# Reporters' Privilege in the 11th Circuit

## Introduction and History

Neither the plain language of the First Amendment of the U.S. Constitution nor federal statutory law provide for a reporters' privileget. The United States Supreme Court even rejected a First Amendment-based reporters' privilege in the 1972 case *Branzburg v. Hayes*, which held that the First Amendment does not permit reporters to refuse to testify before a grand jury about information they had obtained in the course of newsgathering.[1]However, despite these apparent death knells for reporters' privilege, ambiguities in the 5-4 *Branzburg* decision allowed many lower courts to construe *Branzburg* as creating a qualified reporters' privilege. The United States Court of Appeals for the Eleventh Circuit is one such court.

The Eleventh Circuit is the federal appellate court that decides appeals from cases in the nine federal district courts spread throughout Georgia, Alabama, and Florida. Congress established the Eleventh Circuit in 1981 after splitting these districts apart from the Fifth Circuit. Accordingly, Fifth Circuit decisions that occurred before 1981 are binding precedent in the Eleventh Circuit.

One vital and binding Fifth Circuit decision involving reporters' privilege laid the groundwork for the Eleventh Circuit to advance this qualified right. The Fifth Circuit first recognized a qualified reporters' privilege in 1980 in *Miller v. Transamerican Press, Inc*.[2] There, the court considered the question of whether a plaintiff in a libel suit could compel journalist defendants to identify a confidential source. The court held that "a reporter has a First Amendment privilege which protects the refusal to disclose the identity of confidential informants, however, the privilege is not absolute and in a libel case as is here presented, the privilege must yield."[3] In the court's discussion, it outlined what would become the reporters' privilege for journalists in civil cases in the Eleventh Circuit, concluding that "[a] reporter's privilege exists where a subpoena seeks the identity of a journalist's confidential source in a civil case, including a defamation case in which the reporter or media organization is a party, and the party seeking the information must demonstrate with substantial evidence that the information is relevant, not available elsewhere, and the need for the information is compelling."[4] A few months later, the *Miller* court supplemented their decision, clarifying that reporters' privilege may be pierced if the party seeking the reporter's confidential source presents "substantial evidence that the challenged statement was published and is both factually untrue and defamatory; that reasonable efforts to discover the

[1] *Branzburg v. Hayes*, 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972) (holding that requiring newsmen to appear and testify before state or federal grand juries does not abridge the freedom of speech and the press guaranteed by the First Amendment).
[2] *Miller v. Transamerican Press, Inc*., 621 F.2d 721 (5th Cir.), opinion supplemented on denial of reh'g, 628 F.2d 932 (5th Cir. 1980).
[3] *Id*.
[4] Jennifer A. Mansfield, Reporter's Privilege Compendium: 11th Circuit, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (last updated May 2019).

information from alternative sources have been made and that no other reasonable source is available; and that knowledge of the identity of the informant is necessary to proper preparation and presentation of the case."[5]

In 1986, after the creation of the Eleventh Circuit, the court in *United States v. Caporale* expanded its conception of the reporters' privilege to apply in criminal cases. [6] The court found that in the criminal context "information may only be compelled from a reporter claiming privilege if the party requesting the information can show that it is highly relevant, necessary to the proper presentation of the case, and unavailable from other sources."[7]

The *Miller* and *Caporale* cases thereforeestablish the Eleventh Circuit's baseline standard for the reporters' privilege, allowing journalists to "resist compelled disclosure of their professional news gathering efforts in both criminal and civil proceedings,"[8] with only a few exceptions.

The Scope of Protection in the 11th Circuit

Although the standard for the reporters' privilege was outlined in the *Miller* and *Caporale* decisions, the Eleventh Circuit has since broadened the scope of protection for journalists. For example, in *United States v. Capers*, the court affirmed the lower's court's decision to quash a subpoena seeking from a television station a *non-confidential* recording of an interview with police regarding murder.[9] The court explained that the defendant in that case failed to establish that he could not obtain the sought-after information from other sources, including the police department that had conducted the interview.[10] Although the Eleventh Circuit had previously only expressly addressed protections for confidential information or sources,the *Capers* decision suggests that non-confidential information is also covered under the reporters' privilege.

Federal district courts in the Eleventh Circuit have likewise expanded the reporters' privilege. As in *Capers*, the United States District Court for the Middle District of Alabama held in *Abrams v. Tuberville* that "the test for overcoming the privilege remains the same even if the information was not obtained from a confidential source."[11] In other words, *Abrams* held that the Eleventh Circuit's *Miller* test applies to confidential and non-confidential information alike.

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[5] *Miller v. Transamerican Press, Inc*., 628 F.2d 932, 932 (5th Cir. 1980).
[6] *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986).
[7] *Id*.
[8] Mansfield, note 23, *supra*.
[9] *United States v. Capers*, 708 F.3d 1286, 1303 (11th Cir. 2013)(emphasis added).
[10] *Id*.
[11] Mansfield, note 23, *supra* (citing *Abrams v. Tuberville*, No. 2:12CV177-MHT, 2013 WL 12244457, at *3 (M.D. Ala. Aug. 15, 2013)).

The United States District Court for the Middle District of Florida also expanded the reporters' privilege in *United States v. Fountain View Apartments, Inc*.[12] There, the court held that outtakes, reporters' notes, reporters' personal observations, and internal emails with editors about the story, draft of scripts, or other similar requests were protected by the reporters' privilege.[13] The court explained that these items were not relevant, and thus failed to meet the standards articulated by the Eleventh Circuit in both *Miller* and *Caporale* for overcoming the qualified reporters' privilege.[14] However, not all federal district courts in the Eleventh Circuit have been as protective of news source information as *Fountain View*.Two Georgia federal district court decisions provide examples of this. The District Court for the Northern District of Georgia in *United States v. Vasquez-Ortiz* held that the First Amendment reporters' privilege does not shield outtakes outright.[15] The court explained that, in the case at bar, the outtakes contained highly relevant information, and otherwise met the three-prong standard articulated in *Caporale* for overcoming the qualified reporters' privilege.[16] Particularly, the court reasoned that "[s]ince the outtakes provide footage of the [defendant's] arrest, they are highly relevant in his quest to suppress evidence and statements emanating from his arrest." The District Court for the Southern District of Georgia also did not adopt the broadly protective stance seen in *Fountain View*. In *Woods v. Georgia Pacific Corporation*, the court directed a news organization to provide the court with a copy of a host of documents, including any and all audio recordings or video recordings, including unaired clips and recordings that address, reference, or relate to the interviewee defendant's visit to and entry onto plaintiff's property.[17] The court did not reach the issue of whether those items were protected by the reporters' privilege, but instead directed the news organization to provide "a copy of the unedited version of the footage of [the defendant's] interview with Plaintiff for *in camera* inspection."[18] The court would thereafter "determine whether [the plaintiff] should be entitled to view any or all of this footage."[19]

Recent Jurisprudence

Since the *Miller* and *Caporale* cases, there has been one Eleventh Circuit case related to reporters' privilege: *Price v. Time, Inc*. In that 2005 case, the court considered "whether *Sports Illustrated* magazine and one of its writers [were] protected under Alabama law or by the federal Constitution from being compelled to reveal the confidential source for an article they published…"[20] The answer to the federal constitutional question hinged on whether the plaintiff

[12] *United States v. Fountain View Apartments, Inc*., No. 608-CV-891-ORL-35DAB, 2009 WL 1905046 (M.D. Fla. July 1, 2009).
[13] *Id*.
[14] *Id*.
[15] *Id*.
[16] *Id*.
[17] *Woods v. Georgia Pac. Corp*., No. CV206-190, 2008 WL 11350078, at *1 (S.D. Ga. Nov. 4, 2008)
[18] *Id*.
[19] *Id*.
[20] *Price v. Time, Inc*., 416 F.3d 1327, 1330 (11th Cir.), *as modified on denial of reh'g*, 425 F.3d 1292 (11th Cir. 2005).

"made all reasonable efforts to discover the identity of the confidential source in ways other than by forcing *Sports Illustrated* and its writer to divulge it."[21] That is, the issue turned on one prong of the *Miller* test.

The court found that the plaintiff met the first and third requirements, but stated that it could not conclude that he had "no other reasonable means of discovering the identity of the confidential source." Accordingly, the plaintiff could not compel disclosure of the source's identity.[22] Although the plaintiff had taken some depositions in the case, the court explained that he had not deposed four key persons that might have direct knowledge of the source's identity and therefore had not satisfied the *Miller* decision's requirement of making "reasonable efforts" at alternative discovery. Explaining what "reasonable efforts" means, the court stated that *Miller* does "not [require] every effort and not efforts for which there is a high probability of futility. In this area it is reasonable to require that a party beat the bushes, but it is not reasonable to require him to pull up every tree, bush, and blade of grass by the roots."[23]

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[21] *Id*.
[22] *Id*.
[23] *Id*. at 1348.