O/a 11-6-85

IN THE
SUPREME COURT OF FLORIDA

CASE NO. 66,576

THE TRIBUNE COMPANY
and JAMES TUNSTALL

Petitioners,

vs.

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

Respondents.

ON PETITION FOR REVIEW OF A DECISION OF
THE FIFTH DISTRICT COURT OF APPEAL

BRIEF OF AMICI CURIAE THE MIAMI HERALD PUBLISHING COMPANY AND THE FLORIDA PRESS ASSOCIATION

RICHARD J. OVELMEN
General Counsel
The Miami Herald Publishing Company
One Herald Plaza
Miami, Florida 33101
(305) 376-2868

ARKY, FREED, STEARNS,
WATSON, GREER, WEAVER &
HARRIS, P.A.
2800 One Biscayne Tower
Two South Biscayne Boulevard
Miami, Florida 33131
(305) 374-4800

Attorneys for Amici Curiae
(other counsel inside cover)

Paul J. Levine
MORGAN, LEWIS & BOCKIUS
3200 Miami Center
100 Chopin Plaza
Miami, Florida 33131
(305) 579-0300
Attorneys for The Miami Herald Publishing Company

Parker D. Thomson
Sanford L. Bohrer
THOMSON, ZEDER, BOHRER
WERTH, ADORNO & RAZOOK
200 S. Biscayne Boulevard, Suite 4900
Miami, Florida 33131
(305) 350-7200
Attorneys for Florida Press Association
and The Miami Herald Publishing Company

Laura Besvinick
SHARPSTEIN & SHARPSTEIN
3043 Grand Avenue
Penthouse One
Coconut Grove, Florida 33133
(305) 442-8100
Attorneys for The Miami Herald Publishing Company

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STATEMENT OF THE CASE AND FACTS

The Newspaper Stories

On July 19, 1983, under the byline of reporters William Aubrey and Nell Woodcock, the Brooksville Sun Journal published an article headlined: "Official Complaint Against Koenig and Copeland Is Filed." The article reported that a Hernando County resident had filed complaints with the Florida Ethics Commission against County Commissioners Bill Koenig and Greg Copeland alleging that their filing of a lawsuit against the City of Brooksville and an engineering firm was a misuse of their public offices. One day later, the Tampa Tribune published an article under the byline of reporters Jim Tunstall and Deborah Bacon headlined: "Complaints Filed Against Two Commissioners" (R. 24).[1/] This story also reported that an Ethics Commission complaint had been filed against the commissioners, charging that they "misused their offices by filing a lawsuit against the city and its engineer" without approval of the County Commission (R. 24). The article noted that the Hernando County Commission had informally asked the Ethics Commission to probe the very conduct that was the source of the citizen's complaints and was told that it must file a formal request for such an investigation.

1/ References in this Brief to the Record on Appeal will be styled "(R. ___)".

The lawsuit, and the fact that the Commissioners had filed it in their official capacities without commission authorization, were both matters of public record available from the relevant public court files. The propriety of filing the lawsuit without commission authorization was fully discussed at an open commission meeting prior to publication of the articles (R. 24). The informal request and the subsequent formal county inquiry were disclosed at public commission proceedings. Commissioners Koenig and Copeland publicly admitted having made the unauthorized filing, but denied all wrongdoing. Thus, even without the newspapers' accounts of the alleged filing of the unnamed citizen's Ethics Commission complaints, it was a matter of public record from the outset that the two commissioners might have committed ethics violations by filing their lawsuit and that the Ethics Commission would be asked to investigate. Consequently, this is not a case in which publishing an article about the filing of an Ethics Commission complaint can be said to have injured the commissioners' reputations or to have disclosed anything not already known generally.

The Ethics Commission Complaints

Both newspaper accounts incorrectly reported the Ethics Commission complaints had already been filed. No citizen's complaints had actually been filed with the Ethics

Commission by July 19 and 20, 1983, when the stories appeared.

Hernando County resident Edward Cambridge did file the ethics complaints, but he did not prepare the complaints until July 25; he signed and notarized them on July 26, and he sent them to the Ethics Commission which received them July 27, 1983 (R. 65). Cambridge testified that he had not yet decided to file the complaints by July 20, 1983, the date the second story appeared (R. 59-60). He also said under oath that he was not the source of the story and that he did not know the source of the story, although he identified, at least implicitly, three possible sources (R. 61, 62).

While the Cambridge complaints were pending, Hernando County Attorney Robert Snow also filed an official inquiry seeking a formal opinion regarding the ethical ramifications of the lawsuit improperly filed by Commissioners Koenig and Copeland. The county request is a public record.[2/]

2/ The Cambridge complaints, too, are public records under Chapter 119, but were subject to a temporary confidentiality requirement. See Fla.Stat. §§112.322(2)(c) and 112.324(1). Upon completion of its preliminary investigation, the Ethics Commission's decision either dismissing the complaint (as here) or finding probable cause is immediately made public. Id. In this case, the statutory period of confidentiality lasted 65 days, from the July 27 filing to the September 28 dismissal.

On September 28, 1983, the Ethics Commission issued a public report dismissing Cambridge's charges for failure to allege violations of the Code of Ethics statute. On the same date, the Commission answered the County Attorney's inquiry by determining that the Code of Ethics for public officers had not been violated by the commissioners.

Two weeks after the Ethics Commission decisions, Assistant State Attorney Harry Hendry issued subpoenas for the reporters. Hendry sought to know the source for the July 19 and 20, 1983, stories as part of an investigation requested by Commissioners Koenig and Copeland (R. 90).

The Alleged Violation of the Ethics Commission Statute

Ethics Commission complaints are public records under Chapter 119, but are to remain confidential while pending before the commission.[3/] When the Ethics Commission completed its preliminary investigation, the Cambridge complaints and the commission findings were made public. Notwithstanding the "public record" nature of the complaints, the statute imposes criminal penalties upon any

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3/ Fla.Stat. §§112.322(2)(c) and 112.324(1). Subjects of Ethics Commission probes can waive this temporary confidentiality and make the files immediately public. According to newspaper accounts, "Koenig and Copeland said they intend to ask that all proceedings be made public as soon as possible." Apparently, the state has not concerned itself with this point.

person "who wilfully discloses, or permits to be disclosed, his intention to file a complaint, the existence or contents of a complaint which has been filed with the commission. . . ." §112.317(6), Fla. Stat. (emphasis added, hereinafter, "the Statute").

In this case, the newspaper stories appeared one week prior to the filing of a complaint with the commission. Under the Statute, therefore, only Edward Cambridge could have violated the Statute, and only by disclosing "his intention to file a complaint." When subpoenaed by the prosecutor, Cambridge denied that he was the source of the story. He denied having an intention to file the complaint when the story was written and denied telling anyone that he intended to file a complaint or, after the filing, that he was the complaining party (R. 61).

Cambridge admitted that an acquaintance named Harold Densmore encouraged him to file an Ethics Commission complaint (R. 62). He speculated that commissioners Koenig and Copeland might have been the sources for the story (R. 61). All three are possible sources for the articles, as are any persons with whom they might have discussed the commissioners' conduct even without mentioning an "intention" to file a complaint.

The First Hearing

On October 3, 1983, the state subpoenaed reporters Deborah Bacon of the Tampa Tribune and William Aubrey of the Brooksville Sun Journal. The subpoenas called for the reporters to appear the next day in the State Attorney's Office in Brooksville "to testify concerning knowledge of violation of the criminal law" (R. 6-9). The reporters appeared and answered preliminary questions but refused to answer questions concerning the identity of the confidential sources for the July 19 and 20 articles. The reporters filed motions for protective order, motions to quash the subpoenas, and supporting memoranda of law.

At the first hearing on the motions to quash on October 7, 1983, the state formally introduced the testimony of Cambridge to the effect that he was not the source of the article.[4/] Since the state apparently had not obtained testimony from anyone other than Cambridge, Circuit Judge L.R. Huffstetler ruled that the state had not yet exhausted alternative sources for the information and quashed the subpoenas with leave to re-subpoena the reporters if the

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4/ The questioning of Cambridge was half-hearted, at best. He was not asked to reveal the names of persons with whom he discussed the subject of the Koenig-Copeland lawsuit, an astonishing omission. Nor was he asked who would have had access to such information. Having secured Cambridge's denial that he told anyone he intended to file a complaint, the prosecutor neglected nearly every other conceivably relevant question.

state could later meet its burden under applicable case law (R. 62).

The Second Hearing

In October 1983, the state took testimony from several other witnesses. At no time did the state file criminal charges against any person. Subsequently, the state re-issued the Bacon and Aubrey subpoenas and subpoenaed Bacon's co-author, Jim Tunstall (hereinafter, "Tunstall"), to give sworn statements.

The reporters again filed motions to quash. Unlike the first hearing at which Cambridge's sworn testimony was made part of the record, prosecutor Hendry did not furnish either tape recordings or transcripts of testimony taken from additional witnesses. Over the objection of the reporters' lawyers, Hendry was permitted to testify as to the statements taken from various Hernando County Commissioners, the county attorney, the notary who witnessed Cambridge's signature, and Densmore, the party who encouraged Cambridge to file the complaints. In this bizarre setting, the reporters' lawyers were relegated to cross examining the prosecutor regarding his recollection of what seven different witnesses said under oath concerning their participation in the disclosure of Cambridge's "intention" to file the complaints (R. 86-91).

Prosecutor Hendry, who admitted tape-recording the testimony, had no adequate explanation for his failure to

produce the transcripts or tape recordings. At first, he indicated that the recordings were too lengthy but then admitted that, together, all seven depositions consumed less than two hours. He synthesized those two hours into five minutes of hearsay testimony (R. 87).

Additionally, Hendry apparently did not pursue possible leads that either County Attorney Snow or Densmore were sources for the story. The prosecutor was apparently unaware that, since the stories were published before the complaints were filed, the only possible criminal violation would be against one who discussed his "intention" to file a proceeding. Hendry admitted neglecting to ask Snow whether he encouraged Cambridge to file the ethics complaints (R. 90-91). He did not pursue the matter with Densmore other than to secure his denial that he was the source for the article. According to Hendry, Densmore denied knowledge of Cambridge's intention to file the complaints, a contradiction of Cambridge's earlier testimony which Hendry did not question (R. 89, 62).

The reporters' counsel asked that Hendry be required to produce the tape recordings of the testimony. The court denied the request, and based on Hendry's self-serving summary of the recorded testimony, denied the motions to quash, making no findings of fact to support the decision[5/] (R. 101).

5/ The court's handling of this matter was inconsistent. At the initial hearing October 7, 1983, prosecutor Hendry

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The Contempt Orders

The day following denial of the motions to quash, reporters Tunstall and Aubrey again invoked their First Amendment privileges and refused to answer the state's questions concerning the confidential sources for the July 19 and 20 stories. The reporters were held in contempt and sentenced to an indefinite term of up to six months in county jail (R. 141). They were permitted to remain free on their own recognizance pending appeal.

Proceedings In The Fifth District

On appeal, Tunstall and amici curiae argued that the subpoena should have been quashed because it served no legitimate interest of law enforcement. They claimed Tunstall could not have witnessed a crime because the Statute which was allegedly violated is facially unconstitutional and, thus, void since it abridges the First

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5/ (continued)

boldly asserted that "we feel we have exhausted all alternative means of securing the information." (R. 52). The court did not accept Hendry's statement as conclusive. However, at the November 9 hearing, Hendry was permitted to "establish" the exhaustion of alternative sources by summarizing, over objection, the additional depositions he had taken. The court merely accepted Hendry's statement that he was "an adequate repository of the information." (R. 81).

No emergency existed requiring the motions to quash to be heard immediately. There would have been no prejudice to any party in adjourning the hearing and requiring the prosecutor to produce the tape-recorded depositions.

Amendment by punishing truthful expression concerning public officials.[6/] They further argued that no legitimate law enforcement interest is served by investigating the purported violation of an unconstitutional criminal statute and that the subpoena, therefore, served no cognizable state interest and should have been quashed. They concluded that the contempt conviction should have been reversed.

The assistant attorney general in opposition, did not assert that the statute is constitutional. Instead, he claimed that Tunstall had no standing to challenge the constitutionality of the Statute pursuant to which he was subpoenaed because he was not himself charged with a violation of it. The state also claimed Tunstall had waived the facial unconstitionality argument by failing to raise it in the trial court. The state concluded that the reporter's privilege did not apply because Tunstall had witnessed a crime.

The Fifth District affirmed Tunstall's contempt judgment, holding "[a] witness to a crime, simply because he

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6/ The press demonstrated in the Fifth District that the Statute is facially unconstitutional because it seeks to punish truthful expression about public officials. See, e.g., Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979); Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978); Gardner v. Bradenton Herald, Inc., 413 So.2d 10 (Fla.), cert. denied, 103 S.Ct. 143 (1982); Section III.A., infra. The Attorney General has never contested the constitutionality issue, nor could he given his own prior published opinion on the subject. 1978 Op. Atty. Gen. Fla. 078-16 (January 31, 1978).

happens also to be a news reporter and intends to write about what was told to him, has no greater right to refuse testimony than any other witness." Tribune Co. v. Huffstetler, 9 F.L.W. 2535, 2535 (Fla. 5th DCA 1984). The court further ruled "a reporter has no right to withhold testimony based on his perception or belief that the law which prohibits the conduct of which he is an active observer is unconstitutional. His rights are in no way impaired by the enforcement of the law and thus he lacks standing to challenge its constitutionality." Id. In short, the appellate court held that a judge may imprison reporters to enforce an unconstitutional statute, and that the reporters may not challenge the validity of the Statute.

SUMMARY OF THE ARGUMENT

The Fifth District has affirmed the sentencing of a news reporter to six months in jail for contempt. The district court reached this result even though the reporter was protecting his confidential source relationship and the subpoena served no legitimate interest of law enforcement.

In so holding, the Fifth District chose to wholly ignore two controlling decisions of this Court: Morgan v. State, 337 So.2d 951 (Fla. 1976) ("Morgan") and Trushin v. State, 425 So.2d 1126 (Fla. 1982) ("Trushin"). Instead, the district court held that the reporter's qualified First Amendment privilege does not apply to the instant subpoena because Tunstall witnessed a "crime." The Fifth District

further held that Tunstall waived his right to assert the facial unconstitutionality of the Statute by failing to raise it in the trial court; consequently, the district court rejected Tunstall's right to claim that he witnessed no criminal conduct because no valid criminal law had been violated. The Fifth District also ruled that Tunstall lacks standing to challenge the Statute because he has not been charged with violating it.

The Fifth District is simply mistaken in holding the constitutionality of the Statute could not be raised by Tunstall on appeal. In Trushin, this Court reaffirmed the settled rule of Florida law that the facial constitutionality of a statute which provides the foundation for the case may be raised for the first time on appeal.

Similarly, the Fifth District is mistaken in holding that, on a motion to quash, a reporter has no standing to challenge the facial constitutionality of the criminal statute pursuant to which he has been subpoenaed. In Morgan, this Court quashed a subpoena and reversed the contempt conviction of a reporter precisely because there was no valid underlying criminal statute. Both the Morgan holding and the test it adopted (see infra) afford Tunstall standing to assert the facial unconstitutionality of the Statute.

Even if Tunstall lacks direct standing to challenge the Statute, he has "third party" standing to

assert his source's right to challenge its unconstitutionality. See Higdon v. Metropolitan Dade County, 446 So.2d 203 (Fla. 3d DCA 1984).

The Fifth District should have employed the four-part test announced by this Court in Morgan to balance Tunstall's First Amendment rights against the "legitimate interest of law enforcement" and should have reversed the contempt conviction. Adhering to Morgan, both the trial court and the district court should have considered the following four issues:

> (1) whether enforcement of the subpoena would serve a legitimate interest of law enforcement;
>
> (2) whether this legitimate interest is "immediate, substantial, and subordinating";
>
> (3) whether there is a "substantial connection" between the testimony sought and the subordinating societal interests;
>
> (4) whether enforcement of the subpoena is the least drastic means of serving society's interest;

Morgan, supra, at 955-56 & n.10; 957.

Had the lower courts applied the Morgan test, they would have found that the subpoena in this case fails the first three elements of the test since no legitimate interest of law enforcement is served by enforcing a subpoena issued pursuant to a facially unconstitutional statute. The Statute here is patently unconstitutional because it punishes truthful expression in the absence of a

"clear and present danger" to "a state interest of the highest order." Worrell Newspapers v. Westhafer, 739 F.2d 1219 (7th Cir. 1984), aff'd per curiam, No. 84-827 (U.S. Feb. 19, 1985); Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978); Gardner v. Bradenton Herald, Inc., 413 So.2d 10 (Fla. 1982). Even if the Statute is constitutional, the subpoena here serves no "subordinating" interest since the Statute's purpose, which is to temporarily protect the reputation of public officials, is not implicated here. All the facts relating to the ethics complaints were a matter of public record prior to publication of the article.

The state did not meet the fourth element of the test because it wholly failed to show with competent evidence that alternative sources of the information sought are not available.

Quite clearly, the contempt conviction should be reversed.

ARGUMENT

I. THE FACIAL UNCONSTITUTIONALITY OF THE STATUTE MAY BE APPEALED AS "FUNDAMENTAL ERROR"

The Fifth District Court of Appeal erroneously held Tunstall could not challenge the facial unconstitutionality of Section 112.317(6), Florida Statutes, on appeal because he had failed to do so in the trial court:

> In addition, appellants cannot raise this constitutional question for the first time on appeal. See Sanford v.

Rubin, 237 So.2d 134 (Fla. 1970); Rubin v. Glick, 419 So.2d 817 (Fla. 3d DCA 1983).

9 F.L.W. at 2535. This assertion is simply mistaken as a matter of law and is directly contrary to this Court's articulation of the "fundamental error" doctrine in Trushin v. State, 425 So.2d 1126 (Fla. 1982): "[T]he facial validity of a statute, including an assertion that the statute is infirm because of overbreadth, can be raised for the first time on appeal even though prudence dictates that it be presented at the trial court level to assure that it will not be considered waived."[7] Id. at 1129-30. In

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7/ Cases both following and preceding Trushin have uniformly recognized the principle that the facial unconstitutionality of a statute is fundamental error which may be raised for the first time on appeal. See, e.g., Akins v. State, 462 So.2d 1161, 1166-67 (Fla. 5th DCA 1984) (Cowart, J., dissenting) (holding violations of constitutional double jeopardy rights are fundamental error which may be raised for the first time on appeal); Moosbrugger v. State, 461 So.2d 1033, 1034 (Fla. 2d DCA 1984) (holding assertion that statute is unconstitutionally vague which may be raised for the first time on appeal); Springfield v. State, 443 So.2d 484, 485 (Fla. 2d DCA 1984) (holding that ex post facto application of a valid statute is not fundamental error and therefore may not be raised for the first time on appeal); Kinner v. State, 382 So.2d 756, 757 (Fla. 2d DCA 1980) (holding assertion that statute fails to comport with due process is fundamental error which may be raised for the first time on appeal); Silver v. State, 174 So.2d 91, 93 (Fla. 1st DCA 1965) (holding that the constitutionality of the controlling statute may be considered for the first time on appeal particularly "in cases involving the personal liberty of the individual"); In re Kionka's Estate, 121 So.2d 644, 647 (Fla. 1960) (holding that question of validity of statute is fundamental error which may be raised for the first time on appeal); Town of Monticello v. Finlayson, 23 So.2d 843, 845 (Fla. 1945) (holding that "a fundamental error, based on the unconstitutionality of a statute, can be raised for the first time in the Supreme Court").

short, the Fifth District overlooked the doctrine of "fundamental error" as it applies to the facial invalidity of statutes.[8/]

An appellate court must allow, under the "fundamental error" doctrine, an appeal challenging the facial constitutionality of the statute which forms the foundation of the case because absent a valid statute the court lacks subject matter jurisdiction. Alexander v. State, 450 So.2d 1212, 1216 (Fla. 4th DCA 1984). As this Court explained in Sanford v. Rubin, supra, at 137, a case inexplicably cited by the Fifth District in support of its erroneous summary disposition of the constitutional issue, fundamental error "is error which goes to the foundation of the case or goes to the merits of the cause of action." The criminal statute under which Tunstall was subpoenaed is obviously the foundation of this case. If that statute is not valid, there can be no valid subpoena. The absence of a valid criminal statute deprives the trial court of jurisdiction to either issue or enforce the subpoena.

The Fifth District's error is made plain by its citation to Sanford v. Rubin, supra, and Rubin v. Glick,

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8/ The right to raise constitutional questions for the first time on appeal has particular force where First Amendment rights are violated. Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 82 (1967); Cape Publications, Inc. v. Adams, 336 So.2d 1197, 1199 (Fla. 4th DCA 1976); Gibson v. Maloney, 263 So.2d 632, 636 (Fla. 1st DCA 1972); see also Ingle v. State, 249 So.2d 460 (Fla. 1st DCA 1971).

supra. In Sanford this Court did not permit the constitutionality of an attorneys' fees statute to be raised for the first time on appeal because the availability of attorneys' fees simply "did not go to the merits of the case or the foundation of the case." Id. at 237. Rubin v. Glick, supra, is similarly inapposite. In Rubin, a losing medical malpractice plaintiff claimed on appeal that the only error below was the trial court's refusal to permit him to tell the jury that the defendant physician had insurance coverage. At the time, reference to insurance was prohibited by a rule of civil procedure. Because the plaintiff had not argued in the trial court that the rule was unconstitutional, the Third District decided it would "not entertain his challenge here". Rubin, supra, at 818. The "insurance reference" issue was tangential and, therefore, not "fundamental" to the key issue of medical malpractice in Rubin: Even had plaintiff been permitted to refer to the physician's insurance coverage, it was irrelevant to the outcome of the case.

In this case, unlike Sanford and Rubin, the validity of the confidentiality statute Tunstall seeks to challenge is the heart of the case. Thus, the issue of the Statute's constitutionality is fundamental error which can be considered for the first time on appeal.

II. TUNSTALL HAS STANDING TO ASSERT THE FACIAL UNCONSTITUTIONALITY OF THE STATUTE

The Fifth District concluded that "[a] reporter has no right to withhold testimony based on his perception or belief that the law which prohibits the conduct of which he is an active observer is unconstitutional. His rights are in no way impaired by the enforcement of the law and thus he lacks standing to challenge its constitutionality."[9/] The court is mistaken both in its premise and its conclusion.

The test adopted by this Court in Morgan for adjudicating the reporter's privilege, and this Court's application of the test in Morgan, inherently afford Tunstall standing to assert the unconstitutionality of the Statute here. Also on the facts of this particular case, enforcement of the Statute by issuance of the subpoena directly impairs Tunstall's First Amendment qualified privilege to protect his confidential sources and violates his right to gather news by prohibiting sources from disclosing to him facts relating to Ethics Commission complaints. Despite Tunstall's heavy reliance on Morgan below, the Fifth District chose to ignore entirely this Court's controlling decision. Moreover, Tunstall has "third

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9/ The issue is not, of course, Tunstall's perception of the constitutionality of the Statute, but rather its constitutionality.

party" standing to assert the rights of his sources who could be prosecuted for violations of the Statute.

A. Tunstall Has Direct Standing Under Morgan v. State To Challenge The Statute

In Morgan, this Court reversed a reporter's conviction for contempt for refusing to disclose a source. The Court explicitly overruled Clein v. State, 52 So.2d 117 (Fla. 1950), and held that journalists enjoy a qualified First Amendment privilege to refuse to testify regarding their newsgathering activities unless the subpoena seeking to compel their testimony meets a stringent four-part test.

The facts of Morgan are on "all fours" with this case. In Morgan, the state claimed the reporter's testimony was needed because she had witnessed a "crime" -- the "illegal" divulging of grand jury information. The reporter in Morgan argued, and this Court concurred, that there could be no prosecution for the "crime" witnessed because the statute which prohibited disclosure provided for no criminal penalty. This Court held that the State Attorney thus had no "crime" to investigate and hence no authority to subpoena the reporter to testify. Morgan thus stands squarely for the proposition asserted here that a subpoenaed reporter has standing to quash a subpoena on the ground that no proper criminal investigation exists because there can be no prosecution for the conduct he witnessed.

Moreover, the four-part test set forth in Morgan requires the court to determine both whether the subpoena sought serves a "legitimate interest of law enforcement" and whether that interest is "immediate, substantial, and subordinating". Obviously, the constitutionality of the Statute is directly relevant to these issues. There can be no legitimate law enforcement interest, let alone a "subordinating interest," in subpoenaeing reporters to investigate a "violation" of an unconstitutional law. The constitutionality of the Statute is central to the court's resolution of two of the four parts of the Morgan test and thus to the merits of Tunstall's case. The Morgan test thus guarantees Tunstall standing to challenge the Statute's constitutionality.

The specific facts of this case provide additional support for Tunstall's standing here. The Statute prohibits Tunstall's sources from disclosing to him truthful information about public officials, thereby directly impairing his right to gather news. Morgan, supra, at 954. Further, enforcement of the subpoena would force Tunstall to reveal the name of his confidential source, "chilling" other such sources. This, too, would impair Tunstall's newsgathering right.

Tunstall seeks only to do what this Court explicitly approved in Morgan: to challenge the need for his testimony on the grounds that no cognizable "crime"

occurred. There is no dispute that the sole basis for the State Attorney's inquiry here is the possible violation of Section 112.317(6), Florida Statutes. Tunstall demonstrated below -- and no one has ever contested it -- that a violation of the Statute is not a crime because the Statute is unconstitutional. Tunstall's testimony, like the reporter's in Morgan, would serve no legitimate interest of the criminal justice system since the state has no interest in enforcing unconstitutional laws. See Section III.A., infra. Tunstall is thus entitled to assert on his own behalf that the Statute is facially unconstitutional and therefore does not validly define a cognizable crime which would be the proper subject of investigation or subpoena.

B. Tunstall Has "Third Party" Standing To Assert His Confidential Source's Right To Challenge The Statute

Tunstall not only has direct standing to challenge the facial constitutionality of the Statute; he also has third party standing to challenge the Statute on behalf of his confidential source. Tunstall meets all three criteria which are used under both Florida and federal law to determine whether a party may be permitted to assert the constitutional rights of another. Higdon v. Metropolitan Dade County, 446 So.2d 203 (Fla. 3d DCA 1984).

First, a party may assert the rights of another where there is "some substantial relationship between the

litigant and third parties." Higdon, supra, at 207. Tunstall, to the extent that his claim is that of a third party, is seeking to stand in for his confidential source. This Court has recognized the crucial importance of the reporter/confidential source relationship and carefully protected it in identical circumstances. Morgan, supra, at 955.

Second, the Higdon court observed that third party standing is proper where "the impossibility of the rightholder asserting his own constitutional rights" justifies allowing the litigant before the Court to assert the nonparty's interest. Id. Here, Tunstall's source could not assert his right to engage in the anonymous speech[10/] prohibited by the statute without exposing his identity and thereby surrendering his right. The United States Supreme Court explicitly approved third party standing in analogous circumstances in NAACP v. Alabama ex rel. Patterson, 375 U.S. 449 (1958). In that case, the Court allowed the NAACP as an organization both to challenge a statute which required it to publish a list of its members and to assert the constitutional rights of the members to freedom of association. To require the members themselves to come forward to bring the suit, the Court reasoned, would

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10/ The right of a confidential source to engage in anonymous speech is exhaustively discussed in Note, The Right of Sources - The Critical Element In the Clash Over The Reporter's Privilege, 88 YALE L.J. 1202 (1979); Talley v. California, 362 U.S. 60 (1960).

undermine the very purpose of the challenge: the preservation of the members' anonymity.[11/] Tunstall, no less than the NAACP, must be allowed to assert the rights of one who, in order to preserve his right to engage anonymously in First Amendment activities, cannot come forward to assert the right himself.

Finally, Tunstall has standing because "the enforcement of [the] challenged restriction would result indirectly in the violation of third party rights." Higdon, supra, at 207. Here, forcing Tunstall to identify his confidential source would deprive the source of his right to engage in anonymous speech.

The only case cited by the Fifth District for its summary conclusion that Tunstall lacks standing is Craig v. Boren, 429 U.S. 190 (1976). Yet, Craig, in which the Supreme Court allowed a third party to assert the rights of another, supports Tunstall's assertion of standing here. Craig involved a challenge to the constitutionality of an Oklahoma statute which prohibited the sale of 3.2% alcohol beer to males under the age of 21 and to females under the age of 18. A beer vendor sought declaratory and injunctive relief against enforcement of the statute on the grounds that it denied to males 18-20 years of age equal protection

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11/ The federal government and the State of Florida recognize the importance of their own confidential sources by exempting their identities from the reach of public access laws. 5 U.S.C. § 552(b)(7)(D); Fla. Stat. §119.07(3).

of the laws. The United States Supreme Court held that the beer vendor had third party standing to challenge the constitutionality of the statute.

The Craig Court conducted a two step analysis. First, the Court held that the vendor had "plainly" suffered an "injury in fact" inasmuch as the statute forced the vendor to choose between economic loss (if she obeyed) and possible sanctions (if she disobeyed). These injuries gave the vendor standing to challenge the lawfulness of the statute. Craig, supra, at 194. Second, the Court held, the vendor's standing to challenge the statute for herself gave her standing to assert the substantive rights of the third parties -- the 18-20 year old males -- who would be affected should her constitutional challenge fail. Id. at 195. Because "enforcement of the challenged restriction against the [vendor] would result indirectly in the violation of third parties' rights, Warth v. Seldin, 422 U.S. 490, 510 (1975)," the vendor had standing to assert those third parties' rights in her own challenge to the statute. Id.

This Court must recognize Tunstall's standing to challenge the constitutionality of the Statute, just as the Supreme Court recognized the beer vendor's right to challenge the Statute at issue in Craig v. Boren. As in Craig, Tunstall here is "injured in fact" by enforcement of the Statute. First, the Statute prohibits persons from disclosing to the press the fact that they have filed Ethics Commission complaints. This prohibition directly impairs

Tunstall's right to gather news. Just as the Craig statute prohibited the beer drinker from giving the beer vendor money for beer, so the Statute prohibits the source from giving Tunstall information for publication. Second, enforcement of the Statute entails the forced disclosure of a confidential source, which further impairs Tunstall's right to gather news. Thus, Tunstall, like the beer vendor, is forced to choose: he must either surrender his newsgathering right or resist enforcement of the Statute. As in Craig, Tunstall must have standing to challenge the constitutionality of the Statute and, thereby, standing to assert the substantive rights of the third party -- his source -- who would be injured if his challenge fails. If a beer vendor has standing to assert the rights of an underage beer drinker, a reporter must have standing to assert the rights of his confidential source.12/

12/ Even if Tunstall did not suffer "direct injury" to his newsgathering rights by enforcement of the Statute, he would be entitled to argue its facial unconstitutionality under the expansive First Amendment standing doctrine. The United States Supreme Court stated the principles controlling standing in cases involving First Amendment challenges in Broadrick v. Oklahoma, 413 U.S. 601 (1973). In that case, certain employees sought to have declared unconstitutional a state statute regulating political activity by state employees. They admitted that the statute was constitutional as applied to the conduct in which they had themselves engaged. Nonetheless, they asserted the statute was overbroad and thus unconstitutional, because it reached protected conduct, too. The Supreme Court held that the employees had standing to challenge the statute even though it was constitutional as applied to them:

> It has long been recognized that the First Amendment needs breathing space and that statutes attempting to

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III. THE CONTEMPT CONVICTION SHOULD BE REVERSED BECAUSE THE STATE FAILED TO MEET THE MORGAN TEST FOR OVERCOMING THE REPORTER'S QUALIFIED FIRST AMENDMENT PRIVILEGE

In Morgan, supra, at 953-54, this Court expressly receded from Clein v. State, supra, to recognize the journalist's First Amendment qualified privilege to quash subpoenas seeking to compel testimony regarding their professional newsgathering activities. The core of this Court's opinion in Morgan, was its analysis of the decision of the United States Supreme Court in Branzburg v. Hayes, 408 U.S. 665 (1972). This Court recognized, as have all other authorities,[13] that a majority of Justices in

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12/ (continued)

> restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society. . . . As a corollary, the Court has altered its traditional rules of standing to permit -- in the First Amendment area -- "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." ... Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.

Broadrick, supra, at 611-12. This First Amendment "exception" to the general rules of standing has also been recognized and approved by Florida courts. See, e.g., Pace v. State, 368 So.2d 340, 342 (Fla. 1979). Trushin v. State, 348 So.2d 668 (Fla. 3d DCA 1980).

13/ Saxbe v. Washington Post Co., 417 U.S. 843, 859-61, 863, 94 S.Ct. 2811, 2819-21 (1974) (Powell, J., dissenting); Note, Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen, 26 HASTINGS L. J. 709, 716-19 (1974); Zerilli v. Smith, 656 F.2d 705, 711 (D.C. Cir. 1981); United States v. Hubbard, 493 F.Supp. 202, 204-05 (D.C. D.C. 1978).

Branzburg adopted the reporter's privilege. Morgan, supra, at 954. This Court held that "application of the privilege in a given case involves 'the striking of a proper balance.'" Id., quoting Branzburg, supra, at 709. The Morgan opinion quotes with approval Justice Powell's flat rule that "if a newsman ... has reason to believe that his [grand jury] testimony implicates confidential source relationships 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.']" Morgan, supra, at 954, quoting Branzburg, supra at 709. Since this subpoena serves no legitimate need of law enforcement because it was issued to enforce a facially unconstitutional statute, Morgan and Branzburg dictate that the subpoena be quashed and the contempt conviction be reversed.

In addition to requiring first that the subpoena serve a legitimate need of law enforcement, the Morgan decision noted three additional requirements the state must meet to overcome the reporter's privilege: (2) the legitimate state interest which the subpoena serves must also be "immediate, substantial and subordinating;" (3) there must be a "'substantial connection' between the information desired of the witness and the interest of society in the subject matter of the investigation;" and (4) "the means of obtaining the information is not more drastic than necessary to forward the asserted governmental interest." Morgan, supra, at 955-56 n.10; Id. at 957

(Sundberg, J., concurring). Accord, Morgan v. State, 325 So.2d 40, 43 (Fla. 2d DCA 1975).

The subpoena served on Tunstall fails to meet the first three of these requirements because the Statute is unconstitutional and because, even were it not, the interest the Statute seeks to protect -- "a speculative interest in reputation" -- is neither compromised by the publication here nor sufficient to subordinate the First Amendment interest in protecting confidential sources. The "least drastic means" requirement was also not met because the state failed to show that alternative sources of the information sought were exhausted.

The Fifth District stands alone in disregarding Morgan. The First, Second and Third District Courts of Appeal,[14/] and all Florida trial courts[15/] that have had

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14/ Gadsden County Times v. Horne, 426 So.2d 1234 (Fla. 1st DCA), cert. denied 441 So.2d 631 (Fla. 1983); Johnson v. Bentley, 457 So.2d 507 (Fla. 2d DCA 1984); Tribune Co. v. Green, 440 So.2d 484 (Fla. 2d DCA 1983); 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. 3d DCA 1975).

15/ See, e.g., State v. DiBattisto, 11 Med.L.Rptr. 1396 (Fla. 11th Cir. 1984); State v. Reid, 8 Med.L.Rptr. 1249 (Fla. 15th Cir. 1982); State v. Peterson, 7 Med.L.Rptr. 1090 (Fla. 6th Cir. 1981); State v. Evans, 6 Med.L.Rptr. 1979 (Fla. 11th Cir. 1980); State v. Morel, 4 Med.L.Rptr. 2309 (Fla. 17th Cir. 1979); State v. Silber, 49 Fla.Supp. 71 (11th Cir. 1979); State v. Beattie, 48 Fla.Supp. 139 (11th Cir. 1979); State v. Hurston, 3 Med.L.Rptr. 2295 (Fla. 5th Cir. 1978); State v. Petrantoni, 48 Fla.Supp. 49 (6th Cir. 1978); State v. Carr, 46 Fla.Supp. 193 (11th Cir. 1977); State v. Miller, 45 Fla.Supp. 137 (17th Cir. 1976); State v. Stoney, 42 Fla.Supp. 194 (11th Cir. 1974).

occasion to consider the issue, uniformly have applied the Morgan test to quash subpoenas on reporters. Similarly, the federal courts have unanimously recognized the reporter's qualified constitutional privilege emanating from Branzburg. In Miller v. Transamerican Press, Inc., 621 F.2d 721, modified on rehearing, 628 F.2d 932 (5th Cir. 1980), cert. denied, 450 U.S. 1041 (1981), the Fifth Circuit recognized the reporters' qualified privilege from compelled testimony in a libel case. In so doing, the Fifth Circuit acted in accordance with virtually all relevant authority. Ten sister Circuit Courts of Appeals that have considered the issue have recognized the reporter's privilege, and the two remaining Circuits have not yet addressed the question at the appellate level.[16/] Federal district courts in this Circuit are similarly uniform in applying the Branzburg/

16/ Recognizing the reporter's privilege: Zerilli v. Smith, 656 F.2d 705 (D.C.Cir. 1981); Carey v. Hume, 492 F.2d 631 (D.C.Cir. 1974), cert. dismissed, 417 U.S. 938 (1974); Bruno & 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); In Re Grand Jury Matter, 755 F.2d 1044 (3d Cir. 1985); United States v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980), appeal after remand, 651 F.2d 189 (3d Cir. 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, 705 F.2d 789 (5th Cir. 1983); 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, 563 F.2d 433 (10th Cir. 1977).

Miller test to quash subpoenas served on journalists.[17/]

A. Because The Statute Is Facially Unconstitutional, The Subpoena "Implicates A Confidential Source Relationship Without A Legitimate Need Of Law Enforcement."

The threshold question in adjudicating the validity of a state attorney's investigatory subpoena on a journalist is whether its enforcement serves a "legitimate need of law enforcement." Morgan, supra at 954, quoting Branzburg, supra, at 709 (Powell, J., concurring).

In the present case, there is no dispute that the sole purpose of the state attorney's inquiry was to investigate a possible violation of Section 112.317(6), Florida Statutes. The United States Supreme Court, however, has thrice struck down, as violating the First Amendment, statutes which are substantively identical to the Statute. Worrell Newspapers v. Westhafer, 739 F.2d 1219 (7th Cir. 1984), aff'd per curiam, No. 84-827 (U.S. Feb. 19, 1985); Smith v. Daily Mail Publishing Co., 442 U.S. 97 (1979)

17/ United States v. Horne, 11 Med.L.Rptr. 1312 (N.D.Fla. 1985); United States v. Accardo, 11 Med.L.Rptr. 1102 (S.D.Fla. 1984); United States v. Blanton, 534 F.Supp. 295 (S.D.Fla. 1982) (all quashing subpoenas on reporters in criminal cases).

("Daily Mail"); Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) ("Landmark").[18/]

This Court followed Landmark to strike down a similar statute in Gardner v. Bradenton Herald Inc., 413 So.2d 10 (Fla. 1982), cert. denied, 103 S.Ct. 143 (1982).[19/] Under well settled Florida law, such unconstitutional statutes are void ab initio, since the superior force of the Constitution prevents them from ever becoming law. Amos v. Mathews, 99 Fla. 1, 126 So. 308, 315 (1930); accord, Holley v. Adams, 238 So.2d 401, 405 (Fla. 1970). The Statute is unconstitutional because it punishes truthful expression about public officials which "lies near the core of the First Amendment" even though that expression

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18/ The Indiana statute invalidated in Worrell provided, in part, that "no person may disclose the fact that an indictment or information is in existence or pending until the defendant has been arrested...." 739 F.2d at 1221 (citation omitted).

The Virginia statute invalidated in Landmark provided, in part, that all papers, proceedings, testimony, and other evidence "shall not be divulged by any person to anyone except the Commission, except that any proceeding filed with the Supreme Court shall lose its confidential character." 435 U.S. at 830 n.1.

19/ The Florida statute struck down in Bradenton provided: "(1) No person shall print, publish, or broadcast, or cause to be printed, published, or broadcasted, ... the name or identity of any person served with, or to be served with, an inventory or notification of interception of wire or oral communications, ... until said person has been indicted or informed against by the appropriate prosecuting authority." 413 So.2d at 11.

(i) poses no "clear and present danger" to (ii) any "state interest of the highest Order". Daily Mail, supra, at 103; Landmark, supra, at 841-42, 843-44.

The Statute being unconstitutional and thus void, there was no crime for the state attorney to investigate. Accordingly, the subpoena should have been quashed because it served "no legitimate interest of law enforcement".

1. The Statute is unconstitutional because it punishes truthful expression without serving "a state interest of the highest order"

The Statute imposes criminal penalties upon any person who

> wilfully discloses, or permits to be disclosed, his intention to file a complaint, the existence or contents of a complaint which has been filed with the commission, or any document, action or proceeding in connection with a confidential preliminary investigation of the [Ethics] commission...

Fla.Stat. §112.317(6).[20/] The intitial test for determining whether such a law is constitutional was most recently

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20/ The statute is an anomaly. The Legislature has provided for disciplinary proceedings for all professions regulated by the Department of Professional Regulation. See Fla. Stat. §455.225. However, persons filing disciplinary complaints (or any others with knowledge of the proceedings) are generally free to proclaim from the rooftops, if they so desire, that a disciplinary proceeding is pending against a particular person. There are simply no similar confidentiality requirements governing disciplinary proceedings of the following Boards: Accountancy, Acupuncture,

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articulated in Daily Mail. The Supreme Court held "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." Id. at 103. The Statute serves no such state interest.21/

The decision of the United States Supreme Court in Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978), makes clear the unconstitutionality of the Statute.

20/ (continued)

Architecture, Chiropractics, Dentistry, Professional Engineers, Funeral Directors and Embalmers, Landscape Architecture, Medical Examiners, Nursing, Optometry, Osteopathic Medical Examiners, Pharmacy, Hearing Aid Specialists, Veterinary Medicine, Pilot Commissioners, Barbers, Construction Industry Licensing, Cosmetology, Massage, Naturopathic Examiners, Opticians, Nursing Home Administrators, Electrical Contractors, Professional Land Surveyors, and Psychology.

21/ The invalidity of the Statute is clear. In a 1978 opinion, the Florida Attorney General himself warned against filing a criminal prosecution against a city councilwoman who indirectly disclosed the existence of an Ethics Commission proceeding at a city council meeting. The Attorney General noted that the statute:

> does not purport to regulate time, place, or manner of expression; nor does it proscribe conduct. What it does attempt to prohibit is expression itself, when the expression deals with a particular subject, i.e., allegations of official misconduct. ... The Florida statute has, for all practical purposes, made it a crime to speak the truth.

1978 Op. Atty. Gen. Fla. 078-16 (January 31, 1978).

In Landmark, the Supreme Court struck down a Virginia statute that imposed criminal penalties for prematurely divulging information regarding confidential judicial disciplinary commission proceedings. The Court, acknowledging that confidentiality of the commission's proceedings was a legitimate state interest, nonetheless found the statute violated the First Amendment:

> We conclude that the publication Virginia seeks to punish under its statute lies near the core of the First Amendment, and the Commonwealth's interests advanced by the imposition of criminal sanctions are insufficient to justify the actual and the potential encroachments on freedom of speech and of the press which follow therefrom.

Landmark, supra, at 838.

Virginia asserted several state interests served by the confidentiality statute, including the protection of individuals' reputations during investigations which might eventually exonerate them. The Supreme Court found those interests wanting:

> Moreover, neither the Commonwealth's interest in protecting the reputation of its judges, nor its interest in maintaining the institutional integrity of its courts is sufficient to justify the subsequent punishment of speech at issue here, even on the assumption that criminal sanctions do in fact enhance the guarantee of confidentiality.

Landmark, supra, at 841-42. The Landmark Court squarely held "[o]ur prior cases have firmly established, however, that injury to official reputation is an insufficient reason 'for repressing speech that would otherwise be free.'" Id.

The Supreme Court has struck down all such attempts to punish one who speaks the truth about public officials.

> The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern, without previous restraint or fear of subsequent punishment.

Thornhill v. Alabama, 310 U.S. 88, 101-102 (1940). Criticism of public officials in the performance of their duties is speech at the core of the First Amendment.

> [W]here the criticism is of public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth... Truth may not be the subject of either civil or criminal sanctions where the discussion of public affairs is concerned.

Garrison v. Louisiana, 379 U.S. 64, 72-73 (1964).[22/]

Characterizing the "Landmark issue" as "almost identical to that in the instant case," this Court also has struck down Section 934.091, Florida Statutes, which imposed criminal sanctions on the news media for publishing the name

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22/ The concept that citizens are free to criticize public officials is central to the First Amendment. See A. Meiklejohn, Free Speech and its Relation to Self-Government, in POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 3 (1960). "Meiklejohn is noted for arguing that the meaning of free speech must be that all speech relating to the process of selfgovernance is 'absolutely' protected against governmental suppression." L. Bollinger, Free Speech and Intellectual Values, 92 YALE L.J. 438, 447 (1983).

of a person who had been subjected to governmental wiretapping. Gardner v. Bradenton Herald, Inc., 413 So.2d 10 (Fla.), cert. denied, 103 S.Ct. 143 (1982).

The statutory protection here of the "reputational interest" of the commissioners for a temporary period is simply too insubstantial to support the Statute's infringement of First Amendment rights.[23/]

2. The Statute is unconstitutional because it punishes truthful expression without meeting the "clear and present danger" test.

To pass constitutional muster, a statute imposing criminal penalties for free expression must not only be supported by a "state interest of the highest order," it

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23/ The same supposed state interests relied on by the state in this case were argued in an attempt to uphold a similar confidentiality requirement under a Michigan political reform law. That statute provided:

> Any person filing or aware of the filing of a sworn complaint ... shall not publicize any information relative to the sworn complaint.

1975 P.A. 227, Section 40 (Mich.).

As in the instant case, the Michigan statute purported to prohibit "not only media publication but private communications between two or more persons as well." In re Advisory Opinion on Constitutionality of 1975 P.A. 227, 396 Mich. 465, 242 N.W.2d 3, 7 (1976). In attempting to support the constitutionality of the statute, proponents of the law cited what they considered several compelling state interests, including the reputation of candidates. Id. at 8. However, "possible injury to the reputation of a public official does not afford a basis for repressing speech." Id.

must also meet the imminency standard of the "clear and present danger" test devised by Justice Holmes. The immediacy of the threat to the state interest is as important as its magnitude.

> Properly applied, the test requires a court to make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression.

Landmark, supra, at 842-43 (emphasis added).

Applying the test to the facts in this case, this Court is required to "examine for itself 'the particular utterance here in question and the circumstances of its publication to determine to what extent the substantive evil of unfair administration of justice was a likely consequence, and whether the degree of likelihood was sufficient to justify subsequent punishment.'" Id. at 344, quoting Bridges v. California, 314 U.S. 252, 271 (1941). The imminency requirement imposed by the Supreme Court in cases such as this one is stringent indeed:

> What emerges from these cases is the "working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished," Bridges v California, supra, at 263, 86 L Ed 192, 62 S Ct 190, 159 ALR 1346, and that a "solidity of evidence," Pennekamp v Florida, supra, at 347, 90 L Ed 1295, 66 S Ct 1029, is necessary to make the requisite showing of imminence. "The danger must not be remote or even probable; it must immediately imperil." Craig v Harney, supra, at 376, 91 L Ed 1546, 67 S Ct 1249.

In Landmark, the Supreme Court found that the premature publication of an ethics complaint against a judge did not pose a sufficiently imminent threat to the administration of justice to warrant punishment of such expression. Similarly, premature publication of an ethics complaint against a county commissioner does not pose a clear and present danger to county government.

Landmark is only the latest in a long line of decisions overturning criminal convictions of persons violating proscriptions against discussing judicial, state commission or grand jury proceedings. In each case, the Court has found that the exercise of free speech did not present a clear and present danger to the administration of justice. Wood v. Georgia, 370 U.S. 375 (1962); Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1941). This case is no different. The Statute is facially unconstitutional; consequently enforcement of the subpoena would serve no "legitimate interest of law enforcement". The subpoena should have been quashed and the contempt conviction reversed.

B. The Contempt Conviction Should Be Reversed Because Enforcing The Subpoena Serves No "Immediate, Substantial, And Subordinating" State Interest And The Testimony Sought Is Not "Substantially Related" To Any Such Interest.

Since the Statute is unconstitutional and the subpoena thus not necessary to further a legitimate state

interest, the subpoena can serve no "immediate, substantial, and subordinating" state interest, and the testimony would not "substantially relate" to any such interest. Consequently, the subpoena also should have been quashed under the second and third elements of the Morgan test.

Yet, even if the Statute were to be held constitutional, the state could not show Tunstall's testimony to be necessary to an "immediate, substantial, and subordinating" state interest. The matters disclosed by Tunstall here were all already a matter of public record. The need for an Ethics Commission ruling had been discussed by the County Commission at an open meeting and was a matter of common knowledge in Hernando County. The two commissioners involved had publicly discussed what would later become the basis of the Ethics Commission complaint -- the filing of the lawsuit -- which was itself another public act. No reputational damage could possibly have been done by the disclosure in question.

In fact, the interest in enforcing the subpoena is even weaker here than it was in Morgan. In Morgan, this Court noted: "One interest recognized by statute may have been defeated, in the present case, but this interest was a private interest in reputation." Morgan, supra, at 955. The Court observed that this private interest was only "speculative," since the public official might not have prevailed in a motion to repress the grand jury report that was prematurely disclosed by the reporters. Thus, the

Morgan Court held: "On this record, the balance must be struck in favor of the public interest in unencumbered access to information from anonymous sources." Id. at 956. As this Court queried, "If the mere possibility of injury to reputation justified a court in requiring that a reporter divulge sources, in what circumstances would a reporter not have to give up the names of confidential sources?" Id. Here, where even the "speculative interest" in private reputation present in Morgan is absent, the balance must be struck in favor of Tunstall and the contempt conviction reversed.

C. The State Failed To Demonstrate The Exhaustion of Alternative Sources

1. The prosecutor's testimony was insufficient proof of exhaustion

At the initial hearing on the reporters' motions to quash, the trial judge disregarded prosecutor Hendry's unsupported statements that he had exhausted alternative sources for the information. Instead, the transcript of Edward Cambridge's deposition was read into the record, and the court specifically found that the state had not yet exhausted alternative sources suggested by the deposition (R.55-68, 73-74).

At the November 9, 1983 hearing, however, prosecutor Hendry either carelessly or cleverly chose not to bring with him the tape recordings or transcripts of the

seven depositions taken after the first hearing. The omission was careless because the record is silent as to possible sources for the information suggested by the witnesses. The strategy was clever since it deprived the reporters' lawyers of the ability to point to other leads for finding witnesses. Regardless of Hendry's intent, the strategy worked. Judge Huffstetler simply acccepted the prosecutor's summary and found that all alternative sources for the information had been exhausted.

Even Cambridge, however, had not been "exhausted" as an alternative source. His deposition left much to be desired as the air hung heavy with unasked questions: Who else besides Harold Densmore encouraged Cambridge to file a complaint? With whom did he discuss the subject of the Koenig-Copeland lawsuit, i.e., the subject matter of the complaint. Did he call the Ethics Commission to inquire about filing a complaint? Did he ask anyone if they had filed complaints or were planning to do so? Were the rough drafts of the complaints prepared prior to the date the stories appeared? Who had access to his office? With whom did he meet or talk in the days immediately prior to the two articles' publication?

Even had the state conducted a proper inquiry of Cambridge, it is not enough for the prosecutor to say under oath, that he has exhausted alternative sources. The party seeking compelled testimony must "demonstrate and prove"

compliance with the four-part test. State v. Peterson, 7 Med.L.Rptr. 1090, 1091 (Fla. 6th Cir. 1981); State v. Silber, 49 Fla.Supp. 71, 73 (11th Cir. 1979); State v. Beattie, 48 Fla. Supp. 139, 141 (11th Cir. 1979). In this case, the state has simply failed to prove that all alternative sources have been exhausted.

2. The prosecutor's testimony violated Tunstall's due process rights.

The prosecutor's testimony that ultimately sent Tunstall to jail also violated Tunstall's due process right to cross-examination. This right, originating in the confrontation clause of the Sixth Amendment, applies to the states via the Fourteenth Amendment's due process clause. Douglas v. Alabama, 380 U.S. 415 (1965).

In Douglas, the defendant was unable to cross-examine a witness convicted of the same crime with which the defendant was charged. The witness asserted his right to remain silent. The prosecutor, however, was permitted to read the witness' confession, which implicated the defendant, to the jury. The Court held that the defendant's inability to cross-examine the witness denied him the right of cross-examination secured by the confrontation clause.

In Chapman v. State, 302 So.2d 136 (Fla. 2d DCA 1974), the court held that use of a deposition, taken in the involuntary absence of defendant, as evidence against him, violated his "right to be personally present during his

trial and his Sixth Amendment right to confront witnesses." Id. at 138. See also State v. Basilere, 353 So.2d 820 (Fla. 1977); James v. State, 400 So.2d 571 (Fla. 4th DCA 1980); Seidel v. State, 240 So.2d 521 (Fla. 4th DCA 1970).

Either the witnesses should have been brought to court to testify concerning their knowledge of the source of the story or, at the least, their depositions should have been made part of the record so the reporters' counsel and the court could ascertain the bona fides of the state's assertion that "all sources have been exhausted." See State v. Reid, 8 Med.L.Rptr. 1249, 1258 (Fla. 15th Cir. 1982). The prosecutor's testimony should have been excluded, and Tunstall should have been given the opportunity to cross-examine the witnesses whose testimony the prosecutor only summarized. The right to cross-examine is essential to a fair hearing and due process of law. Tunstall's due process rights were violated and his contempt conviction should therefore be reversed. Times Publishing Co. v. Burke, 375 So.2d 297 (Fla. 2d DCA 1979) (reporter's contempt conviction reversed where denial of counsel violated due process).

3. The prosecutor's testimony was inadmissible hearsay.

The Florida Evidence Code, Fla. Stat. §90.801(1)(c), defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay evidence is inadmissible except as provided otherwise by Section 90.802, Florida Statutes.

The trial court permitted Hendry to testify, over objection, concerning what seven persons allegedly told him while under oath. He compressed two hours of depositions into five minutes of pure hearsay testimony (R. 87). That testimony was the state's sole evidence of exhaustion of alternative sources.

The purpose of the hearsay rule is to assure that evidence presented to courts is reliable, and that the right of cross-examination is meaningful. Hendry's "summary" of the depositions taken clearly violated the rule. See Rodriguez v. State, 305 So.2d 305 (Fla. 2d DCA 1974); State v. Inman, 347 So.2d 791 (Fla. 3d DCA 1977). What is more, his testimony clearly fails to satisfy the stringent exhaustion requirement of the four-part test. See Zerilli v. Smith, 656 F.2d 705, 715 (D.C.Cir. 1981) (Justice Department statement that an internal investigation revealed no wrongdoing held insufficient to satisfy exhaustion requirement). "Permitting this kind of gamesmanship would poorly serve the First Amendment values at stake here." Id.

The state simply failed to carry its burden of proving that it exhausted all alternative sources; the subpoena should therefore have been quashed and Tunstall's contempt conviction reversed.

CONCLUSION

For the foregoing reasons, the contempt conviction should be reversed.

Respectfully submitted,

RICHARD J. OVELMEN
General Counsel
The Miami Herald
Publishing Company
One Herald Plaza
Miami, Florida 33101
(305) 376-2868
Attorney for The Miami
Herald Publishing Company

By Richard J. Ovelmen

ARKY, FREED, STEARNS, WATSON
GREER, WEAVER & HARRIS, P.A.
One Biscayne Tower
Suite 2800
Miami, Florida 33131
(305) 374-4800
Attorneys for The Miami Herald
Publishing Company

By
Bruce W. Greer
Gerald B. Cope, Jr.
Bradford Swing

THOMSON ZEDER BOHRER
WERTH ADORNO & RAZOOK
200 S. Biscayne Boulevard
Suite 4900
Miami, Florida 33131
(305) 350-7200
Attorneys for Florida Press
Association and The Miami
Herald Publishing Company

By Sanford L. Bohrer
Parker D. Thomson
Sanford L. Bohrer

MORGAN LEWIS & BOCKIUS
3200 Miami Center
100 Chopin Plaza
Miami, Florida 33131
(305) 579-0300
Attorneys for The Miami Herald
Publishing Company

By Paul Levine
Paul J. Levine

SHARPSTEIN & SHARPSTEIN
3043 Grand Avenue
Penthouse One
Coconut Grove, Florida 33133
(305) 442-8100
Attorneys for The Miami Herald
Publishing Company

By
Laura Besvinick

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was served by mail this 9th day of July, 1985, upon the following:

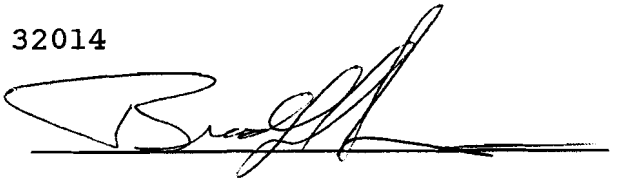
HONORABLE L.R. HUFFSTETLER, JR.
Circuit Judge
P.O. Box 1660
Brooksville, Florida 33512

HARRY O. HENDRY, ESQ. and
JAMES M. BROWN, ESQ.
Assistant State Attorneys
Fifth Judicial Circuit
19 N.W. Pine Avenue
Ocala, Florida 32670

GREGG D. THOMAS, ESQ. and
STEPHEN L. BRANNOCK, ESQ.
Holland and Knight
P.O. Box 1288
Tampa, Florida 33602

JOSEPH E. JOHNSTON, JR., ESQ. and
DAVID S. SASSER, ESQ.
29 South Brooksville Avenue
Brooksville, Florida 33512

MARK S. MENSER, ESQ.,
Assistant Attorney General
125 Ridgewood Avenue
Daytona Beach, Florida 32014



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