

FILED

SEP 29 2008

**IN THE CIRCUIT COURT
FOR THE THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS**

CLERK OF CIRCUIT COURT # 82
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

The Alton Telegraph,

Petitioner,

v.

The People of the State of Illinois,

Respondent.

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Cause No. 08-MR-

548

IN RE GRAND JURY SUBPOENA
DIRECTED TO THE ALTON
TELEGRAPH

MOTION TO QUASH SUBPOENA TO THE ALTON TELEGRAPH

Petitioner *The Alton Telegraph* ("The Telegraph"), pursuant to 735 Ill. Comp. Stat. 5/8-901 (2007), hereby objects to and moves to quash the grand jury subpoena (the "Subpoena") that was issued by the Madison County Third Judicial Circuit Court on September 18, 2008 and received by The Telegraph on September 22, 2008. A copy of the Subpoena is attached hereto as Exhibit A. In support of this Motion, The Telegraph shows the following:

1. The Subpoena commands that "The Alton Telegraph, Attn: Jim Shrader" appear at 9:00 a.m. on October 2, 2008, before the Grand Jury to be held at the Madison County Criminal Justice Center in Edwardsville, Illinois, and produce at that time the following: "Any records leading to the full identity, including name, address and IP address of the following bloggers that have left messages and comments on the Alton Telegraph Web Page: john3418, puplebutterfly, mrssully, cstyle and pnbcm."

2. The Subpoena was issued in connection with a criminal investigation that does not involve The Telegraph.

3. The Telegraph is a daily newspaper of general circulation that is distributed in Alton, Illinois and the surrounding area, and it is engaged in newsgathering activities. The Telegraph distributes news in traditional form and through the electronic media.

8. By providing information anonymously on The Telegraph's website about a newsworthy topic and in response to an article published by the Telegraph, the anonymous persons at issue are both "persons" and a "means" by which The Telegraph obtained information and therefore constitute protected "source[s]" under Section 5/8-901. Indeed, in the digital age a newspaper or reporter receiving information in this fashion is no different from anonymous tips provided to newspaper reporters telephonically or in written form.

9. The Subpoena should be quashed because the State's Attorney has failed to meet the high standard required to overcome the protection afforded by Section 5/8-901.

10. For example, there has been no showing whatever that the State's Attorney and local law enforcement have exhausted all other potential avenues for the information sought—alleged *past* criminal activity by the subject of the investigation. The State's Attorney must employ traditional methods of investigation, such as reviewing criminal and court records and speaking with friends, neighbors, colleagues and other persons who know the defendant, before conscripting the news media in conducting the investigation. Plainly there are means other than The Telegraph to seek further background information about the defendant, and the State's Attorney must exhaust those other means before he may overcome the statutory privilege under Section 5/8-901.

11. The Illinois Appellate Court has held that "the legislature intended divestiture of a reporter's privilege to be a last resort to get the sought-after information." *Arya*, 226 Ill. App. 3d at 862. Accordingly, the State's Attorney must "satisfy the court that its investigation has been sufficiently thorough and comprehensive that further efforts to obtain the sought-after information would not likely be successful." *Id.* at 861. In so doing, he must make "more than a showing of inconvenience to the investigator before a reporter can be compelled to disclose his

sources." *People v. Warden*, 104 Ill. 2d 419, 428 (1984). The State's Attorney has not even approached such a showing here.

12. For these reasons, Section 5/8-901 protects the information sought from The Telegraph from disclosure, which warrants entry of an order quashing the Subpoena.

13. In addition to violating Section 5/8-901, the Subpoena also violates The Telegraph's rights as secured by the First and Fourteenth Amendments to the United States Constitution, which further precludes the State's Attorney from compelling The Telegraph to disclose the sought-after information.

14. In *Branzburg v. Hayes*, 408 U.S. 665 (1972), the Supreme Court considered in three separate cases a newspaper reporter's constitutional privilege from giving grand jury testimony. In discussing the interplay between a grand jury's power to obtain or compel testimony and the free press protections of the First Amendment, the Court held:

Finally, as we have earlier indicated, news gathering is not without its First Amendment protections Grand juries are subject to judicial control and subpoenas to motions to quash.

Id., 408 U.S. at 707-08.

15. Justice Powell wrote a concurring opinion in *Branzburg*, and his vote was necessary to achieve the five-member majority. See *Branzburg*, 408 U.S. at 709. In his concurrence, Justice Powell amplified the foregoing discussion, writing that:

If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationship without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered.

Id., 408 U.S. at 710 (Powell, J., concurring).

16. This case presents the dangers to free press rights highlighted by Justice Powell in *Branzburg*. Here, Detective Burns of the Madison County Sheriff's Department contacted The Telegraph informally, asking for the identity of those who posted information about the defendant anonymously on The Telegraph's website. When informed by the newspaper's publisher that such a request had to be made formally, Detective Burns responded not by making a formal request but rather by attempting to hale Jim Shrader and The Telegraph before a grand jury.

17. The tenuous connection between the information sought and the pending investigation, as well as the ample alternative means the State's Attorney has for securing information about other criminal activity by the defendant, raise significant questions about the "legitimate need" for the information sought in the Subpoena. The Subpoena relates to information posted anonymously about *other* crimes allegedly committed in the past by the defendant, who is currently charged with murder.

18. Given the suggestion from the State's Attorney that he may seek information on the defendant's alleged past criminal conduct from The Telegraph before looking elsewhere for that same information, the constitutional balance tips even more heavily in favor of protecting The Telegraph from being forced to disclose its sources. *See Branzburg*, 408 U.S. at 710 ("The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.") (Powell, J., concurring). This further warrants entry of an order quashing the Subpoena.

19. To do otherwise would chill the First Amendment rights of The Telegraph, Jim Shrader, and those who provided information anonymously on The Telegraph's website. As the Seventh Circuit recently held, "[w]e do not expect courts will forget that grand juries must

operate within the limits of the First Amendment as well as the Fifth." *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003).

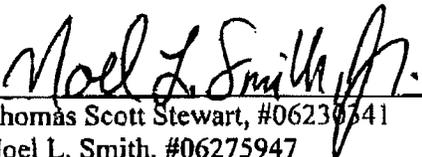
WHEREFORE, for the foregoing reasons, The Telegraph respectfully requests that the Court enter an Order quashing the grand jury Subpoena at issue and preventing The Telegraph from being compelled to disclose the identities, names, addresses and IP addresses of those who provided information anonymously on its website. The Telegraph further requests that it have such other and further relief to which it is justly and equitably entitled.

DATED this 29th day of September, 2008.

Respectfully submitted,

HEPLER, BROOM, MACDONALD,
HEBRANK, TRUE & NOCE, LLC

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OFFICE OF THE STATE'S ATTORNEY
MADISON COUNTY, ILLINOIS

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September 18th, 2008

The Alton Telegraph
ATTN: Jim Shrader
111 East Broadway
Alton, IL 62002

RE: 08-18924

Madison County Sheriff's Department- Detective Burns

Dear Keeper of Records:

Enclosed please find a Grand Jury Subpoena Duces Tecum issued by the Madison County Third Judicial Circuit Court regarding the above-captioned investigation. Please note the return date on the subpoena is October 2nd, 2008.

Pursuant to current Illinois law, you **MUST APPEAR IN PERSON** before the Grand Jury bearing the records requested in the attached Subpoena Duces Tecum. The Grand Jury meets in the Madison County Criminal Justice Center located at 509 Ramey Street in Edwardsville, Illinois. Please appear in court promptly at 9:00 AM with the requested records.

Thank you in advance for your cooperation.

Very truly yours,

A handwritten signature in cursive script that reads "William A. Mudge".

William A. Mudge
Madison County State's Attorney

WAM:jeh



SUBPOENA DUCES TECUM

IN THE CIRCUIT COURT FOR THE THIRD JUDICIAL CIRCUIT OF ILLINOIS, MADISON COUNTY, EDWARDSVILLE, ILLINOIS

STATE OF ILLINOIS,)
) SS.
COUNTY OF Madison)

THE PEOPLE OF THE STATE OF ILLINOIS

to the Sheriff of said County - GREETING:

WE COMMAND YOU TO SUMMON The Alton Telegraph, Attn: Jim Shrader, 111 East Broadway, Alton, IL 62002

if he shall be found in your County, personally to be and appear on the 2nd day of September, AD 20 08, before the Grand Jury Court of said County, to be holden at the Courthouse in Edwardsville in said County, and to bring with h and produce at the time and place aforesaid, to be used as evidence for The People certain instrument Of writing purporting to be Any records leading to the full identity, including name, address and IP address of the following bloggers that have left messages and comments on the Alton Telegraph Web Page: john3418, purplebutterfly, mrssully, cstyle and pnbcm.

bearing date on or about the day of in the year of our lord two thousand and then and there to testify, and the truth to speak, concerning all and singular those things of which he may have knowledge, or said instrument of writing doth import of, and concerning a certain suit now pending and undetermined in the said Grand Jury Court wherein

The People of The State of Illinois
Plaintiff, in an MCSD/Det. Burns pending investigation/08-18924/CH/ih

Defendant, in the plea of on the part of the said And this he shall in nowise omit, under penalty of what the law directs; and have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.



WITNESS, Clerk of our Said Third Judicial Circuit Court, and the Seal thereof, At Edwardsville this 18th day of September, AD 20 08 Clerk