IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 66,576

THE TRIBUNE COMPANY and
JAMES TUNSTALL,
Appellants,

vs.

THE HONORABLE L.R. HUFFSTETLER, JR.
and THE STATE OF FLORIDA,
Appellees.

On Review From
The Fifth District Court of Appeal

# AMICUS CURIAE BRIEF OF THE TIMES PUBLISHING COMPANY AND LUCY WARE MORGAN

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## STATEMENT OF INTEREST OF AMICI CURIAE

Amicus Curiae, the Times Publishing Company, is the publisher of The St. Petersburg Times and Evening Independent, both newspapers of daily circulation throughout the west coast of Florida. As such, Amicus has an interest in the free and open dissemination of information to the public.

Amicus Curiae, Lucy Ware Morgan, is a professional journalist employed by The St. Petersburg Times.

Amici have a particular interest in this case because they were once parties to a similar case and subjected to a similar dilemma almost ten years ago, in Morgan v. State, 337 So.2d 951 (Fla. 1976).

In that case, Lucy Morgan faced the prospect of going to jail as the result of two personal commitments: her commitment to inform her readers, and a pledge to protect her source concerning matters of public interest. The charges she faced, like those here, imposed a very chilling effect on journalists and news sources everywhere.

In its review of that case, this court upheld the qualified First Amendment privilege which protects reporters' confidential news sources. In the nearly ten years following that opinion, subsequent courts have followed the supreme court's lead. The public has been well served by that decision and better informed as a result.

## JURISDICTION

Amici accept and adopt the Petitioners' statement of jurisdiction.

## STATEMENT OF THE CASE AND THE FACTS

Amici accept and adopt the Petitioners' statement of the case and of the facts.

## ARGUMENT

### I. THE UNITED STATES SUPREME COURT AND THE FLORIDA SUPREME COURT HAVE RECOGNIZED AND APPLIED A QUALIFIED FIRST AMENDMENT PRIVILEGE TO PROTECT THE CONFIDENTIALITY OF NEWS REPORTERS' SOURCES

The United States Supreme Court in Branzburg v. Hayes, 408 U.S. 665 (1972), recognized that the reporter's qualified privilege under the First Amendment exists in all but rare circumstances. Although the Supreme Court in Branzburg held, in a 4-1-4 decision that a reporter may have to testify about criminal activities that were witnessed, the Court restricted its holding to the particular facts of the case. Justice Powell, who cast the deciding vote, emphasized in his concurring opinion the necessity of a reporter's privilege to protect confidential informants. He opined that the reporter's qualified privilege "should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct." Branzburg, Id. at 710.

Justice Powell explained that the proper balance must be struck on a case-by-case basis by balancing the interests of society in a free press, on one hand, and in a fair and complete trial, on the other. He observed that under the Branzburg decision journalists are not "without constitutional rights with respect to the gathering of news or the safeguarding of sources," id. at 709, adding, "the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection." Id. at 710. Moreover, reporters will "have

recognizing a qualified privilege protecting reporters against compelled testimony concerning news sources. In so doing, that Court acted in accordance with virtually all relevant authority. Nine Circuit Courts of Appeals have considered the issue and have unanimously recognized the reporter's privilege; the two remaining Circuits have not yet addressed the question at the appellate level. Palandjian v. Pahlavi, Med. L. Rptr. 1028 (D.C. Cir. 1984); Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981); Carey v. Hume, 492 F.2d 631 (D.C. Cir.), cert. dismissed 417 U.S. 938 (1974); Bruno v. Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980); United States v. Burke, 700 F.2d 70 (2d Cir. 1983); In Re Petroleum Products Antitrust Litigation, 680 F.2d 5 (2d Cir. 1982); Baker v. F. & F. Investment, 470 F.2d 778 (2d Cir. 1972), cert. denied 411 U.S. 966 (1973); United States v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980), cert. denied 449 U.S. 1126 (1981), appeal after remand 651 F.2d 189 (3d Cir. 1981), cert. denied 454 U.S. 1056 (1981); United States v. Criden, 633 F.2d 346 (3d Cir. 1980), cert. denied sub nom. Schaffer v. United States, 449 U.S. 1113 (1981); Riley v. City of Chester, 612 F.2d 708 (3d Cir. 1979); United States v. Steelhammer, 539 F.2d 373 (4th Cir. 1977), rev'd in part on reh. en banc 561 F.2d 539 (4th Cir. 1977); In Re Selcraig, Case No. 82-1067 (5th Cir. May 27, 1983, slip op.); Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1972), cert. denied 409 U.S. 1125 (1973); Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972); Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977). In addition, the Justice Department has adopted

stringent guidelines restricting the issuance of subpoenas to third party journalists in criminal cases. 28 C.F.R. § 50.10 (1984).

More than half the states have enacted statutory "shield laws" for reporters, and only seven states have not yet recognized the privilege either by statute or by common law rule. Goodale, Outline of Reporter's Privilege Cases, 2 Communications Law 1983 (1983) 555-834, particularly at 817-834 (see Appendix for cases and statutes by jurisdiction).

In Miller, the Eleventh Circuit recognized that when the reporter's privilege had been raised by a defendant journalist in a libel suit, other circuits had followed a three part test for its adjudication first outlined by Judge (later Justice) Potter Stewart in Garland v. Torre, 259 F.2d 545 (2d Cir. 1958), cert. denied 358 U.S. 910 (1958). The Miller Court noted that the test requires the plaintiff to provide evidence answering the following three questions: "(1) is the information relevant, (2) can the information be obtained by alternative means, and (3) is there a compelling interest in the information?" Id. at 726. The Miller Court then proceeded to apply that test to the specific case at issue (as required by Justice Powell's opinion) holding:

> In the case before us the information is relevant. The district court found that the alternative means had been exhausted, and this finding is not clearly erroneous. Fed. R. Civ. P. 52. That leaves the third prong, compelling interest.

Id. at 726. In applying the "compelling interest prong" to the facts before it, the Miller Court analyzed the prior decisions of

other Circuits as requiring proponents of compelled source disclosure to first show that there is "substantial evidence that the challenged statement was published and is both factually untrue and defamatory" and that the information sought is "necessary to the proper presentation of the case." 628 F.2d at 932.

The real issue in the case at bar is this: whether and how the trial court should have applied the constitutional balancing test to the particular facts before it--a criminal investigation, not a libel suit--in which the state attorney, at the behest of two public officials, is seeking to compel a reporter to reveal a confidential source without showing either that alternative sources have been exhausted or that the reporter has any information necessary to the resolution of this investigation.

B. FLORIDA FULLY RECOGNIZES A CONSTITUTIONAL BALANCING TEST TO PROTECT NEWS REPORTERS FROM COMPELLED DISCLOSURE OF THEIR SOURCES.

In Morgan v. State, 337 So.2d 951 (Fla. 1976), the Florida Supreme Court applied the balancing test to find "in favor of the public interest in unencumbered access to information from anonymous sources." Id. at 957. In the Morgan case, a reporter was called as a witness in a criminal investigation involving a grand jury leak. The state attorney sought to compel the reporter to reveal her confidential source. This Court, reversing the Second District Court of Appeal, held that the investigation of a grand jury leak was insufficient to overcome the reporter's qualified privilege.

The facts of Morgan are strikingly similar to those in the instant case. In the case a bar, a reporter was also called as a witness in a criminal investigation and likewise the reporter was ordered to reveal his confidential source. Moreover, in Morgan, the information sought went to a collateral matter, i.e., the violation of a statute prohibiting grand jury disclosure. Similarly, in the present case, the state attorney is investigating a collateral matter, i.e., the violation of a statute prohibiting leaks. The only difference between the cases is that Morgan involved an investigation into alleged grand jury leaks, and here, alleged leaks from a State Ethics Commission are the investigative subject. The similarity dictates identical treatment, and the result in Morgan applies.

In Morgan v. State, 325 So.2d 40 (Fla. 2d DCA 1975), the Second District construed Branzburg as conveying a news reporter's constitutional privilege. This Court did not disagree, but rather reweighed the balance to favor First Amendment protection. By contrast, the Fifth District has fundamentally misconstrued Branzburg, and hence Morgan.

In his opinion, Justice Hatchett, writing for the Florida Supreme Court, acknowledged that under the Branzburg decision, a court could require a reporter to testify in a criminal case about a crime he witnessed, but that authority was limited to "grand juries' good faith investigation of crime." Id. at 954. This analysis applies with equal force to the case presently before this court. First, this case does not involve so serious a matter as a grand jury investigation and, second, the criminal

activity which was the focal point of the newspaper article is no longer under investigation.

This Court noted that the "present case differs from Branzburg in that the grand jury before whom petitioner [Morgan] appeared was not investigating a crime." 337 So.2d at 954. Accordingly, application of the Branzburg plurality position was improper; rather, the limited privilege supported by the Branzburg concurring and dissenting Justices was available to reporter Morgan. Id. Additionally, this Court specifically stated that "[a]pplication of the privilege in a given case involves 'the striking of a proper balance,'" id., recognizing the need for and applying the balancing test outlined in Branzburg.

In the instant case, the Fifth District has failed to apply Branzburg properly. The Fifth District focused strictly on the language in the plurality opinion, construing Branzburg to stand for the proposition that a reporter has no privilege under the First Amendment whenever there is a kind of investigation into purported criminal conduct.

This reading of the opinion is erroneous, overlooking Justice Powell's concurrence which makes clear that the Branzburg decision is limited to its facts. Additionally, the Fifth District did not attempt to apply the balancing test suggested by the United States Supreme Court in Branzburg and approved by the Florida Supreme Court in Morgan. The Fifth District in fact attempted to extend the holding in Branzburg to limit a reporter's privilege, not only in the case of good faith grand

jury investigations, but to any alleged investigation into the commission of a crime where a reporter is believed to be a witness. This is a clear misapplication of the Branzburg opinion.

C. THE CONSTITUTIONAL BALANCING TEST APPLIES WITH EQUAL FORCE TO CRIMINAL INVESTIGATIONS.

The Fifth District misapplied the reporter's privilege to the criminal investigation below by failing to strike the proper balance between the competing interests present.

To apply the compelling need requirement of the constitutional balancing test, the court must balance the government's interest in maintaining secrecy and preserving the reputation of its officials with three equally important First Amendment rights.

First, the public enjoys a First Amendment right to receive information free of governmental interference. "The public right to receive information has been repeatedly recognized and applied to a vast variety of information." In Re Express-News Corp., 695 F.2d 807, 809 (5th Cir. 1982)(collecting exhaustive list of Supreme Court decisions at 809, n.2). Compelled testimony of the reporters would seriously restrict that flow of information.

Second, the public and the press enjoy an affirmative right to gather the news. Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 55 (1980); Island Trees v. Pico, 457 U.S. 594 (1982); Branzburg v. Hayes, supra; Associated Press v. U.S. District, 9 Med. L. Rptr. 1617 (9th Cir. 1983); United States v. Chagra, 701 F.2d 354 (5th Cir. 1983); Newman v. Graddick, 696 F.2d 796 (11th Cir. 1983); In Re Express-News Corp., supra; United States v.

Brooklier, 685 F.2d 1162 (9th Cir. 1982); see United States v. Criden, 648 F.2d 814, 820-21 (3d Cir. 1981). See also, subpoena cases discussed infra.

Finally, news sources themselves have an independent First Amendment right to engage in confidential speech. Talley v. California, 362 U.S. 20 (1960); Note, The Right of Sources - The Critical Element In The Clash Over The Reporter's Privilege, 88 Yale L.J. 1202 (1979).

The reporter's privilege properly balances competing interests because it ensures that First Amendment rights give way only where compelled testimony is necessary to protect vital governmental interests. By way of comparison, the first element of the balancing test in Miller v. Transamerican Press, supra, requires a libel plaintiff to make a showing with "substantial evidence" that the article complained of was published by the defendant, is defamatory, and is false. In applying this prong to the case at bar, the state should likewise be required to produce substantial evidence that the case they have instituted is meritorious. Second, Miller requires the libel plaintiff to show that reasonably available sources for the information they seek from the press have been exhausted. The state here should be required to make the same showing. Finally, Miller requires a showing that the testimony sought from the journalist is "necessary to the proper preparation and presentation of the case." Similarly, the state should be required to show that the testimony they seek is necessary to the presentation of their meritorious prosecution. Where such a showing has been made, the

unpublished notes does not change because a case is civil or criminal." Id. The Cuthbertson Court further noted that a refusal to recognize the privilege would "amount to finding that these [fifth and sixth amendment] interests always prevail over the first amendment interest underlying the privileges." Id. The Court observed that in Nebraska Press Association v. Stuart, 427 U.S. 539, 561 (1976), the Supreme Court had stated explicitly that the "Bill of Rights did not undertake to assign priorities as between First and Sixth Amendment rights, ranking one as superior to the other. . . ." Cuthbertson at 147. Instead, the Third Circuit held that:

> A defendant's Sixth Amendment and due process rights certainly are not irrelevant when a journalist's privilege is asserted. But rather than affecting the existence of the qualified privilege, we think that these rights are important factors that must be considered in deciding whether, in the circumstances of an individual case, the privilege must yield to the defendant's need for the information.

Cuthbertson at 147.

These two cases are distinguishable from the instant case because the interest balanced against the Reporter's First Amendment privilege in Cuthbertson and Burke is that of the defendant's Sixth Amendment right to a fair criminal trial, while in the instant case, it is the interest of the state to maintain secrecy. However, the courts in these cases sought to deemphasize differences in cases involving the reporter's privilege: whether the cases were criminal or civil, whether reporters were parties or non-parties, whether the state or a defendant initiated the action. The emphasis of these courts was

to acknowledge the reporter's privilege in criminal as well as civil cases. This court should adopt the same approach.

The United States Court of Appeals for the Second Circuit already has done so. In a civil case, In Re Petroleum Products Antitrust Litigation, 680 F.2d 5, 7 (2d Cir. 1982), the Second Circuit had held that to overcome the reporter's privilege, the party seeking to compel the information must show it is "highly material and relevant, necessary or critical to the maintenance of the claims, and not obtainable from other available sources." Subsequently, the Second Circuit squarely held the same test should apply in criminal cases:

> We see no legally principled reason for drawing a distinction between civil and criminal cases when considering whether the reporter's interest in confidentiality should yield to the moving party's need for probative evidence. To be sure, a criminal defendant has more at stake than a civil litigant and the evidentiary needs of a criminal defendant may weigh more heavily in the balance. Nevertheless, the standard of review should remain the same. Indeed, the important social interests in the free flow of information that are protected by the reporter's qualified privilege are particularly compelling in criminal cases. Reporters are to be encouraged to investigate and expose, free from unnecessary government intrusion, evidence of criminal wrongdoing.

United States v. Burke, supra, at 77. This Court should follow the Second and Third Circuits and apply the constitutional balancing test to criminal cases.[1]

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[1] Many courts have applied the privilege in criminal cases to quash subpoenas. United States v. Burke, supra; United States v. Cuthbertson, supra; United States v. Criden, 633 F.2d 346 (3d Cir 1980); United States v. Orsini, 424 F. Supp. 229 (E.D.N.Y. 1976), aff'd without opinion 559 F.2d 1206 (2d Cir.), cert. denied 434 U.S. 997 (1977); New Hampshire v. Siel, 444 A.2d 499 (NH Sup. Ct. 1982)(reporter's qualified

D. THE CONSTITUTIONAL BALANCING TEST APPLIES TO THE INSTANT CASE, IN WHICH A REPORTER HAS BEEN ORDERED TO REVEAL HIS SOURCE, BUT IS NOT LIMITED TO SUCH SITUATIONS.

Confidential relationships are a vital part of a reporter's ability to effectively gather and disseminate news. If a reporter is compelled to reveal information obtained from a confidential source, the reporter's ability to gather news would be greatly impaired because sources would be less likely to confide in him. They would correctly view the interview as the subject of future testimony against them. Prudent, potential news sources would therefore simply choose not to disclose information of public interest.

Even absent a danger of implication of confidential sources, the balancing test applies. The availability of the privilege does not turn on whether confidential sources would be exposed by compelling the testimony. The issue was squarely addressed by

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Footnote [1], continued

privilege against disclosure in criminal actions can be overcome only by a showing that the defendant has attempted unsuccessfully to obtain information sought by all reasonable alternatives, that the information would be relevant to his defense, and that reasonable probability exists that the information would affect the verdict); State v. St. Peter, 132 Vt. 266, 315 A.2d 254 (1974)(newsgatherer is entitled to refuse to answer inquiries unless defense counsel can demonstrate that there is no other adequately available source for information and that information is relevant and material on the issue of guilt or innocence); Brown v. Commonwealth, 214 Va. 755, 204 S.E.2d 429, cert. denied 419 U.S. 966 (1974)(refusal to identify source upheld on the ground that even if the source were the prosecution witness presumed by the defendant, inconsistent statements were not material for impeachment purposes); U.S. v. Accardo, 11 Med. L. Rptr. 1102 (S.D. Fla. 1984). See cases collected in Goodale, 2 Communications Law 1982 supra, at 611-65.

the Third Circuit in United States v. Cuthbertson, 630 F.2d at 147. There the Court held that the privilege applies to the compelled disclosure of any unpublished information:

> We do not think that the privilege can be limited solely to protection of sources. The compelled production of reporter's resource materials can constitute a significant intrusion into the newsgathering and editorial processes. See Loadholtz v. Fields, 389 F. Supp. 1299, 1303 (M.D. Fla. 1975). Like compelled disclosure of confidential sources, it may substantially undercut the public policy favoring the free flow of information to the public that is the foundation for the privilege. See Riley v. City of Chester, supra. Therefore, we hold that the privilege extends to unpublished materials in the possession of CBS.

Accord: United States v. Criden, 633 F.2d 346, 358 (3d Cir. 1980), which suggests that a confidential source relationship provides a stronger reason to quash a reporter's subpoena. Although "the lack of a confidential source may be an important element in balancing the defendant's need for the material sought against the interest of the journalist in preventing production in a particular case," United States v. Cuthbertson, 630 F.2d at 147, the reporter's privilege applies and must be overcome even in the absence of confidentiality. As is discussed below in Argument II, the basis for the privilege is as much to protect newsgathering and preserve the free flow of information to the public as it is to protect the right of confidential sources to engage in anonymous speech. The fundamental issue in every reporter's privilege case is whether compulsory process would also infringe upon those two fundamental rights. Many cases in Florida alone have applied the reporter's privilege to quash subpoenas served on journalists where no confidential sources were involved. "Although no confidential source information is

involved, this distinction is irrelevant to the chilling effect enforcement of the subpoena would have on the flow of information to the public." United States v. Blanton, 534 F. Supp. 295, 297 (S.D. Fla. 1982); Loadholtz v. Fields, 389 F. Supp. 1299, 1303 (M.D. Fla. 1975); State v. Morel, 50 Fla. Supp. 5 (17th Cir. 1979); State v. Miller, 45 Fla. Supp. 137 (17th Cir. Ct. 1976); State v. Stoney, 42 Fla. Supp. 194 (11th Cir. Ct. 1974).

### E. BECAUSE THE STATE DID NOT MEET THE CONSTITUTIONAL BALANCING TEST, THE DISTRICT COURT SHOULD HAVE QUASHED THE SUBPOENAS.

The First Amendment privilege "occupies a preferred position among the individual rights conferred by the Constitution and . . . any infringements thereon are closely scrutinized and strictly limited." Loadholtz, 389 F. Supp. at 1300. Furthermore, "freedom of the press as guaranteed by the First Amendment . . . is broad enough to include virtually all activities for the press to fulfill its First Amendment functions." Id. at 1300.

The great weight of federal authority imposes a strict burden of proof for defeating the First Amendment privilege on the party seeking to compel disclosure from a reporter. To meet this burden of proof, courts have espoused a three-part test: "(1) is the information relevant, (2) can the information be obtained by alternative means, and (3) is there a compelling interest in the information?" Miller, supra, at 726. The majority of federal jurisdictions have followed suit. See e.g., U.S. Ex Rel. Viutton Et Fils S.A. v. Karen Bags, Inc., 600 F.

Supp. 667, 669-670 (S.D.N.Y. 1985); Continental Cablevision, Inc. v. Storer Broadcasting Co., 583 F. Supp. 427, 433, 434 (E.D. Mo. 1984); Dowd v. Calabrese, 577 F. Supp. 238 (D.C.D.C. 1983); United States v. Burke, 700 F.2d 70, 76-77 (2d Cir. 1983); Zerilli v. Smith, 656 F.2d 705, 713-14 (D.C. Cir. 1981); United States v. Cuthbertson, 630 F.2d at 145; Riley v. City of Chester, 612 F.2d 708, 716 (3d Cir. 1979); Silkwood v. Kerr-McGee Corp, 563 F.2d 433, 438 (10th Cir. 1977); Miller v. Transamerican Press, supra. The Miller Court articulated in its modified opinion on rehearing what is required to establish each element of the three-part test. "We do not mean to intimate that a plaintiff will be entitled to know the identify of the informant merely by pleading. . . . Before receipt of such information the plaintiff must show: Substantial evidence. . . ." 628 F.2d at 932 [emphasis added].

Beginning with Justice (now Judge) Hatchett's opinion in Morgan v. State, 337 So.2d 951 (Fla. 1976), Florida courts have also utilized the three-prong test to help effectuate the balancing test set out by this Court in Morgan. Justice Sundberg, in his concurrence, set out this formula to give guidance to lower courts. Consequently, a vast body of Florida case law requires a showing by the party seeking to compel testimony of a newspaper reporter and production of his work product to meet this stringent test. Morgan v. State, 337 So.2d at 957 (Sundberg, J., concurring); Johnson v. Bentley, 457 So.2d 507 (Fla. 2d DCA 1984); Tribune Co. v. Green, 440 So.2d 484 (Fla. 2d DCA 1983); Gadsden County Times, Inc. v. Horne, 426 So.2d at

1241; Times Publishing Co. v. Burke, 375 So.2d 297 (Fla. 2d DCA 1979); State v. Laughlin, 43 Fla. Supp. 166 (16th Cir. 1974), aff'd 323 So.2d 691, 692 (Fla. 3 DCA 1975). Florida trial courts have uniformly applied the three part test to quash subpoenas served on reporters in criminal cases, even where no confidential sources are implicated. State v. Reid, 8 Med. L. Rptr. 1249 (Fla. 15th Cir. 1982)(despite the absence of confidential sources, subpoena is quashed as the court was not satisfied that: the information sought was relevant and material, the information was unavailable from unprotected sources, and that failure to produce the evidence would "substantially prejudice" defendant's ability to present his case); State v. Peterson, 7 Med. L. Rptr. 1090 (Fla. 6th Cir. Ct. 1981)(criminal defendant's failure to show compelling interest that would be served by reporter's compelled testimony and that would be sufficient to override reporter's privilege requires Florida trial courts to quash the subpoena); State v. Evans, 6 Med. L. Rptr. 1979 (Fla. 11th Cir. Ct. 1980)(failure of criminal defendants to show that information sought from newspaper reporter was relevant and material to his defense, that he had a compelling need for such information, and that he had exhausted all alternative sources, warranted granting of motion to quash the subpoena); State v. Morel, supra (criminal defendant's failure to show, in seeking to subpoena reporter's nonconfidential information, that information was relevant and material to defense, that there was a compelling need for disclosure overriding reporter's First Amendment privilege, and that defendant had unsuccessfully attempted to

obtain information from alternative sources, warranted quashing the subpoena); State v. Silber, 49 Fla. Supp. 71 (11th Cir. Ct. 1979)(criminal bribery defendant's failure to establish compelling interests to outweigh First Amendment interests warranted order quashing subpoena duces tecum because press had broad First Amendment privilege against compelled testimony and the production of documents); State v. Beattie, 48 Fla. Supp. 139 (11th Cir. Ct. 1979)(murder defendant's failure to demonstrate reporter had information relevant to his defense, that defendant attempted unsuccessfully to obtain the information from other sources, and that non-production would violate his constitutional rights, warranted order to quash subpoena duces tecum); State v. Hurston, 3 Med. L. Rptr. 2295 (Fla. 5th Cir. Ct. 1978)(news reporter can be subpoenaed only if party seeking subpoena demonstrates that information is relevant and material either to proof of offense charged or to defense, that compelling need for disclosure overrides reporter's First Amendment privilege and that unsuccessful attempts have been made to obtain information from alternative sources); State v. Petrantoni, 48 Fla. Supp. 49 (6th Cir. Ct. 1978)(criminal defendant's failure to show, in seeking to subpoena testimony from newspaper reporters concerning telephone conversations with defendant, that information was relevant, material and unavailable from other sources and nondisclosure would violate defendant's constitutional rights, warranted order quashing the subpoena); State v. Carr, 46 Fla. Supp. 193 (11th Cir. Ct. 1977)(same); State v. Miller, 45 Fla. Supp. 137 (17th Cir. Ct. 1976)(same); State v. Stoney, 42 Fla.

Supp. 194 (11th Cir. Ct. 1974)(Defendant, in order to subpoena reporter in a rape trial, would have to show that the reporter had relevant information, that the information was not available from other sources, and that the evidence was important to the defendant's constitutional rights).

Moreover, "Florida trial courts have adopted virtually a per se rule against compelled discovery from reporters in civil cases, even where no confidential sources are involved." Bohrer and Ovelmen, The New Access Problem: The Reporter's Right of Access to News and Qualified Privilege From Compelled Testimony Relating to Newsgathering, The Reporter's Handbook 15 (Florida Bar 1983); Lang v. Tampa Television, 11 Med. L. Rptr. 1103 (4th Cir. Ct. 1984). Accord: Coira v. Depoo Hospital, 48 Fla. Supp. 105 (16th Cir. Ct. 1978); Lopez v. Garcia, 46 Fla. Supp. 173 (11th Cir. Ct. 1977); Hendrix v. Liberty Mutual Insurance Co., 43 Fla. Supp. 137 (17th Cir. Ct. 1975); Schwartz v. Almart Stores, 42 Fla. Supp. 165 (11th Cir. Ct. 1975); Harris v. Blackstone Developers, 41 Fla. Supp. 176 (4th Cir. Ct. 1974); Spiva v. Francouer, 39 Fla. Supp. 49 (11th Cir. Ct. 1973).

### 1. THE DEFENDANTS PRESENTED NO EVIDENCE THAT "OTHER REASONABLE SOURCES" ARE UNAVAILABLE.

The test requires, in the language of the Miller decision, a "showing, supported by substantial evidence . . . that reasonable efforts to discover the information from alternative sources have been made and that no other reasonable source is available. . . ." 628 F.2d at 932 [emphasis added].

During the hearing on the first subpoena, the court

discovered that the state attorney's investigation consisted of one short interview with Mr. Cambridge. That interview yielded the names of at least two non-reporter parties who may have information relevant to the investigation. These two people had not been interviewed. (R. 59, 62). Additionally, the tape of the interview disclosed that Mr. Hendry did not ask Mr. Cambridge for the names of those parties with whom he may have discussed the subject of the Koenig/Copeland lawsuit nor did he request the names of any parties who might have access to information regarding the complaint.

It is impossible to know how much Mr. Hendry had progressed with his investigation at the time of the second hearing on the subpoena, because he simply stated that he had talked to a few more people and had gotten nowhere. The reporter's lawyers were, therefore, unable to assess the extent of Mr. Hendry's investigation or cross-examine witnesses.

Therefore, it is highly probable that there are other sources from whom the state attorney could get information requested from the reporters. The state has not met the burden placed on it by the majority of courts to make a "showing," supported by "substantial evidence" that reasonable efforts were made to discover the information elsewhere. The testimony given by Mr. Hendry was scanty and incomplete.

### 2. THE STATE PRESENTED NO EVIDENCE THAT THERE IS A COMPELLING NEED FOR THE REPORTERS' TESTIMONY SUFFICIENT TO OVERRIDE THE REPORTER'S FIRST AMENDMENT PRIVILEGE.

Under the balancing test, a party seeking compulsory process

against the news media cannot obtain compelled disclosure of First Amendment activities without first showing there is a compelling need sufficient to override the reporter's First Amendment privilege. The record here is devoid of any showing that the reporters' testimony is necessary to the state's case.

The State assumes that the reporters have information bearing on the Koenig/Copeland lawsuit. The State further assumes that the reporters' testimony would be necessary to determine whether a misdemeanor was committed. The record, however, is devoid of in any demonstration that these assumptions are valid.

### 3. THE STATE FAILED TO PRESENT "SUBSTANTIAL EVIDENCE" THAT IT HAS A MERITORIOUS CASE BASED ON THE VIOLATION OF A NON-DISCLOSURE STATUTE

No information the reporter in this case might possess would be relevant to a violation of the non-disclosure statute. The statute makes illegal the disclosure of the "existence of contents of a complaint which has been filed. . . ." Fla. Stat. § 112.317(6) (1983). As to unfiled complaints, "Any person who willfully discloses, or permits to be disclosed, his intention to file a complaint: is guilty of a misdemeanor." Id. In this case, a complaint was not filed until after the story was reported so the first circumstance does not apply. The second circumstance is inapplicable because the Tribune article did not contain an announcement of an intent to file a complaint, but rather a statement, which was later determined to be incorrect, that the complaint had already been filed.

Therefore, Tunstall's testimony is irrelevant. The revelation of his confidential source would be of no use to the State because his identity would not lead to someone who could be prosecuted.

## II. REQUIRING REPORTERS TO REVEAL THEIR CONFIDENTIAL SOURCES IN THE INSTANT CASE UNDERMINES THE REPORTER'S FIRST AMENDMENT PRIVILEGE.

As shown below, requiring reporters to reveal their confidential sources would (i) violate the right of sources to engage in anonymous speech; (ii) restrict the flow of information to the public; and (iii) "chill" and interfere with the right of the press to gather and report news. Furthermore, it would constitute an open invitation to disgruntled public officials to harass or retaliate against the press, in direct violation of this Court's decision in Morgan. "Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification." 337 So.2d at 956, quoting Branzburg 408 U.S. at 707-8.

### A. REQUIRING REPORTERS TO TESTIFY WOULD VIOLATE THE FIRST AMENDMENT RIGHT OF NEWS SOURCES TO ENGAGE IN CONFIDENTIAL SPEECH.

As noted above, the United States Supreme Court has repeatedly recognized the right to engage in anonymous or confidential speech. Talley v. California, supra; Bates v. City of Little Rock, 361 U.S. 516 (1960); N.A.A.C.P. v. Alabama, 357 U.S. 449 (1959). The Executive Branch and Congress, too, have

recognized the need for anonymous speech. Federal Trade Commission v. Groiler Incorporated, 51 U.S.L.W. 4660 (Case No. 82-372, June 6, 1983); EPA v. Mink, 410 U.S. 73 (1980); 5 U.S.C. § 552(b)(5). This right has been largely overlooked in the reporter's privilege cases because the journalist himself is the privilege-holder, but applies with full force to cases involving an attempt to compel the disclosure of a reporter's confidential source who contributed information about governmental activities. Members of the public enjoy a First Amendment right to speak anonymously to the press. Note, The Right Of Sources - The Critical Element In The Clash Over The Reporter's Privilege, 88 Yale L.J. 1202, 1208-1213 (1979); Comment, Freedom Of The Press, 84 Harv. L. Rev. 1536, 1538-39 (1971). The decision of the district court ignores this right. As is noted in United States v. Criden, 633 F.2d 346 (1980),

> all the specific rights and privileges granted to the press have been established by means of judicial interpretations of naked constitutional text, and every court formulation of a specific nuance of the Constitution's text has been accompanied by stated reasons. The reasons for the court's pronouncements are as important as the pronouncements themselves.

Id. at 355.

The case law subsequent to Branzburg indicates a trend in the federal courts to preserve the reporter's privilege for the policy reasons set out in the Branzburg decision. The decisions in the last decade indicate a growing concern that thwarting the reporter's privilege will gravely impair the free flow of information to the public.

In granting a motion to quash a subpoena on the press in a civil case which implicated the reporter's confidential sources, the District of Columbia Circuit observed that "unless potential sources are confident that compelled disclosure is unlikely, they will be reluctant to disclose any confidential information to reporters." Zerilli v. Smith, 656 F.2d 705, 712 (D.C. Cir. 1981); Note, Reporters and Their Sources: The Constitutional Right to a Confidential Rlationship, 80 Yale L.J. 317 (1970). The Court in Zerilli cautioned that: "In our view the deterrent effect can also be avoided so long as the privilege is overridden only in rare circumstances." Id. at 713, n.46. Thus, routinely compelled disclosure of the identity of sources will "chill" or "deter" persons from exercising their right to engage in anonymous speech.

This Court should also consider the pragmatic reasons underlying what amounts to a "national commitment" to the reporter's First Amendment privilege. Criden at 355.

As enunciated in the Criden case, courts have made a value judgment that the immediate distribution of news weighs in the balance more heavily than a restraint on the flow of information to the public that would undoubtedly result if confidential news sources had to be identified. The Criden court analogizes the reporter-confidential source relationship to one most of us are familiar with in the realm of private human experience, where it is commonplace for a person when conveying news or gossip to say, "Don't tell anyone I told you, but . . ."

In the private world as well as in the media world, if the individual fears this confidence will not be preserved, he or she will not give it. And, if the information is released to a third party, the individual has a right to expect confidentiality. The breach of this agreement will lead to an undesired result--no further exchange of information.

The Criden court also observed that there is a general expectation in some sectors of society that "information flows more freely from anonymous sources." Some examples cited by the Court include proprietors of public service businesses such as hotels and restaurants who solicit anonymous information from their customers about their service; and law enforcement officials who frequently rely on the use of tips from informants.[2] The court noted that "the rule protecting a

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[2] In State v. Hardy, 114 So.2d 344 (Fla. 1st DCA 1959), the court outlined considerations involving disclosure of confidential police informants as follows:

> The privilege whereby law enforcement officers are not required to disclose the identity of those furnishing information with regard to the commission of crimes is based on sound public policy and has long been recognized by the courts of this country and of England. Hardy's Trial, 24 How. St. Tr. 99 (1794); United States v. Moses, 1827, 27 Fed. Cas. page 5, No. 15,825, 4 Wash. C.C. 726. It is common knowledge that without the aid of confidential informants the discovery and prevention of crime would present such a formidable task as practically to render hopeless the efforts of those charged with law enforcement. And the alarming fact that the underworld often wreaks vengeance upon informers would unquestionably deter the giving of such information if the identity of the informer should be required to be disclosed in all instances.

See also Elkins v. State, 388 So.2d 1314 (Fla. 1st DCA 1980).

journalist's source does not depart significantly from daily experience in informal dissemination of information." Criden at 356.

Reporters are the watchdogs of government, the "surrogates of the public," Richmond Newspapers, Inc. v. Virginia, 448 U.S. 55 (1980), but they cannot be in all places or see all things at once. A confidential source is usually in a unique position because of his or her employment within the system to inform a reporter concerning aspects of the governmental function that have not been made available to the public due to ignorance, inadvertance, or in come cases, corruption (which is of course the very nature of the state's and this commission's investigations).

Another aspect of the reporter's privilege attempts to protect the source from retribution. If reporters were forced to reveal their confidential sources, those individuals not willing to speak up about injustices in the system will forever stand silent, fearful that if they speak out and their names are disclosed they will lose their job or suffer other retribution for performing a public service.

"The brute fact of human experience is that public officials are far more willing to test new ideas under the public microscope through anonymous disclosure than when they are required to be identified as the sources." Criden at 396.

B. REQUIRING THE REPORTERS TO TESTIFY WILL IMPERMISSIBLY RESTRICT THE FLOW OF INFORMATION TO THE PUBLIC AND UNCONSTITUTIONALLY INTERFERE WITH THE RIGHT OF THE PRESS TO REPORT AND GATHER NEWS.

As noted above, the right of the public to receive

information free of governmental interference unsupported by a compelling countervailing interest is well-settled. In Re Express-News Corp., supra, at 809, n.2. More recently, the public and the press have been afforded an affirmative right of access to information relevant to meaningful speech about public affairs. Globe Newspaper Co. v. Superior Court, supra; Branzburg v. Hayes, supra. The Eleventh Circuit has observed that the right to receive information and the right to gather news and information are protected by the First Amendment because "[I]nformed public opinion is critical to effective self-governance." Newman v. Graddick, supra, at 801.

A decision to require reporters to testify would infringe upon both the right of the public to receive information, and the right of the press to gather it for publication, in several important ways:

First, the ease and frequency with which reporters would be summoned into court under the district court's ruling would lead to the routine subpoena of reporters in criminal cases. The trial judge, during the hearing on the second subpoena, required no evidentiary showing as to the need for the reporter's testimony. He accepted the state attorney's unsupported representations that he had exhausted alternative sources for information regarding the Koenig/Copeland lawsuit.

A rule such as this, requiring the routine appearance of reporters, would in itself restrict the flow of news and interfere with newsgathering in two ways. First, when reporters are appearing in court to testify they cannot be gathering news.

A rule which routinely forces reporters to abandon newsgathering activities to appear in court will then frequently interfere with the gathering of news. Second, the threat of reporters having to make frequent court appearances ultimately will "chill" newsgathering and restrict the flow of information to the public by causing editors and publishers to avoid reporting those stories which carry a heavy risk of compelled testimony. The result would be that important events will go unreported. The need for a rule providing substantial protection to the confidentiality of news sources is crucial not only because sources have a right to speak anonymously, but also because

> unless reporters and informers can predict with some certainty the likelihood that newsmen will be required to disclose news or information obtained in confidential relationships, there is a substantial possibility that many reporters and informers will be reluctant to engage in such relationships. As a result of this deterrence, the flow of information to the public will be diminished regardless of whether disclosure could have actually been compelled.

Note, supra, 80 Yale L.J. at 336, quoted in Zerilli v. Smith, supra, at 713, n.46. The empirical support for the contention that the public and the press will not obtain important information if confidential sources are not protected is overwhelming. Note, supra, 88 Yale L.J. at 1205, n.18; Newsman's Privilege to Withhold Information From Grand Jury, 86 Harv. L. Rev. 137, 147 n.43 (1972); Blasi, Press Subpoenas: An Empirical Analysis at 53, 57 (1972); Branzburg v. Hayes, 408 U.S. at 736, n.20 (Stewart, J. dissenting). Even potential sources who had not insisted strictly on confidentiality in the past may well decide not to talk to journalists, given a rule that would

source of published information, so that the authorities could silence the source." 337 So.2d at 956. The potential for abuse and harassment presented by this ruling is sufficiently grave to warrant an expedited consideration and reversal by this court.

## CONCLUSION

The district court's decision misconstrues Branzburg and conflicts with Morgan to the end of chilling the free exchange of publicly important information. That decision is due to be reversed.

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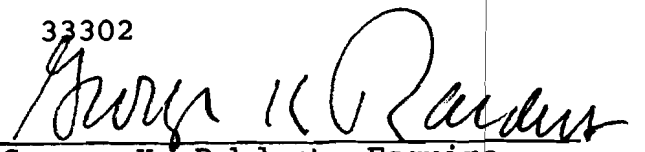

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