ORIGINAL

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE No. 90,457

MERLAN DAVIS,

Repondent.
_____/

AMICUS BRIEF OF TIMES PUBLISHING COMPANY AND DIANE MASON

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ADDITIONAL STATEMENT OF THE FACTS

The Times and Mason adopt the Statement of the Facts in the State's Initial Brief, and add the following.

In the trial court, defense counsel filed a Motion To Issue Subpoena Duces Tecum Without Deposition In Court Appointed Case, seeking the present whereabouts of Mason "whom Defendant believes has valuable information regarding this case." R.754-56. At hearing on the motion, defense counsel argued

> Indeed, I would submit to the Court that anything that Nicole Terry [the victim] told Diane Mason was for the purpose of publication and with the knowledge that it would be published. And if it didn't make it into the column [sic] it was simply because Diane Mason edited it out for her own journalistic purposes.
>
> The issue that I'm going after is central to the case and that's whether or not Nicole Terry purposely caused the collision for whatever reason. It's not a peripheral issue. And Diane Mason spoke to Nicole Terry in depth on this issue, and I'd like to speak to Diane Mason.

R.824-25.

Defense counsel also candidly acknowledged that "I have reason to believe -- I have from one source that, in fact, Nicole Terry intentionally caused the contact, the collision between the two vehicles for a variety of reasons," R.822-23, that "I'm seeking this information for impeachment purposes," R.829, because it would "be

useful to have the testimony of a very credible person such as Diane Mason and in fact she may have additional information additional statements that go far beyond the impeachment potential of my other source. I won't know until I speak to her." R.830.

The Times, which had notice of the defense motion and which appeared at the hearing through counsel, argued that the widely-used three-part test necessary to overcome the reporter's qualified privilege could not be met in this instance. The proponent of the testimony acknowledged the existence of another source for the information, and defense counsel wanted to conduct a "fishing expedition" into the reporter's mind. R.825-26. The Times cited *Tribune Co. v. Green*, 440 So.2d 484 (Fla. 2d DCA 1983) and *United States v. Blanton*, 534 F. Supp. 295 (S.D. Fla. 1982) to the trial court, but did not file any papers or place the newspaper article into the record. R.827-29.

The trial court denied the defense motion by Order entered January 15, 1993, on the grounds of *Tribune Co. v. Green*. R.758-60.

Mason's article, in pertinent part, reads:

> She [Nicole Terry] knew she was going to have to slow down for the single lane. She tapped her brakes lightly, hoping the brake light would make Davis back off. He stayed right on her tail, she says. She stepped on her brakes.
>
> Davis's car smashed into hers.

Diane Mason, *No Way Out*, ST. PETERSBURG TIMES, Feb. 4, 1992, at 1D.[1]/

At trial, Terry, the victim, described the collision and her thought process as follows:

> Q: What happened next?
>
> A: There was a draw bridge coming up and some more construction and I knew that I wasn't going to be able to make the necessary moves with my car at sixty miles an hour -- it wasn't a sports car -- and I had to slow down, so I knew Vince [the defendant] was really close on my bumper. I couldn't --
>
> Q. How close was he?
>
> A: I couldn't see his headlights in my rearview mirror, and I knew that I had to slow down so -- so I tapped on the brakes so my lights would go on, so he would know, so he would know to back off and get away, because I had to slow down. And I tapped on the brakes and he smashed into my car.

In this post-conviction appeal, Davis raised the refusal of access to the reporter as a sub-issue in his Initial Brief. None of the briefs were served formally on the Times, Mason or its counsel, nor were the Times, Mason, or counsel informally aware the Second DCA was considering the matter. The Second DCA did not invite briefing on the issue of the reporter's privilege, and the Times did not file such a brief. Only when the Second DCA issued its opinion on March 26, 1997, did the Times and Mason

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[1]/ The State has made a copy of the article a part of the record before this Court.

learn that the appellate court had even been considering the issue.

The Times and Mason filed a Motion to Intervene for the Purpose of Seeking Rehearing on the Reporter's Privilege Issue and a Motion for Rehearing, both served April 14, 1997. The Second DCA struck both motions as "unauthorized," by Order entered April 23, 1997.

Thereafter, on May 20, 1997, the Times and Mason applied to this Court for permission to appear as amici curia, which status was granted by Order dated June 3, 1997. Still pending is the Times' and Mason's Motion to Leave to Intervene in this Court, served June 12, 1997.

The Times and Mason have not yet been heard by an appellate court on the issue of the reporter's privilege.

SUMMARY OF THE ARGUMENT

Nonparties like Mason and the Times have a due process interest in being heard by the tribunal before their rights and privileges are adjudicated. Thus, it was error for the Second District to have ruled that Mason had no testimonial privilege, without affording Mason and the Times notice of the pendency of the issue and extending them the opportunity to be heard on the matter. This error was compounded, after the Second District released its opinion, by striking the Times' and Mason's motion for

rehearing and by refusing to hear their arguments.

On the merits, the reporter's qualified privilege is well-settled as a matter of federal opinions construing the First Amendment. Under Florida's jurisprudential principles, in the absence of a controlling precedent to the contrary, the free press guarantee of the Florida Constitution offers protections at least as broad as those of the First Amendment. Furthermore, this Court has acknowledged that federal courts' interpretations of federal law are binding on the state's courts.

Here, Davis desired the reporter's deposition testimony for impeachment of the victim's testimony. The victim's testimony at trial, however, was not inconsistent with nor materially different from the account of her statements contained in the Times' news article, authored by Mason. Therefore, there was no predicate for impeaching the victim, and the trial court did not err in refusing to allow issuance of a subpoena.

This Court previously has ruled, in *Miami Herald Pub. Co. v. Morejon,* 561 So.2d 577 (Fla. 1990), that a reporter who witnesses a "relevant event" has no testimonial privilege in a subsequent criminal proceeding. This Court should reaffirm that holding and make clear that interviewing a victim in a criminal matter is not the same as being an eyewitness to a relevant event, that is, the actual crime or the defendant's arrest. This is so, regardless of the lack of confidentiality in the source's identity.

ARGUMENT

I. FLORIDA'S CONSTITUTION PROVIDES PROTECTION FOR NEWSGATHERING.

A. As a matter of jurisprudence, state constitutional provisions provide at least as much protection as their parallel federal counterparts.

While this Court from time to time has addressed a qualified privilege against compelled inquiry into newsgathering, it has issued no definitive pronouncements on the topic in terms of Florida's constitutional guarantee of a free press.

Article I, Sec. 4 of the Florida Constitution provides: "No law shall be passed to restrain or abridge the liberty of speech or of the press." The precise contours of this provision have been clear for some time. "The scope of protection accorded to freedom of expression in Florida under article I, section 4 is the same as is required under the First Amendment." *Dep't of Education v. Lewis*, 416 So.2d 455, 461 (Fla. 1982). *See also State v. Globe Comm'ns Corp.*, 622 So.2d 1066, 1081 (Fla. 4th DCA 1993)("As noted by the trial court, [Art. I, § 4] provides at least the same protection as that provided by the First Amendment to the United States Constitution"); *Florida Canners Ass'n v. Dep't of Citrus*, 371 So.2d 503, 517 (Fla. 2d DCA 1979)("...[I]n the absence of any expression by our supreme court that the Florida guarantee is broader in scope than the federal, we conclude that the two are the same . . .")(quoted with approval in *Lewis, supra*).

This being so, the certified question posed by the Second District should be answered in the affirmative.

As a matter of state constitutional logic, this Court may construe the Florida Constitution to provide *more* protection than the First Amendment, but not *less*. In Justice Shaw's cogent observation, "In any given state, the federal Constitution thus represents the floor for basic freedoms; the state constitutions, the ceiling." *Traylor v. State*, 596 So.2d 957, 962 (Fla. 1992). Where both documents have parallel or similar provisions, and in the absence of any controlling state precedent, this Court may look for guidance to federal opinions construing the parallel federal provision. Under these circumstances, federal interpretations of the U.S. Constitution are at least "highly persuasive and accorded great weight" in determining the state law question, *Wright v. State*, 418 So.2d 1087, 1092 (Fla. 1st DCA 1982), although a state supreme court obviously is the paramount source in interpreting that state's constitution. *See, e.g., Pomponio v. Claridge of Pompano Condominium*, 378 So.2d 774, 779 (Fla. 1980)("We recognize that this Court, when construing a provision of the Florida Constitution, is not bound to accept as controlling the United Stated Supreme Court's interpretation of a parallel provision of the federal Constitution," although such opinions "helpful,""persuasive," "obviously entitled to great weight").

B. The Supremacy Clause requires state courts' deference to federal courts' pronouncements on federal issues.

The Supremacy Clause of the United States Constitution[2]/ provides the basic framework upon which our system of federalism rests. "The purpose of the supremacy clause was to avoid the introduction of disparities, confusions and conflicts which would follow if the Government's general authority were subject to local controls." *United States v. Allegheny County,* 322 U.S. 908,913 (1944). Although federal law is applicable to the states, the latter are free, of course, to afford greater protection than that afforded by federal law. The states are not required to do so, nor may the states disregard federal law. Every citizen is a citizen of a particular state, who also enjoys the protections of federal law, even if the particular state has chosen a different path, as a matter of state law.

The United States Supreme Court had recent occasion to discuss these bedrock principles in a case arising in Pinellas County.

> Three corollaries follow from the proposition that "federal" law is part of the "Law of the Land" in the State:
>
> 1. A state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of "valid excuse." [citation omitted] . . .

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[2] U.S. **CONST.** art. VI, cl. 2: "This Constitution . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

> 2. An excuse that is inconsistent with or violates federal law is not a valid excuse: The Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source. . . . [citations omitted]
>
> 3. When a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts, we must act with utmost caution before deciding that it is obligated to entertain the claim. [citations omitted] . . .
>
> These principles are fundamental to a system of federalism in which the state courts share responsibility for the application and enforcement of federal law.

Howlett v. *Rose,* 496 U.S. 356, 369-73 (1990)(state courts must entertain federal civil rights actions; may not use state sovereign immunity statute to "evade" federal law "that Congress has made on behalf of all the People").

Clearly, then, "[s]tate courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law." *Stone v. Powell, 428* U.S. 465, 493 n.35 (1976). There is no valid excuse for Florida's courts to disregard the federal courts' First Amendment jurisprudence.

C. Even if this Court's answer to the certified question is in the nepative, the Times' and Mason's First Amendment rights must be recognized.

In this case, the Second District certified the question to this Court in terms of *Florida* law:

> In light of the decision in *CBS, Inc. v. Jackson, 578* So.2d *698* (Fla. 1991), and *Miami Herald Publ'g Co. v. Morejon,* 561 So.2d 577 (Fla. 1990), does Florida law provide a qualified reporter's privilege against the disclosure of non-confidential information relevant to a criminal proceeding?

Davis v. State, 22 Fla.L.Weekly D798, 798 (Fla. 2d DCA March 26, 1997)

Presumably, the Second District omitted citation to this Court's other two post-*Branzburg*[3]/ opinions, *Morgan v. State, 337* So.2d 951 (Fla. 1974), and *Tribune Co, v. Huffstetler*, 489 So.2d 722 (Fla. 1986), because those two cases involved confidential sources of information upon which the newspaper publication was based. By contrast, *Jackson* involved video outtakes of the criminal defendant's arrest, and *Morejon* involved the reporter's eyewitness observation of the criminal defendant's arrest. Neither of the two latter cases implicated any confidential source of information

Thus, the certified question turns upon the lack of confidentiality of the news source. *See also Kidwell v. State,* 22 Fla.L.Weekly D1416, 1420 n.3 (Fla. 4th DCA June 11, 1997)("In *Tribune Co. v. Huffstetler*, 489 So.2d 722 (Fla. 1986), and *Morgan v. State,* 337 So.2d 951 (Fla. 1976), however, the supreme court did approve a qualified privilege for *confidential sources"); Dollar v. State,* 685 So.2d 901,903 (Fla.

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[3]/ *Branzburg* v. *Hayes,* 408 U.S. 665 (1972), the well-spring case from which flows the case law on the First Amendment-based qualified reporter's privilege. See discussion, *infra.*

5th DCA 1996)("We are unaware of any issues of confidentiality of sources or privilege applicable to this situation"); *Gold Coast Publications, Inc. v. State,* 669 So.2d 316, 3 18 (Fla. 4th DCA 1996)("the underlying purpose of the qualified newsgathering privilege [is] to protect the confidential aspects of [the media's] newsgathering *efforts"). But see Times Pub. Co. v. Burke,* 375 So.2d 297,299 (Fla. 2d DCA 1979), in which then-Chief Judge Grimes read this Court's opinion in *Morgan* to raise "serious first amendment questions which must be considered before a court can compel a news reporter to testify concerning information received from his sources," even where, as there, the source's identity was *known.* The *Davis court* appears to have jettisoned *Burke,* probably because it mistakenly assumed this Court had rejected a privilege for newsgathering in *Morejon* and *Jackson.*

Apparently, then, at least three of Florida's District Courts of Appeal have now read this Court's four opinions on this topic as creating a bright-line rule of law: Protection is afforded to confidential sources of information *(Morgan* and ***Huffstetler***),[4] and no protection is afforded to non-confidential sources *(Morejon* and *Jackson),* even though this Court has never announced such a rule. Clearly, the District Courts need this Court's guidance, as do Florida's media.

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[4]/ Nevertheless, reporter Tim Roche was held in contempt and jailed for his refusal to identify a confidential news source. *Roche* v. *State,* 589 So.2d 978 (Fla. 4th DCA 1991).

Assuming ***arguendo*** for the moment that these District Courts' formulation as noted above is a correct statement of Florida's law, either common law[5]/ or state constitutional law, and this Court's answer to the certified question thus is in the negative, the Times' and Mason's federal rights nevertheless must be respected.

D. Federal law protects reporters in Mason's circumstance.

To date, the United States Supreme Court has addressed the reporter's privilege issue only once, in ***Branzburg*** v. ***Hayes,*** 408 U.S. 665 (1972). The entire body of federal case law on this topic stems from Justice Powell's observation in ***Branzburg*** that claims of newsgathering privilege must be evaluated on a case-by-case basis by striking a proper balance between "vital constitutional and societal interests," ***Id.*** at 7 10 (Powell, J., concurring). Indeed, then-Justice Barkett took note of the First Amendment source of the privilege in her special concurrence in *Morejon* and stated, without qualification, that "when a reporter is subpoenaed to testify about information acquired as part of a newsgathering mission, some first amendment interests clearly are implicated." 561 So.2d at 582 (Barkett, J., concurring). Justice Barkett's observation

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[5]/ Justice McDonald noted in his separate opinion in *Jackson* that any party seeking proprietary material from a nonparty

> should demonstrate to a judicial tribunal that it is relevant, that no alternative source exists, and that the party has a need for the information before its production for inspection is compelled. This basically is the same test employed when a qualified privilege exists or when a party claims a work product privilege for tangible evidence gathered in anticipation of trial. . .

Jackson, 578 So.2d at 701 (McDonald, J., concurring and dissenting).

is especially striking, coming as it does eighteen years after *Branzburg* was decided and coming in a case in which no confidential sources were implicated. Justice Barkett must have been alluding to the developed body of federal case law in existence at the time of her statement. It is this body of law that is deserving of this Court's scrutiny.

Federal courts consistently have recognized the sensitive constitutional issues inherent in requiring a reporter to testify about newsgathering. Since *Branzburg*, ten of the twelve federal circuits, when presented with the question, have recognized the existence of a qualified privilege, based in the First Amendment, for a reporter resisting inquiry to newsgathering.[6]/ *See, e.g., United States v. Caporale, 806* F.2d 1487 (1 lth Cir. 1986); *LaRouche v. National Broadcasting Co. Inc., 780* F.2d 1134 (4th Cir. 1986); *In re Selcraig, 705* F.2d *789* (5th Cir, 1983); *United States v. Burke, 700* F.2d *70* (2d *Cir.* 1983); *Zerilli v. Smith, 656* F.2d *705* (D.C. Cir. 1981); *Bruno & Stillman v. Globe Newspaper Co., 633* F.2d *583* (1 st Cir. *1980); United States v. Cuthbertson,* 630 F.2d 139 (3d Cir. 1980); *Silkwood v. Kerr-McGee Corp., 563* F.2d 433 (10th Cir. *1977); Farr v. Pitchess, 522* F.2d *464* (9th Cir. 1975); *Cervantes v. Time, Inc., 464* F.2d 986 (8th Cir. 1972).

In. addition, all four circuits that have addressed the question of whether the

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[6]/ Only the Sixth Circuit reads *Branzburg* as denying a qualified privilege to journalists in its single opinion on the subject. *In re Grand Jury Proceedings,* 810 F.2d 580 (6th Cir. 1987). The Seventh Circuit has not addressed the issue.

privilege protects non-confidential sources or non-confidential information have answered in the affirmative.[7]/ See, *e.g., Shoen v. Shoen, 5* F.3d 1289 (9th Cir. 1993)(privilege applies to journalist's resource materials even absent confidentiality); *United States v. LaRouche Campaign,* 841 F.2d 1176 (1st Cir. 1988)(NBC's First Amendment interests merit extending protection to non-confidential information); *von Bulow* by *Auersperg v. von Bulow,* 811 F.2d 136 (2d Cir. 1987) (relationship between journalist and source may be confidential or non-confidential for purposes of privilege); *United States v. Cuthhertson,* 630 F.2d 139 (3d Cir. 1980) (privilege shields unpublished resource materials even though information not obtained in confidence).

Federal district courts have followed suit. *See e.g., United States v. Marcos,* Cr. No. 87-598 (S.D.N.Y. May 31, 1990), 1990 U.S. Dist. LEXIS 6541 (qualified privilege extends to non-confidential as well as confidential sources of information); *Miller v. Mecklenburg County,* 602 F.Supp. 675 (W.D.N.C. 1985) ("majority view [among district courts] clearly is that non-confidential material received by a reporter from an investigative source is protected by the qualified privilege"); *United States v. Blanton,* 534 F.Supp. 295 (S.D. Fla. 1982); *aff'd,* 730 F.2d 1425 (11th Cir. 1984) (non-confidentiality of source of information gathered, developed or received in

[7]/ Although the Eleventh Circuit has yet to decide the question directly, it has affirmed a lower federal court's holding that a qualified privilege does protect non-confidential sources and information. *U.S. v. Blanton,* 730 F.2d 1425 (1 lth Cir. 1984).

newsgathering capacity "irrelevant to chilling effect"); *Loadholtz v. Fields, 389* F.Supp. 1299 (M.D. Fla. 1975) (non-confidentiality of source "utterly irrelevant to 'chilling effect' on flow of information to press and public"),

Though the specifics of the cases vary according to the civil or criminal nature of the proceeding, or to the importance of the information sought, or to the reporter's status as a party or merely a non-party witness, or to the confidential or non-confidential nature of the information sought, one thing is clear: federal courts read *Branzburg* as affording First Amendment protection to reporters resisting compelled inquiry into their newsgathering work product in all types of situations, For example, in *United States* v. *Burke, supra,* the Second Circuit refused to make any distinction between civil cases and criminal prosecutions *vis a vis* the compelled production of unpublished notes and other materials of a reporter, even though "a criminal defendant has more at stake than a civil litigant and the evidentiary needs of a criminal defendant may weigh more heavily in the balance" and even where the defendant wanted the unpublished materials to impeach the Government's principal witness against him, 700 F.2d at 77. Likewise, in *Loadholtz v. Fields, supra,* the District Court held that the confidentiality of the information's source "is utterly irrelevant to the 'chilling effect' that the enforcement of these subpoenas would have on the flow of information to the press and to the public," in a case in which the source of the information was the

opposing party and obviously known to the proponent. 389 F. Supp. at 1303.

These and other opinions, in federal courts across the country, cannot be ignored in Florida's courts, and, indeed, Florida jurisprudence suggests as much. "We recognize, of course, that state courts are bound by federal court determinations of *federal* law questions." *Mobil Oil Corp. v. Shevin, 354* So.2d 372, 375 n.9 (Fla. 1977)(emphasis in original).[8]/

As it stands, two Florida reporters have been jailed in the past few years: one for refusing to testify about a non-confidential interview and one for refusing to identify a confidential *some* . *See Kidwell* v. *State,* 22 Fla.L. Weekly D14 16 (Fla. 4th DCA June 11, 1997) and *Roche v. State,* 589 So.2d 978 (Fla. 4th DCA 1991). In the *Kidwell* case, the United States District Court for the Southern District of Florida granted a writ of habeas corpus to release the reporter from jail, *while the case was pending in the Fourth DCA.*[9] This clash of state and federal judicial positions is alarming and signals an unseemly constitutional battle that ought to be avoided. This clash can be avoided

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[8]/ ***But see State v. Dwyer***, 332 So.2d 222, 335 (Fla. 1976), in which this Court remarked that federal circuits' opinions are not binding on state courts. *Dwyer*, however, concerned a matter of state law, and the Court's unqualified statement must be understood in that context, That lack of qualification has led some courts to conclude that Florida state courts may freely ignore all federal courts except the United States Supreme Court. Here, of course, Mason and the Times raised both state law and federal law in the trial court. R.825-27.

[9]/ A copy of the District Court's Explanatory Memorandum is in the Record, attached to the Times Publishing Company's Motion for Rehearing filed in the Second DCA.

by applying settled jurisprudential principles of federalism and constitutional law to this issue of the law's protection for newsgathering.

II. THE TIMES AND MASON WERE ENTITLED TO DUE PROCESS BEFORE ADJUDICATION OF THEIR TESTIMONIAL PRIVILEGE.

A. The Second DCA erred in refusing to entertain argument from the Times and Mason

The essence of due process is that all interested parties are given fair notice and a reasonable opportunity to be heard before a judgment is rendered. *Scull v. State, 569* So.2d 1251, 1252 (Fla. 1990). Indeed, this Court has stated that "due process envisions a law that hears before it condemns, proceeds upon inquiry, and renders judgment only after proper consideration of issues advanced by adversarial parties." Id. Due process embodies the fundamental conception of fairness that ultimately derives from the natural rights of individuals. Id.

The central meaning of due process has been clear for more than a century: "'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy this right they must first be notified." *Fuentes v. Shevin, 407* U.S. 67, 80 (1972)(citing *Baldwin v. Hale,* 1 Wall. 223,233, 17 L.Ed. 53 1). A corollary to this fundamental principle of due process, yet no less important, is that notice and

opportunity must be granted at a meaningful time in a meaningful manner. ***Id.*** This Court has interpreted this corollary to mean that in any proceeding that is to be accorded fmality, notice must be "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." ***Dawson v. Saada,*** 608 So.2d 806, 808 (Fla. 1992)(citing *Mullane v. **Central Hanover Bank & Trust Co., 339*** U.S. 306,314 (1950).

In the instant case, the Second District failed either to apprise the Times or Mason of the pendency of the reporter's privilege issue or to afford them the opportunity to present their objections. Such due process is required when a decision implicates an interest within the protection of the Fourteenth Amendment. *Ingraham **v. Wright,*** 430 U.S. 65 1,672 (1977). The interests asserted by the Times and Mason are those protected by the First Amendment and are thus protected under the Due Process Clause of the Fourteenth Amendment. After the Second District issued its opinion and in an effort to protect those rights, which the Second District had adjudicated in their absence, the Times and Mason sought to intervene in this case. The motion to intervene was stricken, as "unauthorized," Certainly had Mason been asserting a Fifth Amendment privilege the Second District would not have proceeded to adjudicate her constitutional rights in her absence, as was the case here.

According to Fla.R.Civ.P. 1.230, anyone claiming an interest in pending litigation may

at any time be permitted to assert his right by intervention. The test to determine what interest entitles a party to intervene has been part of Florida law for nearly eighty years:

> [T]he 'interest which will entitle a person to intervene... must be in the matter in litigation, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment. In other words, the interest must be that created by a claim to the demand in suit or some part thereof, or a claim to, or lien upon, the property or some part thereof, which is the subject of the litigation.

Union Cent. Life Ins. Co. v. *Carlisle*, 593 So. 2d 505, 507 (Fla. 1992)(citing *Morgareidge* v. *Howey*, 75 Fla. 234, 238-239, 78 So. 14, 15 (1918).

The deciding court must first determine the interest asserted is appropriate to support intervention and then must exercise its discretion to determine whether to permit intervention, *Id,* at 507. In the instant case, the interest in a newspaper reporter's privilege to resist inquiry into newsgathering that is asserted by the Times and Mason is appropriate to have permitted intervention in that it was the dispositive issue for the Second District in its opinion. This issue, that of recognizing a reporter's privilege in Florida where a non-confidential source's words to the reporter -- published and unpublished -- are sought by the criminal defendant for impeachment purposes, was not fully briefed by the parties, on a record that did not even include the newspaper story. Yet the Second District vacated both the criminal conviction and ensuing sentence of the Defendant, Merlan Davis, because the trial court refused issuance of a subpoena

to the Times for the current whereabouts of Mason, a former Times reporter, who had published an interview with the defendant's victim while still employed by the Times.[10]/

Furthermore, the Second District certified a question to this Court regarding a reporter's privilege and remanded the underlying dispute to the trial court. By remanding the underlying criminal case to the trial court, the Second District effectively foreclosed the Times' and Mason's opportunity to resist a second attempt to compel Mason's testimony.

Clearly, the Times and Mason have suffered a "direct and immediate" loss to their rights "by the direct legal operation and effect of the [Second District's] judgment." In not allowing the intervention of the Times and Mason, the Second District foreclosed the Times' and Mason's opportunity to protect their interests, thus abusing its discretion by striking the Times' and Mason's motion to intervene for the

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[10]/ As the Second District noted, the Times and Mason were represented by counsel in the trial court's hearing on the defense motion for issuance of the subpoena. Defense counsel complained to the trial court that

> I sent correspondence to [Mason] through the St. Pete Times. The response came from counsel for the St. Pete Times in essence saying that anything any conferences she had with Nicole Terry [the victim] carry a qualified privilege, that they would not divulge the whereabouts of Diane Mason, that there would be no cooperation in any way in that regard.

R.823.

Aside from the propriety of defense counsel's trying to contact a witness who is known to be represented by counsel on a specific matter, see R.Regulating Fla. Bar 4-4.2, Mason was not willing to have her whereabouts revealed to Davis, a man charged with stalking a woman, in essence. The trial court bypassed this preliminary issue and dealt immediately, and properly, with the ultimate question of privilege.

limited purpose of seeking a rehearing on the reporter's privilege issue. See *generally Carlisle,* 593 So.2d at 508 (trial judge abused discretion in not allowing insurance company to intervene for limited purpose of protecting interest in plaintiffs recovery in malpractice suit). Such a severe abuse of discretion amounts, on its face, to a violation of the Due Process Clause of the Fourteenth Amendment.

While a non-party's intervention in a criminal case is unusual, it is not unprecedented, especially where the nonparty seeks to assert fundamental rights. For example, in *Post-Newsweek Stations* v. *Doe,* 612 So.2d 549 (Fla. 1992), this Court ruled that customers of an alleged prostitute had standing to assert their privacy rights to prevent the disclosures of their identities. Similarly, in a civil action, the First District gave notice of the contents of interview notes to non-party job applicants where those notes were the subject of a public records request and, moreover, even went so far as to appoint counsel to brief the issue for those applicants who wished to intervene in order to assert their privacy interests. Likewise, the Fourth District explicitly ruled that a trial court's summary closing of an arraignment and sentencing hearing, without notice and without affording the newspaper attorney an opportunity to protest the closure, "constituted a complete denial of the constitutional and due process requirements set forth *in State ex rel. Miami Herald v. McIntosh,* [340 So.2d 904 (Fla. 1977)] ." *Palm Beach Newspapers, Inc.* v. *Nourse,* 413 So.2d 467,468 (Fla. 4th DCA

1982). Just as this Court requires notice be given to at least one representative of the local media before a trial court hears a motion to close a courtroom to the public, ***Miami Herald Pub.*** Co. v. ***Lewis,*** 426 So.2d 1 (Fla. 1982), so should this Court require notice be given to nonparties who are asserting fundamental rights, such as testimonial privileges.

B. The Times and Mason should have been allowed to argue to the Second District that Davis' proposed "impeachment" of his victim's trial testimony was improper.

These fundamental notions of notice and opportunity to be heard are so elemental as to render the Second District's actions inexplicable. Here, the Second District has taken the extraordinary step of overruling one of its own precedents? because of its reading of this Court's opinions in ***Miami Herald Pub. Co. v.*** *Morejon*, 561 So.2d 577 (Fla. 1990) and ***CBS, Inc. v. Jackson,*** 578 So.2d 698 (Fla. 1991). Those opinions are distinguishable from the instant circumstance, and, had the Times and Mason had the opportunity to do so, gladly would have drawn those distinctions and argued for the retention of the ***Green*** case. Neither the State nor Davis fully briefed this complex issue of law, and Davis only considered the question important enough to devote two and one-half pages to it in his Initial Brief to the Second District.

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[11]/ "Our reversal of this decision is grounded upon our conclusion that [Tribune Co. *v.] Green*[, 440 So.2d 484 (Fla. 2d DCA 1983),] is no longer viable." Slip Op. at 4.

In.Br. 18-20.

In that brief, Davis argued that he was denied "crucial impeachment testimony" by the lower court's refusal to allow him to question the reporter about the victim's statements to her. In. Br. 19. Davis cited to one lone reporter privilege case, *Morejon*. Even a cursory comparison, however, of the newspaper article, *which was not part of the record on appeal,* and the victim's trial testimony demonstrate that the two statements are virtually identical. The victim described the Sunshine Skyway Bridge incident to the jury the same way she had described it to the reporter. There was no impeachment possible with a prior inconsistent statement, because the victim's prior statement to the reporter was not inconsistent. "To be inconsistent, a prior statement must either directly contradict or materially differ from the expected testimony at trial." *State v. Smith,* 573 So.2d 306, 3 13 (Fla. 1990). The victim's testimony here was neither inconsistent with nor materially different than what she had said to the reporter. *See also, e.g., Shere v. State,* 579 So.2d 86, 93 (Fla. 1991)(victim's in-court memory failure not proper grounds for impeachment with prior statements "especially when those statements had not been shown to be materially inconsistent"). *Cf.* R.32 (victim's trial testimony) *and No Way Out* (victim's statements to reporter).

Clearly, the Second District should have given the Times and Mason the opportunity to fully brief the issues in this case, including the opportunity to make the

newspaper article part of the record and to demonstrate that Davis' argument about impeaching his victim's testimony was baseless, rather than accepting Davis' characterization of the value of the reporter's testimony, whole cloth. At a minimum, this Court should make clear to Florida's District Courts of Appeal that, under similar circumstances, it is error to refuse to notify or to entertain argument from the affected reporter and media organization.

C. The Times and Mason should have been permitted to argue that reporters are not proper discovery sources.

As an alternative to his impeachment theory, Davis argued in the Second District that he should have been allowed "to interview Diane Mason to *ascertain whether* Nicole Terry had indicated that she had caused the collision." In. Br. 19(emphasis supplied). Such a statement by Terry is not part of the newspaper article, and Davis offered no explanation for why such an inflammatory and newsworthy-- and illogical -- statement by the victim, had it been made, would not have been published as part of the article. Clearly, Davis wanted to inquire into whatever unpublished statements the victim made to the reporter. He wanted to use the reporter as a discovery source, roaming at will through the reporter's work product, unrestrained by relevancy requirements.

In support of his discovery rights, Davis cited *Trafficante v. State*, 92 So.2d 811

(Fla. 1957)(per *cur.)* and *Green v. State,* 377 So.2d 193 (Fla. 3d DCA 1979), to the Second District. In. Br.19. The precise rule in *Trafficante* is that fundamental unfairness would result if a criminal defendant were denied "the means to compel the attendance of witnesses, within the jurisdiction of the court, who are in possession of material facts which show or tend to show his innocence of the charge." 92 So.2d at 815. Here, Davis had no reason to believe that Mason had any exculpatory information; he merely had such a hope.

In *Green*, the other case cited by Davis, an attorney was on trial for grand larceny in the handling of two clients' funds. The trial court denied enforcement of a subpoena duce tecum for one of the client's records, and the. testimony of two witnesses who "clearly" would have impeached the client was excluded as being related solely to a collateral matter. 377 So.2d at 202-03. The Third District ruled that the trial court should have conducted a hearing to determine the relevancy of the documents and should have allowed the witnesses' testimony. Again, however, the defendant in *Green* was able to show that she had been denied evidence helpful to her defense, unlike the Defendant here.

A defendant's right to compel discovery, in any event, is not absolute and must yield in the face of the assertion of a lawful privilege. "The compulsory process clause gives the defendant the right to bring his witnesses to court and to have their non-

privileged testimony heard; it does not carry with it the additional right to displace a proper claim of privilege, including the privilege against self-incrimination." *State v. Montgomery, 467* So.2d 387,394 (Fla. 3d DCA 1985).[12]/ Furthermore, "[t]he purpose of the discovery rules is to help a defendant to prepare his case, but it is not to give him a procedural escape hatch on appeal for the avoidance of the determination of a trial court, absent a showing of prejudice or harm to his case." *Ivester v. State, 398* So.2d 926, 93 1 (Fla. 1st DCA 1981)(relinquishing jurisdiction temporarily for trial court to conduct "prejudice or harm" hearing). .

Here, of course, Davis can make no showing of prejudice or harm to his case, because Mason's testimony, even if compelled, would have been cumulative to that of Terry, the victim. As the State argues, any error the trial court made'in this matter is utterly harmless,

Thus, once Mason and the Times raised the privilege that inheres in newsgathering the burden was on Davis to make a sufficient showing to overcome the privilege. *Montgomery, supra.* Only if this Court is prepared to say, categorically, that newsgatherers have no claim of privilege will Davis succeed in this argument,

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[12]/ The *Montgomery* opinion is a scholarly assessment of immunity law, in which the court looked "to the federal courts for guidance on the issues presented." *State v. Montgomery, 467* So.2d at 390.

D. This Court already has recognized the newsgathering privilege.

This Court, however, following the lead of the United States Supreme Court in ***Branzburg,*** already has ruled that the First Amendment protects newsgathering. The pivotal language in ***Branzburg*** has dictated the shape of its progeny: "Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated." ***408*** U.S. at 681. In ***Morgan v. State, 337*** So.2d 951, 953 (Fla. 1976), this Court specifically acknowledged the import of ***the Rranzburg*** principle: "The United States Supreme Court has now sanctioned the view that the First Amendment affords 'some protection for seeking out the news.'" Just how far the First Amendment goes in protecting newsgathering is a thorny issue. "Of course, no such privilege can amount to an absolute right to an unimpeded flow of information in all places and at all times. Application of the privilege in a given case involves 'the striking of a proper balance.'" ***Morgan v. State,*** 337 So.2d at 954(quoting ***Branzburg).*** This Court reasoned that "[t]he 'preservation of the rule of secrecy' in which some governmental activity has traditionally been enshrouded, is not the specific, substantial governmental interest, necessary to defeat a reportorial source privilege," ***Id.*** at 955, and observed further that the "First Amendment is clearly implicated when government moves against a member of the press because of what she has caused to be published." *Id.* at 956. See also ***In***

re Adoption of Proposed Local Rule 17, 339 So.2d 181, 183 (Fla. 1976)("It is fundamental that news gathering qualifies for First Amendment protection, for a ban upon news gathering could effectively destroy freedom of the press").

E. Routine newsgathering should be protected from casual intrusions.

At the heart of this case is this Court's recent reluctance to rule that forcing reporters to give deposition testimony or trial testimony or to produce notes or photographers to produce unpublished photographs is more than a "mere inconvenience." "Although the media may be somewhat inconvenienced by having to respond to such discovery requests, mere inconvenience neither eviscerates freedom of the press nor triggers the application of the journalist's qualified privilege." CBS, *Inc. v. Jackson, 578* So.2d 698, 700 (Fla. 1991). Of course, to the extent that compelled intrusion into news gathering results in fewer news stories or photos published, there is more than "mere inconvenience," and we are all the losers. Just as certainly, however, this effect is incapable of precise proof, because it is impossible to prove a negative, by counting stories and photos not published.[13]/ Certainly, common sense mandates the conclusion that Nicole Terry, the victim in this case, would have

[13]/ The amicus brief of many of Florida's news organizations attaches as an appendix a list of the subpoenas served on the media in Florida last year.

spoken less freely to the reporter had she known that her tormentor and former boyfriend, Davis, would be able to use the reporter against her,

In some respects, a reporter's interview of a news source is confession-like, and a certain intimacy of communication envelopes the two, not unlike frank discussions between a physician and a patient. There is an atmosphere of trust and understanding. The source trusts the reporter to hear what he is saying and to record it accurately and to present it fairly, and the reporter trusts the source to be forthcoming and truthful. The spectre of compelled intrusion into this delicate relationship must perforce be disruptive and introduce circumspection and suspicion not otherwise present,

> Relationships between reporters and sources can be fragile things, and society should protect rather that discourage those relationships, . . .As in communications between doctors and patients, lawyers and clients, and husbands and wives, full and candid disclosures between reporters and sources serve important social interests -- in this case, the gathering and reporting to the public of significant news.

John P. Borger, *Why Journalists Should Have A Privilege Not to Disclose Unpublished Information*,4 A.B.A. SEC. TORT & INS. PRACTICE 6 (1997).

If the Supreme Court does not take up this issue it will leave the district courts in confusion and this will lead to additional unnecessary confrontations with the press, an intrusion into press rights and, possibly, the unnecessary jailing of dedicated reporters.

It will also lead to the development of practice techniques in both civil and criminal practice where lawyers, empowered to seek testimony from reporters as their first target in discovery, begin to further entangle the press in the daily business of litigation.

After all, if there is no privilege, there is no protection and a lawyer would be wasting his client's money if she did not take advantage of the press investigation which will be present in very many cases. (In making that argument, we might lean on the power of attorneys to command other citizens to appear at places and times convenient to the attorney and point out that reporters, by the nature of their jobs will bear the brunt of this activity.)

If the opinion of the District Court is not quashed, there will be real mischief The result, in effect, will be the judicial determination that there is no reporters privilege, no First Amendment or Florida Declaration of Rights protection for this reporter even though the reporter and the news organization have not been allowed to argue their case.

What will happen if the case is not reversed: It will return to the trial level and, assuming that the case is retried, the reporter will be called. If the trial judge has only the opinion of the Second DCA, the judge will be bound to deny the privilege. It is very unlikely that the reporter will testify. She will then be sanctioned (much as

Kidwell was sanctioned) pending the trial and review will be sought.

This will be the first review that the reporter and the news organization will be afforded and we will be faced with a tremendous waste of time. There would be unnecessary conflict between two of society's most important institutions.

If, instead, the Court will recognize the importance of providing due process to the reporter and the news organization at this time, this result can be avoided. The Court can take the case, recognize that there is a First Amendment value to news gathering even where there are no confidential sources and reaffirm the basic law set forth in ***Morgan*** and *Huffstetler*.

If, as the conceptual framework of *Branzburg* implies, the government must show an interest sufficiently weighty to overcome the interest in a free press, it would follow that any other proponent of a reporter's testimony must make an equally weighty showing, including the criminal defendant who wishes to use the reporter as a discovery source of first resort or who has the same information as the reporter from another, alternative source, as was the case here.

This Court should consider Chief Judge Grimes' assessment of events in Times ***Pub. Co. v. Burke, 375*** So.2d 297,299 (Fla. 2d DCA 1979)(citations omitted):

> We have concluded that the procedure followed below was lacking in due process. The essence of procedural due process is the right to a hearing upon reasonable notice.

> . . .Furthermore, the opportunity to be represented by counsel in both civil and in criminal proceeding has been equated with due process. . . .

These words were true when written nearly twenty years ago and apply with equal force as a description of what occurred to the Times and Mason in the Second DCA.

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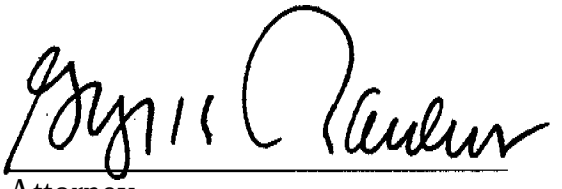

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