62
8 88

IN THE SUPREME COURT OF FLORIDA
CASE NO. 73,195
DCA 87-1903

FILED
SID J. WHITE
DEC 27 1988
CLERK, SUPREME COURT
By _____ Deputy Clerk

THE MIAMI HERALD PUBLISHING COMPANY, a division of Knight-Ridder, Inc. and JOEL ACHENBACH,

Petitioners,

vs.

ARISTIDES MOREJON, et al.,

Respondents.

ON REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

INITIAL BRIEF OF PETITIONERS

THE MIAMI HERALD PUBLISHING COMPANY AND JOEL ACHENBACH

THE MIAMI HERALD PUBLISHING COMPANY
Samuel A. Terilli, Jr.
General Counsel
One Herald Plaza
Miami, Florida 33132-1693
(305) 376-2368

THOMSON BOHRER WERTH & RAZOOK
A Partnership Including Professional Associations
Sanford L. Bohrer, P.A.
Jerold I. Budney
4900 Southeast Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2363
(305) 350-7200

BAKER & MCKENZIE
Richard J. Ovelmen
7.31 Brickell Avenue
Suite 1600
Miami, Florida 33131
(305) 789-8900

Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES:

STATEMENT OF THE CASE AND FACTS

This case is before this Court on the following question certified by a panel of the Third District Court of Appeal as being of great public importance:

> "The central question presented for review is whether a news journalist has a qualified privilege under the First Amendment to the United States Constitution, as interpreted by the Florida Supreme Court in Morgan v. State, **337** So.2d **951** (Fla. **1976)** and Tribune Co. v. Huffstetler, **489** So.2d 722 (Fla. **1986)** to refuse to divulge information learned as a result of being an eyewitness to a relevant event in a criminal case -- i.e., the police arrest and search of the defendant -- when the journalist witnesses such an event in connection with a newsgathering mission."

(R. 103). The Third District held "the journalist has no such qualified privilege and must therefore testify. . . .". Petitioners, The Miami Herald Publishing Company and Joel Achenbach (collectively "The Miami Herald"), seek reversal of that holding.

The Airport "Bust"

On October 2, **1986,** while on routine duty at the Miami International Airport, Metropolitan Dade County Police Officers John Facchiano, Claude Noriega, and Connie Mallia observed Respondent Aristides Morejon and his traveling companion, Pablo Aloneida Lana (A. **30-31).** After watching Morejon and Lana purchase tickets for a flight to New York and check their bags, the officers approached Morejon and Lana and asked to inspect the bags. Morejon and Lana both consented. All of the conversation was in English,

according to all three police officers. (A. **62, 193-7, 224-5, 203-5, 230, 234-5, 237-8).** Upon inspection of the tote bags, the police found four kilos of cocaine. Morejon and Lana were arrested and charged with narcotics trafficking. (A. **65-6).**

They were fully advised of their constitutional rights, again in English, and following this advice, they both gave voluntary statements in English. (A. **121-34).** Morejon admitted Lana had contacted him, and he had agreed to fly from New York to Miami to pick up cocaine and return with it to New York. (A. **127).** He was to be paid **$1,000** per kilo. (A. **127).** At no time did Morejon state he could not understand English. (A. **57, 126-34).**

The Motion to Suppress

On March **26, 1987,** Morejon filed an unsworn Motion to Suppress Evidence Obtained Through an Unreasonable Search and Seizure (the "Motion to Suppress"). The Motion alleges that, although Morejon had resided in New York City since **1980,** he "is not fluent in the English Language." (A. **15).** The Motion to Suppress further alleges "Morejon did not understand that he had a right to refuse said search and consented to said search." (A. **15).** But the Motion to Suppress does **not** state Morejon did not understand what was said to him by the officers, or that any lack of understanding of his rights was in any way connected with his asserted lack of fluency in English. (A. **15).**

Morejon presented no evidence in support of this unsworn, unverified claim of lack of English fluency. He filed no

affidavit, and gave no testimony. He did not provide affidavits or testimony of friends, relatives, business acquaintances, or anyone else who has known him during the six years he has been in this country. He did not offer testimony from his co-defendant Lana or the airlines ticket agent. He did not rebut the sworn testimony of the three police officers with evidence in any form.

Instead, he subpoenaed a journalist, Joel Achenbach.

Joel Achenbach's Newsaatherina Activities

Miami Herald journalist Joel Achenbach observed the events of October 2, **1986** in his professional newsgathering capacity. He was researching an article about problems at the airport, including drug trafficking. (A. **144, 87).** Authorization to monitor police activities at the airport was provided through departmental channels, and the police provided Achenbach with a briefing of their routine procedures at the airport. (A. **86).** Achenbach was told to remain five to six feet away from any conversations the officers might have, but that he was free to listen to those conversations. (A. **87-88).** Achenbach was to accompany the police on only that single morning. (A. **88).**

Therefore, but for Petitioners' journalistic decision to observe and report on police conduct at the airport, Achenbach would not have observed the events of October **2, 1986.**

Upon receipt of the subpoena, Petitioners moved to quash it. (the "Motion to Quash"). (A. **1).**

The Ruling On The Motion To Quash

In accordance with what had been an unbroken line of decisions over the preceding **15** years in that jurisdiction, Petitioners asked the trial judge, Howard Gross, to grant the Motion to Quash because Morejon had failed to satisfy his burden of making a three-part factual showing to overcome the journalist's qualified privilege against being compelled to testify in a case to which he is not a party. Petitioners' Motion to Quash was heard June **23** and **25, 1987,** more than eight months after Morejon's arrest. Morejon presented no evidence. (A. **255-6, 259).**

Morejon's counsel claimed the qualified privilege simply did not apply because Achenbach was an "eyewitness to material events," namely the arrest and discovery of the evidence. (A. **248).** He further contended that Achenbach's article suggested certain contradictions between the sworn testimony of the police and Achenbach's observations: (i) the police stated they spoke only in English, but the article mentioned that one word of Spanish was used at one point (for luggage); (ii) the article stated Morejon gave two consents, one to a stop and one to a search, while the police testimony suggests there was but one consent; and (iii) the article indicated the officers ran up to the defendants, while the police testimony was that the police walked more quickly than the defendants. (A. **243-245).**

However, despite these contentions by his counsel, Morejon: (i) produced no evidence he did not understand what was said to him in English by the officers; (ii) never explained why

the number of consents was relevant; and (iii) never contended he was in any way startled, scared or surprised by whatever manner he was approached by the officers.

Judge Gross conceded he found this case "extremely close", but nonetheless determined Achenbach should be compelled to testify because "Mr. Achenbach was an eyewitness to a material event and does not have a First Amendment privilege in this particular case." (A. **260).** Then, assuming an appellate court might disagree, Judge Gross proceeded to apply the three-part test to the facts. He found there to be "a very important question in this case of whether or not this defendant" speaks English. (A. **261).** Achenbach's article indicated one word of Spanish was spoken which indicated to the Judge "he did at least hear Spanish spoken by officers who have testified there was no Spanish spoken." (A. **262).** Judge Gross concluded that "the question of whether or not the defendant in this case, Mr. Morejon, understood his rights relating to the luggage is crucial in a motion to suppress" and hence is sufficiently compelling to override the First Amendment interest. Judge Gross held the final part of the test had been met because (although there was no such evidence) Morejon had "attempted to obtain [the information] from other sources." (A. **262).** He did not identify those sources.

The Decision of The Third District Court of Appeal

The Third District affirmed. It held a journalist has no privilege under any circumstances to decline to testify where

the journalist observed a "relevant event in a criminal case." The Third District also suggested or opined in dicta that, irrespective of several Second District (and numerous other) decisions to the contrary, it had "serious doubts" as to whether any journalistic work product, other than the identity of confidential sources, should be protected by a testimonial privilege. Acknowledging "forceful arguments to the contrary" and "not unimpressive" decisions to the contrary, the Third District certified the following question to this Court:

> [W]hether a news journalist has a qualified privilege under the First Amendment . . . to refuse to disclose information learned as a result of being an eyewitness to a relevant event in a criminal case. . . when the journalist witnesses such an event in connection with a newsgathering mission.

The Third District answered this question in the negative. Petitioners ask that this Court answer it in the affirmative, and hold anyone seeking to compel the testimony of a journalist regarding his or her journalistic work product must make the showing required by the three-part test.

SUMMARY OF THE ARGUMENT

More than a decade ago, in Moraan v. State, **337** So.2d **951** (Fla. **1976**), this Court recognized the journalist's qualified First Amendment privilege from compelled discovery. Only two years ago, the Court reaffirmed this holding in Tribune Co. v. Huffstetler, **489** So.2d 722 (Fla. **1986**). While the Court did not adopt a comprehensive method for adjudicating claims of the privilege,

in a special concurrence[1/] Justice Sundberg endorsed the test employed by the Second District which subsequent Florida case law has refined into the "three-part test." Pursuant to this test, a party seeking to overcome the journalist's privilege has the burden of proving that the information sought must be relevant; it must not be possible to obtain the information by alternative means, and there must be a compelling interest in the information. Gadsden County Times, Inc. v. Horne, 426 So.2d 1234, 1241 (Fla. 1st DCA 1983).

In this case, a panel of the Third District Court concluded (i) Florida's courts have not adopted the three-part test; (ii) the burden of proof should be placed on the journalist in such cases; and (iii) it seriously doubts whether the privilege should apply when no confidential news sources are implicated. The Third District is wrong on each count.

First, the three-part test has become firmly established throughout Florida as the standard for adjudicating the reporter's privilege. The test has been adopted because it makes sense of the difficult task of striking a proper balance between competing constitutional rights. In a criminal case, the First Amendment may give way, but only when it is shown to be necessary to preserve a Sixth Amendment interest, and then only in the absence of alternative sources not impinging First Amendment freedoms. As a matter of common sense, no such need can be shown where the same

---

1/ Morgan v. State, 337 So.2d at 957.

information can be obtained from other sources, the information is not relevant to any issue in the case, or the defendant has no compelling need for the evidence.

Second, contrary to the panel below, Florida courts have correctly allocated the burden of proof to the party seeking to overcome the privilege. They have done so not simply because the party is overriding a First Amendment right, but more practically because it is a party with access to the discovery taken, not the non-party journalist, who is in the best position to argue whether the facts previously elicited in discovery satisfy each element of the three-part test. Moreover, this allocation of the burden of proof is in accord with the manner in which other evidentiary privileges are litigated.

Third, the panel below simply misapprehended the journalist's qualified privilege. The court proffered two unsupported justifications for its holding that the reporter's privilege is not applicable where the reporter has witnessed an arrest, search or seizure. First, the panel asserted "the ability of the journalist to gather and report on the witnessed event is not substantially threatened by requiring the disclosure of what was seen in a subsequent court proceeding. . . ." Second, the Court concluded "the fact that it is inconvenient for a journalist to respond to a witness subpoena and give his eyewitness testimony is of no constitutional significance; all persons who witness such events are equally inconvenienced by having to respond to such witness subpoenas. . . ." (R. 108-9). In doing so, the

Court misapprehended the rationale behind the reporter's privilege and the effect unlimited compulsory testimony would have on the functions performed by the press.

The journalist's privilege has always been grounded on the First Amendment policy that the autonomous newsgathering and editorial processes of the press must be protected from unwarranted interference, burdens, and intrusion in order to preserve the independent flow of information to the public. The privilege has never been based on the concept of "confidentiality." In fact, the confidentiality of sources is protected only to preserve this flow of information, not the reverse.

It is the special constitutional role of the press to "watchdog" and objectively monitor our system of criminal justice, especially arrests, searches, and seizures. Police "beat" reporters may observe and report on hundreds of police actions in a year. Much of what is learned or believed by reporters about the police may not be published or may be published at a later time. The performance of this "watchdog" role involves some of the most difficult and delicate editorial and newsgathering decisions. The reporter's privilege was recognized to prevent the burdening of this special function. Thus, the "narrow exception" to the reporter's privilege created by the court below for the witnessing of "relevant events" such as arrests, and police searches and seizures, ironically would remove any protection at all from compelled discovery into the core constitutional function performed by the press.

Moreover, contrary to the Third District's assertion, the "inconvenience" of testifying about "relevant events" witnessed, does not fall equally upon all citizens. Unlike other citizens, it is the reporter's special constitutional function to report on just such events. Thus, the Third District's analysis strikes at the core of not simply what reporters habitually do, but rather what their constitutional role requires them to do in our system. Moreover, the burden that would be placed upon the press if reporters could be routinely hauled into court to testify about "nonconfidential" information would be especially harmful. Reporters in their professional capacities are routinely and regularly "eye witnesses" to numerous arrests, accidents and witnesses' statements and conduct. If reporters had no qualified privilege from such discovery, they would soon become "testifiers", not reporters.

Finally, the facts of this case and the specific holding of the trial court demonstrate the need for the qualified privilege. The reporter was acting strictly in his professional newsgathering capacity. Even so, the court below held the privilege does not apply because the journalist was eyewitness to a "relevant event", the arrest and seizure of evidence. But the court begged the question, because there is no competent evidence in this record at all that the "event" is relevant to any genuine issue in the prosecution. The sole basis for compelling the reporter's testimony is an unsworn and unsupported motion claiming Morejon was not "fluent" in English and did not

understand he could refuse to "consent" to a search of his baggage. No one has testified that Morejon did not speak English or did not consent to the search, not even Morejon himself. He made no verified motion, submitted no affidavit, and introduced no testimony of friends or relatives as to his fluency in English--even though he has resided in the United States since 1980. He presented no evidence at all. And no evidence was submitted that the subpoenaed journalist could shed any light on this "issue". The sole basis for the Third District's conclusion that the reporter witnessed a "relevant event" is an unsworn motion to suppress.

This Court has twice before recognized the reporter's privilege; in passing upon it yet a third time, the bench, the press and the bar would greatly benefit from the guidance that would be provided by adoption of the three-part test. A clear allocation of the burden of proof to the party seeking to overcome the privilege would prevent needless conflicts between our fundamental rights, and be consonant with the great weight of Florida authority.

ARGUMENT

I. FLORIDA COURTS HAVE CORRECTLY ADOPTED THE THREE-PART TEST AS THE EVIDENTIARY BALANCING TEST FOR ADJUDICATING THE JOURNALISTS' QUALIFIED PRIVILEGE.

Twelve years ago, in Moraan v. State, 337 So.2d 951 (Fla. 1976), this court recognized the journalist's qualified First Amendment privilege from compelled discovery. Only two years

ago, the court reaffirmed this holding in Tribune Co. v. Huffstetler, 489 So.2d 772 (Fla. 1986).

Although this Court in Moraan v. State, supra and Tribune Co. v. Huffstetler, supra, did not expressly adopt a specific test or standard for adjudicating the privilege, a myriad of decisions in Florida's Federal and State courts have done so. For the past fifteen years, Florida courts have uniformly followed the three-part test initially set forth by the dissenting justices in Branzburg v. Haves, 408 U.S. 665 (1972), who, together with Justice Powell, established the qualified privilege adopted by this Court in Moraan v. State and Tribune Co. v. Huffstetler:

To compel a journalist to divulge information received in his professional newsgathering capacity, Florida courts have held the party seeking such testimony must first show:

1. The information is relevant to a meritorious claim or defense;

2. There is a compelling need for disclosure sufficient to override the First Amendment interests; and

3. There are no alternative sources for the information less chilling of First Amendment interests.

This Court should now adopt this test.

A. The Three-Part Test Is Well Established in Florida.

The Opinion erroneously asserts the "three-question method" set forth in Gadsden Countv Times, Inc. v. Horne, 441 So.2d 1234, 1241 (Fla. 1st DCA), petition denied, 441 So.2d 631

(Fla. 1983), "do[es] not, as urged, establish a three-part test which the party seeking the information from the journalist must satisfy in order to obtain such information . . . ." (R. 106). The Third District is wrong. The First District in Horne did expressly adopt that three-part test, stating: "we adopt that test for application in Florida." 426 So.2d at 1241.

Moreover, essentially all of Florida's reported trial court and federal court decisions for the past fifteen years have applied the three-part test in determining whether a journalist can be compelled to testify. Similarly, Florida appellate courts have also adopted the three-part test, and no Florida appellate court until now has suggested the three-part test should not be applied where a qualified privilege was found to exist. This Court should not recede from this well-established rule, and should confirm that the three-part test is the proper balancing mechanism by which a court should determine whether a journalist may be compelled to testify in a given case.

1. Florida Circuit Courts Have Been Consistently Applying The Three-Part Test For the Past Fifteen Years.

Questions involving evidentiary privileges are ordinarily resolved by Circuit Judges. Their uniform application of the three-part test without confusion for fifteen uninterrupted years is impressive confirmation the test fairly adjudicates the rights and interests of all concerned.

Petitioners are aware of 51 reported Florida trial court decisions, 39 of which utilize the three-part test or its four-part variation. Five of the remaining 12 appear to use the test, six do not address the issue, and one decision grants an absolute privilege in civil litigation: Florida v. Widel, 15 Media L. Rep. 1711 (Fla. 9th Cir. Ct. 1988) (applying the "three-pronged test of the news reporter's qualified privilege"); Florida v. Kersev, 14 Media L. Rep. 2352 (Fla. 6th Cir. Ct. 1987) ("three-part test requires party seeking the compelled testimony of a news gatherer to show that (1) the information is relevant; (2) there is no alternative source for this same information; and (3) there is a compelling need for the information"); Florida v. Lee, 14 Media L. Rep. 1863 (Fla. 3d Cir. Ct. 1987) (same); Sunset Chevrolet, Inc. v. Heiden, 14 Media L. Rep. 1252 (Fla. 12th Cir. Ct. 1987) (same); Damico v. Lemen, 14 Media L. Rep. 1031 (Fla. 13th Cir. Ct. 1987) (same); In Re Miami News, 13 Media L. Rep. 2167 (Fla. 11th Cir. Ct. 1987) (same); Bartsch v. Southland Corporation, 13 Media L. Rep. 2165 (Fla. 9th Cir. Ct. 1987) (same); In Re Confidential Proceedinas, 13 Media L. Rep. 2071 (Fla. 13th Cir. Ct. 1987) (same); McCuiston v. Wanicka, 13 Media L. Rep. 1975 (Fla. 20th Cir. Ct. 1987) (same); Miller v. Richardson, 13 Media L. Rep. 1235 (Fla. 11th Cir. Ct. 1986) (same); Florida v. Selinaer, 12 Media L. Rep. 2004 (Fla. 4th Cir. Ct. 1986) (same); Florida v. Williams, 12 Media L. Rep. 1783 (Fla. Broward Cty. Ct. 1986) (same); Capriles v. Maanum Marine Corp., 12 Media L. Rep. 1496 (Fla. 11th Cir. Ct. 1985) (same); Lacy v. Dissin, 12

Media L. Rep. 1431 (Fla. 13th Cir. Ct. 1985) (same); Florida v. Crawford, 12 Media L. Rep. 1309 (Fla. 17th Cir. Ct. 1985) (same); State v. Labrada, 13 Fla. Supp. 2d 111 (Fla. 11th Cir. Ct. 1985) (same); Florida v. Torreqrossa, 12 Media L. Rep. 1311 (Fla. Broward Cty. Ct. 1985) (same); Woods v. Lutheran Inner-City Center, Inc., 11 Media L. Rep. 1775 (Fla. 4th Cir. Ct. 1985) (same); State v. DiBattisto, 9 Fla. Supp. 2d 79 (Fla. 11th Cir. Ct. 1984) (same); Shaw v. American Learnina Systems, Inc., 10 Media L. Rep. 2045 (Fla. 17th Cir. Ct. 1984) (same); Cundiff v. Roess, 2 Fla. Supp. 2d 153 (Fla. 6th Cir. Ct. 1983) (same); Overstreet v. The Neighbor, 9 Media L. Rep. 2255 (Fla. 13th Cir. Ct. 1983) (same); State v. Roman, 2 Fla. Supp. 2d 120 (Fla. 5th Cir. Ct. 1983) (four-part test applied burden of proof on party seeking to compel testimony)[2/]; Shiner v. Florida Dept. of Transportation, 9 Media L. Rep. 1672 (Fla. 4th Cir. Ct. 1983) ("compelling reasons" test, but relying upon "three-part test" cases); Florida v. Taylor, 9 Media L. Rep. 1551 (Fla. 20th Cir. Ct. 1982) (four-part test applied); Jasper v. Rochelle-Thomas, 9 Media L. Rep. 1336 (Fla. 15th Cir. Ct. 1982) (litigant seeking compelled testimony must determine it is necessary and relevant to proving underlying case prior to issuing subpoena); Statewide Collection Corp. v. Anderson, 9 Media L. Rep. 1056 (Fla. Duval Cty. Ct. 1982) (motion to quash granted; test and burden not identified); Hancock v.

[2/] Many Florida trial courts have used a "four-part test" that is virtually identical to the three-part test. Both tests require at least relevancy, exhaustion of alternative sources, and a compelling interest in disclosure.

Wilkinson, 5 Fla. Supp. 2d 87 (Fla. 10th Cir. Ct. 1982) (four-part test applied ; State v. Kangus, 2 Fla. Supp. 2d 131 (Fla. 15th Cir. Ct. 1982) (three-part test); McCoy v. Public Gas Co., 8 Media L. Rep. 1057 (Fla. 15th Cir. Ct. 1982) (subpoena quashed without discussion); Florida v. Reid, 8 Media L. Rep. 1249 (Fla. 15th Cir. Ct. 1982) (three-part test); Florida v. Peterson, 7 Media L. Rep. 1090 (Fla. 6th Cir. Ct. 1981) (four-part test); Florida v. Evans, 6 Media L. Rep. 1979 (Fla. 11th Cir. Ct. 1980) (three-part test); Schulthise v. Wever Bros., Inc., 6 Media L. Rep. 1661 (Fla. 4th Cir. Ct. 1980) (party seeking to compel discovery must show "compelling necessity"); In Re Nuaent, 5 Media L. Rep. 1723 (Fla. 15th Cir. Ct. 1979) (subpoena quashed, burden and test not explicitly addressed); State v. Morel, 50 Fla. Supp. 5 (Fla. 17th Cir. Ct. 1979) (three-part test); Department of Transportation v. Saemann, 49 Fla. Supp. 199 (Fla. 15th Cir. Ct. 1978) (motion to quash subpoena is premature; burden shifts from reporter after prima facie showing); State v. Silber, 49 Fla. Supp. 71 (Fla. 11th Cir. Ct. 1979) (four-part test); State v. Beattie, 48 Fla. Supp. 139 (Fla. 11th Cir. Ct. 1979) (four-part test); Coira v. DePoo Hospital, 48 Fla. Supp. 105 (Fla. 16th Cir. Ct. 1978) (absolute privilege granted in civil cases); Stuart v. Palm Beach Gardens Hospital, 48 Fla. Supp. 85 (Fla. 15th Cir. Ct. 1978) (burden shifts); State v. Petrantoni, 48 Fla. Supp. 49 (Fla. 6th Cir. Ct. 1978) (four-part test); Florida v. Hurston, 3 Media L. Rep. 2295 (Fla. 5th Cir. Ct. 1978) (three-part test); State v. Carr, 46 Fla. Supp. 193 (Fla. 11th Cir. Ct. 1977) (motion

to quash granted because subpoena served no compelling reason); Lopez v. Garcia, 46 Fla. Supp. 173 (Fla. 11th Cir. Ct. 1977) (subpoena quashed: no compelling interest to overcome privilege); State v. Miller, 45 Fla. Supp. 137 (Fla. 17th Cir. Ct. 1976) (three-part test); State v. Laughlin, 43 Fla. Supp. 166 (Fla. 16th Cir. Ct. 1974) (three-part test apparently applied), aff'd., 323 So.2d 691 (Fla. 3d DCA 1975), cert. denied, 339 So.2d 1170 (Fla. 1976); State v. Stoney, 42 Fla. Supp. 194 (Fla. 11th Cir. Ct. 1974) (four-part test); Hendrix v. Liberty Mutual Insurance Co., 43 Fla. Supp. 137 (Fla. 17th Cir. Ct. 1975) (four-part test); Schwartz v. Almart Stores, Inc., 42 Fla. Supp. 165 (Fla. 11th Cir. Ct. 1975) (subpoena for nonconfidential source material quashed; test and burden not discussed); Harris v. Blackstone Developers, 41 Fla. Supp. 176 (Fla. 4th Cir. Ct. 1974) (three-part test).

None of these cases states the three-part test is not a "test", or suggests it should not be applied to balance the interests in obtaining a journalist's testimony against the resulting impairment to the newsgathering process.

2. Florida Appellate Courts Have Also Adopted The Three-Part Test.

Florida appellate courts have also adopted the three-part test:

The First District. Contrary to the language of the Third District's Opinion below, the First District in Gadsden

County Times, Inc. v. Horne applied the same three-part test urged by The Miami Herald in this case:

> Because we feel that application of the Garland three-part test as set out in Miller will enable trial courts to strike the "proper balance" between the interests of the press and the party seeking disclosure as required by Morgan, we adopt that test for application in Florida.

Gadsden County Times, Inc. v. Horne, 426 So.2d at 1241. The cases referred to by the First District, Miller v. Transamerican Press, Inc., 621 F.2d 721, modified on reh'g, 628 F.2d 932 (5th Cir. 1980), cert. denied, 450 U.S. 1041 (1981); Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977); Garland v. Torre, 259 F.2d 545 (2d Cir.), cert. denied, 358 U.S. 910 (1958); Riley v. Chester, 612 F.2d 708 (3d Cir. 1979); Gulliver's Periodicals, Ltd. v. Chas. Lew Circulatina Co., Inc., 455 F. Supp 1197 (N.D. Ill. 1978); Winegard v. Oxberaer, 258 N.W. 2d 847 (Iowa 1977), cert. denied, 436 U.S. 905 (1978), all apply that same three-part test.

The Second District. In five reported opinions, the Second District Court of Appeal has adopted and applied the three-part test. CBS, Inc. v. Cobb, 13 F.L.W. 2483 (Fla. 2d DCA) (November 18, 1988); Waterman Broadcastina of Florida, Inc. v. Reese, 523 So.2d 1161 (Fla. 2d DCA 1988); Gevelin v. Pinellas County, 497 So.2d 999 (Fla. 2d DCA 1986); Johnson v. Bentley, 457 So.2d 507 (Fla. 2d DCA 1984); Tribune Co. v. Green, 440 So.2d 484 (Fla. 2d DCA 1983), review denied, 447 So.2d 886 (Fla. 1984). See also, Times Pub. Co. v. Burke, 375 So.2d 297 (Fla. 2d DCA 1979).

The Third District. Notwithstanding the Opinion in this case, in State v. Lauahlin, 373 So.2d 691 (Fla. 3d DCA 1975), affirming, 43 Fla. Supp. 166 (Fla. 16th Cir. Ct. 1974), the Third District affirmed a trial court order which apparently applied the three-part test and placed the burden of proof on the party seeking to compel the discovery, but did not explicitly discuss these issues.

The Fourth District. The Fourth District has discussed the reporter's privilege in three cases. In Satz v. News and Sun-Sentinel Co., 484 So.2d 590 (Fla. 4th DCA 1985), review denied, 494 So.2d 1152 (Fla. 1986) and In Re Tiernev, 328 So.2d 40, 44 (Fla. 4th DCA 1976), the three-part test was not discussed. Tiernev, decided just before Morgan, and involving almost identical issues, is of dubious precedential value. And Satz never reached the issue of the three-part test because it erroneously found there could be no privilege under search warrant law which has no applicability to a subpoena and which had previously gone out of existence in 1980.[3/] The only decision in which the Fourth

---

3/ Satz v. News and Sun-Sentinel Co., is a poorly-reasoned decision which misread the sole case it relies on, a "search warrant" decision in which the U.S. Supreme Court had stated that "objections that might be asserted in opposition to compliance with a subpoena are largely irrelevant to determining the legality of a search warrant under the Fourth Amendment." Zurcher v. Stanford Daily, 436 U.S. 547, 567, reh'g denied, 439 U.S. 885 (1978). And, in any event, Zurcher was legislatively overruled by the Privacy Protection Act of 1980 42 U.S.C. 2000aa, et. seq. Perhaps that is why, when the News and Sun-Sentinel Co. moved for rehearing en banc, but not simple rehearing, Chief Judge Hersey stated "but for procedural inadequacies . . ., I would vote to grant rehearing and/or certify the proffered question to the Supreme Court of Florida. My difficulty is not with the result, but with the rationale." Id. at 592.

District has addressed the three-part test is Kridos v. Vinskus, 483 So.2d 727, 729 (Fla. 4th DCA 1986) in which the Fourth District recognized the establishment of the three-part test, citing Horne and Johnson v. Bentlev:

> "In civil cases, for example, there is a three-pronged test for determining whether a news media person should be compelled to testify: The information sought must be relevant; it must not be possible to obtain the information by alternative means, and there must be a compelling interest in the information. Gadsden County Times, Inc. v. Horne, 426 So.2d 1234 (Fla. 1st DCA 1983), and Johnson v. Bentlev, 457 So.2d 507 (Fla. 2d DCA 1984).

The Fifth District. In Carroll Contractinu, Inc. v. Edwards, 528 So.2d 951, 954 (Fla. 5th DCA 1988), the Fifth District did not reach the issue of whether the qualified privilege applied to disclosure of photographs taken in an off-duty happenstance by a photographer, but applied each of the elements of the three-part test in determining that any qualified privilege must yield in that case because the particular photographs at issue were "necessary and relevant and . . . the best and exclusive way to prove" a disputed issue.

The Florida Supreme Court. Finally, this Court has twice quashed subpoenas on the press without addressing the three-part test, but this Court in Huffstetler cited with approval the Second District's decision which adopted the three-part test, and Justice Sundberg's special concurrence in Moruan approved the three-part test. Tribune Co. v. Huffstetler, 489 So.2d 722, 723 (Fla. 1986),

citing with approval Tribune Co. v. Green, 440 So.2d at 484; Morgan v. State, 337 So.2d 951, 957 (Fla. 1976) (Sundberg, J. concurring).

3. Florida's Federal Courts Have Uniformly Applied The Three-Part Test.

Federal courts sitting in Florida have uniformly adopted and applied the three-part test: U.S. v. Caporale, 806 F.2d 1487 (11th Cir. 1986), cert. denied, 107 S.Ct. 3265, 97 L.Ed.2d 763 (1987) (affirming U.S. v. Accardo, 11 Media L. Rep. 1102 (S.D. Fla. 1984)); U.S. v. Paez, 13 Media L. Rep. 1973 (S.D. Fla. 1987); U.S. v. Waldron, 11 Media L. Rep. 2461 (S.D. Fla. 1985); U.S. v. Harris, 11 Media L. Rep. 1399 (S.D. Fla. 1985); U.S. v. Horne, 11 Media L. Rep. 1312 (N.D. Fla. 1985); U.S. v. Blanton, 534 F. Supp. 295 (S.D. Fla. 1982); Brown v. Okeechobee, 6 Media L. Rep. 2579 (S.D. Fla. 1981); Johnson v. Miami, 6 Media L. Rep. 2110 (S.D. Fla. 1980); Loadholtz v. Fields, 389 F. Supp. 1299 (M.D. Fla. 1975). As Judge Hoeveler wrote after surveying the law regarding the reporter's qualified privilege: "Although various jurisdictions have adopted a variety of formulations for the required balancing, they all require the party seeking the compelled testimony of a journalist to establish the relevance of the information sought, and its unavailability from alternative sources". Johnson v. Miami, supra at 2111.

B. A Careful Examination Of The Three-Part Test Shows It is Only A Common Sense Method Of Balancing Countervailing Interests, And Is Consistent With The Balancing Tests Adopted By This Court In Analogous First Amendment Contexts.

That the above Courts have all adopted the three-part test, and rejected other tests or ad hoc balancing in each case, is no coincidence. To the contrary, their adoption of the three-part test reflects the collective wisdom of two judicial systems in applying common sense and standard First Amendment principles to properly balance the competing interests involved. Under the three-part test, the First Amendment interests do give way to Sixth Amendment rights, but only where it has been shown with competent evidence that this sacrifice is necessary.

1. The First Element: The Journalist's Testimony Must Be Relevant.

The first prong merely requires a showing of relevance; what purpose can be served in compelling the journalist's testimony if it is not material to any issue in controversy? This element is based on Justice Powell's directive in Branzburg: "if the newsman is called upon to give information bearing only a remote and tenuous relationship with the subject of the investigation . . . he will have access to the Court on a motion to quash." Branzburg, 408 U.S. at 710 (Powell, J., concurring). In proper

cases this element may be readily satisfied.[4/] Because irrelevant testimony is not even discoverable, let alone admissible, in a criminal or civil case,[5/] there surely can be no issue as to the propriety of the first element of the test.

2. The Second Element: There Must Be A Compelling Need Sufficient To Outweigh The First Amendment Interests.

a. This is a standard element in all First Amendment balancinu tests.

The second prong of the test--requiring a showing of a compelling need outweighing any resulting impairment of First Amendment interests--is certainly not unique to "reporter's privilege" cases. This "compelling need" test merely reflects the black letter principle that where First Amendment interests are to give way, there must be a "compelling governmental interest" which overrides them.[6/]

[4/] For example, in Waterman Broadcastina of Florida, Inc. v. Reese, **523 So.2d** at **1162,** the Second District found the relevance of a confession in a criminal case to be "obvious." Similarly, the First District in Gadsden Countv Times, Inc. v. Horne, **426** So.2d at **1242,** found a reporter's testimony regarding alleged malice in a libel suit was relevant and therefore satisfied the first prong of the test. And the Fifth District in Carroll Contracting, Inc. v Edwards, **528 So.2d** at **954** found photographs of the road in an automobile accident case also to be relevant.

[5/] Rule **3.220,** Fla. R. Crim. P., limits criminal discovery depositions to persons with information "relevant to the offense charged," and Rule **1.280,** Fla. R. Civ. P., limits civil discovery to matters "relevant to the subject matter of the pending action."

[6/] See, e.g., Globe Newspaper Co. v. Superior Court, **457 U.S. 596, 606-07 (1982)** (access); First Nat'l Bank of Boston v. Bellotti, **435** U.S. **765, 786 (1978)** (commercial speech); U.S. v. O'Brien, **391** U.S. **367, 376-77 (1969)** (political speech); Gibson v. Florida Leaislative Investiuation Com., **372** U.S. **539, 546**

This Court also has required a showing of such a "compelling governmental interest" in other First Amendment contexts. E.g., Winn-Dixie Stores, Inc. v. State, 408 So.2d 211, 212 (Fla. 1981); Falzone v. State, 500 So.2d 1227, 1339 (Fla. 1987) (to "impinge" First Amendment interests, there must first be a showing of "a compelling governmental interest" requiring such impingement). Most recently, in Barron v. Florida Freedom Newspapers, 531 So.2d 113 (Fla. 1988), this court balanced the First Amendment right to access to civil judicial proceedings against countervailing interests in closure by requiring a showing, inter alia, that closure is "necessary" to protect certain delineated compelling interests. Id. at 118.

As was explained by the late Judge Charles Scott in a seminal Florida decision recognizing the reporter's privilege, this element of the three-part test is imposed because "only a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.'" Loadholtz v. Fields, 389 F. Supp. 1299, 1300 (S.D. Fla. 1975) (citations omitted). Loadholtz has since been cited with approval in 45 reported decisions in and out of Florida, in State and Federal courts. Therefore, this second prong of the three-part test is merely a standard element routinely considered whenever courts balance First Amendment interests.

(1963) (compelled disclosure of membership information impairs First Amendment association interests, and therefore requires showing of "compelling interest").

b. This element permits the consideration of the peculiar facts and interests in a particular case through a balancing of interests.

In addition, this second element of the test merely reflects the very balancing of interests initially mandated by five of the nine justices in Branzburg, and then followed by this Court in Moraan and Huffstetler: "The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions." Branzburg, 408 U.S. at 710 (Powell, J., concurring); Huffstetler, 489 So.2d at 723; Moraan, 337 So.2d at 954. It similarly echoes Justice Powell's admonition that a subpoena will be quashed where the journalist's testimony is sought "without a legitimate need of law enforcement." Branzburg, 408 U.S. at 710 (Powell, J., concurring).

This second prong of the test will be satisfied in appropriate cases,[7/] and enables trial courts to assign weight

---

7/ In Carroll Contractina, Inc. v. Edwards, 528 So.2d at 954, for example, the court found that photographs taken at the scene of a road construction site accident by an off-duty reporter were the only accurate record of road conditions at the time of the accident. The court reasoned that their production was thus "critical" to the proponent's defense of a personal injury claim and consequently to the "proper administration of justice." Id. In Waterman Broadcastina of Florida, Inc. v. Reese, the Second District found the prosecution had a "compelling interest" in obtaining a confession by the defendant. 523 So.2d at 1162. And in CBS, Inc. v. Cobb, that court found a compelling need for unpublished film footage of an interview of the defendant where published portions of that same interview had already been used to the defendant's detriment. 13 F.L.W. at 2485.

to the competing interests presented pursuant to the directive of Branzburg, Morgan, and Huffstetler.

3. The Third Element: No Alternative Sources.

a. This is a standard element in all First Amendment balancing tests.

The third element is that there be no alternative sources for the information sought in the journalist's testimony which would be less chilling of First Amendment interests. This element follows directly from the standard First Amendment analysis routinely applied by this Court and the United States Supreme Court wherever there is a compelling interest requiring the impairment of First Amendment activities; such impairment may be "no greater than is essential to the furtherance of that interest."8/

This Court has also confirmed that any impingement of First Amendment interests must be "narrowly drawn so as to involve no more infringement than is necessary." E.g., Winn-Dixie Stores, Inc. v. State, 408 So.2d at 212. As a result, in Barron v. Florida Freedom Newspapers, 531 So.2d at 118, this Court recently held in a closure case: "the trial court shall determine that no reasonable alternative is available to accomplish the desired result and, if none exists, the trial court must use the least restrictive closure necessary to accomplish its purpose." Therefore, where there are

8/ U.S. v. O'Brien, 391 U.S. at 377 (speech). Accord, e.g., Elrod v. Burns, 427 U.S. 347, 362-3 (1976) (association); Press-Enterprise Co. v. Superior Court of Calif., 464 U.S. 501, 511 (1984) (access).

alternate sources for the information sought from a reporter which would impose less of a burden on the newsgathering process, then such a less restrictive alternative must be employed.

Again, one of the seminal reporter's privilege decisions in this State, Loadholtz v. Fields, explained that this element is imposed because "any justifiable infringement upon First Amendment rights must be no greater than is necessary to vindicate legitimate subordinating interests." 389 F.Supp. at 1301. Accordingly, this is only a standard element routinely considered whenever there is a balancing of First Amendment interests.

b. This element prevents harassment of the press and is a matter of common sense.

Elimination of this element would invite potential harassment of the press, and defy common sense. For example, prosecutors know reporters investigate the background of many criminal cases, and thereby often obtain relevant information known by, and which could be presented by, several other possible witnesses. Absent such an "alternate source" requirement, prosecutors could present the press with an ultimatum: either soften criticism of the prosecutor's office, or the prosecutor will routinely subpoena reporters, rather than alternative sources, to provide testimony. Analogous scenarios would occur in which attorneys and litigants who have been criticized by the press could harass or undermine the objectivity of the press. Because of the potential drain on resources such scenarios would create,

the press needs the protection of the third element of the three-part test to withstand such threats. In Branzburg, Justice Powell declared that the balancing of First Amendment interest meant that "no harassment of newsmen will be tolerated." Branzburg, 408 U.S. at 709-10 (Powell, J., concurring). This third prong of the three-part test is necessary to ensure that result.9/

4. The Three-Part Test Adopted In Horne and Green Is A Logical Extension Of The Three-Part Test Adopted By This Court In Lewis As a Balancina Mechanism.

The foregoing review of each element of the three-part test adopted in Horne and Green shows it to be consistent with past efforts of this Court to create practical methods by which trial courts can balance First Amendment rights against countervailing interests. Indeed, this three-part test is merely an analogue of the three-part test adopted by this court in Miami Herald Pub. Co. v. Lewis, 426 So.2d 1 (Fla. 1983) to balance First Amendment

---

9/ Nor does this element create a barrier to parties seeking a journalist's testimony. In CBS. Inc. v. Cobb, the Second District found there was no alternative source to film outtakes from a prison interview because the defendant asserted he could not remember everything said during the interview. 13 F.L.W. at 2485. In Carroll Contracting, Inc. v. Edwards, 524 So.2d at 954, there was no alternative source for the information provided by photographs of the scene of an accident because the witnesses' memories were poor and less accurate. And in Waterman Broadcastina v. Reese, there was no alternative source for a confession witnessed exclusively by the journalist because a confession is "unique" and the prosecutor had "talked to everyone else, no one else had such a conversation." 523 So.2d at 1162.

interests in access to criminal judicial proceedings,[10/] against Sixth Amendment interests in closure. Each prong of the Lewis three-part test is an analogue of the Horne and Green three-part test: (1) just as closure must be "effective in protecting the rights of the accused" under the Lewis test, the journalist's testimony must at least be "relevant" to disputed issues so as to effectively serve some legitimate purpose; (2) just as closure must be "necessary to prevent a serious and imminent threat to the administration of justice," there must be a "compelling need" for the journalist's testimony outweighing the burden on the newsgathering process; and (3) just as there must be "no alternatives" to closure under the Lewis test, there must be no "alternative sources" for the information sought from the journalist. Thus the Horne and Green three-part test is a logical extension of the balancing test adopted by this Court in Lewis.

Therefore, the three-part test not only parallels what has already been adopted by this Court in Lewis, but also satisfies the functions articulated in Branzburg: it prevents potential harassment of the press, while maintaining the flexibility to permit compelled testimony of journalists unless either there is no legitimate need for the testimony, or any such need is outweighed by any resulting negative impact to the newsgathering process.

10/ In Barron v. Florida Freedom Newspapers, 531 So.2d at 118, this Court confirmed that the Lewis three-part test is "derived primarily from First Amendment contentions."

II. THE BURDEN OF PROOF UNDER THE THREE-PART TEST IS ON THE PARTY SEEKING TO OVERCOME THE REPORTER'S PRIVILEGE AND COMPEL THE JOURNALIST'S TESTIMONY.

In its Opinion, the Third District incorrectly asserted: "the burden of proof on this issue should rest with the journalist who asserts his qualified privilege, not with the party seeking the information which the journalist refuses to disclose." (R. 106). This unprecedented assertion is directly contrary to all prior authority, and it reflects a fundamental misconception of both how the three-part test is applied and the function it serves.

A. Florida's Appellate and Trial Courts Have Uniformly Placed The Burden of Proof on The Party Seeking to Impair First Amendment Interests By Compelling A Journalist's Testimony.

1. All Reported Florida Decisions Applying The Three-Part Test Have Placed The Burden Of Proof On The Party Seeking The Journalist's Testimony.

None of the eight appellate court decisions or 39 reported trial court decisions in this State which have applied the three-part test has ever previously suggested the burden of proof should be imposed on the journalist. To the contrary, they have uniformly[11/] placed the burden of proof on the party seeking to compel the journalist's testimony:

11/ The Third and Fourth District Courts of Appeal have never previously addressed the burden of proof under the three-part test.

First District: error to compel journalist to testify until evidence is introduced satisfying each element of the three-part test. Gadsden County Times, Inc. v. Horne, 426 So.2d at 1242.

Second District: party seeking to compel journalist's testimony has "very high burden" of satisfying all three prongs of the test. Tribune Co. v. Green, 440 So.2d at 487.

Fifth District: party seeking to compel journalist's testimony "established a sufficient basis to overcome the privilege". Carroll Contractina, Inc. v. Edwards, 528 So.2d at 954.

Circuit Courts: "Once the news reporter's qualified privilege is invoked by the news reporters, the burden shifts to the proponent of compelled testimony to establish the [three-part test]. Bartsch v. Southland Corporation, 13 Media L. Rep. 2165, 2166 (Fla. 9th Cir. Ct. 1987).

Florida Federal Courts: "information may only be compelled from a reporter claiming privilege if the party requesting the information can show that it is highly relevant, necessary to the proper presentation of the case, and unavailable from other sources." U.S. v. Caporale, 806 F.2d at 1504.

2. This Allocation Of The Burden Of Proof Is Consistent With Standard First Amendment Analysis.

The three-part test is merely one example of standard First Amendment analysis applied whenever one seeks to impair First Amendment interests. In all such instances, the burden of showing a "compelling need" to impair those interests, and the lack of an alternative means of satisfying that compelling need, is always placed on the party seeking to impair the First Amendment interests. First Nat'l Bank of Boston v. Bellotti, 435 U.S.

at 786; Elrod v. Burns, 427 U.S. at 362. See also, Philadelphia Newspapers v. Hepps, 475 U.S. 767, 106 S.Ct. 1558, 1564 (1986).

Most recently, this Court in Barron v. Florida Freedom Newspapers, Inc., emphasized that a party seeking closure of a civil judicial proceeding bears the burden of proof to show that the First Amendment and common law interests in access to that proceeding are outweighed in a particular case: "The burden of proof in these proceedings shall always be on the party seeking closure." 531 So.2d at 118. This holding follows this Court's prior holding in Lewis that: "Those seeking closure have the burden of producing evidence and proving by the greater weight of the evidence that closure is necessary." Miami Herald Pub. Co. v. Lewis, 426 So.2d at 8. There is no reason to apply a different standard here.

B. The Evidence Needed To Satisfy The Three-Part Test Will Usually Be Exclusively Known By and Available To The Party Seeking The Testimony.

There are sound practical reasons for placing the burden of proof on the litigant seeking to compel a journalist's testimony. Prior to a hearing on whether the journalist should be compelled to testify, the journalist has not been a party to the litigation or privy to the discovery proceedings; only the party seeking the journalist's testimony knows why he wants it and whether it truly is so relevant that his fair trial rights would be compromised if he did not obtain it. The Miami Herald's journalists receive more than 100 subpoenas each year, and seldom

can the purpose of a subpoena be determined from its receipt. It is not uncommon for courts to fail to find such a reason even after a full hearing. Moreover, the parties to the underlying litigation know whether alternative sources have been sought or exhausted; the journalist does not because he is not a party to the proceedings and has not taken witness statements or depositions of other sources. And because discovery responses are no longer filed with the court, the journalist has no means of determining such facts. See Rule 3.220(d), Fla. R. Crim. P.; Rule 1.310(f), Fla. R. Civ. P.

In Barron v. Florida Freedom Newspapers, this Court recognized this precise problem in holding that the party seeking closure bears the "heavy burden" of justifying closure "because those challenging the order will generally have little or no knowledge of the specific grounds requiring closure." 531 So.2d at 118-19. Thus, placing the burden on the press would require the journalist to become a full party in the underlying discovery proceedings. Such a result is impractical and would result in unnecessary delays of the litigation while the journalist attempts to gather the facts and evidence already possessed by the litigants. As this Court recognized in Barron, such procedural quagmires can only be prevented by following the uniform precedent governing the three-part test and placing the burden of proof on the party seeking to impair First Amendment interests by compelling the journalist's testimony.

C. Once There Has Been A Prima Facie Showing Of Any Qualified Testimonial Privilege, Including The Qualified Reporter's Privilege, The Burden of Proof Shifts To The Party Seeking The Testimony To Overcome That Qualified Privilege.

The reporter's privilege is a qualified testimonial privilege. It, like all other qualified privileges, can be overcome upon a showing that the privilege is not applicable under certain circumstances.

The Second District Court of Appeal has described this shifting burden of proof:

> Where a claim of privilege is asserted, the parties seeking disclosure are faced with the necessity of producing evidence that the communication claimed to be privileged was in fact not privileged. A mere claim of the privilege does not conclusively establish the privilege but merely shifts to the other party the necessity of showing that the communication was in fact not privileged.

Leithauser v. Harrison, **168** So.2d **95, 97** (Fla. 2d DCA **1964).** Similarly, in the context of the attorney work-product privilege, Florida courts have uniformly placed the burden of proof on the party seeking to elicit the work product, and **not** the party asserting the privilege: "Once the party opposing production asserts a work product privilege, the burden shifts to the party requesting production to show that he is 'unable without due hardship to obtain the substantial equivalent of the material by

other means.'" Dade County School Board v. Soler, 13 F.L.W. 2639, 2640 (Fla. 3d DCA) (December 16, 1988).~~12~~/

Nor can this burden of proof under the three-part test be satisfied by unsworn assertions of counsel. See, Procter & Gamble Co. v. Swillev, 462 So.2d 1188, 1194 (Fla. 1st DCA 1985) (unsworn assertions insufficient to satisfy burden of overcoming work product privilege). One cannot satisfy such a shifting burden of proof by merely creating paper issues. ~~13~~/

The qualified reporter's privilege exists wherever compelled testimony of a reporter might chill the newsgathering process, and can only be overcome upon satisfaction of the three-part test. Thus, the three-part test is the means by which the court determines if the qualified privilege can be overcome in a particular case; it does not determine whether the privilege exists in the first place. It is black letter law that a party seeking to overcome a qualified privilege bears the burden of proof. There is no reason to apply any different rule where one seeks to overcome the qualified reporter's privilege by satisfaction of the three-part test.

12/ Accord, e.a., Seaboard A.L.R. Co. v. Timmons, 61 So.2d 426, 428 (Fla. 1952); Scotchel Enterprises, Inc. v. Velez, 455 So.2d 1129, 1130 (Fla. 4th DCA 1984); Winn-Dixie Stores, Inc. v. Nakutis, 435 So.2d 307, 308 (Fla. 5th DCA 1983), review denied, 446 So.2d 100 (Fla. 1984).

13/ See, e.g., Landers v. Milton, 370 So.2d 368, 369 (Fla. 1979); Harvey Building, Inc. v. Haley, 175 So.2d 780, 782-3 (Fla. 1965); F&R Builders v. The Lowell Dunn Co., 364 So.2d 826, 827 (Fla. 3d DCA 1978), cert. denied, 372 So.2d 468 (Fla. 1979). See also, Chrysler Corp. v. Miller, 450 So.2d 330 (Fla. 4th DCA 1984); Westinghouse Elev. Co. v. DFS Const. Co., 438 So.2d 125, 127 (Fla. 2d DCA 1983).

III. THE JOURNALIST'S PRIVILEGE PROTECTS THE AUTONOMY AND FREEDOM OF THE NEWS-GATHERING AND EDITORIAL PROCESSES, NOT MERELY THE CONFIDENTIALITY OF NEWS SOURCES.

The court below entertained "serious doubts as to whether a news journalist's qualified privilege to refuse to divulge information from confidential news sources, as established in Moraan and Huffstetler, should be extended wholesale to include all non-confidential sources of information." (R. 107). The court was not "unmindful, however, of petitioners' forceful arguments to the contrary supported by some non-binding, but not unimpressive, authority." (R. 108). The sole expressed basis for this view was the court's speculation that:

> "[U]nlike confidential news sources which are likely to dry up if disclosed, non-confidential news sources and like evidence seem, for the most part, unlikely to disappear if journalists are required to testify concerning same in a subsequent court proceeding - and thus newsgathering and dissemination do not appear to be seriously threatened by such disclosure."

Id. In a decision published almost simultaneously, the Fifth District echoed this doubt in a case involving unpublished, nonconfidential photographs. Carroll Contracting, Inc. v Edwards, 528 So.2d 951 (Fla. 5th DCA 1988).

The recent doubts expressed by these two courts are contrary to the weight of prior authority, and those doubts are not justified in light of the First Amendment interests the reporter's privilege is intended to serve.

A. The Weight of Authority Recognizes That The Reporter's Privilege Applies Irrespective Of The Presence of Confidential Sources.

The authority which has recognized the journalist's privilege protects information that is not gathered from confidential sources, particularly unpublished work product, is impressive indeed. Judge Scott emphatically stated the distinction between compelling discovery of confidential source material and other information gathered by a journalist "is utterly irrelevant to the 'chilling effect' that enforcement of these subpoenas would have on the flow of information to the public." Loadholtz v. Fields, 389 F. Supp. 1299, 1303 (M.D. Fla. 1975). Similarly, Judge Paine held in U.S. v. Blanton, 534 F. Supp. 295 (S.D. Fla. 1982):

> "Although no confidential source or information is involved, this distinction is irrelevant to the chilling effect enforcement of the subpoena would have on the flow of information to the press and public."

Other federal trial courts sitting in Florida have concurred. U.S. v. Meros, 11 Media L. Rep. 2496 (M.D. Fla. 1985) (qualified privilege applied reporter's source of information was known to be the defendant in that criminal case); U.S. v. Waldron, 11 Media L. Rep. 2461 (S.D. Fla. 1985) (qualified privilege applies to information gleaned by reporter from conversation with identified witness in criminal prosecution). Most recently, the Eleventh Circuit Court of Appeals affirmed Judge Kehoe's application of the

three-part test to information obtained by a reporter from identified FBI agents. U.S. v. Caporale, 806 F.2d at 1504.

Until the recent Third and Fifth District opinions, Florida appellate courts had been equally unequivocal on the issue. In Tribune Co. v. Green, 440 So.2d 484, 486 (Fla. 2nd DCA 1983), the court stated:

> "There is abundant case law that [the three-part] test is applicable to criminal as well as civil cases and to confidential and non-confidential sources of information."

Very recently, the Second District reiterated this view in CBS, Inc. v. Cobb, 13 F.L.W. 2483, 2484 (Nov. 18, 1988): "This court has refused to distinguish between information received in confidence, such as through an 'informer', and that which was not." Accord, Johnson v. Bentley, 457 So.2d 507 (Fla. 2d DCA 1984) (three-part test applies to subpoena for unpublished photographs). A legion of Florida trial courts have applied the privilege where no confidential sources were implicated. [14/] In Florida v. Williams, 12 Media L. Rep. 1783, 1784 (Fla. 17th Cir. Ct. 1986), the court capsulized the threat to dissemination of

---

[14/] Schwartz v. Almart Stores, Inc., 42 Fla. Supp. 165, 166 (Fla. 11th Cir. Ct. 1975); State v. Carr, 46 Fla. Supp. 193, 194 (Fla. 11th Cir. Ct. 1977); Florida v. DiBattisto, 9 Fla. Supp. 2d 79, 82 (Fla. 11th Cir. Ct. 1984); Lacv v. Dissin, 12 Media L. Rep. 1431 (Fla. 13th Cir. Ct. 1985); State v. Morel, 50 Fla. Supp. 5 (Fla. 17th Cir. Ct. 1979); Florida v. Peterson, 7 Media L. Rep. 1090 (Fla. 6th Cir. Ct. 1981); State v. Petrantoni, 48 Fla. Supp. 49 (Fla. 6th Cir. Ct. 1978); Hancock v. Wilkinson, 8 Media L. Rep. 2566 (Fla. 10th Cir. Ct. 1982); In Re Nugent, 5 Media L. Rep. 1723 (Fla. 15th Cir. Ct. 1979); State v. Miller, 45 Fla. Supp. 137, 139 (Fla. 17th Cir. Ct. 1976); Hendrix v. Libertv Mutual Ins. Co., 43 Fla. Supp. 137, 139 (Fla. 17th Cir. Ct. 1975).

newsworthy information to the public if the qualified privilege did not extend to non-confidential sources:

> With the simple service of a subpoena, journalists could be dragged into court for virtually every article published in the newspaper. Under such circumstances, the mere threat of a subpoena could have could a 'chilling effect' on a journalist in the preparation of an article that one intended First Amendment protection of the media and public would become meaningless.

Most recently, the New York Court of Appeals in O'Neill v. Oaksrove Construction, Inc., 71 N.Y.2d 521, 523 N.E.2d 277 (1988) held the reporter's privilege applies to non-confidential unpublished photographs, stating: "The considerations underlying this qualified privilege are not peculiar to materials obtained in confidence." As Florida's Second District approvingly observed:

> The autonomy of the press would be jeopardized if resort to its resource materials by litigants seeking to utilize the newsgathering efforts of journalists for their private purposes, were routinely permitted." O'Neill v. Oaksrove Construction, Inc., 71 N.Y.2d 521, 526, 528 N.Y.2d 1, 2, 523 N.E.2d 277, 279 (1988). That is, the scope of the First Amendment's protection may be broader than is necessary only to protect confidential informants, extending to the expense and harassment that might be foreseeable if litigants were allowed unlimited access to journalistic archives.

CBS, Inc. v. Cobb, 13 F.L.W. at 2484.

B. The Journalist's Privilege Protects the Autonomy of the Newsgathering and Editorial Processes.

It has long been recognized that the special role of the press is to provide a check on government, to "watchdog" or monitor

its activities. This has been especially true of the criminal justice system and the actions of police:

> A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. . . . The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.

Sheppard v. Maxwell, 384 U.S. 333, 350 (1966).[15/]

To perform this special function the press engages in two fundamental processes: newsgathering and editing. These processes operate near the core of the First Amendment when they report on police actions, arrests or searches and seizures. Yet it is precisely these core functions which the Third District has explicitly stripped of all protection by imposing an exception to the reporter's privilege adopted by this Court in Moraan and Huffstetler for "eyewitness testimony" concerning "relevant events" such as arrests or searches by police.

Compelling reporters to testify whenever they have witnessed events such as arrests, searches and seizures, regardless of whether there has been a showing satisfying the three-part test, would burden and interfere with the newsgathering and editorial processes in several ways. First, it would impermissibly burden

---

15/ Accord, Cox Broadcastina Corp. v. Cohn, 420 U.S. 469, 470 (1975) ("the commission of crime, prosecutions resulting therefrom, and judicial proceedings arising from prosecutions are events of legitimate concern to the public and consequently fall within the press' responsibility to report the operations of government.")

newsgathering. The Third District assumed that the newsgathering function could be injured only if confidential sources of information dried up. But, the free flow of information can be disrupted by excessive burdens on the press, and it is the flow of information, not confidentiality, the privilege protects:

> As many of the courts have already noted, confidentiality, or the lack thereof, has little, if anything, to do with the burdens on the time and resources of the press that would inevitably result rom discovery without special restrictions. 16/

It is a reporter's constitutional mission to be present when controversial police conduct occurs. Thus, a police reporter may observe several hundred arrests and searches (as well as statements of parties and witnesses) in a year; a rule that would allow him or her to be automatically subpoenaed in every instance, with no requirement beyond the allegation of bare relevancy in an unsworn pleading, would obviously produce an enormous burden on newsgathering. It would become malpractice for an attorney **not** to subpoena a reporter. Reporters would become "testifiers."

The problem is not simply that reporters would be subpoenaed for work they habitually do, the difficulty is the Third District has explicitly withdrawn protection for newsgathering precisely when the press is performing its special constitutional mission: monitoring governmental actions like arrests and searches. The rule is thus not only incapacitating in its effect but also discriminatory in its criterion. Contrary

---

16/ O'Neill v. Oakarove Construction, supra.

to the Opinion below, the burden of giving such testimony does not fall equally on all citizens, because it is the special role of the press to witness and report on arrests and other police actions.

The injury to newsgathering does not end with this burden. Carving out such an exception to the reporter's privilege would inevitably interfere with newsgathering judgments generally. Newspapers may become reluctant to assign their reporters to matters where the likely result will be expensive and time-consuming testimony; better to cover a less controversial story. The public's perception of the autonomy of the press will also be threatened. The demand for confidentiality itself will increase, as well as the reluctance to give information to the press at all, as the public develops the perception that a statement to the press is a statement to a professional witness in court.

The damage to the editorial process would be even greater; it would allow litigants to usurp the editor's role because they would decide what unpublished work-product is disseminated by having the clerk issue a subpoena. Moreover, editors may be forced to "kill" a story, or at least delete portions of it, if they perceive the consequences of publication may be expensive and time-consuming testimony of its reporters.

The U.S. Supreme Court has long admonished that the First Amendment prohibits any interference with the autonomy of the press to determine for itself, free of governmental regulation,

which of the information it has gathered should be disseminated. Miami Herald Publishins Co. v. Tornillo, 418 U.S. 241, 258 (1974). Under the Third District's rule, this precious right would be undermined in the very context it is most needed -- editorial judgments regarding press reporting of official governmental action. The editors of The Miami Herald decided to report on police activity at the Miami Airport. They decided what to publish about the activity observed. In a single opinion the Third District has reallocated that constitutional role to litigants who need make no showing to exercise their new authority over journalists. The destruction of editorial autonomy over news reports on official government actions, contrary to the Third District, **has** "imperiled" "substantial free press interests." (R. 109).

Finally, the Third District's rule limiting the reporter's privilege to confidential information or sources attempts to draw a line where none is possible. Material may be "confidential information," but not from a confidential source. It may be nonconfidential information, but the source may be off the record or not for attribution. Some sources in the same conversation provide both sorts of information with varying levels of attribution or confidentiality as to source. To separate one from the other, or to restrict testimony to nonconfidential source material, is not only difficult in theory, but impractical.

The Opinion below, in part because it mistakenly believed the privilege to be grounded in confidentiality, rather than First

Amendment principles, and in part because it ignored the fundamental role of the press to report on official actions, has created an exception to the reporter's privilege which if allowed to stand will greatly injure the ability of the press to perform its appointed constitutional function.

IV. THE THREE-PART TEST WAS NOT SATISFIED HERE.

It was the burden of the party seeking Achenbach's testimony to prove by competent evidence presented to the trial court that the three elements of the three-part test had been satisfied: (1) relevancy; (2) compelling need; and (3) no alternative sources. Although the three-part test can be satisfied where there is a legitimate need for a journalist's testimony, here, no evidence was produced that could shed light on any legitimate issues in the case. That is why counsel for Morejon failed to satisfy the three-part test as to any of its elements.

Judge Gross held that Achenbach could give evidence that was relevant to whether Morejon could understand English well enough to have consented to the search. He found Morejon to have a compelling need for this testimony because in the absence of genuine consent to the search, there would have been no "probable cause" for a voluntary search. He concluded there were no alternative sources because only Achenbach could have overheard the conversations at the Airport.

Judge Gross was mistaken in each respect, and the Third District made no attempt to affirm his conclusions.

1. The Testimony Sought Was Not Shown To Be Relevant To Any Issue Genuinely In Controversy.

Judge Gross found that Achenbach could give testimony relevant to whether Morejon spoke English well enough to have consented to the search of his luggage. But, "relevancy has been defined as a tendency to establish a fact in controversy or to render a proposition in issue more or less probable." (emphasis added). Zabner v. Howard Johnson's, Inc., 227 So.2d 543, 545 (Fla. 4th DCA 1969). And in Kridos v. Vinskus, 483 So.2d 727 (Fla. 4th DCA 1986), the trial court's denial of a motion to quash a criminal defendant's subpoena was reversed because the testimony sought from the witness "could shed no light on the issues of [the] case." Id. at 731.

Therefore, Judge Gross' finding of relevancy was mistaken in two ways. First, there was no evidentiary issue as to whether Morejon could understand English. He never testified he could not understand it. He filed no affidavit or verified motion. 17/ No friend, relative, business associate, or anyone else who had known him for the six years he had lived in this country came forward with testimony he could not understand English. Morejon did not call the airline ticket teller or his co-defendant to testify on this point. In contrast, the three police officers

---

17/ Even in his unsworn Motion to Suppress, Morejon never asserted he did not speak English well enough to consent to the search of his luggage; he only contended he was not "fluent" in English, and that he did not understand he had a right to refuse consent. (A. 15).

testified Morejon spoke English well, and that he even gave them a post-arrest statement in English. (A. 57, 126-34, 193-7, 225).

It is black letter Florida law that bare unsworn assertions in a pleading cannot be used to rebut sworn competent evidence to create a fact issue. See, Landers v. Milton, 370 So.2d 368, 369 (Fla. 1979); Harvey Building, Inc. v. Haley, 175 So.2d 780, 782-3 (Fla. 1968); F&R Builders v. The Lowell Dunn Co., 364 So.2d 826 (Fla. 3d DCA 1978). Thus, Morejon never laid the requisite predicate to place this purported factual issue in controversy, and therefore any testimony by Achenbach could not be "relevant" to an issue in the case.

Judge Gross also erred because there was no showing that Achenbach could testify as to Morejon's language facility, even had that been properly at issue. There is no basis for assuming Achenbach has any knowledge of Morejon's fluency, and the only evidence proffered on this point was the article mentioned that a single Spanish word had been used during the entire Airport incident.

Morejon's counsel offered two other reasons for seeking Achenbach's testimony. First, the article reflects that Morejon first consented to being stopped and providing information to the officers, and then again consented to a search of his luggage. (A. 173-4). At the hearing, Morejon's counsel argued his client needed this testimony to contradict the testimony of the police officers who said there was only one consent. (A. 243). This is absurd. First, if there were two consents as stated in the

article, then that merely strengthens the case against Morejon, it doesn't weaken it. Second, Morejon's counsel simply misread the testimony of the officers; they testified there were two separate consents, just as stated in the article. (A. 57-9, 62-3, 107, 156, 194-7, 203-5).

Second, Morejon's lawyer argued the article suggests the officers may have made an improper "approach" to Morejon. (A. 245). But the Motion to Suppress does not assert that the officers improperly "approached" Morejon and the other smuggler. It does not cite any case saying the "approach" was unlawful. The officers uniformly testified they simply approached the suspects, identified themselves as police officers, and asked if they could talk to the suspects. They admit they had to catch up to Morejon and therefore were approaching him at a gait faster than that of Morejon as he walked down the airport concourse. (A. 224). The article and the officers' testimony are entirely consistent. Moreover, no showing was made at the hearing on the Motion to Quash as to how this is an issue as to which Achenbach might have relevant information. Morejon's attorneys argued the article shows Achenbach's testimony is needed because he wrote the officers were "off and running," meaning they startled or scared or surprised Morejon. At no time has Morejon contended either in the unsworn Motion to Suppress or through an affidavit or testimony at the hearing that he was in any way startled, surprised or scared as a result of the manner in which he was approached by the officers.

2. There Was No Compelling Need For The Testimony.

Because there was no showing that the information sought from Achenbach would be "relevant" to an issue in controversy, a fortiori there could be no finding of a "compelling need" for Achenbach to testify.

Morejon has not testified, as he is entitled to without impairing his Fifth Amendment rights,[18/] to establish that he did not understand what the detectives were saying to him, and that he did not freely and voluntarily consent to the search. Achenbach may not be compelled to testify over his First Amendment privilege when Morejon could testify without waiving his Fifth Amendment privilege. Again, it is black letter law in Florida that even the prosaic attorney work product privilege may not be overcome by a bare allegation of need. Rule 1.280(b)(2), Fla. R. Civ. P.; Procter & Gamble Co. v. Swilley, 462 So.2d 1188, 1197 (Fla. 1st DCA 1985).

3. There Were Alternative Sources.

There are various alternative sources to show that Morejon does not understand English well enough to knowingly waive his rights -- friends, relatives, business associates, and

---

18/ See Simmons v. United States, 390 U.S. 377, 394 (1968) (defendant may testify at suppression hearing without waiver of Fifth Amendment rights and his testimony may not be later used against him at trial).

even Morejon himself. Counsel for Morejon failed to call any witnesses to testify for this purpose.

Because it is undisputed that there were alternative sources for the information sought from Achenbach, the three-part test required Judge Gross to quash the subpoena. In Tribune Company v. Green, supra, the Second District quashed the subpoena because the Court found there were other persons who also had the information sought from the reporter -- co-conspirators with the defendant who had received immunity:

> In view of their involvement in the charged misconduct, we feel that not only are they alternative sources but far better sources. It is inconceivable that [the reporter] could add anything more to the testimony of these "first hand players".

Id. at 486. For similar reasons, at least at this point in this case, Judge Gross should have ruled likewise.

CONCLUSION

For the foregoing reasons, the certified question should be answered affirmatively, the Opinion of the Third District should be quashed, and Judge Gross's Order should be vacated with directions that the subpoena served on Joel Achenbach be quashed.

THE MIAMI HERALD
PUBLISHING COMPANY
Samuel A. Terilli, Jr.
General Counsel
One Herald Plaza
Miami, Florida 33132-1693
(305) 376-2868

BAKER & MCKENZIE
Richard J. Ovelmen
701 Brickell Avenue
Suite 1600
Miami, Florida 33131

THOMSON BOHRER WERTH & RAZOOK
A Partnership Including
Professional Associations

Sanford L. Bohrer, P.A.
Jerold I. Budney
4900 Southeast Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2363
(305) 350-7200

CERTIFICATE OF SERVICE

I CERTIFY a true copy of the foregoing Initial Brief of Petitioners The Miami Herald Publishing Company and Joel Achenbach was served by mail this 22nd day of December, 1988, upon:

Bruce Rosenthal
Assistant Public Defender
1351 N.W. 12th Street
Miami, Florida 33125

and

Robert Byerts
Assistant State Attorney
1351 N.W. 12th Street
Miami, Florida 33125

5823.461-D.33/122288