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IN THE SUPREME COURT OF FLORIDA
CASE NO. 90,839

DAVID KIDWELL,

Petitioner,

vs.

STATE OF FLORIDA
and JOHN ZILE,

Respondents.

****
ON DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL
****

ANSWER BRIEF OF RESPONDENT STATE OF FLORIDA

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Case No. 90,839
Kidwell v. State

CERTIFICATE OF INTERESTED PERSONS

Counsel for the State of Florida adopts the certificate contained in the initial brief on appeal.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS.....i

TABLE OF CONTENTS.....ii

TABLE OF CITATIONS.....iii-vi

PRELIMINARY STATEMENT.....1

STATEMENT OF THE CASE AND FACTS.....2-7

SUMMARY OF THE ARGUMENT.....8

ARGUMENT.....9-25

THERE IS NO REPORTER'S PRIVILEGE APPLICABLE TO PETITIONER UNDER THE FACTS PRESENT IN THIS CASE

Conclusion.....26

Certificate of Service.....26

TABLE OF AUTHORITIES

FEDERAL CASES

Branzburg v. Hayes,
408 U.S. 665,
92 S. Ct. 2646,
33 L. Ed. 2d 626 (1972) 12,18,20,21

Cohen v. Cowles Media Co.,
501 U.S. 663,
111 S. Ct. 2513,
115 L. Ed. 2d 586 (1991) 21

In re Grand Jury Proceedings,
5 F.2d 397 (9th Cir. 1993) 15,20,23

In re Grand Jury Proceedings,
810 F.2d 580 (6th Cir. 1987) 20,22,23

In re Grand Jury Subpoena,
947 F. Supp. 1314 (E.D. Ark. 1996) 15

In re Grand Jury Subpoena Duces Tecum,
112 F.3d 910 (8th Cir. 1997) 22

In re Grand Jury Subpoenas,
78 F.3d 1307 (8th Cir. 1996) 23

Karem v. Priest,
744 F. Supp. 136 (W.D.Texas 1990) 13

In re Shain, 978 F.2d 850 (4th Cir. 1992) 15,23

United States v. Cutler,
6 F.3d 67 (2d Cir. 1993) 20

United States v. Larouche Campaign,
841 F.2d 1176 (1st Cir. 1988) 19

University of Pennsylvania v. EEOC,
493 U.S. 182 (1990) 21

STATE CASES

Andrews v. Andreoli,
400 N.Y.S.2d 442 (1977) 24

In re Bridge,
205 A.2d 3 (N.J. Super. Ct. App. Div. 1972) 13,24

CBS, Inc. v. Jackson,
578 So. 2d 698 (Fla. 1991) 10,17

Caldero v. Tribune Publishing Co.,
562 P.2d 791 (Idaho 1977) 13,15

Clein v. State,
52 So. 2d 117 (Fla. 1950) 12

In re Contempt of Stone,
397 N.W.2d 244 (Mich. App. 1986) 15

Davis v. State,
22 Fla. L. Weekly D798 (Fla. 4, 1997) 3,11

In re Decker,
471 S.E.2d 462 (S.C. 1995) 13

Dow Jones and Company v. Superior Court,
303 N.E.2d 847 (Mass. 1973) 13

In Re Farber,
394 A.2d 330 (N.J. 1978) 13

Gold Coast Publications, Inc. v. State,
669 So. 2d 316 (Fla. 4th DCA 1996),
rev. denied,
682 So. 2d 1099 (Fla. 1996) 8,11,12,24

In re Grand Jury Witness Subpoena of Abraham,
92 Ohio App. 3d 186, 634 N.E.2d 667 (1993) 22

Hamilton v. Hamilton,
409 So. 2d 1111 (Fla. 4th DCA 1984) 25

Kidwell v. State,
22 Fla. L. Weekly D1416 (Fla. 4th DCA June 11, 1997) . . 3,9,20

In re Letellier,
578 A.2d 722 (Me.1990) 22

Miami Herald Publishing Co. v. Morejon,
561 So. 2d 577 (Fla. 1990) 10,17,24

Morgan v. State,
337 So. 2d 951 (Fla. 1976) 14,16,20

National Broadcasting v. Court of Common Pleas,
556 N.E.2d 1120 (Ohio 1990) 15

Newburn v. Howard Hughes Medical Institute,
594 P.2d 1146 (Nev. 1979) 24

Pankratz v. District Court,
609 P.2d 1101 13

State of Texas v. McMeans,
884 S.W.2d 772 (Tex.Cr.App 1994) 13

State v. Buchanan,
436 P.2d 729 (Or. 1968) 13

State v. Hohler,
543 A.2d 364 (Me. 1988) 13,20

State v. Salsbury,
924 P.2d 208 (Idaho 1996) 20

Tampa Television, Inc., v. Norman,
647 So. 2d 904 (Fla. 2d DCA 1994) 14

In re Tierney,
328 So. 2d 40 (Fla. 4th DCA 1976) 16

Tofani v. State,
465 A.2d 413 (Md. 1983) 13,19

Tribune Co. v. Huffstetler,
489 So. 2d 722 (Fla. 1986) 14,16

Vaughn v. State,
381 S.E.2d 30 (Ga. 1989) 13

Waterman,Broadcasting of Florida Inc., v. State,
523 So. 2d 1161 (Fla. 2d DCA 1988)] 11

STATUTES

§27.04, Fla.Stat. 2

§90.507, Fla.Stat. 24

PRELIMINARY STATEMENT

Petitioner was the Defendant and Appellee, State of Florida, was the Prosecution in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida. In this brief, the parties shall be referred to as they appear before this Honorable Court of Appeal except that Appellee, State of Florida, may also be referred as the State or prosecution.

In this brief, the symbol "A" will be used to denote the appendix filed by petitioner, a number after the "A" refers to the exhibit number of the appendix and the next number(s) refers to the exact page number in the appendix. "AB" will be used to denote the initial brief.

All emphasis in this brief is supplied by Appellee unless otherwise indicated.

STATEMENT OF THE CASE

The State of Florida rejects the statement of the case found in the initial brief and substitutes the following.

On September 12, 1996 petitioner, David Kidwell, was served with a state attorney's investigative subpoena pursuant to § 27.04, Fla. Stat. (A8 122) Petitioner appeared at the Office of the State Attorney on September 17, 1996 as directed in the subpoena. (A7 76-116) However, petitioner refused to answer any questions asked of him by the Assistant State Attorney and claimed the subpoena was invalid. (A7 78-79) Based on his refusal to answer any questions petitioner was served with an order to show cause, entered by Circuit Judge Roger Colton, on September 17, 1996. (A8 117-121) The order required Kidwell to appear before the Judge Colton on October 1, 1996. (A8 118) The October 1st hearing was rescheduled for October 7, 1996. On October 7th, Kidwell appeared before Judge Roger Colton. (A10 127-145) Judge Colton found Kidwell guilty of indirect criminal contempt. (A11 126) Kidwell was sentenced to 70 days in the Palm Beach County Jail and fined $500. (A11 147-148) A purge provision was included in the order.

An appeal from the finding of contempt and sentence was filed in the Fourth District Court of Appeal. The Fourth District affirmed both the finding of contempt and sentence in a lengthy

opinion. Kidwell v. State, 22 Fla. L. Weekly D1416 (Fla. 4th DCA June 11, 1997). In the opinion the Fourth District certified the same question as in Davis v. State, 22 Fla. L. Weekly D798 (Fla. 4, 1997), pet. pending, case no. 90,457 (Fla. 1997).

A notice to invoke jurisdiction of this court was filed on June 13, 1997, two days after the issuance of the opinion in the Fourth District. On July 14, 1997 the Fourth District issued an order in response to a Motion for Rehearing and/or Clarification that was filed by the State of Florida on June 17, 1997. The order deleted the word "unpublished" from one sentence in the beginning of the opinion.

STATEMENT OF THE FACTS

The State of Florida rejects petitioner's statement of the facts as it contains extensive argument and contains many alleged facts that are not contained in the record before this court. The State of Florida substitutes the following.

On November 5, 1994 the Miami Herald carried an article titled: "John Zile: We Both Lied." (A1-1) Petitioner, David Kidwell, authored the article. (A1-1) In the article Kidwell tells readers he interviewed Zile for 75 minutes while Zile was incarcerated in the Palm Beach County Jail. (A1-1) [1]

The published article contains numerous direct quotes from Zile where he graphically describes his direct participation in the events surrounding the death of his stepdaughter, Christina Holt. For example Zile states: "I hit her and that was wrong. There's no excuse for what happened. There's no explanation that's good enough. But I just want people to understand my state of mind." (A1-2) Later Zile describes Christina having diarrhea before the final beating as "she did it on the floor again. I saw it coming down her bathrobe. I was furious. I asked her why she did it and

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[1] There is nothing in the record suggesting that Kidwell identified himself to jail officials as a reporter for the Miami Herald prior to his interview of Zile.(A7-81) It is not known if Kidwell tape recorded his conversation with Zile.(A7-82)

she said 'because I felt like it'." (A1-2) In the article Zile describes the fatal beating as: "Yeah I spanked her. Her butt was black and blue. I popped her in the mouth, but nothing I did should've killed her. She started having a seizure." Zile continues: "She was choking on her own vomit. I was trying to give her mouth to mouth. I was pounding on her chest. I used smelling salts. I put her in a cold bath, but she was dead." (A1-2) The article also states that Zile and his wife Pauline together decided not to call for help. (A1-2) The article also describes Zile's account of the disposal of Christina's body and the attempt to cover up the crime. (A1 2-3)

On September 12, 1996, petitioner, David Kidwell was served with a state attorney's investigative subpoena pursuant to § 27.04, Fla. Stat. (A6-75) Although Kidwell appeared at the Office of the State Attorney on September 17, 1996 as directed in the subpoena, (A7 76-116) Kidwell, after giving his name and address, refused to answer any questions stating "that the subpoena issued to me is invalid." (A7-78) Kidwell was then asked: "Are you saying on the grounds that you feel you have a privilege?" (A7-79) He answered: "No. I'm saying that the subpoena is invalid. I shouldn't be here." (A7-79)

Based on his refusal to answer any questions, Kidwell was served with an order to show cause, issued by Circuit Judge Roger Colton, on September 17, 1996. (A8 117-118) The order to show cause stated: "The Respondent did appear in response to said subpoena, however, refused to answer questions relating to his personal knowledge of facts relating to the pending prosecution of the defendant John Zile." (A8-118) The order directed Kidwell to appear before Judge Colton on October 1, 1996. (A8-118) That hearing was rescheduled to October 7, 1996 and on that date Kidwell appeared before Judge Roger Colton. (A10 127-145) At that proceeding Judge Colton made specific written factual findings that were read into the record. (A10 130-135) Kidwell was found guilty of indirect criminal contempt. (A10-134) Kidwell addressed the court and stated in part: "I know the law is against me. The Courts have retreated from the idea that these principles are worth protecting. I am convinced I cannot allow my ethics to retreat with me." (A10-136) After a short statement from both the prosecutor and petitioner's attorney, Kidwell was sentenced to 70 days in the Palm Beach County Jail and fined $500. (A10 144-148) The sentence contained a purge provision as follows: "David Kidwell may purge himself of this sentence by answering any and all

questions propounded to him by Petitioner, so long as this is accomplished prior to October 13, 1996." (A11 147-148)

On October 21, 1996, Kidwell was released from state custody through an order entered by United States District Court Judge Wilkie Ferguson. (A13-218) The order releasing Kidwell stated that "[a]n explanatory decision will follow." On October 30, 1996 Judge Ferguson issued an Explanatory Memorandum in which he explained his reasoning for releasing Kidwell from State custody. (A11 220-227).

SUMMARY OF THE ARGUMENT

The Fourth District correctly decided that based on the instant facts no reporter's privilege would apply to petitioner. Petitioner had voluntarily published the name of his source of information, John Zile, and utilized direct quotes from the interview of John Zile, on the front page of the Miami Herald. The State sought to use Kidwell's statements to the reporter as admissions in the pending murder trial. Following the decision in Gold Coast Publications, Inc. v. State, 669 So. 2d 316 (Fla. 4th DCA 1996), rev. denied, 682 So. 2d 1099 (Fla. 1996) the Fourth District concluded that no reporter's privilege applied. The certified question should be answered in the negative holding that a news reporter cannot assert any type of privilege when there is no confidential source or confidential information involved and the evidence is relevant.

ARGUMENT

THERE IS NO REPORTER'S PRIVILEGE APPLICABLE TO PETITIONER UNDER THE FACTS PRESENT IN THIS CASE

The Fourth District concisely stated the relevant facts as follows in Kidwell v. State, 22 Fla. L. Weekly D1416 (Fla. 4th DCA June 11, 1997):

> Here a newspaper reporter engaged in a jailhouse interview with a man charged with murder. The defendant had previously given the police a confession. The interview was not on any confidential basis, and the reporter made no promises to defendant of any confidentiality in order to persuade him to talk to the reporter. In a later newspaper article, the reporter wrote extensively about the interview. After a mistrial was ordered in the criminal case, necessitating a retrial, the prosecutor subpoenaed the reporter for a deposition for discovery purposes and to adduce at the retrial certain statements made by the defendant to the reporter. The prosecutor openly revealed his intention to use these statements as admissions of the defendant at the retrial. The reporter, however, claimed a privilege on the grounds that his knowledge was acquired while he was engaged in "professional news gathering." After being ordered by the trial judge to answer the prosecutor's questions, the reporter continued to claim the privilege and refused to answer. The trial judge found him in criminal contempt and sentenced him to be incarcerated for 70 days in jail or until he earlier answered the questions, and to pay a fine of $500.

Kidwell, 22 Fla.L.Weekly at D1416.

Below, Kidwell asserted that under these facts he did not have to answer any questions regarding his interview with the incarcerated

criminal defendant. Based on the asserted privilege, Kidwell argued that he was immune from the subpoena power of the State Attorney and could not be required to answer any questions whatsoever even though he published specific details of the Zile interview in the newspaper.

The State would direct this court to several factors which distinguish this case. One, the issue arose from a criminal case where the State Attorney was seeking relevant information for use at a murder trial; two, this case involves published information, specifically, no confidential sources or confidential information are involved; and three, Zile's statements to the reporter were relevant and potentially critical to the prosecution of the pending murder trial.

Petitioner argues that the District Court erred in holding he is not protected by any privilege whatsoever under the facts present at bar and would urge that the court answer the certified question in the affirmative. The State of Florida contends the ruling of the District Court was correct based on the case law[2] and

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[2] IN LIGHT OF THE DECISIONS IN *CBS, INC. V. JACKSON, 578 So. 2d 698 (Fla. 1991)*, AND *MIAMI HERALD PUBL'G. CO. V. MOREJON, 561 So. 577 (FLA. 1990)*, DOES FLORIDA LAW PROVIDE A QUALIFIED REPORTER'S PRIVILEGE AGAINST THE DISCLOSURE OF NON-CONFIDENTIAL INFORMATION RELEVANT TO A CRIMINAL PROCEEDING?

requests that this court answer the following certified question[3] in the negative.

The Fourth District found the facts in Gold Coast Publications, Inc. v. State, 669 So. 2d 316 (Fla. 4th DCA 1996), rev. denied, 682 So. 2d 1099 (Fla. 1996), virtually identical to the facts in the present case. In both cases a reporter interviewed a criminal defendant facing charges of murder. In both cases the interview resulted in an article published in a newspaper. Both articles identified by name the criminal defendant and both articles provided direct quotes from the interviewed defendant. Based on these facts the Fourth District in Gold Coast held:

> In the instant case, as in *Waterman,[Broadcasting of Florida Inc., v. State*, 523 So. 2d 1161 (Fla. 2d DCA 1988)] the source of information provided to the journalist was known by all who read the article or viewed the broadcast-in each case it was the defendant himself. Under these circumstances, no persuasive claim for the protection of confidential news sources can be made. If, in his or her newsgathering ventures, the reporter agrees to keep the identity of the source secret, and does just that, the individual and the information will be protected. This procedure will promote the underlying purpose of the qualified newsgathering privilege which is extended to the press to

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[3] The certified question is from Davis v. State, 22 Fla. L. Weekly D798 (Fla. 2d DCA March 26, 1997), pet. pending, case no. 90,457 (Fla. 1997)

protect the confidential aspects of its newsgathering efforts.

669 So. 2d at 318.

Contrary to Florida law, Kidwell would have this court extend to him the protections of a qualified privilege under these facts where no privilege exists. A review of the history of a reporter's privilege in this State is illuminating. In the seminal case of Clein v. State, 52 So. 2d 117 (Fla. 1950) the court unambiguously stated that "[m]embers 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." Clein v. State, 52 So. 2d 117, 120 (Fla. 1950).

In 1972 the United States Supreme Court issued their landmark decision of Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct 2646, 33 L. Ed.2d 626 (1972). Since Branzburg was decided there have been literally hundreds of published cases from virtually every state and federal trial and appellate court, in both criminal and civil contexts, interpreting the Branzburg opinion. As a result, one can find several published opinions from other courts supporting an

"asserted" interpretation of the Branzburg opinion.[4] The State does assert however, that this Court, in interpreting Branzburg,

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[4] In several footnotes petitioner lists numerous opinions from both state and federal trial and appellate courts that on their face support their interpretation of Branzburg. Published opinions supporting the State's position are also plentiful. See Tofani v. State, 465 A.2d 413 (Md. 1983)(Maryland high court holds that reporter has no privilege under First Amendment to refuse to testify to grand jury investigating criminal activity); Vaughn v. State, 381 S.E.2d 30 (Ga. 1989)(Georgia Supreme Court holds there is no news gatherer's privilege pursuant to First Amendment or Constitution of Georgia); State v. Buchanan, 436 P.2d 729 (Or. 1968)("nothing in state or federal constitution compelling court to recognize reporter's privilege"); State of Texas v. McMeans, 884 S.W.2d 772 (Tex.Cr.App 1994)(newsmen have no constitutional privilege, qualified or otherwise, to withhold evidence relevant to a pending criminal prosecution); In Re Bridge, 295 A.2d 3 (N.J. Super. Ct. App. Div. 1972)(newspaper writer has no first amendment privilege to refuse to answer questions posed to him before grand jury); Karem v. Priest, 744 F.Supp 136 (W.D.Texas 1990)("there is no absolute or qualified testimonial privilege for news reporters under the First Amendment."); In Re Farber, 394 A.2d 330(N.J. 1978)("the First Amendment affords no privilege to a newsman to refuse to appear before a grand jury and testify as to relevant information he possesses, even though in so doing he may divulge confidential sources"); State v. Hohler, 543 A.2d 364 (Me. 1988)(No privilege for a reporter to refuse to testify concerning non-confidential, published information obtained from an identified source); Dow Jones and Company v. Superior Court, 303 N.E. 2d 847 (Mass. 1973)(First amendment imports no qualified privilege to journalist to refuse to testify before court or grand jury seeking information relevant to court proceeding); Caldero v. Tribune Publishing Co., 562 P.2d 791, 797 (Idaho 1977)("Our reading of Branzburg...is to the effect to no newsman's privilege against disclosure of confidential sources founded on the First Amendment exists in an absolute or qualified version."); Pankratz v. District Court, 609 P.2d 1101 Colo. 1980)(no constitutionally based reporter's privilege); In re Decker, 471 S.E.2d 462 (S.C. 1995)(no first amendment privilege allowing reporter to withhold confidential source of information arising from murder prosecution)

has recognized an extremely narrow and qualified news gathering privilege protecting against forced revelation of confidential sources of information in certain specific factual contexts. See Morgan v. State, 337 So. 2d 951 (Fla. 1976); Tribune Co. v. Huffstetler, 489 So. 2d 722 (Fla. 1986). The privilege is extremely narrow and qualified. See Tampa Television, Inc., v. Norman, 647 So. 2d 904, 905 (Fla. 2d DCA 1994) (qualified privilege only extends to confidential sources and not "the entire yield of the reporter's news gathering efforts") This "qualified privilege" found in Morgan and Huffstetler has no application in the present factual context as, at bar, it is "undisputed" that Kidwell possessed relevant evidence, from a disclosed source, the information was published in a major newspaper and the information would be admissible at a pending criminal trial for first degree murder.

In Morgan this court concluded that the facts presented fell within the "official harassment of the press" exception to the general rule against finding a reporter's privilege. 337 So. 2d at 956. This was based on the court's conclusion "that the grand jury was not investigating a criminal matter..." 337 So. 2d at 954. In a criminal context courts have often interpreted the majority opinion in Branzburg, with Justice Powell's concurrence, as creating an exception to the general rule of no privilege only

where bad faith or press harassment is alleged and proven. In re Grand Jury Subpoena, 947 F. Supp 1314, 1320 (E.D. Ark. 1996)(in the absence of allegation of bad faith or press harassment the narrow circumstances mentioned in Branzburg and in Justice Powell's concurrence as implicating First Amendment concerns have no application); In re Shain, 978 F.2d 850 (4th Cir. 1992)(in the absence of confidentiality or allegation of vindictiveness reporter has no privilege that can be asserted against compelled testimony in criminal trial regarding published interviews); In re Grand Jury Proceedings, 5 F.3d 397 (9th Cir. 1993)(in absence of allegations of bad faith or press harassment first amendment does not provide news gatherer with privilege to refuse to testify before federal grand jury); Caldero v. Tribune Publishing Co., 562 P.2d 791, 197 (Idaho 1977)("The only restriction against compelled disclosure appear to be in those cases where it is demonstrably intended to unnecessarily harass members of the news media on a broad scale..."); In re Contempt of Stone, 397 N.W.2d 244, 249 (Mich. App. 1986)(no privilege "unless the grand jury is not being conducted in good faith..."); National Broadcasting v. Court of Common Pleas, 556 N.E.2d 1120, 1127 (Ohio 1990)(a court may enforce a subpoena over a reporter's claim of privilege, so long as it is persuaded that the subpoena has been requested or issued for a

legitimate purpose, rather than for harassment); In re Tierney, 328 So. 2d 40, 44 (Fla. 4th DCA 1976)("Unless it can be shown that the questions propounded were *not* relevant and material to a good faith grand jury investigation then no First Amendment privilege exists"). This "bad faith or press harassment" exception is what this court recognized in Morgan as the court specifically noted that the proceedings were "not part of an effort to obtain information needed in a criminal investigation." 337 So. 2d at 956. At bar there has never been any allegations of bad faith or press harassment. Therefore, the exception discussed by this court in Morgan is not applicable.

Likewise, in Huffstetler, the court recognized the qualified privilege first discussed in Morgan, but limited the qualified privilege discussed in Morgan to civil or quasi civil cases when it concludes that: "we find that the societal interests underpinning most criminal statutes are not present in the instant case. Much like the situation in *Morgan,* the principal interest which section 112.317(6) furthers amounts to a private interest in reputation." 489 So. 2d at 724. Morgan and Huffstetler both stand for the limited rule that where a grand jury investigation is commenced to discover confidential information or the name of confidential sources useful only in a civil or quasi civil action, the courts

will apply the "official harassment of the press exception" and grant the reporter a qualified privilege. Applying this principle, the court in Kidwell held that the qualified privilege did not apply to Kidwell because the situation involved a pending criminal trial arising from the murder of a seven year old child. No confidential source or confidential information was involved and the information was relevant.[5]

In more recent cases this court has reaffirmed, that in the absence of an issue involving forced revelation of a confidential source, no news gathering privilege exists. See Miami Herald Publishing Co. v. Morejon, 561 So. 2d 577 (Fla. 1990)(no privilege whatsoever protecting journalists from testifying as to their personal observations of a relevant event); CBS, Inc. v. Jackson, 578 So. 2d 698 (Fla. 1991)(no privilege against compelled production of televised video tapes). While the law in Florida establishes that a reporter has the same duty as any other citizen to testify pursuant to a subpoena, it subject only to the narrow and qualified privilege against forced revelation of confidential

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[5] In Morgan and Huffstetler this court interpreted Branzburg, and carved out a very narrow exception to the general rule stated in Clein. Morgan and Huffstetler, cases involving confidential sources, are the only cases where this Court found any qualified news gathering privilege.

sources in certain factual contexts. The decisions in C.B.S. v. Jackson and Miami Herald Publishing Co. v. Morejon indicate that this Court does not recognize a general news gathering privilege or a qualified privilege in the absence of a confidential source.

Petitioner argues that the holding in Miami Herald Publishing Co. v. Morejon, which recognizes no privilege whatsoever for the relevant eyewitness observations of a reporter, should be limited solely to instances involving a journalist's eyewitness observation of criminal activity. He also asks this court to greatly expand the interpretation of Branzburg to provide him with a "qualified privilege" under the facts of this case. Each contention should be rejected.

The argument most commonly used in support of a qualified privilege involving confidential sources is that without such a privilege "informants will refuse or be reluctant to furnish newsworthy information in the future." Branzburg, 408 U.S. at 682. At bar there was never a confidential source or confidential information. Petitioner does not suggest that sources will dry up or be hesitant to talk to the reporter in the future. Indeed, everything was voluntarily disclosed on the front page of the Miami Herald based on an understanding between the reporter and the criminal defendant.

In Tofani v. State, 465 A.2d 413 (Md. 1983), a reporter for the Washington Post, authored a three part series about the conditions at a local jail describing several incidents of rape and sexual assault at the jail. 465 A.2d at 414. "Although Tofani did not personally witness any of the criminal activity described, she was given permission by both victims and assailants to identify them by name in her articles, which she did." Id. Tofani was subpoenaed to appear before the grand jury. Tofani moved to quash the subpoena citing a first amendment news gatherer's privilege as well as privilege pursuant to Maryland's shield law. The Maryland Supreme Court held that no qualified privilege applied and concluded as follows: "Surely if the [United States] Supreme Court was unwilling to protect a source who has not personally engaged in criminal conduct, it defies logic to contend that it would protect a self-confessed criminal, as here...In so concluding, we find it difficult to envision that sources willing to be publicly labeled as self confessed criminals would suddenly disappear if the First Amendment protection championed in this case was not forthcoming." 465 A.2d at 413; see also United States v. Larouche Campaign, 841 F. 2d 1176, 1181 (1st Cir. 1988)("We have been referred to no authoritative sources demonstrating or explaining how any chilling

effect could result from disclosure of statements made for publication without any expectation of confidentiality.")

There are no federal appellate or any decision of an intermediate state appellate court that would recognize a qualified First Amendment privilege applicable to Kidwell under the facts of the present case. Indeed, the United States Supreme Court has not recognized the asserted news gathering privilege. Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646, 33 L. Ed. 2d 626 (1972). In Branzburg the majority opinion[6] stated: "Until now the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against

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[6] There is wide discrepancy between courts and judges regarding whether the opinion of Justice White in Branzburg is a majority or plurality opinion. In re Grand Jury Proceedings, 5 F.2d 397, 400 (9th Cir. 1993)("It is important to note Justice White's opinion is *not* a plurality opinion. Although Justice Powell wrote a separate concurrence, he also signed Justice White's opinion, providing the fifth vote necessary to establish it as the majority opinion."); In re Grand Jury Proceedings, 810 F.2d 580 (6th Cir. 1987)(opinion refers to majority opinion); United States v. Cutler, 6 F.3d 67, 72 (2d Cir. 1993)("Justice Powell concurred in the majority opinion") compare Morgan v. State, 337 So. 2d 951, 954 (Fla. 1976)(refers to both "five man majority" and "plurality opinion"); State v. Salsbury, 924 P.2d 208 (Idaho 1996)(speaks of plurality opinion and acknowledges that Justice Powell cast the deciding vote creating the majority for the decision); Kidwell v. State, 22 Fla. L. Weekly D1416, D1418 (Fla. 4th DCA June 11, 1997)(Judge Farmer's opinion makes point that Justice Powell's concurring opinion was merely added to Justice White's opinion; in dissent Judge Klein refers to plurality opinion, Id. at D1419)

self-incrimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do." 408 U.S. at 689-690.

If there is any doubt that this was the holding of Branzburg one only has to look at the 1991 language of the United States Supreme Court in Cohen v. Cowles Media Co., 501 U.S. 663, 111 S. Ct. 2513, 115 L. Ed. 2d 586 (1991). In Cohen the court referred to their Branzburg opinion and stated: "Neither does the First Amendment relieve a newspaper reporter of the obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, even though the reporter might be required to reveal a confidential source." 501 U.S. at 669; see also University of Pennsylvania v. EEOC, 493 U.S. 182 (1990)("In Branzburg, the Court rejected the notion that under the First Amendment a reporter could not be required to appear or to testify as to information obtained in confidence without a special showing that the reporter's testimony was necessary.")

Clearly, the qualified privilege upon which petitioner relies is applicable only in cases involving the forced revelation of confidential sources in specific factual contexts. This is

consistent with many state and federal appellate courts[7]. See In re Grand Jury Proceedings, 810 F.2d 580 (6th Cir. 1987)(reporter has no first amendment privilege to withhold information sought by grand jury where confidential source relationship is not implicated); In re Grand Jury Witness Subpoena of Abraham, 92 Ohio App.3d 186, 634 N.E.2d 667 (1993) (reporter did not have first amendment or state constitutional privilege to refuse to testify under subpoena before grand jury regarding non-confidential, non-source material that had already been published from an interview with individual under criminal investigation); In re Letellier, 578 A.2d 722 (Me.1990) (reporter did not have constitutional privilege to refuse to comply with grand jury subpoena commanding him to turn over those portions of a videotaped non-confidential interview that were not broadcasted); State v. Hohler, 543 A.2d 364, 366 (Me. 1988)(in identical factual context

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[7] In footnote 7 of the initial brief petitioner states that nine Federal Courts of Appeals have recognized a journalist's privilege based on the First Amendment. The state questions the validity of this assertion. See In re Grand Jury Subpoena Duces Tecum, 112 F. 3d 910, 940 n. 8 (8th Cir. 1997)(whether Branzburg established a qualified news reporter's privilege is an open question in this Circuit) However, the issue relevant at bar is whether the Courts of Appeals would recognize a privilege under the facts of the present case. The State does not believe that any of the cited Federal Courts of Appeals would recognize such a privilege under the facts of the present case.

identical factual context as at bar court holds: "we refuse to recognize a qualified privilege for a reporter not to testify concerning non-confidential, published information obtained from an identified source.").

At least one federal decision has expressly rejected the existence of any reporter's privilege whatsoever in any civil or criminal context. In re Grand Jury Proceedings, 810 F. 2d 580 (6th Cir. 1987). Other Federal Courts of Appeals have specifically rejected the existence of a qualified privilege where the information is needed regarding the investigation or prosecution of a criminal case. In re Shain, 978 F.2d 850 (4th Cir. 1992)(in absence of confidentiality or allegation of vindictiveness reporter has no privilege that can be asserted against compelled testimony in criminal trial regarding published interviews); In re Grand Jury Proceedings, 5 F.3d 397 (9th Cir. 1993)(in absence of allegations of bad faith or press harassment first amendment does not provide news gatherer with privilege to refuse to testify before federal grand jury); In re Grand Jury Subpoenas, 78 F.3d 1307, 1313 n. 13 (8th Cir. 1996)(absent unusual circumstances the First Amendment rarely offers protection from a duty to testify before a grand jury). Since Kidwell cannot identify any privilege, there is no need for this court to "balance any interest" or "address the

merits of the proposed three part test". Gold Coast, 669 So. 2d at 318; Morejon, 561 So. 2d at 580 n. 4. Petitioner's suggestion that the court extend a qualified privilege to him should be rejected.

Waiver

Should this court decide that a qualified testimonial privilege is applicable to Kidwell, any privilege has been voluntarily waived by Kidwell. Testimonial privileges are waived through voluntary disclosure of the communication to third parties. § 90.507 Fla. Stat. The State cannot think of a better example of voluntary disclosure than publication in a major newspaper. See Andrews v. Andreoli, 400 N.Y.S. 2d 442 (1977)(no applicable privilege under state or federal constitution, and reporter's privilege pursuant to State shield law waived through voluntary publication); In re Bridge, 205 A.2d 3 (N.J. Super. Ct. App. Div. 1972)(any privilege under State shield law waived where newspaper reporter disclosed in published article source of information and specific information gained during interview); Newburn v. Howard Hughes Medical Institute, 594 P.2d 1146 (Nev. 1979)(entire reporter's privilege granted pursuant to State shield law waived through voluntary disclosure of any significant part of the matter). At bar, even if Kidwell had a privilege at one time, the privilege has been waived through publication of the name of

the source and direct quotes from the source in an article in the Miami Herald. "It is black letter law that once the privilege is waived, and the horse out of the barn, it cannot be reinvoked." Hamilton v. Hamilton, 409 So. 2d 1111, 1114 (Fla. 4th DCA 1984).

CONCLUSION

Wherefore, based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Court AFFIRM the decision of the Fourth District and answer the certified question in the negative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Answer Brief of Respondent" has been furnished by mail to: Sanford Bohrer, Holland and Knight, 701 Brickell Ave., Suite 3000, Miami, FL. 33131, and to Arthur Jacobs, General Counsel, Florida Prosecuting Attorneys' Association, Post Office Box 1110, Fernandina Beach, Florida 32035-1110, this 10th day of September, 1997.

OF COUNSEL