The problem with the three-part test, and the reason it is so aggressively asserted by the petitioners, is that, as demonstrated by the Florida trial court and Florida federal court

decisions they have cited, it is virtually outcome-determinative.

Of the sixty such decisions which have been cited by the Petitioners, an overwhelming majority of which expressly or implicitly apply the test (Brief of Petitioners at 13-14), in only two was disclosure ordered.[5] State v. Labrada, 13 Fla.Supp.2d 111 (Fla. 11th Cir. 1985) (limited disclosure to extent of videotape outtakes of contested execution of search warrant at residence, and testimony related thereto; disclosure otherwise denied); Stuart v. Palm Beach Gardens Hospital, 48 Fla.Supp. 85 (Fla. 15th Cir. Ct. 1978) (numerous photographs of open heart surgery subject of major medical malpractice action). This is so even though a number of the decisions involved non-confidential, unpublished and published information,[6] and one involved a publicly aired videotape of an

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[5] A few other cases merit discussion. In State v. Beattie, 48 Fla.Supp. 139 (Fla. 11th Cir. Ct. 1979), which was a capital case, disclosure was denied of the reporter in his capacity as reporter, and granted only in an individual capacity to the limited extent to which he had factual knowledge arising from membership in a health spa where the crime occurred and from his relationship with the victim and the victim's wife.

In State Department of Transportation v. Saemann, 49 Fla.Supp. 199 (Fla. 15th Cir.Ct. 1978), the court held a reporter's motion to quash a subpoena to be premature, on the basis that the appropriate procedure is for the witness to appear and when questioned, raise the issue of privilege. The court further observed that "the burden is upon the movant to demonstrate initially that he is within the category that is entitled to special protection and, further, that the enforcement of the subpoena would have a chilling affect upon his First Amendment rights. Only when he has carried this burden does the burden shift to the person seeking testimony(.)" Id. at 201-202.

In Woods v. Lutheran Inner-City Center, 11 Med.L.Rptr. 1775 (Fla. 4th Cir. Ct. 1985), disclosure of unpublished photographs and videotapes was denied, but the possibility allowed of future disclosure of broadcast videotapes if justification were to be shown.

(Cont'd)

attorney and client sought by the Florida Bar in investigation of a violation of the disciplinary rule relating to trial publicity. In Re Confidential Proceedings, 13 Med.L.Rptr. 2071 (Fla. 13th Cir. Ct. 1987).[7]

Indeed, a number of the decisions actually state a proposition of "immunity" from subpoena unless the proposed test is met; Hendrix v. Liberty Mutual Insurance Co., 43 Fla.Supp. 137, 139-140 (Fla. 17th Cir. Ct. 1975) ("constitutional immunity"); State v. Miller, 45 Fla.Supp. 137, 139 (Fla. 17th Cir. Ct. 1976) (same); State v. Morel, 50 Fla.Supp. 5, 6 (Fla. 17th Cir. Ct. 1979) (same) and, as acknowledged by the Petitioners (Brief at 14, 16), absolute "immunity" has been expressly held. Coira v. DePoo Hospital, 48 Fla.Supp. 105, 107 (Fla. 16th Cir. Ct. 1978) ("[W]hile the court recognizes the possible impediments to proof such immunity may cause a civil litigant and the possible loss of money which might result, these

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[6] State v. Miller, 45 Fla.Supp. 137 (Fla. 17th Cir. Ct. 1976); State v. Peterson, 7 Med.L.Rptr. 1090 (Fla. 6th Cir. Ct. 1981); State v. Williams, 12 Med.L.Rptr. 1783 (Fla. Broward County Ct. 1986); Schwartz v. Almart Stores, 42 Fla.Supp. 165 (Fla. 11th Cir. Ct. 1975); Shaw v. American Learning Systems, 10 Med.L.Rptr. 2045 (Fla. 17th Cir. Ct. 1984); State v. DiBattisto, 9 Fla.Supp.2d 79 (Fla. 11th Cir.Ct. 1984).

[7] A number of cases iterate the phrase, that "in a criminal case the rights of defendants under the Sixth Amendment to the United States Constitution and Article I, Section 16 of the Florida Constitution are substantial countervailing interests which may require issuance of subpoenas," or some close variant thereof, but in none of the cases is the interest considered of any moment. State v. Miller, 45 Fla.Supp. at 139; State v. Morel, 50 Fla.Supp. at 6; State v. Stoney, 42 Fla.Supp. at 196; State v. DiBattisto, 9 Fla.Supp.2d at 79; Hendrix v. Liberty Mutual Insurance Co., 43 Fla.Supp. at 140; Coira v. DePoo Hospital, 48 Fla.Supp. at 107.

factors cannot defeat the reporter's privilege not to disclose under our constitutional guarantees of freedom of the press"). See also Statewide Collection v. Anderson, 9 Med.L.Rptr. 1056 (Fla. Duval Cty. Ct. 1982), implying the same absolute view.

Another case has gone so far as to conclude that the waiver of privilege provision of the evidence code, § 90.507, Fla.Stat., cannot even be constitutionally applied to reporter's privilege. State v. Roman, 9 Med.L.Rptr. 1733, 1735 (Fla. 5th Cir.Ct. 1983).[8]

The point is profoundly underscored by a Florida case the Petitioners have not cited to this Court, Lang v. Tampa Television, 11 Med.L.Rptr. 1103 (Fla. 4th Cir. Ct. 1984), in which, in quashing a subpoena on the basis of press privilege, the trial court quoted P.L.I. Communications Law (1984) at 268:

> Common Law Privilege: Qualified privilege recognized. Florida's courts have upheld reporters' claims of privilege more consistently and scrupulously, than the courts of any other state. In civil cases and in cases involving disclosures to the press of sealed grand jury materials, the press privilege against disclosure under the First Amendment and the Florida Constitution has

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Compare, State v. Hohler, 543 A.2d 364 (Me. 1988) (refusing to recognize qualified constitutional privilege as to published, non-confidential information); Commonwealth v. Corsetti, 387 Mass. 1, 438 N.E.2d 805, 809 (Mass. 1982) (criminal contempt upheld; no privilege to refuse to disclose information in criminal prosecution when source and content already published: "We are aware of no case or statute that has acknowledged a privilege in a reporter, by agreement with his disclosed source, to regulate the source of information made public."); Tofani v. State, 297 Md. 165, 465 A.2d 413 (Md. 1983) (no privilege, under either First Amendment or shield statute, where reporter voluntarily revealed names of sources in published news articles).

been viewed as absolute, not susceptible to being overridden by an[y] showing on the part of the party seeking discovery.

11 Med.L.Rptr. at 1103. (emphasis added)

The completely unwarranted extension and application of privilege represents a virtual shutoff of information to the critical adjudicative function of the courts, and placement beyond the longstanding principle of the public's right to every person's evidence and concomitant duty of each member of society to testify when called upon.

The legitimate, important, and unquestionable constitutionally cognizable interest of the press in not being harrassed, oppressed, abused, or 'commandeered' by litigants is more than amply protected by sound trial court supervision of process and the fundamental discovery requirements that a subpoena seek needed, relevant information, that it not be overbroad, and that it not issue for harrassive or other improper purposes. Beyond that, little can be said. The matter must be considered on a case by case basis. That is the precise point of Justice Powell's concurrence in Branzburg.

The greater the intrusion in a particular case upon press editorial or confidentiality interests, and the lesser the importance or nexus to the seeking party's position, the clearer the case becomes in favor of denying compelled disclosure. To weight equally in advance, as the petitioners have done, confidential, non-confidential and eyewitness contexts, and the interest of all non-press litigants, civil or criminal, itself precludes a reasoned evaluative process and should be considered

untenable constitutional dogma.

Perhaps the most articulate formulation of review is that expressed by Chief Judge Coffin of the U.S. First Circuit Court of Appeals, in the context of a civil defamation case in which confidential sources and information were sought. Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980). Referring to the discussion of First Amendment interests in both Branzburg and in Herbert v. Lando, and the concurrence of Justice Powell in both, it was stated:

> It thus seems clear that in both cases the First Amendment concerns articulated by the parties asserting privileges were in fact taken into consideration by the Court, but found to be outweighed in the context of those cases. This kind of fact-sensitive approach comports with the shifting weights of the competing interests. ...
>
> Whether or not the process of taking the First Amendment concerns into consideration can be said to represent recognition by the Court of a "conditional", or "limited" privilege is, we think, largely a question of semantics. The important point for purposes of the present appeal is that courts faced with enforcing requests for the discovery of materials used in the preparation of journalistic reports should be aware of the possibility that the unlimited or unthinking allowance of such requests will impinge upon First Amendment rights. [footnote omitted].

Id. at 595.

Relating to burden, it was further observed:

> Initially each party has a burden. The plaintiff must establish relevance of the desired information and the defendant has the burden of establishing need for preserving confidentiality. ...
>
> . . . .
>
> Depending upon the court's assessment of

> the importance to the defendant's continued newsgathering effectiveness of preserving the source's confidentiality, the court has a number of options. If the claimed confidentiality seems unsupported, unlikely, or speculative, the court may order discovery. ...
>
> . . . .
>
> We deliberately refrain from further categorizing with any precision what inquiries should be made by the court or in what sequence. The task is one that demands sensitivity, invites flexibility, and defies formula. While obviously the discretion of the trial judge has wide scope, it is a discretion informed by an awareness of First Amendment values and the precedential effect which decision in any one case would be likely to have. Given the sensitivity of inquiry in this detailed area, detailed findings of fact and explanation of the decision would be appropriate.

Id. at 597-598.

As noted, the interest-sensitive discussion in Bruno & Stillman, Inc. was framed in the context of confidentiality interests in a civil case. In addition to those jurisdictions, some of which have been previously discussed, which recognize no presumptive constitutional privilege even in instances of confidentiality, (~~see also~~ Newburn v. Howard Hughes Medical Inst., 594 P.2d 1146 (Nev. 1979); Gagnon v. District Court, 632 P.2d 567 (Co. 1981); Hurst v. State, 160 Ga.App. 830, 287 S.E.2d 677 (Ga.Ct.App. 1982); Georgia Communications Corp. v. Horne, 294 S.E.2d 725 (Ga.Ct.App. 1982)), there are jurisdictions which recognize by statute or case law a presumptive privilege as to confidential sources or information but not as to non-confidential information or materials. ~~See~~, e.g., Clampitt v. Thurston County, 658 P.2d 641 (Wash. 1983) (en banc) (threshold

requirement of reporter's privilege is that interest in non-disclosure be supported by a need for confidentiality): Hatchard v. Westinghouse Broadcasting Co., 532 A.2d 346, 350 (Pa. 1987) (receding from prior interpretation of shield law and holding non-confidential, unpublished materials outside its scope: "We fail to see how [the] purpose [of maintaining a free flow of information] is promoted by protecting from discovery documentary information that was in the possession of the publisher of the defamatory statement where disclosure of this information would not reveal the identity of the confidential media-informant").

As will shortly be seen, the category denoted by eyewitness observations is broadly recognized to have the least protectable interest of all.

Essential to the petitioners' position is the proposition that the distinction between confidential and non-confidential information is "utterly irrelevant to the chilling effect" that the enforcement of subpoenas would have on the flow of information to the press and to the public. In addition to the proposition being highly questionable on its face, it is worthwhile to note its origin. Loadholtz v. Fields, 389 F.Supp. 1299 (M.D. Fla. 1975), appears to have been the first case to state the proposition. Significantly, Loadholtz was a civil case, and did not purport to assert that any such rule would apply in a criminal case: to the contrary, it repeatedly recognized the absence of any presumptive privilege in the criminal case context. Id. at 1301-1302. The Loadholtz proposition has since taken on a life far beyond its origin.

In United States v. Larouche Campaign, 841 F.2d 1176 (1st Cir. 1988), also authored by Judge Coffin, it was pertinently obse ved:

> When there is no confidential source or information at stake, the identification of First Amendment interests is a more elusive task. True, some courts have stated in conclusory fashion that any distinction between subpoenas seeking confidential and non-confidential materials "is irrelevant as to the chilling effect" that results when the materials are disclosed. United States v. Blanton, 534 F.Supp. 295, 297 (S.D. Fla. 1982); Loadholtz v. Fields, 389 F.Supp. 1299, 1303 (M.D. Fla. 1975). See also United States v. Cuthbertson, 630 F.2d 139, 147 (3d Cir. 1980). But no illuminating examples or reasoning are produced to support the conclusion. We have been referred to no authoritative sources demonstrating or explaining how any chilling effect could, result from the disclosure of statements made for publication without any expectation of confidentiality.

Id. at 1181.

That is not to say, however, that the interests in avoiding judicial intrusion into the newsgathering process, in not becoming an investigative arm of the judicial system, in compiling non-broadcast material, or the burden on journalists' time and resources are inconsequential. As recognized by Judge Coffin in Larouche, these are legitimate concerns, and disclosure ought not to be ordered casually or cavalierly. Id. at 1182. There is no suggestion in this case that that was done by either of the two lower courts.

On the other hand, that does not mean that the asserted interests rise to the presumptive, unreachable constitutional level urged by the petitioners. The asserted interests must be

measured against a criminal defendant's constitutional right to a "fair trial under the Fifth Amendment and to compulsory process and effective confrontation and cross-examination of adverse witnesses under the Sixth Amendment." Larouche, 841 F.2d at 1182. In the instant case, the Fourth Amendment right against unreasonable searches and seizures is also implicated. As stated in Larouche, "(n)o one or all of [the] asserted First Amendment interests [in non-disclosure of non-confidential materials] can be said to outweigh these very considerable interests of the defendants(") therein, id. at 1182, nor can it outweigh those of the defendant herein.

EYEWITNESS OBSERVATIONS OF CRIME BY REPORTER -- NO PRIVILEGE, EVEN IN JURISDICTIONS WHICH OTHERWISE RECOGNIZE [BY STATUTE OR CASE LAW] A REPORTER'S PRIVILEGE

The specific question presented by this case is, of course, as framed by the District Court, whether a reporter has a qualified privilege under the First Amendment to "refuse to divulge information learned as a result of being an eyewitness to an relevant event in a criminal case -- i.e., the police arrest and search of the defendant -- when the journalist witnesses such an event in connection with a newsgathering mission." Miami Herald Publishing Co. v. Morejon, 529 So.2d at 1205. Writing for the panel, Judge Hubbart, in a characteristically thoughtful opinion, concluded that any journalist's privilege has "no application" to such information, and, further, observed that: "No court in Florida or, to our knowledge, in the country, has ever extended the news journalist's qualified privilege to such an extreme as

to include such eyewitness testimony; we decline to be the first court to so hold." Id. at 1208. As to this statement, which is the heart of the case, the Petitioners have cited not a single case which holds to the contrary. Every case on point which the Respondent's research has revealed is in complete accord with the view of the district court expressed by Judge Hubbart.

For instance, in Pankratz v. District Court, 609 P.2d 1101 (Co. 1980) (en banc), a state medicare fraud unit director had allegedly disclosed to a newspaper reporter a list of anticipated grand jury indictments. Id. at 1101. The state official was cited for contempt, and the reporter was subpoenaed for the hearing thereon. The reporter, although admitting to having the interview with the state official, moved to quash the subpoena on the ground of an agreement of confidentiality and reporter's privilege. Id. at 1102. The trial court denied the motion to quash, holding that:

> When a reporter has observed ... criminal or wrongful conduct and is subpoenaed to testify and produce documents relating to the conduct which is the subject matter of the charge, he stands in the same shoes as an ordinary citizen and can claim no special privilege.

Id. at 1102.

Upon review, the Colorado Supreme Court noted the absence of any privilege in such circumstances under Branzburg v. Hayes, and declined to create such a privilege under the Colorado constitution. The court stated in pertinent part:

> Where a news reporter, who is a first-hand observer of criminal conduct, is subpoenaed to testify and to produce relevant documents "in the course of a valid grand jury investigation or criminal trial," there is no privilege

> under the Colorado constitution to refuse to respond to the subpoena.

Id. at 1103.

After discussing several cases, a number of which are relied upon by the Petitioners herein, including Morgan v. State, 337 So.2d 951 (1976), which the Colorado Supreme Court distinguished on the basis that the contempt proceedings therein "were not brought to punish violation of a criminal statute and were not part of an effort to obtain information needed in a criminal investigation", the court further noted and concluded:

> We have found no case to support the proposition that a news reporter who actually witnesses the criminal act has a qualified constitutional privilege to refuse to respond to a subpoena.
>
> We find no testimonial privilege, under the federal or the Colorado constitution, which would shield Petitioner from an obligation to respond to the subpoena which has been issued to him.

Id. at 1103.

It may be further pertinently noted that, unlike the instant case, there was a claim of confidentiality in Pankratz.

Not unexpectedly, the courts of those jurisdictions which, either by caselaw or statute, recognize a reporter's privilege, refrain from extending it to eyewitness reportorial observations. In In Re Grand Jury Proceedings (Ridenhour), 520 So.2d 372 (La. 1988), a reporter responded to a subpoena to appear before the grand jury, and was asked a series of questions about his sources and information, and his knowledge of any criminal wrongdoing, based upon several articles he had published about lax revenue enforcement by the New Orleans finance depart-

ment and which suggested a city administration "coverup" bordering on the criminal. Id. at 373. Although there was a Louisiana shield statute protecting a reporter's "source of information'' which had been construed to protect indirect as well as direct identification, in the course of positing a presumptive reporter's privilege generally, the Louisiana Supreme Court concluded that:

> Our reading of Branzburg, leads us to hold that unless the reporter has witnessed criminal activity or has physical evidence of a crime, he may move to quash the subpoena or he may appear and refuse to answer certain questions.

Id. at 376. (emphasis supplied)

Although, as noted in the brief of Petitioner (id. at 18), Iowa is another jurisdiction favoring a reporter's privilege, (Winegard v. Oxberger, 258 N.W.2d 847 (Iowa 1977), cert. denied, 436 U.S. 905, 98 S.Ct. 2234, 56 L.Ed.2d 402 (1978)), in reversing, for application of an incorrect standard, a trial court's order of disclosure of television station videotape outtakes of the suicide of an individual in police custody, which were sought for a contemplated civil suit, and in reaffirming its applicable test, the Iowa Supreme Court stated:

> [I]f the resisting party falls within the class of persons qualified for the privilege, such as a reporter, and the information in question is obtained in the news gathering process, it is presumptively privileged. This, of course, does not mean that a reporter may raise the privilege to avoid testifying, as any other citizen, to observations made as an eyewitness.

Bell v. City of Des Moines, 412 N.W.2d 585, 588 (Iowa 1987) (citing Branzburg v. Hayes) (emphasis added).

See also Alexander v. Chicago Park Dist., 548 F.Supp. 277, 278 (N.D.Ill. 1982) (civil rights action) ("A reporter's observations of a public place or event are no different in kind than that of other individuals; and as to this, they are not entitled to constitutional protection. The provisions of the First Amendment simply do not extend to cover the reporters' observations of the parks during an investigation.")

Bell and Alexander demonstrate that the exclusion of eyewitness observations from any cognizable constitutional protection applies in civil cases as well.[9]

In Lightman v. State, 15 Md.App. 713, 294 A.2d 149, (Md.Ct.Sp.App. 1972), aff'd. per curiam, 266 Md. 550, 295 A.2d 212 (Md. 1972), cert. denied, 411 U.S. 951, 93 S.Ct. 1922, 36 L.Ed.2d 414 (1973), a newspaper reporter was summoned by the grand jury to testify to illegal drug activities which, according to his published article (as in the present case), he had personally witnessed. Relying on Maryland's shield statute, the reporter refused to disclose the information, and was held in civil contempt. 294 A.2d at 151-152. Upon appeal, the Maryland Court of Special Appeals held that the statute was broad enough to encompass both confidential and non-confidential information,

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[9] Both the Petitioners and the Amicus Tribune Company have placed reliance on Gulliver's Periodicals, Ltd. v. Chas. Levy Circulating Co., 455 F.Supp. 1197 (N.D.Ill. 1978), a private antitrust case which follows Loadholtz v. Fields, in according like treatment to confidential and non-confidential information. The author of Gulliver's Periodicals was District Judge George N. Leighton. Judge Leighton was also the author of Alexander, and had no hesitance in distinguishing Gulliver's Periodicals with respect to eyewitness observations. 548 F.Supp. at 278.

but that it should not be read to include within the ambit of protection criminal activities personally observed by the reporter. 294 A.2d at 156-157.

Lightman is a particularly instructive case because of Maryland's pre-eminent status as a jurisdiction concerned with providing protection for the important freedom of gathering and disseminating news, as evidenced by its having been the first jurisdiction, in 1896, to enact a shield law (see Branzburg v. Hayes, n. 37, 408 U.S. at 698, 92 S.Ct. at 2665; Lightman, 294 A.2d at 152), preceding any other state by nearly four decades. Of course, as previously noted, and in contrast to Maryland, Florida extends no statutory protection but rather contains a statutory prohibition against extension of privileges not constitutionally grounded.

And, of course, in Branzburg v. Pound, 461 S.W.2d 345 (Ky. 1970), the Kentucky Supreme Court [then the Kentucky Court of Appeals] construed a statutory shield provision protecting against compelled disclosure of a reporter's ''source of information'' as providing a privilege to refuse to divulge the identity of confidential informants who supplied information, but not to permit a reporter to refuse to testify about events (possession of marijuana and conversion of marijuana into hashish) which he observed personally, including the identities of the persons observed. It was that decision which was affirmed, on constitutional grounds, sub nom. Branzburg v. Hayes:

> [W]e cannot seriously entertain a 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. Insofar as any reporter in these cases undertook not to reveal or testify about the crime he witnessed, his claim of privilege under the First Amendment presents no substantial question.

Branzburg v. Hayes, 408 U.S. at 692, 92 S.Ct. at 2662 (emphasis added).[10]

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[10] If the petitioners should attempt to distinguish some of the foregoing cases on the basis that a grand jury investigation rather than a criminal proceeding was involved, it should be noted that the great weight of authority rejects any such distinction. ~~See~~, e.g., United States v. Liddy, 354 F.Supp. 208, 213 (D.D.C. 1972) (Sirica, J.) (holding, as to Watergate burglary defendants' request for tape-recording of newspaper interviews with confederate who would be key witness at trial, sought for possible impeachment purposes, no First Amendment privilege against disclosure of confidential information relevant to a criminal trial; "[T]he specific question facing the Supreme Court in Branzburg concerned grand jury investigations and the confidentiality of news sources as opposed to the confidentiality of information and criminal trials. Nevertheless, the principles there enunciated by the Court are of sufficient breath to be controlling here."), emergency stay denied, 478 F.2d 586 (D.C. Cir. 1972). ~~See also~~, Rosato v. Superior Court, 51 Cal.App.3d at 213, 124 Cal.Rptr. at 442; Pankratz v. District Court, 609 P.2d at 1103; Bell v. City of Des Moines, 412 N.W.2d at 588; Branzburg v. Hayes, 408 U.S. at 685-686, 92 S.Ct. at 2659; New York v. O'Neill, 79 S.Ct. at 571; In re Farber, 78 N.J. 259, 394 A.2d 330, 334 ("[T]he obligation to appear at a criminal trial on behalf of a defendant who is enforcing his Sixth Amendment right is at least as compelling as the duty to appear before a grand jury."), cert. denied, 439 U.S. 997, 99 S.Ct. 598, 58 L.Ed.2d 670 (1978).

The only pertinent difference between compelled disclosure before a grand jury as distinct from in a criminal proceeding, from the point of view of First Amendment interests, arises in the instance of confidential sources or information; that is due to the presumptive secrecy of grand jury proceedings, e.g., Branzburg v. Hayes, 408 U.S. at 694-695, 92 S.Ct. at 2646, in contrast to the likelihood of public revelation in a criminal proceeding. Ironically, the decision in Morgan v. State, may be said to undermine the basis of the distinction. In any event, the distinction has no application to the instant case.

On the other hand, from a defendant's point of view, in moving from the grand jury context to that of a criminal proceeding, it may be observed that constitutional protections are markedly heightened.

In a decision on material facts indistinguishable from the instant one, the California Second District Court of Appeal recognized no First Amendment privilege nor any privilege under broad state constitutional and statutory provisions. Delaney v. Superior Court (Kopetman), 252 Cal.Rptr. 60, 202 Cal.App.3d 1019 (Cal.Ct.App. 1988), review granted and opinion superseded, 252 Cal.Rptr. 277, 762 P.2d 441 (Cal., Oct. 27, 1988).[11] In Delaney, a newspaper reporter accompanied a police task force patrolling a downtown city area in response to complaints of drugs and other criminal behavior. The defendant and a companion were observed seated on a plaza mall bench, under circumstances which aroused the officers' suspicions. A resultant pat-down of the defendant, which was consensual according to the officers, yielded a misdemeanor charge of possession of brass knuckles. Id. at 62.

The defendant moved to suppress the evidence, asserting in his motion that the pat-down search was non-consensual and illegal, and subpoenaed the newspaper reporter and photographer to testify at the suppression hearing. Id. at 62. After their motions to quash were denied, the reporters were called by the prosecution (which bore the burden of justifying the police conduct) to testify at the suppression hearing, and they did so only to the extent of establishing that each was so situated as

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[11] Under the unique provisions of California jurisprudence, the grant of review of a lower court decision by the California Supreme Court serves to vacate the lower court opinion. This occurs by automatic operation of court rule and is irrespective of the merits. See, e.g., People v. Rogers, 21 Cal.Rptr.3d 542, 146 Cal.Rptr. 732, 579 P.2d 1048, 1051 (Cal. 1978),. The Delaney decision is discussed here for illustrative purposes only.

to have seen and heard what occurred. Id. at 62. They refused to testify, however, as to the question of alleged consent. Id. at 62. Upon review of writs of habeas corpus granted the reporters by the superior court, the Court of Appeal, after discussing the development of the California shield provisions in the wake of Branzburg, which included the expansion of statutory protection from disclosure of "sources" to "unpublished information obtained or prepared in gathering, receiving or processing" news as well, and elevation of the protection to the California constitution, noted in passing the absence of any privilege under Branzburg:

> The Times reporters also contend that their testimony cannot be compelled under the First Amendment to the United States Constitution. This argument was expressly rejected in Branzburg v. Hayes, [pinpoint cite omitted], and no subsequent legal developments compel a contrary result.

249 Cal.Rptr. at 64 n.9. Proceeding to discuss the central question framed, the one of privilege under the state constitutional and statutory provisions, the court held that the "unpublished information" privilege does not apply when a reporter is an eyewitness to a public event. Id. at 61-62, 67. In pertinent part, it stated:

> Our holding is strictly limited to a factual situation where, as here, eyewitness testimony regarding a public event[13] is sought from a newsperson. Because in such a situation the subject matter of the testimony is not dependent upon anyone's trust being placed in the newsperson, there is no basis to differentiate the newsperson's observation of the event from that of any other citizen. In short, the testimony is wholly unrelated to the shield law.[14]

> [13] "Public event" refers to an event which occurs in an area accessible to and readily detectable by the general public.
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> [14] The Times reporters have also argued that the shield law is necessary because if media personnel were routinely subject to subpoena, the practical burdens on time and resources, as well as the consequent diversion of journalistic effort and disruption of newsgathering activity, would be inimical to a free press. While, as stated, we recognize the invaluable service provided to society by a free press, we cannot agree that the expenditure of time and resources that is required when a representative of the media is subpoenaed may be legally distinguished from a subpoena served on any ordinary citizen. It is frequently inconvenient and costly to perform the civic duty required by court process. We see no reason to accord special status to the media to be protected from such civic duty based solely on the practical burdens of compliance. Indeed, in this case the Times reporters were not shielded from appearing at Delaney's suppression hearing and responding to question about matters which were covered in their published story.

249 Cal.Rptr. at **66.**

Whether the California Supreme Court will agree with the Delaney interpretation of the California shield provision remains, of course, to be determined. The point is that the decisions which hold broad shield provisions to afford no protection against disclosure of eyewitness observations underscore the absence of any cognizable constitutional protection in such circumstances.[12]

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Even in the instance of a president or legislator in the course of official duties witnessing a crime or otherwise coming (Cont'd)

The closest Florida case on point is Satz v. News and Sun-Sentinel Co., 484 So.2d 590 (Fla. 4th DCA 1985), rev. denied, 494 So.2d 1152 (Fla. 1986), which held that there was neither an absolute nor a conditional reporter's privilege against compelled disclosure, pursuant to a subpoena issued by a state attorney investigating the misuse of city equipment, of unpublished newspaper photographs of equipment and city employees where the photographs did not implicate confidential sources. The Satz court expressly rejected the application of the three-part test proferred by the Petitioners herein, finding no privilege in one's status as a newsperson to withhold such evidence, relying on Zurcher v. Stanford Daily, 436 U.S. 547, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978).[13] There is no reasoned basis to distinguish

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upon relevant knowledge of a crime by a third-party, a privilege could not be interposed.

See, e.g., United States v. Nixon, supra p. 17; Gravel v. United States, 408 U.S. 606, 622, 92 S.Ct. 2614, 2625, 33 L.Ed.2d 583 (1972) ("Neither does [the Speech or Debate Clause] immunize Senator or aide from testifying at trials and grand jury proceedings involving third-party crimes where the questions do not require testimony about or impugn a legislative act.").

As was stated in Girardeau v. State, 403 So.2d 513 (Fla. 1st DCA 1981), pet. for rev. dism., 408 So.2d 1093 (1981) the same principles are "applicable on the state level to an issue so fundamental as the need for a full disclosure of all evidence relating to criminal acts." Id. at 518 (upholding contempt of state legislator, who chaired house corrections committee, for refusal to testify before grand jury investigating death of prison inmate).

[13] The Petitioners claim Satz to be in error because of its reliance on Zurcher, which the Petitioners assert was overruled by Congress in the enactment of the Privacy Protection Act of 1980, 42 U.S.C. 2000aa et seq. The Petitioners have erroneously analyzed the legislation, and have misconceived in general the relationship between statutes and the constitution.

Zurcher held that where a search warrant validly issues, there is no constitutional impediment to a search for evidence pursuant thereto even if the search involves a third-party not suspected of criminal involvement, even where the third-party is the press, and that there is no constitutional requirement for (Cont'd)

photographs, which in effect constitute recorded eyewitness observations, from the eyewitness observation themselves.

Finally, this court recently had occasion to pass upon the question of discoverability of eyewitness observations in a criminal case. In Downing v. State, 13 FLW 719 (Fla. Dec. 15, 1988) (corrected opinion), without dissent it was held: "A defendant should be entitled to obtain the statement of any person who is a witness to the crime of which he is charged(.)"[14] Id. at 719.

The foregoing authorities compel a negative answer to the certified question.

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the government to proceed by subpoena rather than by search warrant.

Congress, in response to Zurcher, did not alter the substantive scope of protection of journalistic materials from the reach of judicial process, but established a preference for notice, i.e., for a subpoena rather than a search warrant which by its nature is issued ex parte. See, 42 U.S.C. 2000aa-11; 28 C.F.R. Part 59; Doe v. Stephens, 851 F.2d 1457, 1464 (D.C. Cir. 1988) ("[T]he Act by its terms restricts only searches and seizures, not subpoenas.")

Since it was precisely that, i.e., a subpoena, which the Satz court held to be properly issuable for the materials sought, the decision fully comports both with the constitutional ruling of Zurcher as to where or from whom evidence may be obtained, and with the Act's preferred means of obtaining it.

Parenthetically, it may be noted that the Act only provides for civil damages for violation, § 2000aa-6, expressly provides that evidence obtained in violation of its terms shall not be excluded on that basis, id, and certain of its provisions and the implementing guidelines cover a wide range of third-party privacy relationships, including those of physicians, lawyers, clergymen, and psychologists.

[14] The complete quotation is as follows: "A defendant should be entitled to obtain the statement of any person who is a witness to the crime of which he is charged even when such witness is a law enforcement officer.'' Id. at 719. Downing held, insofar as pertinent here, that police reports are discoverable by a criminal defendant to the "extent that they constitute statements of the officers recounting the events which they ... observed" and are discoverable in certain non-eyewitness circumstances as well. Id. at 719-720.

CONCLUSION

Based on the foregoing argument, authorities, and policies discussed, the certified question must be answered in the negative, and the decision of the District Court of Appeal should be affirmed in all respects.

Respectfully submitted,

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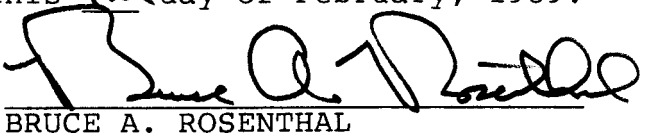
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Richard J. Ovelmen, Attorney for Petitioners, 701 Brickell Avenue, Suite #1600, Miami, Florida 33131, a copy mailed to Gregg D. Thomas, Steven L. Brannock and Carol Jean LoCicero, Attorneys for Amicus the Tribune Company, Post Office Box 1288, Tampa, Florida 33601, and a copy mailed to Sanford L. Bohrer and Jerold I. Budney, Attorneys for Petitioners, 4900 Southeast Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131, this 9th day of February, 1989.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