IN THE SUPREME COURT OF FLORIDA

CASE NO. 90,839

DAVID KIDWELL,

Petitioner,

vs.

THE STATE OF FLORIDA
and JOHN ZILE,

Respondents

REPLY BRIEF OF PETITIONER DAVID KIDWELL

ON DISCRETIONARY REVIEW
OF THE FOURTH DISTRICT
COURT OF APPEAL OF FLORIDA

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Introduction

The State asks this Court to hold that in any criminal case where harassment or bad faith cannot be shown, the First Amendment provides no protection from compelled testimony revealing published or unpublished information gathered on a non-confidential basis by a journalist, regardless of whether the testimony is necessary or available from other sources. This means the State is asking this Court to hold it is the right -- indeed the obligation -- of every attorney in a criminal case to compel the testimony of and the production of all notes by every journalist known or believed to have information relating to the case.

Alternatively, the State asks this Court to hold that if the press publishes anything relating to a criminal case, the press waives all rights against being compelled to testify regarding such subject matter, and is fair game for all information it has, published and unpublished.

This Court should reject the State and hold (1) there is a qualified privilege, and a journalist's testimony will only be compelled where it is truly relevant, really needed, and otherwise unavailable, and (2) the privilege is not waived by publication.

ARGUMENT

1. This Court should not hold that the First Amendment provides a journalist no protection from compelled testimony regarding published or unpublished information gathered on a non-confidential basis.

What this case is about and what it means are critical, and the State simply refuses to even address these matters. This

case is not simply about "published information." It is about published and unpublished information. This case is not simply about a journalist confirming what has been published. It is about whether he can be compelled to tell everything he knows, from whatever source, whether published or not, about any criminal case. It is about the discovery depositions, the notes, and the cross examination of that journalist, all of which will go well beyond simply confirming what was published. And finally, this case is about what will or will not be published in the future; it is about censorship and self-censorship, as reporters and their editors make judgments about what they want the lawyers to know instead of what they believe the public should know.

a. The State itself asked dozens of questions beyond what was published.

If one were to read only the State's brief, one would believe this case is a simple one in which Kidwell was asked only to confirm under oath that the words he wrote in the article were accurate. To be able to lead the reader to such a conclusion, the State had to ignore the record, because the record includes the questions the State wants answered, the same questions Kidwell was held in contempt for not answering, and more than a score of those questions seek information not contained in the article. The State indicated it wanted to know (1) everything Kidwell knew about Zile, (2) what Zile's wife said to Kidwell, (3) what records Kidwell reviewed, (4) what police officers told Kidwell, (5) what knowledge Kidwell had of Zile's confession, and (6) all the natural followup questions:

Had you spoken to [Zile] prior to your going to the Palm Beach County Jail on the phone? (A.111).

Did you know John Zile before you went to see him at the County Jail? (A.111).

Before you went there, had you heard or read any of his statements that he gave to the police officers? (A.124).

Had you ever spoken with or met Pauline Zile? (A.112).

What did he say about Pauline's involvement in the death of Christina? (A.117).

Did you speak to Pauline Zile's attorney before you went there? (A.124-125).

Describe what John Zile was wearing in the jail when you saw him. (A.113).

Did he appear to you to be under the influence of any medication? (A.113).

What was his behavior like at the jail when you were questioning him? (A.125).

What details did John Zile tell you that his wife left out regarding Christina's death? (A.114).

Did you make any promises to John Zile about anything? (A.115).

Did you threaten him to talk to you? (A.115).

What did he tell you about that specific incident..? (A.115-116).

What did John Zile tell you about the bruises on Christina's body? (A.116).

Who did he attribute those bruises to---? (A.116).

Did you speak with any of the police officers before you went there? (A.125).

Did you read it in any of the police reports or hear it on the news? (A.125).

The State Attorney concluded by indicating these questions were just the beginning: **"I'm going to go through all the questions I would have asked him had he answered."** (A.136).

b. The simple line-drawing urged by the State is not simple at all, and the inescapable result will be self-censorship and opening the newsroom to the criminal justice system's attorneys.

The State would have this Court hold this case simply involves confirmation under oath of the accuracy of a published article and a simple bright-line rule can be drawn. But this case is not simply about Kidwell standing behind what he wrote in the newspaper; it is about how he got to do the interview, the preparation he did for it, other sources he had prior to the interview, what other people involved in the case told him before the interview, and all other facts Kidwell had relating to the case. That is what the State was asking for. In addition, Zile's counsel would be certain to go beyond this to seek bases for undermining Kidwell's credibility, and under the discovery rules, in a first degree murder case, Zile's counsel might inquire about Kidwell's general journalistic practices or Kidwell's conduct in other circumstances, and pursue the normal lines of questioning used to depose State witnesses. The reverse would be true if it were Zile who wanted Kidwell's testimony, and the State the party trying to undermine his credibility. And the holding urged on this Court will not make distinctions based upon who wants the information or why.

This case is not about the published information gathered on a non-confidential basis by a journalist. It is about all the information gathered on a non-confidential basis, published and unpublished. If this Court is going to hold there is no First Amendment privilege -- not even the qualified one urged by Kidwell -- then there is no principled way of separating unpublished information from published information, the newsroom will be opened to the criminal justice system, and the press will truly have become the unpaid private investigators of the criminal justice system.[1]

The most recent decision on point is by the Supreme Court of Appeals of West Virginia. State v. Charleston Mail Associates, 488 So. 2d 5 (W.Va. 1977). Clearly aware of the many decisions on point, the West Virginia court held a criminal defendant must meet the three-part test urged here by Kidwell. There was a dissent, but the dissenting justice urged even more protection for the press, not less.

c. The State acknowledges a need for balancing while urging this Court to reject a balancing test.

The State says there is no need to balance interests or consider the particular factual circumstances in determining whether a journalist should be compelled to testify, but then proceeds to tell the Court that the facts are important. Thus, the

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[1] The State does not identify one prosecution thwarted by the State's inability to obtain a journalist's testimony. Ironically, in the companion case of State v. Merlan Davis, Case No.90,457, also pending before this Court, the State is arguing that quashing a defense subpoena to a journalist in that case was harmless error.

State points to the fact that "the State Attorney was seeking relevant information for use at a murder trial." (Br.10). Does this mean relevance matters? Does it mean that the nature of the case, whether it be civil or criminal, felony or misdemeanor, matters? Apparently the State's answers to these questions are yes. (In State v. Merlan Davis, the State says relevance is important, Initial Brief, p.8). The State also says the nature of the information sought is significant: "this case involves published information," with no confidential source. (Br.10). Does this mean that if, as noted above, unpublished information is "involved," that there might be protection for the press? Apparently the State's answer to this question is yes. (Curiously, in State v. Merlan Davis, the State says this case "dealt with specific unpublished statements." I.B. p.8) Finally, the State says it is significant that there is a real need for the information: "Zile's statements to the reporter were...potentially critical to the prosecution." (Br.10). Does this mean that, if, as the trial judge himself noted, the information was cumulative, or not critical, that the press might deserve some protection? Apparently the State's answer to this question is yes. Otherwise, why would the State say there was no error to hold there is no privilege "under the facts present at bar." Thus, the State uses balancing and urges it on this Court.

2. This Court should recognize the privilege already recognized by its federal breathren and urged on the Court by two of the four judges in this case who have considered the issue.

This Court's decision is not controlled by **Morejon**. The narrow scope of the **Morejon** decision is apparent both from what Judge Klein and Judge Ferguson have said, and from the decisions of other states which this Court expressly relied upon in **Morejon**. See **Morejon**, 561 So. 2d at 581-82. See, e.g., the first decision this Court cited in **Morejon** as an example of "eyewitness observations," In re Ziegler, 550 F. Supp. 530, 531 (W.D.N.Y. 1982). (Reporter compelled to testify because he was an "eyewitness to a crime.") See, also, Rosato v. Superior Court, 51 Cal. App. 3d 190, 218, 124 Cal. Rptr. 427, 446 (5th Dist. 1975), also cited by this Court. (Reporter's privilege does not shield journalists "from testifying about criminal activity in which they have participated or which they have observed"); Lightman v. State, 294 A.2d 149, 157 (Md. Ct. App.), aff'd, 295 A.2d 212 (1972), cert. denied, 411 U.S. 951 (1973) ("personal observations" of criminal activity). Other courts have seen the same significance. See In re Woodhaven Lumber & Mill Work, 589 A.2d 135, 138 (N.J. 1991) (citing **Morejon** for proposition that "an eyewitness exception to press privileges involve[s] newspersons who witnessed human participation in a crime or accident."). Because **Morejon** concerned the narrow "eyewitness" issue, this Court did not reach the distinct question of "whether the qualified privilege extends to nonconfidential second-hand information obtained by a journalist in newsgathering activities." Kidwell v. McCutcheon, 25 Med. L. Rptr. 1219, 1220 (footnote omitted) (S.D. Fla. 1996).

Morejon and **Jackson** simply acknowledge the principle established by the United States Supreme Court more than 20 years ago in Branzburg v. Hayes, 408 U.S. 665 (1972): when a reporter is an eyewitness to the subject matter of a subsequent trial, the First Amendment must yield. Otherwise, the reporter's privilege applies. "Surely, if the supreme court in Morejon had intended its decision to apply to [non-eyewitness situations], it would have addressed Blanton and Loadholtz" and these other federal cases recognizing a privilege in Florida in such situations. Kidwell v. State, 696 So.2d 399, 408 (Fla. 4th DCA 1997)(Klein, J., concurring specially).[2]

To define eyewitness as broadly as did the district court in this case would obliterate the privilege altogether, by sweeping within the **Morejon** holding every reporter who talks to anyone about any matter that relates to a criminal prosecution. See also, Kidwell v. McCutcheon, 25 Med. L. Rptr. at 1220-21 (if journalist's non-confidential interview is not qualifiedly privileged, "there is a question whether any newsgathering activity remains protected by the First Amendment."). Were the State's view to prevail, any interview with a person charged with or suspected of a crime or a witness to a crime or arrest, including the police, would invite subpoena, on the grounds that the reporter was an "eyewitness" to relevant statements. Indeed, it might be malpractice or ineffective

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[2] According to three federal circuits, a lack of confidentiality should at most constitute "a factor that diminishes" a journalist's interest in resisting a subpoena. See, e.g., Shoen v. Shoen, 5 F.3d 1289,1295 (9th Cir. 1993).

assistance of counsel to fail to subpoena the reporter. This is a truly chilling proposition, which if adopted would immediately and inevitably curtail such interviews. Cf. Shoen v. Shoen, 5 F.3d 1289, 1294-95 (9th Cir. 1993) (citing dangers of "administrative and judicial intrusion into the newsgathering and editorial process" and of "converting the press in the public's mind into an investigative arm of prosecutors and the courts"). This "court must guard closely against the chilling effects that would result from subjugating reporters to the whims of attorneys seeking discovery of information obtained in the course of reporting a story, especially when the relevance and necessity of obtaining the information are questionable." Brinston v. Dunn, 919 F.Supp. 240, 244 (S.D. Miss. 1996). The dissent in Charleston Mail Associates made the same point:

> "I believe additional considerations are necessary to insure the press can freely collect and edit news, unhampered by repeated demands for its resource materials....To the extent America has been able to survive and thrive, we must credit the First Amendment with being one of the main reasons. Whether you like the press or not--and a lot of people in public life do not--if you love freedom and democracy, you better zealously support and protect the First Amendment."

A distinction between eyewitness activity and general newsgathering, therefore, is appropriate. The interests at stake for a journalist are considerably greater -- and a litigant's interests are considerably lesser -- when the reporter was not an eyewitness to anything. "There is a significant distinction between being an eyewitness to a news event and merely conducting an

interview long after, such as was done in this case." Kidwell v. State, 696 So.2d at 407-408, (Klein, J., concurring specially).

It is understandable how some lawyers and judges see no abridgement of First Amendment rights to ask a journalist to confirm under oath what he or she published or broadcast. But when, as in this case, a reporter is asked who else he talked to, what other sources he consulted, what he observed but did not report, what he was told but did not publish, and to testify as to all other information he has about the case, all regardless of whether the facts were published, core issues of editorial judgment and press freedom arise. A proper, limited reading of **Morejon** and **Jackson** protects these core First Amendment matters from unwarranted probing. Cf. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974) ("The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials -- whether fair or unfair -- constitute the exercise of editorial control and judgment," a process that should be immune from government intrusion).

The qualified privilege, therefore, means only that a litigant will be denied non-eyewitness testimony that is cumulative, irrelevant, or for which there is a reasonable alternative source or no compelling need. Given the First Amendment interests at stake, this is the only fair result.[3]

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[3] The State is forced to rely almost exclusively on grand jury decisions to support its position. Thus, of twelve decisions cited in its footnote 4, six were grand jury decisions, (Tofani, Vaughn,

3. There was no waiver simply because Kidwell published the interview of Zile.

The State's fallback position is waiver. The State's position is that if the subject matter of an interview by a reporter is disclosed publicly, the reporter's privilege is waived, both as to what was published and what was not published. This argument is based on a false premise. That false premise is that the sole purpose for a testimonial privilege for reporters is to protect confidentiality. In fact, the purpose for the privilege is to protect journalists' work product, and to keep the press separate from the government and the judiciary. As Judge Scott noted in Loadholtz v. Fields, 389 F.Supp. 1299, 1302 (M.D. Fla. 1979), the "distinction [between confidential information and non-confidential information] is utterly irrelevant to the 'chilling effect' that the enforcement of these subpoenas would have on the flow of information to the press and the public. The compelled production of a reporter's resource materials is equally as invidious as the compelled disclosure of his confidential informants." See, also, Hatch v. Marsh, 134 F.R.D. 300, 301 (M.D. Fla. 1990), U.S. v. Marcos, 17 Med.L.Rptr. 2005 (S.D.N.Y. 1990). Different privileges protect different interests. Thus, the attorney client privilege protects only the communications between attorney and client. It does not protect the fact that they

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Buchanan, Bridge, Farber, Dow Jones), one involved a libel suit against the press (Caldero), in one all the alternatives were exhausted (Decker), one reserved ruling regarding unpublished information (Hohler), and one involved personal observation of the event (Pankrantz).

communicated or the client from being compelled to testify to all the underlying facts. In contrast, the psychotherapist privilege protects both the fact of the communication and the identity of the patient. And a criminal defendant can testify on his own behalf at a trial, but decline to do so at a second trial, without there being a waiver. It would indeed be a Hobson's choice if in order to exercise one's constitutional right as a member of the press to report the facts to the public, one must waive his privilege not to be hailed into court later as someone else's unpaid investigator. See Simmons v. U.S., 390 U.S. 377 (1968).

The State cites three decisions it says supports its position. The first, Andrews v. Andreoli, 400 N.Y.S. 2d (Sup. Ct. 1977), a New York State trial court decision, simply holds that the privilege as applied to that grand jury case was to protect confidentiality, and where there was no confidentiality agreement, there was no privilege. The second decision, In re Bridge, 295 A.2d 3 (N.J. Super. Ct. App. Div. 1972), involved a grand jury investigation. The final decision, Newburn v. Howard Hughes Medical Institute, 594 P.2d 1146 (Nev. 1979), involved a statutory privilege and a statutory waiver by the disclosure -- not in the newspaper -- but in conversations with third parties.

There was no waiver.

CONCLUSION

For these reasons, the district court of appeal's decision should be reversed, and the circuit court's adjudication of contempt and sentence should be reversed and vacated.

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I HEREBY CERTIFY a true copy of the foregoing was served by mail this 10th day of October, 1997, upon:

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