O/G 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 REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONERS

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PRELIMINARY STATEMENT

This case presents the possibility of the ultimate legal irony -- a reporter who wrote an essentially truthful story may go to jail for refusing to reveal his source to an investigating state attorney when the underlying investigation could never result in a constitutional conviction. Such a result is abhorrent to the First Amendment and would surely shock the conscience of its drafters and adherents.

STATEMENT OF THE CASE AND FACTS

On July 20, 1983, the Hernando edition of the Tampa Tribune published an article entitled "Complaints Filed Against Two Commissioners" (R. 23; A. 1). The article was co-authored by Tribune reporters James Tunstall and Deborah Bacon.[1]

The Tribune article reported that a complaint had been sent to the State Ethics Commission charging Hernando County Commissioners Copeland and Koenig with misuse of their offices by filing a lawsuit against the City of Brooksville and its engineer. The article quoted a "source who asked not to be identified" as saying the charges were filed by an "influential resident of west Hernando County." In conclusion, the article

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[1] Appellants, The Tribune Company and James Tunstall, will be referred to collectively as "Tunstall." Appellees, the Honorable L. R. Huffstetler, Jr. and the State of Florida, will be referred to collectively as the "State." Citations to the record on appeal will be referred to as "R.__" and citations to the appendix to this brief will be referred to as "A.__."

noted that the same topic had previously been discussed at an open meeting of the Hernando County Commission:

> The County Commission asked the Ethics Commission to probe the suit and other issues late last week but was told that formal complaints would have to be filed.

Id.

Apparently, the fact that an Ethics Commission investigation was either in process or about to be requested was common knowledge in Hernando County. As noted in the Tribune article, the county commission had discussed requesting an Ethics Commission ruling at an open meeting (A. 1, 2). Further, all three local newspapers alluded to the proceeding in some manner. The Tribune quoted one confidential source as reporting that a complaint had been filed on July 20, 1983. The Brooksville Sun Journal quoted three sources for the same proposition the day before (A. 3).[2] Reporter Dianne Stallings of the St. Petersburg Times also knew a complaint was in the works and was calling sources regarding the matter (R. 60).

Five days after the Tribune article was published, Edward J. Cambridge did prepare complaints to file with the Ethics Commission. Mr. Cambridge, an attorney practicing in West Hernando County, signed and notarized the complaints on July 26, and sent them to the Ethics Commission, which received them July 27, 1983 (A. 4). Cambridge testified that he had not yet decided to file

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[2] A companion action involving Sun Journal reporter William Aubrey proceeded through the District Court of Appeal. However, Mr. Aubrey died in January, 1985 and that court subsequently dismissed his appeal as moot.

the complaint by July 20, 1983, the date of the Tribune's story (R. 60). He also said, under oath, that he did not know Tunstall, was not the source of the Tribune's story, and did not know the name of the source. However, Cambridge identified, at least implicitly, three possible sources (R. 61-62, 68).

While the Cambridge complaints were pending with the Ethics Commission, Hernando County attorney Robert Snow filed an official inquiry also seeking an opinion from the Ethics Commission as to the ethical ramifications of the commissioners' lawsuit.

On September 22, 1983, the Ethics Commission met in executive session and voted to dismiss the Cambridge complaints for failure to assert a legally sufficient charge (A. 5). Under Florida law, any temporary requirement of confidentiality attaching to the complaints and the commission's investigation ended at that time. § 112.324(2), Fla. Stat. (1983).[3] Also on September 22, 1983, the Ethics Commission replied to the Hernando County attorney's request for an advisory opinion. The commission gave the same reply to that request as to Cambridge -- the ethics code was not violated (A. 6).

Soon after the Ethics Commission disposed of the matter, Commissioners Copeland and Koenig filed a complaint with the State Attorney's office regarding violation of Section 112.317(6), Florida Statutes (1981) (R. 91). That misdemeanor

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[3] Under the Florida Public Records Act, the complaints were at all times public records. § 119.011(1), Fla. Stat. (1983). However, public records may be subject to a temporary confidentiality requirement. See § 112.324(1), Fla. Stat. (1983).

statute prohibits disclosure of one's own intent to file an ethics complaint or the existence of a complaint that has been filed.[4] The state attorney thereafter began an investigation to determine who had told the Tribune that an ethics complaint had been filed.[5]

The First Subpoena And Hearing

On October 3, 1983, Tunstall's co-author, Tribune reporter Deborah Bacon, was subpoenaed to appear the following day before the state attorney to testify "concerning knowledge of violation of the criminal law" (R. 7). Tunstall was not subpoenaed at that time. Bacon appeared as requested, responded fully to prelimi-

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[4] Section 112.317(6) reads in its entirety:

> Any person who willfully 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 commission, before such complaint, document, action, or proceeding becomes a public record as provided herein, shall be guilty of a misdemeanor of the first degree, punishable as provided in S. 775.082 or S. 775.083.

§ 112.317(6), Fla. Stat. (1981).

[5] Interestingly, immediately after the Tribune published the article at issue, but before the Cambridge complaint was filed, Commissioners Copeland and Koenig told the St. Petersburg Times that a complaint existed and that they were willing to waive confidentiality of any ethics investigation (A. 7). The state attorney apparently has never investigated this disclosure, although it certainly violates the language of the statute in the same manner as the revelation by Tunstall's source.

nary questions, but claimed her First Amendment privilege and refused to testify concerning the confidential source (R. 44).

Two days later, Bacon filed a motion to quash the subpoena and for a protective order (R. 1). Attached to her motion was Bacon's affidavit affirming that all information she had concerning the ethics complaint had been gathered in the scope of her employment as a professional journalist (R. 5). The accompanying memorandum detailed Florida law recognizing a reporter's qualified privilege against compelled testimony and requiring the party seeking to overcome that privilege to satisfy a three-part relevancy/alternative sources/compelling need test (R. 10).

A hearing on Bacon's motion was held October 7, 1983 (R. 43-75). At that hearing, the assistant state attorney asserted in argument that he had exhausted all alternative sources, that there was a compelling need for the testimony sought and that the testimony was relevant (R. 52-53). He thus assured the circuit court that the burden upon those seeking to outweigh the reporter's qualified privilege was satisfied. Id. Nevertheless, the court required Mr. Hendry to reveal the fruits of his investigation to date (R. 56). In response, Mr. Hendry introduced a taped testimony of an interview with Mr. Cambridge in which Cambridge stated he was not the source of the article.

As a result of the introduction of the taped interview, the court learned that Mr. Hendry's investigation had consisted primarily of conducting only the one short interview with Mr. Cambridge. The tape recording itself revealed the names of at least two more non-reporter parties who appeared to have

information relevant to the investigation but had not been interviewed (R. 59, 62). The tape also revealed that Mr. Hendry had neither asked Mr. Cambridge to reveal the names of persons with whom he had discussed the subject of the Koenig/Copeland lawsuit, nor the names of those who might have access to information concerning the complaint (R. 56-69). Recognizing that the burden upon the state had not been met, the court granted Bacon's motion to quash (R. 3, 73-74).

The Second Subpoenas And Hearing

Subpoenas were again issued by the assistant state attorney on November 2, 1983 (A. 8). This time, both Bacon and Tunstall were subpoenaed to testify. Both filed motions to quash and for protective orders with affidavits and memoranda in support (R. 15-23). A hearing on those motions was held on November 9, 1983 (R. 76-102).

At the November 9 hearing, despite his past history of prematurely asserting that his burden had been met, Mr. Hendry was not required to detail the additional evidence gathered in his investigation. He did not furnish either tape recordings or transcripts of testimony taken from additional witnesses. Rather, over the objection of the reporters' counsel, the court permitted him to take the stand himself and merely state that he had talked to a few more people and had gotten nowhere (R. 83-87).

Mr. Hendry's testimony consisted purely of hearsay compilation of statements taken from various Hernando County commission-

ers, the county attorney, the notary who witnessed Cambridge's signature, and Hal Densmore, the person who encouraged Cambridge to file the complaints. The reporters' lawyers were thus neither able to assess the scope of Hendry's investigation nor cross-examine his sources.

No explanation was given for the deviation from the procedure followed at the previous hearing. The prosecutor, Mr. Hendry, at first indicated that the recordings were too lengthy to play in their entirety. However, he later testified that all the taped interviews totalled less than two hours in playing time (R. 88).

Mr. Hendry's testimony did indicate that he had neglected to ask county attorney Snow whether he encouraged Mr. Cambridge to file the complaints (R. 90-91). He also did not pursue the contradiction with Mr. Cambridge's earlier testimony resulting from Mr. Densmore's denial of knowledge that Cambridge would file a complaint (R. 63, 90).

Following the hearing, the court denied the motions to quash (R. 100-01). Both Tribune reporters appeared for deposition as required later that same day. Bacon testified she did not know the name of the confidential source quoted in the story and was thereafter released from her subpoena (R. 32-35). Tunstall responded fully to preliminary questions, but refused to reveal the name of the source (R. 36-42).

The Contempt Hearing

The following morning, November 10, 1983, as the first step in initiating contempt proceedings Mr. Hendry requested the court to direct Tunstall to reveal his source (R. 107). Tunstall argued in reply that he should be permitted appellate review of the denial of his motion to quash before contempt proceedings were initiated (R. 107-10). The court rejected that argument and directed him to testify (R. 118).

Citing protection under the First and Fourteenth Amendments to the United States Constitution, similar provisions in the Florida Constitution and advice of counsel, Tunstall again refused to reveal his source (R. 107-10, 117-18). Thereafter, in a written order prepared by the assistant state attorney, the court found Tunstall in civil contempt (R. 140-42). He was sentenced to an indefinite term of up to six months in the county jail with the provision that he might purge the contempt by agreeing to testify. Id.

Later in the day, Tunstall filed a notice of appeal (R. 148). A bail hearing was held and the court ordered Tunstall released on his own recognizance pending appeal (R. 143, 144-47).

Appellate Proceeding

On December 6, 1984, the Fifth District Court of Appeal issued an opinion affirming the contempt citation of the circuit court (A. 10). Tribune Co. v. Huffstetler, 463 So. 2d 1169 (Fla. 5th DCA 1984). Although extensive existing precedent had been argued to the court by Tunstall and amici, very little of it was

recognized or referred to in the court's opinion. Subsequently, the district court denied Tunstall's motion for rehearing or certification (A. 11).[6]

Following the district court's denial of rehearing, Tunstall filed a timely notice of appeal to this Court. In his jurisdictional brief, Tunstall argued conflict with other Florida reporter's privilege cases, especially this Court's decision in Morgan v. State, 337 So. 2d 951 (Fla. 1976). Conflict was also argued with cases determining what matters may be raised for the first time on appeal as fundamental error and with the standing of the press to challenge the constitutionality of statutes affecting it. Finally, constitutional question jurisdiction was argued based upon the district court's interpretation of the First Amendment to the United States Constitution and Article I, Section 4 of the Florida Constitution.

On May 30, 1985, this Court issued an order accepting jurisdiction. Oral argument is scheduled for Wednesday, November 6, 1985 (A. 13).

SUMMARY OF THE ARGUMENT

This Court has recognized a qualified reporter's privilege

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[6] On January 7, 1985, the parties executed a joint motion and stipulation permitting Tunstall to remain released on his own recognizance until all appellate remedies are exhausted. This stipulation was adopted by the circuit court on January 7, 1985 (A. 12).

against compelled testimony. The existence of that privilege is also recognized by every federal circuit court to consider the subject, as well as by three of the five Florida District Courts of Appeal. Only the Fifth District Court of Appeal, in this case, has refused to acknowledge the existence of a reporter's privilege.

Most courts nationwide, including two Florida district courts of appeal, utilize a three-part test in applying the privilege. That test questions the relevancy of the information sought from the reporter, whether the information is available from alternative sources, and whether there is a compelling need for the information. The party seeking to compel the reporter's testimony bears a heavy burden of demonstrating compliance with each of the elements of the test. Here, the State has not met its burden as to any of the test elements.

The underlying state attorney's investigation is invalid because it seeks enforcement of a facially unconstitutional prior restraint statute. Therefore, there can be no compelling need for Tunstall's testimony. In addition, careful statutory analysis indicates that Tunstall's source could not have violated the Ethics Commission non-disclosure statute, so Tunstall's testimony cannot be legally relevant. Finally, the State has not demonstrated exhaustion of alternative sources.

Beyond the substantive issues, the procedure utilized at the hearings below was not in accord with constitutionally mandated due process. Even though important First Amendment concerns were at issue, the State was permitted to present only a hearsay

synopsis of its investigative efforts, rather than actually demonstrating the scope and fruits of those efforts.

Tunstall was also deprived of due process because the lower court refused to permit a stay pending appeal prior to finding him in contempt. That procedural ruling is squarely in conflict with precedent requiring prompt appellate review when First Amendment rights are impacted.

Because the court's denial of Tunstall's motion to quash the subpoena was improper, both substantively and procedurally, reversal of the contempt judgment against him is mandated.

ARGUMENT

Many of this Court's finest moments have involved protection of the free flow of information so vital to our democratic system. A prior restraint on publication was rejected in Miami Herald Publishing Co. v. McIntosh, 240 So. 2d 904 (Fla. 1976), when Justice Boyd eloquently wrote:

> [Freedom of the press] is a cherished, almost sacred right of every citizen to be informed about current events on a timely basis so each can exercise his discretion in determining the destiny and security of himself, other people, and the nation. News delayed is news denied.

Id. at 910.

In Re Petition of Post Newsweek Stations, Florida, Inc., 370 So. 2d 764 (Fla. 1979), the Court became a national leader in providing for extensive electronic media access to judicial proceedings, recognizing the importance of public observation of the affairs of government:

> A democratic system of government is not the safest form of government, it is just the best that man has devised to date, and it works best when its citizens are informed about its workings.

Id. at 781.

Most essential to the instant determination was this Court's recognition, in Morgan v. State, 337 So. 2d 951, 953 (Fla. 1976), of the constitutional necessity of providing a qualified reporter's privilege against compelled testimony:

> [I]mportant public interests, as well as private interests, may be served by publication of information the press receives from confidential informants.

It is against this background, and that of Florida's unquestioned commitment to open government, that the instant controversy must be resolved. This Court, which refused to send reporter Lucy Morgan to jail for publishing information the government wished to quiet, is now asked to send reporter James Tunstall to jail for six months for the same reason.

I. TUNSTALL HAS A QUALIFIED PRIVILEGE AGAINST COMPELLED TESTIMONY.

The First Amendment to the United States Constitution, in unequivocal terms, prohibits lawmaking which abridges freedom of speech or the press. Likewise, Article I, Section 4, of the Florida Constitution prohibits laws which restrain or abridge the liberty of speech or the press.

These constitutional mandates would be undermined if the press were governmentally prohibited from access to essential information. Any law which included such a prohibition would "abridge" freedom of the press at its roots -- the sources of information. For that reason, the courts have recognized the necessity of providing a right of access to information relevant to public affairs. E.g., Press Enterprise Co. v. Superior Court, ___ U.S. ___, 78 L.Ed.2d 629, 104 S.Ct. 819 (1984); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); Richmond Newspapers v. Virginia, 488 U.S. 55 (1980); Newman v. Graddick, 696 F.2d 796 (11th Cir. 1983). This right of access is based in part on the Supreme Court's declaration that the process of newsgathering, as a whole, enjoys the protection of the First Amendment. Branzburg v. Hayes, 408 U.S. 665, 707 (1972).

The ability to develop and maintain confidential sources is essential to the newsgathering process. Riley v. City of Chester, 612 F.2d 708, 714 (3d Cir. 1979); Blasi, The Checking Value and First Amendment Theory, 1977 A.B.A. Research J. 523, 603. Maintenance of this source relationship requires that journalists be protected from the power of compulsory process. Sweezy v. New Hampshire, 354 U.S. 234, 245 (1957); Times Publishing Co. v. Burke, 375 So. 2d 297, 299 (Fla. 2d DCA 1979). The rationale behind that protection was cogently expressed by the Third Circuit in Riley:

> The interrelationship between newsgathering, news dissemination, and the need for a journalist to protect his or her source is too apparent to require belaboring. A journalist's inability to protect the confidentiality of sources s/he must use will jeopardize the journalist's ability to obtain information on a confidential basis. This in turn will seriously erode the essential role played by the press in the dissemination of information in matters of interest and concern to the public.

Id. at 714 (citations omitted). See also, Baker v. F & F Investment, 470 F.2d 778, 782 (2d Cir. 1972), cert. denied, 411 U.S. 966 (1973).

Perhaps the Third Circuit thought the necessity of source protection "too apparent to require belaboring," but that essential relationship is under attack here. Tunstall's source spoke on a matter close to the core of the First Amendment -- ethics in government. He or she spoke under an agreement of confidentiality. To require a breach of that agreement will, as stated

in Riley, "seriously erode" the press' role in our democratic process.

1. The Reporter's Qualified Privilege Is Clearly Recognized In Florida

The State of Florida is the most vigilant American jurisdiction in protecting reporters' First Amendment rights. "Florida's courts have upheld the reporter's claims of privilege more consistently and scrupulously than the courts of any other state." 2 J. Goodale, Communications Law, 799 (1983).

This Court first recognized the reporter's privilege in Morgan v. State, 337 So. 2d 951 (Fla. 1976). In that case, this Court extensively analyzed Branzburg and determined that the Supreme Court had recognized a qualified reporter's privilege. That privilege requires a balancing of First Amendment interests against countervailing constitutional considerations. Id. at 954-55. Ultimately, in Morgan, this Court reversed a contempt citation analogous to that at issue here. Id. at 956.

Subsequent to Morgan, the reporter's qualified privilege in Florida has been defined by the circuit courts and, more recently, by the district courts of appeal. For some time, Florida circuit courts have been utilizing a balancing test, proposed by the dissenting opinion in Branzburg, to weigh the reporter's qualified privilege against competing concerns.[7]

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[7] E.g., State v. Di Battisto, 11 Med.L.Rptr. 1396 (Fla. 11th Cir. Ct. 1984); Lang v. Tampa Television, Inc., (footnote cont)

Recently, decisions of two district courts of appeal have mandated the adoption of the balancing test whenever a reporter is asked to testify concerning information acquired in the newsgathering process. In addition, a third district court of appeal has acknowledged the existence of the reporter's privilege.

In Gadsden County Times v. Horne, 426 So. 2d 1234 (Fla. 1st DCA), petition denied, 441 So. 2d 631 (1983), plaintiff Mallory Horne sued the Gadsden County Times for defamation. The article alleged to be libelous included information obtained from confidential sources. Horne attempted to compel a Times reporter to disclose the identity of those sources. The district court, overturning a lower court order in Horne's favor, ruled that Horne had failed to meet his burden under the three part test emanating from this Court's decision in Morgan:

1. Is the information relevant;

2. Can the information be obtained through alternative means; and

3. Is there a compelling need for the information.

Id. at 1241. See also Morgan, 337 So. 2d at 955-56 n.10.

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[7](cont) 8 Fla. Supp.2d 153 (Fla. 4th Cir. Ct. 1984); State v. Morel, 50 Fla. Supp. 5 (Fla. 17th Cir. Ct. 1979); State v. Beattie, 48 Fla. Supp. 139 (Fla. 11th Cir. Ct. 1979); State v. Petrantoni, 48 Fla. Supp. 49 (Fla. 6th Cir. Ct. 1978); State v. Carr, 46 Fla. Supp. 193 (Fla. 11th Cir. Ct. 1977); State v. Miller, 45 Fla. Supp. 137 (Fla. 17th Cir. Ct. 1976); Hendrix v. Liberty Mutual Insurance Co., 43 Fla. Supp. 137 (Fla. 17th Cir. Ct. 1975); State v. Stoney, 42 Fla. Supp. 194 (Fla. 11th Cir. Ct. 1974).

The Second District Court of Appeal has recently confirmed the applicability of the balancing test in two separate opinions. In Tribune Co. v. Green, 440 So. 2d 484 (Fla. 2d DCA 1983), the court wrote that the balancing test is to be used in "criminal as well as civil cases and [in cases involving] confidential and nonconfidential sources of information." Id. at 486. The reporter's testimony sought in Green concerned information already published and not based on confidential sources. Nevertheless, the court determined that the state had failed to "carry their very high burden. . .," and quashed the subpoena. Id. at 487.

Green was reaffirmed last year in Johnson v. Bentley, 457 So. 2d 507 (Fla. 2d DCA 1984). There the court rejected an argument that the Gadsden/Green test did not apply to unpublished photographs, holding that the test was applicable and that the trial judge had erred in compelling disclosure without applying the test. Id. at 509.

The Third District Court of Appeal has also recognized the existence of the reporter's privilege, while not specifically being called upon to apply the three-part test. In the immediate post-Morgan case of Laughlin v. State, 323 So. 2d 691 (Fla. 3d DCA 1975), cert. denied, 339 So. 2d 1170 (1976), the court upheld the lower court's refusal to compel a reporter's testimony, writing that "it would have been a violation of the reporter's First Amendment rights to require him to respond to the question in an open trial proceeding." Id. at 692.

In all, therefore, three of the five district courts of appeal have recognized the reporter's privilege and two have

specifically adopted the three-part Gadsden/Green test as the proper analytical framework for application of the privilege. The Fourth District Court of Appeal has not addressed the question. Only the Fifth District Court of Appeal, in this case, has refused to recognize the existence and applicability of the reporter's privilege.

The opinion below is clearly an aberration in Florida law. The district court opinion never cites this Court's decision in Morgan v. State, which is almost squarely on point to the instant situation. The district court opinion never cites Gadsden, Green, or Laughlin, each of which is clearly relevant to the instant controversy. The district court opinion never cites to any of the long line of Florida circuit court cases recognizing the reporter's privilege and utilizing the three-part test.

The district court decision is also aberrational in the procedural setting. Despite the fact that Craig v. Boren, 429 U.S. 190 (1976), provides an avenue for Tunstall to directly challenge the constitutionality of the non-disclosure statute, the district court opinion cites that case for the opposite proposition. And, despite the fact that Sanford v. Rubin, 237 So.2d 134 (Fla. 1970) permits Tunstall's constitutional challenge to the non-disclosure statute to be made for the first time on appeal, the district court opinion also cites that case for the opposite proposition.

Not only does the district court opinion squarely contradict prevailing Florida law, but it also is at odds with the decision of every United States Circuit Court of Appeals to address the

issue.[8] Indeed, the genesis of the three-part test is in the pre-Branzburg case of Garland v. Torre, 259 F.2d 545 (2d Cir.), cert. denied, 358 U.S. 910 (1958). While the analysis of the Second Circuit was certainly more primitive than that generally undertaken today, the Garland opinion addresses the concerns that later evolved into the Gadsden/Green test. E.g., id. at 551.

The federal courts in this circuit have been especially diligent in recognizing and applying the reporter's privilege. In Miller v. Transamerican Press, Inc., 621 F.2d 721 (5th Cir. 1980), the former Fifth Circuit held that:

> A reporter has a First Amendment privilege which protects the refusal to disclose the

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[8] 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 & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980); United States v. Burke, 700 F.2d 70 (2d Cir.), cert. denied, ___U.S.___, 78 L.Ed.2d 85, 104 S.Ct. 72 (1983); In re Petroleum Products Antitrust Litigation, 680 F.2d 5 (2d Cir.), cert. denied, 459 U.S. 909 (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, 409 U.S. 1126 (1981); United States v. Criden, 633 F.2d 346 (3d Cir. 1980), cert. denied, 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. 1976), on rehearing, 561 F.2d 539 (1977); 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); 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 Corp., 563 F.2d 433 (10th Cir. 1977). The privilege has been recognized at the district court level in the remaining two circuits. McArdle v. Hunter, 7 Med.L.Rptr. 2294 (E.D. Mich. 1981)(sixth circuit) and Gullivers Periodicals Ltd. v. Chas. Levy Circulating Co., 455 F.Supp. 1197 (N.D. Ill. 1978)(seventh circuit). See also, United States v. Horne, 11 Med.L.Rptr. 1312 (N.D. Fla. 1985); United States v. Harris, 11 Med.L.Rptr. 1399 (S.D. Fla. 1985).

> identity of confidential informants, however, the privilege is not absolute. . .

Id. at 725. The Miller opinion was later modified to mandate an analytical structure similar to that presented by the Gadsden/Green test:

> The plaintiff must show: substantial evidence that the challenged statement was published and is both factually untrue and defamatory; that reasonable efforts to discover the information from alternative sources have been made and that no other reasonable source is available; and that knowledge of the identity of the informant is necessary to proper preparation and presentation of case.

Miller, 628 F.2d at 932. See also In Re Selcraig, 705 F.2d 789 (5th Cir. 1983)(reaffirming Miller). Federal district courts in Florida have followed the lead of this Court and of the Fifth Circuit in recognizing and applying the reporter's privilege. E.g., United States v. Blanton, 534 F.Supp. 295 (S.D. Fla. 1982); Loadholtz v. Fields, 389 F.Supp. 1299 (M.D. Fla. 1975); United States v. Gerstein, 5 Med.L.Rptr. 1335 (M.D. Fla. 1979). See also, In re Groncowicz, 705 F.2d 1044 (3d Cir. 1985)(quashing a grand jury subpoena on First Amendment grounds despite substantial evidence the subpoenaed party was guilty of mail fraud in relation to sale of his manuscript).

Interestingly, the United States Justice Department has adopted stringent guidelines, based upon the three-part test, concerning the issuance of subpoenas to journalists. 28 C.F.R. § 50.10 (1983). Thus, the federal investigative counterpart to the Florida state attorney recognizes the necessity of protecting the newsgathering process. That recognition is in line with the

determinations of almost every judicial body to consider the matter -- except Florida's Fifth District Court of Appeal.

2. The District Court's Reliance On Branzburg Was Erroneous

The district court based its determination almost exclusively upon the plurality opinion in Branzburg, thus ignoring both the true precedential value of that case and the controlling opinion of this Court interpreting the case. The result reached by the district court is certainly not mandated by Branzburg, and, indeed, a contrary result is required by the vast body of post-Branzburg precedent.

The true precedential value of Branzburg has become apparent through extensive appellate interpretation of the decision, including that undertaken by this Court in Morgan. Recognition is now all-but universal that a majority of the Branzburg court did adopt a qualified reporter's privilege. Further, that qualified privilege is applicable in all settings, specifically including the criminal investigative setting. As Justice Powell wrote in his determinative concurring opinion:

> The court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources.
>
> * * *
>
> The asserted claim to 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.

408 U.S. at 709. See Saxbe v. Washington Post Co., 417 U.S. 843, 859 (1974)(Powell, J. dissenting); Gannet Co. v. DePasquale, 443 U.S. 368, 400 (1979)(Powell, J. concurring). Following his recognition of the necessity for balancing, Powell determined that, "on its facts," Branzburg presented a situation where the reporter's privilege was outweighed by competing constitutional concerns. 408 U.S. at 710.

Justice Powell's opinion provided the decisive vote in the four-one-four decision. The four dissenting justices, Stewart, Brennan, Marshall, and Douglas, would have had the Court adopt more stringent restrictions on reporter subpoenas and would have reached the opposite conclusion in Branzburg on its facts. Therefore, the Powell opinion evidences the minimum First Amendment protection for reporters which is required by Branzburg. See, e.g., Morgan v. State, 337 So. 2d at 953-55; Zerilli v. Smith, 656 F.2d 705, 711 (D.C. Cir. 1981).

Even Justice White's plurality opinion for the prevailing justices provided for a reporter's privilege in a situation such as the instant one. That opinion specified that the First Amendment protects reporters from:

> [o]fficial harrassment of the press undertaken not for purposes of law enforcement, but to disrupt the reporter's relationship with his news sources. . .

Id. at 707-08. This Court interpreted that language of the Branzburg plurality as including attempts

> [t]o force a newspaper reporter to disclose the source of published information, so that the authorities could silence the source.

Morgan, 337 So. 2d at 956. That purpose, the silencing of a source, forbidden by all nine justices in Branzburg and by this Court in Morgan, is exactly what is being attempted here.

Beyond the analytical shortcomings of the district court's application of Branzburg, that case is distinguishable from the instant situation on its facts. Branzburg involved testimony before a grand jury, rather than before an investigating state attorney as is true here. This difference is decisive in light of the great importance placed in the Branzburg plurality opinion upon the role of the grand jury in the American system. 408 U.S. at 686-90. Expunging this emphasis on the grand jury process from Branzburg leaves the decision without its policy basis. Therefore, the district court's leap, without citation, from the grand jury setting to the instant setting, cannot be justified. 413 So. 2d at 1171. See Riley v. City of Chester, 612 F.2d 708, 714 (3d Cir. 1979)(no Supreme Court decision has extended the holding in Branzburg beyond the grand jury setting).

II. TUNSTALL'S QUALIFIED PRIVILEGE HAS NOT BEEN OVERCOME.

Performance of the requisite balancing process, including application of the Gadsden/Green test, leads inexorably to the conclusion that the state has not met its heavy burden to overcome Tunstall's First Amendment privilege. The information at issue is of questionable relevance. Further, alternative sources have not been exhausted. But, most dispositively, there is no compelling need for the information.

1. This Court Is To Conduct A De Novo Review

Although the circuit court purported to make factual determinations satisfying the Gadsden/Green test, those determinations were presented as conclusions and were entirely unsupported by evidence (R. 141-42, A. 9). In fact, the court was presented with a form order by the assistant state attorney which included language tracking the test. The trial judge signed that order, apparently without even reviewing it in advance (R. 135-38). Therefore, the factual "determinations" are sketchy, at best.

Beyond the boiler plate nature of the factual findings below, de novo review is required because core First Amendment issues are involved. This constitutionally based precept was first articulated by the United States Supreme Court in New York Times Co. v. Sullivan, 376 U.S. 254 (1964). There the court held that, when First Amendment issues are impacted, an appellate court has an obligation to "make an independent examination of the whole record" to prevent "forbidden intrusion on the field of free expression." Id. at 284-86.

The requirement of independent appellate examination of First Amendment determinations was reaffirmed last year in Bose Corporation v. Consumers Union of United States, Inc., ___U.S.___, 80 L.Ed.2d 502, 104 S.Ct. 1949 (1984). Bose not only restated the New York Times rule, but also noted that lower court fact findings which are not supported by substantial evidence are to be accorded little weight, especially when important constitutional concerns are involved. 80 L.Ed.2d at 516, citing, Baumgartner v. United States, 322 U.S. 665, 670-71 (1944). That

is exactly the situation involved here. The potential impact on the First Amendment-protected newsgathering process mandates that this Court perform a de novo review of the circuit court's approach to the balancing process. See Morgan v. State, 337 So. 2d at 955-56; Tribune Co. v. Green, 440 So. 2d at 485; Gadsden County Times v. Horne, 426 So. 2d at 1242 (all conducting de novo reviews of reporter's subpoena determinations).

2. The Underlying Non-Disclosure Statute Is Facially Unconstitutional

Essential to the balancing process to be performed by this Court is an evaluation of the constitutionality of the underlying non-disclosure statute. There was much discussion and debate in the district court as to the nature of that evaluation and of Tunstall's standing to call for it. Suffice to say that, one way or the other, the fact that the non-disclosure statute is clearly unconstitutional on its face must be given considerable weight.

a. Tunstall Has Standing To Raise The Constitutionality Issue

The constitutionality of the non-disclosure statute may be raised by Tunstall for two distinct reasons. First, the statute's constitutionality is essential to evaluating the state's compelling need for Tunstall's testimony. Without formally declaring the statute unconstitutional, and without considering Tunstall's standing to request such a declaration, facial unconstitutionality certainly detracts from the weight afforded

the state's interest in seeking Tunstall's testimony. In that regard, Tunstall merely asks the Court to undertake the same evaluation which it performed in Morgan v. State.

In Morgan, this Court looked beyond the face of the statute being investigated to determine its invalidity as a criminal proscription. 337 So. 2d at 954. This determination led to a finding that the reporter's privilege had not been overcome. Similarly, the invalidity of the statute at issue here mandates a conclusion that Tunstall's privilege has not been overcome.

The district court below inadvertently suggested an alternative route to review of the constitutionality of the non-disclosure statute. That court held the issue was controlled by Craig v. Boren, 429 U.S. 190 (1976).

Craig considered the constitutionality of an Oklahoma law prohibiting beer sales to females under the age of 18 but to males under the age of 21. The question at issue was whether the gender-based differential constituted a denial of equal protection to males 18 to 20 years of age. Id. at 192. One of the plaintiffs, a beer vendor, asserted the right to challenge the statute's constitutionality.

The Supreme Court upheld the vendor's standing, casting standing requirements as a means of ensuring an injury-in-fact was involved, sufficient to guarantee concrete adversity. Id. at 194. Further, the court specifically noted that standing requirements are less rigid when the matters at issue threaten to chill First Amendment rights. Id. at 195, n.4.

Craig indicates that Tunstall has the right to directly challenge the constitutionality of the non-disclosure statute. The required injury-in-fact is certainly present. Tunstall is quite adverse to the reality of going to jail for six months, and that potential jailing is a direct result of the state attorney's attempt to apply the non-disclosure statute. Further, the tenacious manner in which both sides have pursued this matter up to the highest court in the state lends substantial credence to the proposition that the issue has been joined. Finally, Tunstall has at stake an ethical concern central to his profession -- protection of confidential sources. He will certainly suffer an injury-in-fact in either event if he is required to choose between violating that ethical precept or being jailed.

Whether this Court considers the constitutionality of the non-disclosure statute merely as a factor in the balancing process, or whether it chooses to formally declare the statute unconstitutional, the issue must be addressed.

b. Tunstall Has Not Waived The Constitutional Claim

The district court held that Tunstall could not raise the question of the constitutionality of the Ethics Commission non-disclosure statute for the first time on appeal. 463 So. 2d at 1171. This determination was erroneous for two reasons. First, Tunstall vigorously argued in the circuit court that the compelling need aspect of the Gadsden/Green test had not been met (R. 20, 93-96). Constitutionality of the underlying statute is an aspect of that argument.

The circuit court's finding of contempt based on the state attorney's investigation of a violation of an unconstitutional statute also constitutes fundamental error. Such fundamental error may be raised for the first time on appeal.

In Trushin v. State, 425 So. 2d 1126 (Fla. 1982), this Court differentiated between challenges to the facial validity of a statute and those to the applicability of a statute to a particular set of facts. Trushin raised, for the first time on appeal, a First Amendment-based challenge to a statute outlawing corrupt attempts to influence another's vote. The challenge was assessed as a matter of fundamental error because the facial validity of the statute was involved, rather than its applicability to a particular set of facts.[9] Id. at 1129-30. Therefore, the issue was addressed.

As was true in Trushin, fundamental error is involved here. On its face, the non-disclosure statute violates the First Amendment. Whether the statute is applied to Mr. Tunstall's source or to anyone else, it cannot withstand constitutional scrutiny in the wake of Landmark Communications v. Virginia, 435 U.S. 829 (1978). Therefore, under Trushin, Tunstall has the right to raise the constitutionality issue for the first time on appeal.

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[9] Even this distinction is now questionable. In Young v. Altenhaus, 10 F.L.W. 252 (Fla. May 2, 1985), this Court reversed a medical malpractice attorney's fees award, holding that the relevant statute was unconstitutional as applied, despite the fact that the statute's constitutionality was not challenged in the trial court. See Cato v. West Florida Hospital, Inc., 10 F.L.W. 1490, 1491 (Fla. 1st DCA June 21, 1985).

c. The Non-Disclosure Statute Impermissibly Punishes Truthful Speech

Any form of prior restraint of expression bears a strong presumption against constitutional validity. E.g., Nebraska Press Association v. Stuart, 427 U.S. 539, 570 (1976); Near v. Minnesota, 283 U.S. 697, 716 (1930); Miami Herald v. Morphonios, 467 So. 2d 1026, 1028 (Fla. 3d DCA 1985). Therefore, a party seeking to justify such a restraint faces a heavy burden. Miami Herald Publishing Co. v. McIntosh, 340 So. 2d 904, 908 (Fla. 1976). In the case of the Ethics Commission non-disclosure statute, that burden cannot be met.

The unconstitutionality of non-disclosure statutes like Section 112.317(6), Florida Statutes (1983), was definitively established in the United States Supreme Court's decision in Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978). The statute at issue in Landmark Communications was remarkably similar to that involved here. The activities of Virginia's judicial inquiry and review commission were required to be held confidential. That statute went on to state that "any person who shall divulge information in violation of the provisions of this section shall be guilty of a misdemeanor." Id. at 830.

A newspaper owned by Landmark Communications published an article reporting a pending judicial inquiry. Landmark was indicted and convicted of violating the non-disclosure statute. The Virginia Supreme Court upheld that conviction.

The United States Supreme Court reversed, holding that the Virginia statute was unconstitutional on its face as violative of

the First Amendment. Although the Court considered the various state interests argued in support of the statute, including protection of judges' reputations during investigations that might ultimately exonerate them from charges and the institutional integrity of the judicial system, those purported interests were found insufficient to justify the resultant diminution in free expression:

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

Id. at 838. The non-disclosure statute here is invalid for identical reasons.[10]

Interestingly, the Florida attorney general, who now apparently supports Florida's non-disclosure statute, once declared it all but unconstitutional. In 1978, prior to the Landmark Communications decision, the attorney general strongly discouraged prosecution under the statute, opining that the inevitable constitutional challenge would almost certainly succeed:

> [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. . .

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[10] The fact that a newspaper published the forbidden information in Landmark Communications, while a private party allegedly published the information here makes no difference. The Supreme Court phrased the Landmark Communications question to include any publisher who is a stranger to the underlying inquiry. 435 U.S. at 837.

1978 Op. Att'y. Gen. Fla. 078-16 (Jan. 31, 1978) at 36. The opinion noted that the state may punish speech only within narrowly limited classes, such as obscenity, libel and fighting words. Id., citing, Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942). The attorney general concluded, "the Florida statute has, for all practical purposes, made it a crime to speak the truth." 078-16 at 36.

Finally, the attorney general suggested that the constitutionality of the non-disclosure statute would ultimately be determined in the then-pending Landmark Communications case. That decision, of course, verified his opinion that the statute is unconstitutional.

Since Landmark Communications, the Florida courts have vigilantly rejected statutes that purport to place prior restraints on speech and the press or to criminally publish certain publications. In Gardner v. Bradenton Herald, Inc., 413 So. 2d 10 (Fla. 1982), cert. denied, 459 U.S. 865 (1982), this Court considered a statute forbidding publication of the name of a person who is a party to a wiretap. Noting that the fact situation was "almost identical" to that in Landmark Communications, this Court declared the statute "an unconstitutional restraint upon the freedom of the press guaranteed by the First and Fourteenth Amendments to the United States Constitution." Id. at 11. Surely, Gardner requires that the non-disclosure statute here, which is more "identical" to the Landmark Communications statute, be either formally declared unconstitutional or treated as such. See also Doe v. Sarasota-Bradenton Television Co., 436 So. 2d 328

(Fla. 2d DCA 1983)(rejecting application to a television news report of a statute prohibiting broadcast of information identifying sexual offense victims); State v. Peterson and Gore, Nos. 84-906-MM and 84-933-MO (Bay County Ct. June 22, 1984)(declaring unconstitutional a non-disclosure statute "borrowed" from the Ethics Commission statute at issue here).

The United States Supreme Court recently reaffirmed Landmark Communications by affirming without opinion the Seventh Circuit's holding in Worrell Newspapers of Indiana, Inc. v. Westhafer, 739 F.2d 1219 (7th Cir. 1984), aff'd, ___U.S. ___ (1985). That case, too, is quite similar to the instant situation.

In Worrell, a confidential source informed a newspaper reporter that a criminal information would be filed by the local prosecutor. A state statute prescribed punishment by contempt for anyone who disclosed the existence of a sealed information before arrest of the suspect. The reporter brought a declaratory judgment action seeking to have the statute declared unconstitutional.[11]

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[11] The statute provided:

> The court, upon motion of the prosecuting attorney, may order that the indictment or information be sealed. If a court has sealed an indictment or information, no person may disclose the fact that an indictment or information is in existence or pending until the defendant has been arrested or otherwise brought within the custody of the court. However, any person may make any disclosure necessarily incident to the arrest of the defendant. A violation of this subsection is punishable as contempt. (footnote cont)

The Seventh Circuit framed the issue as determining the authority of a state to criminally punish a person for truthfully publishing the name of an individual against whom a sealed indictment has been filed. Clearly, that question is for all practical purposes analogous to determining whether a state may criminally punish a person for truthfully publishing the existence of an Ethics Commission complaint. The answer to the Worrell question was no.

In language equally relevant to the instant situation, the court stated the point of law involved:

> Undisputably, courts may seal criminal informations as well as other documents. However, when the press, by whatever means, obtains the information contained in a court sealed document, a state cannot prohibit the publication of the information without violating the First Amendment.

Id. at 1225 (emphasis supplied). In short, the state can constitutionally attempt to prevent someone from discovering the pendency of an Ethics Commission complaint; however, once that person does find out, he or she cannot be punished for publishing the information. Therefore, any prosecution of Tunstall's source would be unconstitutional, as no crime has been committed.

Among all of the Florida Statutes, there probably is no law more clearly unconstitutional than the Ethics Commission

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[11](cont)

§ 35-34-1-1(d), Ind. Code Ann. (1984 Supp.).

non-disclosure statute.[12] This unconstitutionality fatally taints the state attorney's investigation and the only fruit of that investigation, Tunstall's contempt citation. This fatal taint is central to performance of the reporter's privilege balancing process.

3. There Is No Compelling Need Justifying The Issuance Of This Subpoena

Application of the compelling need aspect of the Gadsden/Green test to the instant situation calls upon this Court to balance the government's professed interest in secrecy and protection of the reputation of its officials against the First Amendment concerns impacted by requiring Tunstall to testify. However, these same governmental concerns, secrecy and reputation, have previously been examined by this Court and the United States Supreme Court and determined as insufficient rationales for outweighing First Amendment protections.

The compelling need factor requires an ad hoc review of the entire factual predicate:

> It contemplates a review of the facts in a given situation and the striking of a proper balance between the libel plaintiff's interest in obtaining information and the media defendant's qualified privilege to protect its confidential sources.

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[12] By way of analogy, Florida could have a statute which requires racial segregation in public schools. If the statute were never enforced, it could remain on the books despite its clear unconstitutionality. However, a reporter would certainly not be jailed for refusing to testify concerning information he might have about blacks attending white schools.

Gadsden County Times, 426 So. 2d at 1242.

Even though the Gadsden County Times court referred to this process as situational, there is controlling Florida precedent on point. The instant situation is strikingly similar to that addressed by this Court in Morgan v. State, 337 So. 2d 951 (Fla. 1976).

At issue in Morgan was publication of a synopsis of a sealed grand jury presentment that criticized a local police official. That publication was arguably a violation of a Florida confidentiality statute regarding grand jury proceedings. Report- er Lucy Morgan was questioned by the state attorney as to the source of her information and declined to respond. She was subsequently held in contempt. Id. at 952.

After concluding that Branzburg had recognized a qualified reporter's privilege against testimony, this Court balanced that privilege against claimed state interests. Rejecting the district court's finding that preservation of grand jury secrecy outweighed First Amendment concerns, this Court held:

> We cannot accept the view that a generalized interest in secrecy of governmental operation should take precedence over the interest in assuring public access to information that comes to the press from confidential informants.

337 So. 2d at 955. The Court specifically ruled that neither preservation of secrecy nor the possibility of reputational damage are "the specific substantial governmental interest neces-

sary to defeat a reportorial source privilege."[13] Id. at 955-56. Therefore, the underlying investigation was deemed insufficient to support a compelling need for Morgan's testimony, and her contempt citation was reversed.

The combination of governmental interests in secrecy and the possibility of injury to private reputation deemed insufficient to defeat the reporter's privilege in Morgan is also the only "weight" on the government's side of the scale here. Certainly, the weight of that combination has not increased in the past nine years, as the courts have continued to expand the scope of First Amendment protection. E.g., Press Enterprise Co. v. Superior Court of California, ___ U.S. ___, 78 L.Ed.2d 629, 104 S.Ct. 819 (1984); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980). See also, infra, note 7. As in Morgan, the rationale supporting the underlying investigation here is insufficient to overcome the privilege and Tunstall's contempt citation for fail-

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[13] Morgan cites to United States Supreme Court cases for the proposition that specific and substantial governmental interests must be demonstrated to overcome First Amendment protection. Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969); New York Times Co. v. United States, 403 U.S. 713 (1971)(Pentagon Papers case). Tinker considered whether the schools could prohibit the wearing of armbands by students. The school system argued such a regulation was necessary to prevent the possibility of disturbances. The Supreme Court rejected that rationale, holding that "an undifferentiated fear or apprehension of disturbance is not enough to overcome the right of freedom of expression." 303 U.S. at 508. Similarly, in the Pentagon Papers case, the court held that non-specific interests, even in keeping the inner workings of the Pentagon secret, are not sufficient to override First Amendment values. 403 U.S. at 714. See also, Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981) ("If the privilege does not prevail in all but the most exceptional cases, its value will be substantially diminished.")

ing to cooperate with that investigation should likewise be reversed.

The Ethics Commission statutory scheme itself further demonstrates the lack of a compelling need for Tunstall's testimony. Section 112.324 clearly provides the existence and outcome of an investigation involving county commissioners will always become a matter of public record. Commission investigation records are exempt from the public records act only until there has been a finding of probable cause or lack of probable cause to believe there has been a violation. § 112.324(2), Fla. Stat. (1983). At the point of probable cause determination, all of the Ethics Commission's records of the investigation become public. Id.[14] Therefore, the only potential damage caused by the early disclosure here was reputational loss during the two months between the filing of the complaint and the Ethics Commission determination of lack of probable cause. Compelling a reporter's testimony to protect that sort of nebulous reputational damage was specifically rejected in Morgan:

> If the mere possibility of injury to private 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 informants?

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[14] Even the short period of confidentiality called for by the statute may be waived by the party under investigation. § 112.324(1), Fla. Stat. (1983). The statements attributed to Commissioners Koenig and Copeland in the St. Petersburg Times certainly indicate an intent to invoke that waiver provision here (A. 7).

Id. at 956.[15] See also Landmark Communications, 435 U.S. at 841.

The only argument offered in the district court as justification for overriding Tunstall's First Amendment protection was a generalized desire by the state to enforce its laws. However, this argument also runs afoul of Morgan, where this Court looked beyond such a professed state desire to recognize that the underlying law being enforced was invalid. 337 So. 2d at 954. Therefore, there could be no compelling need for the reporter's testimony. When this Court examines the underlying statute, its invalidity will also be apparent. Again, there can be no compelling need for a reporter's testimony in such a scenario.

Finally, examination of the situation in its entirety emphasizes the absurdity of considering there to be a compelling need for Tunstall's testimony. No one will ever go to jail as a result of this state attorney's investigation. No conviction will ever be obtained. Yet, the reporter, despite the broad range of First Amendment protection afforded him and the strong presumption against prior restraint, may be jailed for refusing to participate in the investigation. That reality alone demonstrates the lack of compelling need for Tunstall's testimony.

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[15] The potential for reputation damage was further ameliorated by the fact that everyone in Brooksville seemed to know that the Ethics Commission would investigate the activities of Commissioners Copeland and Koenig. Indeed, the county commission had instructed the county attorney to file a request for a ruling by the Ethics Commission (A. 1).

4. Tunstall's Testimony Would Be Irrelevant

Although the Morgan balancing analysis indicates the lack of a compelling need for Tunstall's testimony, grounds for reversal of the court below also exist under both the relevancy and alternative sources aspects of the Gadsden/Green test. A careful reading of Section 112.317(6) reveals that no information which Tunstall might possess could be relevant to a violation of the non-disclosure statute.

The date on which an ethics complaint is filed is critical to the application of the non-disclosure statute. The statute attempts to make illegal disclosure by anyone of "the existence of the contents of a complaint which has been filed. . ." (emphasis added). § 112.317(6), Fla. Stat. (1983). However, its sweep is not so broad in relation to complaints not yet on file: "Any person who willfully discloses, or permits to be disclosed, his intention to file a complaint. . ." (emphasis added). Id. Therefore, as to unfiled complaints, there can be a violation by only one party -- the person who intends to file the complaint.

The complaints here were not filed until a week after the newspaper article at issue was printed (A. 4).[16] Therefore, the only possible violation of the statute as of the date of the article would consist of Mr. Cambridge announcing his intent to file a complaint in the future. The Tribune article, however,

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[16] A recent check of the Ethics Commission files indicates that the only complaints filed concerning the commissioners' conduct which could have met the description in the Tribune article were those filed by Mr. Cambridge.

did not contain or refer to such an announcement. Rather, the article states that the complaint had already been "sent to the state Ethics Commission," and elsewhere that ethics charges "were filed" (emphasis supplied) (A. 1). We now know that these statements were incorrect, as no complaint had been filed at the time. The article, therefore, evidences no violation of the law, as the statute does not purport to make illegal an incorrect statement that a complaint has been filed.

Because the Tribune article evidences no violation of the non-disclosure statute, Tunstall's testimony must be irrelevant. Tribune Co. v. Green, 440 So.2d 484, 486 (Fla. 2d DCA 1983). His source broke no law in speaking to Tunstall. Revelation of the source's identity might lead to someone who is mistaken, but cannot lead to someone who can be prosecuted.

5. Alternative Sources Have Not Been Exhausted

The party seeking to compel a reporter's testimony must establish that no one else can provide the same information. Tribune Co. v. Green, 440 So. 2d at 486. Important to note is that this aspect of the test deals with information, and not with specific conversations. Id. at 486. Therefore, the fact that no one else was listening when Tunstall spoke with his source is not dispositive. Likewise, the fact that a rather large number of potential alternative sources exists has not deterred the courts from requiring exhaustion prior to compelling a reporter's testimony. See, e.g., In re Roche, 448 U.S. 1412 (1980) (Brennan, J.)(requiring the interrogation of 65 alternative witnesses

before enforcing the subpoena of a reporter); Carey v. Hume, 492 F.2d 631 (D.C. Cir.), cert. dismissed, 417 U.S. 938 (1974)(60 depositions not unreasonable); Overstreet v. Neighbor, 9 Med.L.Rptr. 2255 (Fla. 13th Cir. Ct. 1983)(117 alternative sources -- subpoena of reporter quashed).

To date, we do not know exactly how many alternative sources exist for the information sought from Tunstall. Due to the incomplete procedure permitted at the hearing below (see infra, section III), information is not available as to other leads which may have become evident during the state attorney's investigation. However, we do know of some sources who were never approached.

The assistant state attorney never interrogated anyone at the Ethics Commission (R. 85-86). Further, he never interrogated Mr. Cambridge as to the names of persons with whom he may have discussed the subject of the Koenig/Copeland lawsuit (R. 56-69). Finally, despite the fact that, if there were a violation of the statute that violation centered around Edward Cambridge, Mr. Cambridge was never asked to provide appointment books, office records, telephone records, or even testimony concerning his actions during the crucial period. This information is a necessary prerequisite for determination of potential alternative sources. Without it, any determination that the state attorney's burden in overcoming the alternative sources requirement has been met is erroneous.

Substantively, none of the aspects of the Gadsden/Green test has been met. Tunstall's motion to quash should, therefore, have been granted.

III. TUNSTALL WAS NOT AFFORDED DUE PROCESS

At the first motion to quash hearing, the circuit court properly required the assistant state attorney to fully present, in chambers with only counsel and parties present, the evidence he had gathered in his investigation to date (R. 56). The court compelled Mr. Hendry to play a tape recording of the only formal interview he had conducted. Id. That presentation clearly indicated that, despite Mr. Hendry's assertion to the contrary, all alternative sources had not been exhausted (R. 73-74).

In the second hearing, on November 9, 1983, the court inexplicably refused to follow the same procedure (R. 82). Despite the protestations of counsel, the court permitted Mr. Hendry to appear as his own witness and to testify that, in his opinion, all potential alternative sources had been interviewed and there were no remaining leads (R. 83-87). This procedure did not provide Tunstall with the required due process and was patently unfair to counsel who had prepared for proceedings similar to the October 7, 1983, hearing.

Scrupulous attention to due process concerns is required when First Amendment rights are impacted. E.g., Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 560-62 (1975)(strict procedural safeguards are necessary to reduce the danger of

undermining First Amendment protections); Carroll v. Commissioners of Princess Anne, 393 U.S. 175, 181 (1968)("the court has insisted upon careful procedural provisions, designed to assure the fullest presentation and consideration of the matter which the circumstances permit"). Nevertheless, the circuit court failed to require full presentation of the evidence and failed to permit appellate review prior to a finding of contempt.

1. The Second Hearing Was Not Conducted In Accordance With Due Process

Although the Gadsden/Green balancing test has been stated in various forms, one thread runs throughout -- the burden is upon the party seeking the testimony of the reporter to demonstrate that the requirements of the test are met. E.g., Tribune Co. v. Green, 440 So. 2d at 485. The key word is "demonstrate." The test does not permit assertions, like those of the assistant state attorney here.

This requirement of hard evidence was reinforced in Miller v. Transamerican Press, Inc., when the Fifth Circuit modified its opinion to read:

> We do not mean to intimate that a plaintiff will be entitled to know the identity of the informant merely by pleading that he was injured by an untrue statement. Before receipt of such information, the plaintiff must show: substantial evidence that [the balancing test has been satisfied].

628 F.2d at 932 (emphasis supplied).

Appropriate procedural safeguards have also been delineated in various Florida circuit court cases:

> [T]he chilling effect upon First Amendment rights arising from subpoenas can be limited if a party seeking to subpoena a newspaper reporter is required, prior to enforcement of said subpoena, to obtain leave of court after an in camera showing to the court that [the elements of the test have been met].

State v. Morel, 50 Fla. Supp. 5 (Fla. 17th Cir. Ct. 1979). Accord, State v. Miller, 45 Fla. Supp. 137 (Fla. 17th Cir. Ct. 1976); State v. Stoney, 32 Fla. Supp. 194 (Fla. 11th Cir. Ct. 1974).

In total derogation of due process concerns, the court below failed to provide for any review of the evidence. No interview tapes were played, although they existed. No interviewees were sworn. Instead, presentation of highly condensed pure hearsay was deemed sufficient to protect Tunstall's due process rights. Such a presentation would be less than the constitutionally required minimum in any setting -- and surely falls far below that level when First Amendment rights are impacted. See Board of Regents of State Colleges v. Roth, 408 U.S. 564, 570 (1972)(procedural requisites vary depending upon the importance of the interest involved).

Beyond the First Amendment considerations, the procedure followed in the November 9 hearing deprived Tunstall of his Sixth Amendment right to confrontation. Douglas v. Alabama, 380 U.S. 415 (1965). In Douglas, the court held that a witness's confession, which implicated the defendant, could not be read to the jury when the witness asserted his right to remain silent. The defendant's resultant inability to cross-examine the witness denied him the due process secured by the confrontation clause.

Id. at 419. See also, Chapman v. State, 302 So. 2d 136, 138 (2d DCA 1974)(use of a deposition taken in the involuntary absence of defendant as evidence against him violates his Sixth Amendment confrontational right).

Like the defendants in Douglas and Chapman, Tunstall was not afforded the opportunity to cross-examine those witnesses the state relied upon. Instead, he had to accept their testimony, as interpreted by the very public official undertaking to jail him, as a given. Again, due process was not afforded.

An abbreviated procedure similar to that permitted below was rejected by the District of Columbia Circuit Court of Appeals in Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981). Plaintiffs there brought suit under the Federal Privacy Act, alleging that the FBI had leaked sealed information to the Detroit News. They then sought to subpoena a reporter concerning the source of his information.

In attempting to demonstrate exhaustion of alternative sources, the plaintiffs relied upon a Justice Department statement that its internal investigation had not revealed any leaks by its employees. The court rejected that tactic, writing that "permitting this kind of gamesmanship would poorly serve the First Amendment values at stake here." Id. at 715.

Likewise, the First Amendment values at stake in the instant case have been poorly served. The self-serving Justice Department assertion in Zerilli is analogous to the state attorney's self-serving declarations here. Due process simply requires more.

2. The Circuit Court Failed To Permit Timely Appellate Review

Tunstall's right to due process was also abridged by the refusal of the circuit court to permit appellate review of its denial of his motion to quash prior to finding him in contempt. National Socialist Party v. Village of Skokie, 432 U.S. 43 (1977); Briggs v. Salcines, 392 So. 2d 263 (Fla. 2d DCA 1980), cert. denied, 454 U.S. 815 (1981).

In Skokie, the Supreme Court reviewed an Illinois Supreme Court decision refusing to either stay a prior restraint order or expedite consideration of the appeal of that order. Id. at 44. This denial of prompt review when First Amendment rights were at issue was deemed a constitutional deprivation:

> If a state seeks to impose a restraint of this kind, it must provide strict procedural safeguards, including immediate appellate review.

Id. at 44, citing, Freedman v. Maryland, 380 U.S. 51 (1965), and Nebraska Press Association v. Stuart, 423 U.S. 1319 (1975)(emphasis supplied).

Similarly, immediate appellate review was mandated by the Florida Second District Court of Appeal in Briggs, which dealt with the scope of the attorney-client privilege. The court there held denial of a motion to quash is reviewable by certiorari:

> The only other way in which he may test the court's order is to risk a contempt citation and then appeal if cited for contempt. We think this is too great a price for him to have to pay in order to protect his client's interest.

Id. at 266. That "great" price is exactly the price Tunstall was forced to pay. He was not permitted review by certiorari, but rather was placed in a position where contempt of court was inevitable. See also Riley v. City of Chester, 612 F.2d 708, 718 (3d Cir. 1979)(courts should exercise restraint in imposing sanctions on the press); Dade County Medical Association v. Hlis, 372 So. 2d 117, 119 n. 1 (Fla. 3d DCA 1979)(no requirement to be held in contempt prior to review of order requiring disclosure of hospital ethics committee records).

Even in situations where contempt is not imminent, certiorari review of orders compelling discovery is proper. Affiliated of Florida, Inc. v. U-Need Sundries, Inc., 397 So. 2d 764, 765 (Fla. 2d DCA 1981). Certainly, in the instant situation where vital constitutional matters are impacted, permitting certiorari review prior to a finding of contempt is essential. The failure of the circuit court to do so again violated Tunstall's due process protection.

IV. THE CONTEMPT CITATION MUST FALL WITH THE UNDERLYING ORDER.

Given the circuit court's refusal to permit appellate review of the denial of the motion to quash, Tunstall had no choice but to endure the contempt holding. To do otherwise would have caused him irreparable injury both professionally and constitutionally. Therefore, the validity of the contempt citation must

rise or fall with that of the underlying denial of the motion to quash.

When compliance with a court order can cause irreparable injury, the affected party may refuse to comply with that order, proceed to contempt, and challenge the order on appeal. In that instance, if the order is found to be erroneous, the concomitant contempt citation will fall as well. Maness v. Myers, 419 U.S. 449, 460 (1975). Requiring a witness to reveal information that should be protected from revelation by constitutional privilege always amounts to irreparable injury. Id.; United States v. Dickinson, 465 F.2d 496, 511-12 (5th Cir. 1972), cert. denied, 414 U.S. 979 (1973). See also, Malloy v. Hogan, 378 U.S. 1 (1964); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1919).

The instant case comes before this Court in precisely the same posture as that of Morgan v. State. As in Morgan, Tunstall has been held in civil contempt for refusing to reveal confidential sources. In Morgan when the reporter appealed the contempt citation, this Court proceeded directly to consideration of the validity of the underlying subpoena. The Court, thus, implicitly recognized that the judgment of contempt would fall if there were error on the substantive issue, and that judgment ultimately was reversed. 337 So. 2d at 956. See also, In re CBS, 9 Med.L.Rptr. 2091 (E.D. La. 1983)(a party can refuse to comply with a production order if the order is later held invalid); Washington v. Coe, 679 P.2d 353 (Wash. 1984)(reversing a contempt citation for refusing to comply with a prior restraint order). Likewise,

once this Court determines that denial of Tunstall's motion to quash was improper, the reversal of the contempt judgment must follow.

CONCLUSION

The state has failed to meet the heavy burden upon those seeking to compel a reporter's testimony. Proper due process was not afforded below. There is no compelling need for Tunstall's testimony, especially in light of the facial unconstitutionality of the non-disclosure statute. Further, the testimony sought is irrelevant, and alternative sources have not been exhausted. Therefore, this Court should reverse the contempt citation and hold that Tunstall cannot be compelled to reveal his source.

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