ORIGINAL

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

MERLAN DAVIS,

Respondent.

Case No. 90,457

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

ALLYN GIAMBALVO
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 239399

Public Defender's Office
14255 49th Street North
Building #1
Clearwater, FL 33762
(813) 464-6595

ATTORNEYS FOR RESPONDENT

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ISSUE II

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Respondent has divided his response into two parts. The first addresses the issues raised in Petitioner/State's initial brief. The second part addresses the issues raised in the amicus briefs.

STATEMENT OF THE CASE AND FACTS

The facts pertaining specifically to the issue before this court are as follows:

Respondent filed a motion for subpoena duces tecum to obtain information from the St. Pete Times concerning the whereabouts of reporter, Diane Mason. (R754-756) A hearing was held on the motion on January 13, 1993. (R821-836) The defense counsel outlined the grounds for the motion: The St. Pete Times had printed an article about the charged incident. The reporter, Diane Mason, referred to statements of Nicole Terry, the alleged victim, in which Terry had described how the collision occurred. The defense attempted to contact Ms. Mason, who no longer worked for the Times, but the newspaper had refused to divulge her whereabouts. (R823)

> [Defense counsel] . . . And Diane Mason of the St. Pete Times did quite a lengthy article with large color photographs and so forth of this relationship and of this case. This was before I got into it. And Diane Mason in her article, refers to the moment just before the collision actually occurred -- clearly she spoke to the victim about how the collision occurred. I -- 1 tried to contact Diane Mason and was advised by the St.Pete Times that she no longer works for them, that they would pass on correspondence. They wouldn't tell me where she was, but they would pass on correspondence. I sent correspondence to her 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 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.

Counsel for the St. Pete Times appeared at the hearing and argued against disclosure of the reporter's whereabouts citing the

reporter's privilege. (R825-826)

The trial judge ruled for the St. Pete Times and denied the defense motion. (R833)

SUMMARY OF THE ARGUMENT

Respondent contends that recent Plorida case-law on the subject of reporters's privilege holds that such privilege is only applicable to confidential information. Since the information in question was never declared to be confidential, there was no privilege qualified or otherwise, which put the reporter and the newspaper on the same footing as any other witness. The Second District was correct in holding the trial court had erred when it applied the three part test used to determine whether the reporter's privilege was outweighed by the respondent's interests in obtaining the information and when it denied respondent's request on the grounds that respondent failed one of the three prongs of the test.

ARGUMENT

ISSUE

IN LIGHT OF THE DECISION IN CBS, Inc. v. Jackson, 578 So. 2d 698 (Fla. 1991), AND Miami Herald Publ'g 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?

PART I

Petitioner claims that the certified question framed by the Second District has no applicability to the instant case, and that it is readily distinguishable from Kidwell v. State, 22 Fla. Law Weekly D1416 (Fla. 4th DCA June 11, 1997), which certified the identical question to this court, as well as, CBS, Inc. v. Jackson and Miami Herald Publ'g v. Morejon.

In Kidwell a news reporter was held in contempt for refusing to divulge at a discovery deposition [1] unpublished statements of a murder defendant allegedly made during a jailhouse interview. The finding of contempt was upheld by the appellate court, In Miami Herald Publ'g v. Morejon a reporter was present at the search and subsequent arrest of Morejon while doing research for a story. Later, the reporter was subpoenaed for a discovery deposition [2] which he and the Herald attempted to have quashed. The trial court

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[1] The prosecution wanted to use the defendant's statements against him at his trial.

[2] Defense counsel wanted to use the reporter's testimony in order to make a 4th Amendment challenge to the validity of the search of defendant's luggage and his subsequent arrest.

denied the request finding that the reporter had no privilege, qualified or otherwise, to refuse to testify. This court upheld the trial court's decision. In CBS, Inc. v. Jackson the defendant served a subpoena duces tecum on CBS, Inc. requesting outtakes of certain video tapes made of his arrest on a drug charge.[3] This court held there was no qualified privilege.

Petitioner distinguishes Jackson and Morejon on the basis that the reporters were eyewitness observers to the offenses charged, while the reporter in the instant case did not personally witness the incident on the Sunshine Skyway Bridge. Petitioner distinguishes Kidwell on the basis that while a confession or admission is relevant evidence, the relevancy of the evidence sought to be elicited herein was "tenuous at best", in other words, the evidence wasn't relevant. Petitioner also argues that it was never established that the reporter had the evidence that defense counsel sought. Moreover petitioner argues, even if the reporter had heard the victim, Nicole Terry, state she intentionally caused the collision by hitting her brakes, it is irrelevant because contact is not necessary to prove aggravated assault with a motor vehicle. Finally, petitioner maintains that even if this constituted error, it was harmless in respondent's case.

It is respondent's opinion that these arguments either miss the point or beg the question. In order to fully understand the

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[3] It is not made clear from the opinion exactly what defense counsel intended to do with the video outtakes. However, one could infer from the opinion that the intended use was for a search and seizure challenge or impeachment of the arresting officer.

real issue before this court, it is necessary to go back to the beginning, the motion hearing on January 13, 1993. It was at this hearing respondent requested the trial court to issue a subpoena duces tecum for deposition to the St. Petersburg Times.[4] The legal representative for the both the newspaper and the reporter claimed that the information obtained in her interview with the victim, Nicole Terry carried a qualified privilege. After hearing argument from both defense counsel and the paper's attorney, the court determined a qualified privilege existed. The trial court then determined respondent had failed to meet one of the three prongs of the test required to overcome the claim of qualified privilege, a showing that no alternative source for the information defense counsel sought existed. Respondent's motion to have the reporter subpoenaed and to compel discovery was denied. (R821-835)

In its opinion, the Second District found the basis for the trial court's denial to be erroneous because according to Jackson and Morejon no privilege whatsoever existed where non-confidential information was involved. Because there was no privilege, the court could not deny defense counsel's request based on failing the three prong test. Although Jackson and Morejon involved reporters who were eyewitnesses to the actual offense, while the reporter in respondent's case was not, this is an inconsequential distinction,

[4] At this point the reporter, Diane Mason, no longer worked for the St.Petersburg Times. The newspaper had already refused a request to furnish defense counsel with her new location, thus the need for the subpoena. At the hearing, the paper's legal representative asserted that she represented both the paper and reporter Mason.

as those cases turned solely upon the confidential versus non-confidential nature of the information sought. Respondent understands and the Second District apparently understood Jackson and Morejon to mean there is no privilege, qualified, limited, or otherwise, which protects reporters from testifying in subsequent court proceedings concerning non-confidential matters.

The purpose of discovery depositions is to ascertain what relevant information a potential witness may possess. It was not as if defense counsel pulled a complete stranger off the street to depose. It was undisputed that the reporter had interviewed Nicole Terry at length about the incidents charged as well as her whole relationship with respondent. It is somewhat ironic to note that a complete stranger with no knowledge of the case could not lay claim to any privilege or assert a lack of relevancy in his testimony to avoid being deposed.[5]

This being the case, petitioner's argument that the evidence sought by defense counsel was irrelevant, immaterial and its existence was unsubstantiated is somewhat premature. While these

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[5] For persons other than members of the Fourth Estate, their only recourse to avoid testifying comes under Fla. R. Crim. P. 3.220 (e):

> Restricting Disclosure. The court on its own initiative or on motion of counsel shall deny or partially restrict disclosures authorized by this rule if it finds there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment resulting from the disclosure, that outweighs any usefulness of the disclosure to the other party.

could be grounds for an objection at trial as to the admissibility of the reporter's testimony, they would not be a valid basis for refusing to divulge the information during discovery. Presumably, without any privilege, the reporter or newspaper would be in the same position as any other witness, therefore their only recourse to avoid being deposed would be pursuant to Fla. R. Crim. P. 3.220(e)[see footnote 4 for the substance of this provision]. It should be noted that none of the factors listed in 3.220 (e) were claimed by either the reporter or the newspaper at the January 13th motion hearing.

Although respondent maintains that relevancy is not a factor to be considered when the information sought from a journalist is non-confidential, respondent still disputes petitioner's claimthat the information sought was irrelevant. Respondent agrees with petitioner's assertion that it was not necessary to establish contact between his vehicle and the victim's in order to make a prima facie case of aggravated assault. However, evidence that the victim, Nicole Terry, might have intentionally caused the collision by slamming on her brakes, would impact on an element of the offense, namely respondent's specific intent to do violence to the person of another. Bartlev v. State, 689 So. 2d 372 (Fla. 1st DCA 1997), State v. Shorette, 404 So, 2d 816 (Fla. 2d DCA 1981). In order to find respondent guilty of aggravated assault, it would have to be established that he was doing more than following too closely behind Nicole Terry's vehicle,

In State v. Shorette, id., Shorette was alleged to have been

driving at a high rate of speed and drinking when he struck an oncoming vehicle. The occupants of the other car would have testified they were in fear that Shorette's car would hit them. However, on appeal, the court held that these facts were insufficient to establish a case of aggravated assault as the undisputed facts would only establish a general, as opposed to a specific intent to do violence to the person of another.

Another pertinent aspect of the relevancy issue is that Nicole Terry was the state's only witness to, as well as being the alleged victim of the offenses charged. Since her credibility was crucial, any indications of bias, prejudice or ulterior motive or any impeachment of her trial testimony was both important and relevant. Relevancy encompasses much more than direct eyewitness testimony or evidence tending to prove an element of the state's case. It also includes matters pertaining to a witness's credibility.

Petitioner has claimed that Nicole Terry's trial testimony in no way differed from the statements that appeared in the newspaper article "No Way Out". Petitioner uses this assertion to support its theory that defense counsel was merely on a "fishing expedition" and the reporter had no relevant information to provide. Respondent can point to one discrepancy between Ms. Terry's trial testimony and published statements that could have proved crucial.[6] At trial Ms. Terry stated that immediately after

[6] Respondent was originally charged in this case with two counts of aggravated assault, one alleging use of his automobile as a dangerous weapons and the other alleging that he pointed a gun at

the collision, respondent had walked over to her car and said something to her, returned to his car where he leaned in the driver's side window and got something, and then proceeded to walk south towards the Skyway Bridge. This was by way of explanation as to why the police had not been able to find the gun that respondent had allegedly pointed at her while they were driving across the bridge prior to the collision. When cross examined as to why she had been unable to see what respondent had retrieved from his car, Ms. Terry responded she had glass in her eyes from the accident and was unable to see clearly. (T71-72) However, in the article, Ms. Terry was quoted as saying:

> "I remember hearing the glass break out. I had glass all over my hair and in my ears. But none in my eyes. I must have had my eyes closed."

Because the statement to the reporter was not made under oath, in order to impeach Ms. Terry it would have been necessary to call the reporter as a witness to testify. Fortunately, Ms. Terry had made a similar statement at a deposition which defense counsel used to impeach her trial testimony on this point. However, this example is used to rebut the assertion that the reporter could offer nothing of relevance in the matter.

PART II

This case involves consideration of the tension exerted

Ms. Terry as they were driving along the Skyway Bridge. Pursuant to a motion for judgment of acquittal, the trial judge reduced this charge to improper exhibition of a firearm. The jury found respondent not guilty of this count.

between a criminal defendant's Constitutional right under the Sixth Amendment to compulsory process, as well as, his procedural right to obtain information via the discovery process versus a reporter's claimed privilege against compelled disclosure of information. The basic position of the amicus briefs is that there is a reporter's privilege for all information obtained in a news gathering capacity, confidential or otherwise, except situations where the reporter is an eyewitness. In all other cases, they argue, there is a qualified privilege which the seeker of the information must overcome by passing the three prong test of: 1) relevancy; 2) no other available sources and 3) compelling need.

Respondent disputes that this is the state of the law in Florida at this time. First, there is no statutory privilege in Florida for reporters against compelled disclosure of either confidential or non-confidential information. Whatever privilege **exists**, is based upon Florida case law, specifically the most recent pronouncements of the Supreme Court of Florida.

In the leading United States Supreme Court case on the subject, Branzburg v. Haves, **408** U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972), the court specifically declined to create any special testimonial privilege for journalists from the First Amendment that was not otherwise enjoyed by ordinary citizens. This case involved journalists 'being compelled to testify before grand juries concerning information they had obtained from confidential

[7] The cases of two journalists other than Branzburg, Pappas and **Caldwell, were consolidated for review as** their issues were identical.

sources. The court held that the reporters could be compelled to testify before the grand jury. Presumably, if the United States Supreme Court wasn't sufficiently swayed to find a constitutional testimonial privilege for confidential information, then there would certainly be no privilege for non-confidential information. Although lower Federal Courts have found a testimonial privilege for reporters in certain instances and a little over half the states have shield laws benefitting reporters, the United States Supreme Court itself has not overruled or altered the position it took in Branzburg, id.. Absent a pronouncement from the United States Supreme Court that reporters have an absolute or qualified testimonial privilege under the First Amendment, Florida Courts are not constrained to find the existence of such a privilege, despite differing opinions of lower Federal courts or other state courts.

Even if one assumed a qualified privilege existed, the problem the undersigned sees with the application of the three prong balancing test prior to or during the discovery process, as was the case herein, is that oftentimes you don't know exactly what you are going to find out until you ask. As to the first prong of the test, relevancy, is this relevancy in the evidentiary sense of what is or isn't admissible at trial or is it merely a showing of some sort readily ascertainable link between the newsgatherer and the case? Certainly it is not uncommon nor a violation of any rule of procedure for someone to be deposed whose testimony might not be legally admissible at trial, but leads to other pertinent information. Is that information any less relevant?

Here it is undisputed that reporter Diane Mason conducted an extensive interview of Nicole Terry, the alleged victim in this case. However, prior to deposing the reporter it would be virtually impossible to determine with certainty that she would provide substantive, legally admissible testimony.

As to the second prong, the undersigned questions how one can establish compelling need, until he has knowledge of all aspects of the case. In some instances certain matters might appear unimportant initially, until seen in the context of the case as a whole. For example, in this case matters of impeachment would not become important or even apparent until one had deposed the victim.

As for the third prong, no other available source, not only is this somewhat difficult to ascertain prior to discovery it is also subject to change as witnesses have been known to disappear, change their testimony or suffer a memory lapse prior to trial or during trial. The plurality opinion in Branzburg, id. touched upon these issues when it asked how a balancing test could effectively be applied in the context of a grand jury investigation whose sole purpose was to find out information. The court rejected the idea.

The Branzburg court also rejected the two primary rationales espoused here by amicus for why a privilege or at least a qualified privilege should exist, One, that sources would dry up if reporters could be forced to testify, and as a result the gathering and dissemination of news to the public would be hampered was repudiated.

> "Estimates of the inhibiting effect of such subpoenas on the willingness of informants to

> make disclosures to newsmen are widely divergent and to a great extent speculative.

As to the second rationale, that journalists would be unduly burdened both financially and timewise if they were forced to respond to subpoenas, the court stated:

> "It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability."

The court then went on to point out examples where otherwise valid laws had been argued to be burdensome on the press, but no special exemption or privilege had been found because the laws served a substantial public interest and were generally applied.

While the instant case deals with a defense request for disclosure of non-confidential information, it should be clear that there are different considerations present depending upon whether the information sought is confidential or non-confidential, whether the proceeding is civil, criminal or administrative in nature, or whether the person trying to obtain the information is defense counsel or the state. It is interesting to note from the amicus briefs filed that the prosecution appears to avail itself of the resources of the press as much or more than criminal defense attorneys.[8] The undersigned counted 18 subpoenas served on behalf of the State Attorney or U.S. Attorney versus 12 issued on behalf of the Public Defender or private defense counsel.

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[8] Respondent is not addressing the question of a reporter's privilege in civil or administrative cases as that is not the question presented herein.

From a historical perspective, Florida courts have been most receptive to finding the privilege applies when a newsgatherer has acquired information from confidential sources. The court's have been the least receptive to a claim of privilege where a request for non-confidential information comes from a defendant in a criminal case.

Amicus does raise legitimate concerns about the trouble and expense of having to provide such information. Certainly any newspaper, magazine or television station is entitled to be reimbursed for its expenses in providing information. Respondent would point out that such organizations do have a recourse under the rules of criminal procedure [3.220 (e)] and the rules of civil procedure [1.280(c)]. However, mere inconvenience to the news organization alone should not activate the privilege. Many other organizations and occupations [emergency room physicians, emergency medical technicians, telephone companies] suffer the inconvenience of frequent subpoenas, yet must respond without being able to assert any privilege. If the president of the United States hasn't been found to be unduly burdened in the performance of his duties by proceeding as a party to litigation, then no one is beyond the call of a subpoena.

CONCLUSION

In light of the arguments made and authorities cited herein, respondent would ask this court to affirm the decision of the lower court.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Helene S. Parnes, A.A.G., Suite 700, 2002 North Lois Avenue, Tampa, FL 33602, (813) 873-4739, Patricia Fields Anderson, Esq., Rahdert, Anderson, McGowan & Steele, P.A., 535 Central Avenue, St. Petersburg, FL 33701, Jonathan D. Kaney, Jr., Esq., 150 Magnolia Avenue, P.O. Box 2492, Daytona Beach, FL 32115-2491, Sanford L. Bohrer, Esq., Gregg D. Thomas, Esq., David S. Bralow, Esq., and James B. Lake, Esq., P.O. Box 1288, Tampa, FL 33601 on this 22 day of July, 1997.

Respectfully submitted,

Allyn Giambalvo

ALLYN GIAMBALVO
Assistant Public Defender
Florida Bar Number 239399
14250 49th Street North
Clearwater, FL 34622

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(813) 464-6595

AG/dlc