IN THE SUPREME COURT OF FLORIDA

THE TRIBUNE COMPANY and
JAMES TUNSTALL,

Petitioners,

vs. CASE NO. 66,576

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

Respondents.

_____/

RESPONDENTS' BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The Petitioners' statement is rejected as false and argumentative. The actual facts are as follows:

In July, 1983, Petitioner Tunstall (a reporter) authored an article entitled "Complaints Filed Against Two Commissioners." The article quoted a confidential source as stating that a complaint had been lodged with the Ethics Commission charging two Hernando County Commissioners with misuse of office. The Ethics Commission did receive such a report, meaning that the "source" violated §112.317(6), Fla.Stat., by reporting the complaint to Mr. Tunstall. (see Pet. App. 1-3).

The State Attorney began an investigation into the crime. The offender's identity was known only to Mr. Tunstall and a co-defendant, Mr. Aubrey. (Mr. Aubrey has since died). Mr.

Tunstall refused, and continues to refuse, to reveal the offender's identity.

It must be noted that, at trial, Tunstall never objected on the ground that §112.317(6) was unconstitutional. The argument was raised de novo in the Fifth District.

The District Court found that Tunstall had no standing to raise the constitutional question de novo on appeal, nor could a reporter pick and choose which laws the state should be "allowed" to enforce, and that the First Amendment issue is controlled by Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646 (1972). (Pet. App. 3).

The State shall rely upon the decision of the Fifth District for any additional facts.

SUMMARY OF ARGUMENT

Discretionary review should not be granted inasmuch as no express or direct conflict exists between the decision below and any decision of this court or another district court. Petitioner's brief frankly misstates the facts and law.

Review should not be granted on the theory of constitutional "construction" where the District Court merely followed a binding decision of the United States Supreme Court in a case squarely on point.

ARGUMENT

THE PETITIONER HAS FAILED TO ESTABLISH A BASIS FOR DISCRETIONARY REVIEW.

The Petitioner contends that this Honorable Court should accept this case for discretionary review under two general theories. First, he claims that the decision of the Fifth District stands in "express and direct" conflict with prior decisions of this Court and other district courts. Second, Petitioner contends that the decision of the Fifth District construed a provision of the United States Constitution. The arguments are based upon substantial misstatements of law and fact and, when viewed in context, are devoid of merit.

A] Conflict

The Petitioner alleges that the decision of the Fifth District stands in express and direct conflict with Morgan v. State, 337 So.2d 951 (Fla. 1976) on the issue of "privilege" and with Trushin v. State, 425 So.2d 1126 (Fla. 1982) and Miami Herald Publishing Co. v. McIntosh, 340 So.2d 904 (Fla. 1978) on the issue of standing.

As the Petitioner conceded in oral argument sub judice, Morgan was unlike this case, and due to the significant differences

involved Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646 (1972) controls. His current citation to Morgan is not understood.

In Morgan, a grand jury was attempting to learn who was leaking information to the reporter in question. No criminal statute, or sanction, was violated or impending against the "source." Our case, by contrast, involved a criminal investigation by the state attorney into a violation of a criminal statute by the "source."

The Petitioner curiously neglects to mention to this Court the passage in Morgan which caused him to concede its inapplicability below, to wit:

> "The present case differs from Branzburg in that the grand jury before whom petitioner appeared was not investigating a crime." Morgan, supra, at 954.

The case at bar involved a federal, constitutional claim under the First Amendment. The claim was that reporters have a right to withhold the name of a criminal offender (as opposed to a mere witness) if that offender provides the reporter with exclusive and/or superior information under a confidentiality agreement.

The federal courts, and not the state appellate courts, are the final arbiters of federal questions. Even this Honorable Court cannot reverse a decision of the United States Supreme Court on an issue of federal constitutional law. see Martin v. Board of County Commissioners, 364 So.2d 449 (Fla. 1978); Lockett v. Blackburn, 571 F.2d 309 (5th Cir. 1978); Smigiel v.

State, 439 So.2d 239 (Fla. 5th DCA 1983).

Addressing the very question of whether the reporter's "privilege" included a privilege to refuse to reveal the name of a criminal offender the Supreme Court rejected the propsition:

> "The preference for anonymity of those confidential informants involved in actual criminal conduct is presumably a product of their desire to escape criminal prosecution, and this preference, while understandable, is hardly worthy of constitutional protection. It would be frivolous to assert - and no one has in these cases - that the first amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate criminal laws. (emphasis added). Branzburg at 92 S.Ct. 2662.

Thus, the United States Supreme Court has characterized as "frivolous" the very claim presented by Mr. Tunstall.

One thing is clear, however, and that is that Morgan took itself outside the scope of Branzburg, and the Fifth District's decision to abide by Branzburg did not conflict in any way with Morgan.

The Petitioner tried to circumvent Branzburg and resurrect Morgan by arguing de novo on appeal the question of whether §112.317(6), Fla.Stat., was unconstitutional. Tunstall, of course, was not accused (at trial or on appeal) of violating the statute. The State was itself merely investigating the case and had not filed charges against any "source" or even made a final decision to charge someone under the statute. Thus, the issue of the constitutionality of this statute was

neither argued nor decided by the trial court. Unless Tunstall could concoct some theory of standing, his "frivolous" claim could not stand.

During oral argument, the amicus curiae arrogantly asserted that the news media could decide what cases were "important enough" to be investigated and thus "allow" a state inquiry to proceed. Now, the corporation claims some general right of standing to litigate the constitutionality of any statute relied upon by any party to any case the newspaper happens to be covering. This incredibly arrogant assertion of special standing, or special citizenship, is "supported" by Miami Herald Publishing Co. v. McIntosh, 340 So.2d 904 (1978). By not conferring privileged class status on Mr. Tunstall, the decision of the District Court allegedly conflicted with "McIntosh."

The Petitioner's non-contextual quotation from McIntosh is a substantial misstatement and is strenuously objected to by the State. The quotation refers to the right of a newspaper to litigate the propriety of a court order limiting press coverage of a trial, not the constitutionality of any statute that any party to the trial stood accused of violating!

The Petitioner also represents that the "constitutional" question was one involving "fundamental error" and, as such, was justiciable on appeal, de novo. Thus, Petitioner alleges,

the decision of the District Court "expressly and directly" conflicts with Trushin v. State, 425 So.2d 1126 (Fla. 1982). As Petitioner is well aware, no conflict exists.

Trushin was charged with violating the statute which he attacked as unconstitutional on appeal. Tunstall is not charged with violating the statute at bar - and as yet - neither has his "source."

The Fifth District was bound under Hoffman v. Jones, 280 So.2d 431 (Fla. 1973) to follow the decisions of this Court defining "fundamental error," to wit:

> "'Fundamental error' which can be considered on appeal without objection in the lower court, is error which goes to the foundation of the case or goes to the merits of the cause of action." Sanford v. Rubin, 237 So.2d 134, 137 (Fla. 1970).
>
> " Constitutional issues, other than those constituting fundamental error, are waived unless they are timely raised." id.

The constitutionality of §112.317(6) Fla.Stat. was not an issue of "fundamental" significance because:

(1) Tunstall was not charged with violating the statute.

(2) Tunstall's source was not yet charged with violating the statute - meaning that even for the putative defendant the issue was not ripe.

Thus, even if Tunstall, as a reporter, enjoys a "special class of citizenship"[1] which gives him special standing to

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[1] Of course, reporters and newspapers do not enjoy such status.

litigate issues on behalf of the subjects of his news stories, his role as self-anointed public ombudsman is limited by the need to preserve third parties' constitutional claims by appropriate objection.

Again, however, Branzburg defuses any "constitutional" claim:

> "Thus we cannot seriously entertain the motion that the first amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof." Branzburg, supra, at 2662.

The brief of the Petitioner does not establish express and direct conflict.

B] Constitutional Question

As this Honorable Court held in Rojas v. State, 288 So.2d 234 (Fla. 1973), there is a difference between "construing" a constitutional provision and "applying" one. If the constitution is merely applied rather than construed, no discretionary review is available.

Petitioner, despite full awareness that the Branzburg case has declared that no "reporter's privilege" exists; and despite full knowledge that the pronouncement of the United States Supreme Court is binding upon the courts of Florida, continues to represent that a "reporter's privilege" exists, and that the Fifth District "construed" the constitution, when, in fact, it merely applied Branzburg. If the decision of the Supreme

Court of the United States is to be tested, this is not the forum.

CONCLUSION

The Petitioner has not demonstrated any basis for discretionary review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief on Jurisdiction has been forwarded by U.S. Mail to the following persons on this 13th day of March, 1985:

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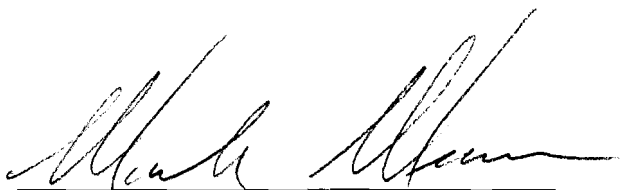

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