IN THE
SUPREME COURT OF FLORIDA

Case No. 75,719

CBS, INC.,
Petitioner,

vs.

KAREEM JACKSON
Respondent.

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

AMICUS CURIAE BRIEF OF THE MIAMI HERALD PUBLISHING COMPANY

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SUMMARY OF ARGUMENT

In Morgan v. State, 337 So.2d 951 (Fla. 1976), this Court recognized the qualified journalist's privilege for the first time, holding that a journalist could not be compelled to testify before a grand jury regarding the identity of her confidential source. Ten years later, in Tribune Co. v. Huffstetler, 489 So.2d 722 (Fla. 1986), the Court reaffirmed its holding in Morgan, again striking the First Amendment balance in favor of protecting the journalist's confidential source.

Today, in this case and in Miami Herald Publishing Co. v. Morejon, 529 So.2d 1204 (Fla. 3d DCA 1988), this Court is presented with its first opportunity to define the scope and availability of the qualified journalist's privilege where confidential source relationships are not an issue. The press petitioners and amici in both cases have argued that the Court should adopt and apply the three-part balancing test now employed by most state and federal courts in Florida. The Miami Herald joins in these arguments but does not repeat them here.[1/]

1/ For an exhaustive discussion of the law of the qualified journalist's privilege and the mechanics of the three-part test, this Court is respectfully referred to the briefs of The Miami Herald Publishing Company and Joel Achenbach in Morejon.

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The purpose of this brief is limited. The Morejon court held that a journalist could not invoke the qualified privilege where he was an eyewitness and confidential sources were not implicated. In essence, the Morejon court recognized two "exceptions" to the qualified journalist's privilege -- circumstances not in which the qualified privilege would be overcome, but in which it would not apply at all. The trial court in this case, upon finding these circumstances present, followed Morejon and ordered CBS to comply with the defendant's subpoena.

This brief addresses only the threshold question of the availability of the qualified journalist's privilege. Are there, as the Third District held in Morejon, particular circumstances which create "exceptions" to the qualified journalist's privilege, such that a court need not consider any other facts or constitutional interests prior to compelling a journalist to testify concerning his newsgathering activity?

Our answer is no. The qualified journalist's privilege should apply, without exception, whenever a journalist is called to testify concerning his newsgathering activities as a journalist. The issue for a court should be whether, under the circumstances of the particular case, the qualified journalist's privilege is overcome. There are two related reasons.

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First, the constitutional genesis and rationale of the qualified journalist's privilege is inconsistent with the creation of absolute exceptions to the privilege. The qualified journalist's privilege is an aspect of the First Amendment right to gather news and its qualified protection should be available whenever a journalist is engaged in newsgathering activities. Although traditionally discussed in privilege terms, the qualified journalist's privilege is actually in the nature of a qualified newsgathering right, much like the qualified First Amendment right of access to judicial proceedings with which this Court is familiar. Absolute exceptions to the qualified journalist's privilege are as offensive to the First Amendment as absolute rules against access to judicial proceedings. By the same token, the qualified journalist's privilege is, like the special right of the press to be notified in the event of an attempted closure, a procedural safeguard afforded to the press alone to preserve its newsgathering ability.

Second, because the journalist's privilege is qualified and not absolute, it is well-suited to accommodate the wide array of facts and circumstances which may arise in any given case. The privilege requires a balancing of countervailing interests; any circumstances that might constitute possible "exceptions" can and should be taken into account in that balancing analysis. Indeed, the two exceptions formulated in Morejon and adopted in the court

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below have historically been treated in this way by this and other courts.

Accordingly, the Court should decline to create any exceptions to the qualified journalist's privilege. The decisions of the Third District in Morejon and the Fourth District in this case should be reversed.

ARGUMENT

I. THE CREATION OF EXCEPTIONS TO THE QUALIFIED JOURNALIST'S PRIVILEGE WOULD BE CONTRARY TO THE FIRST AMENDMENT

A. The Qualified Journalist's Privilege Is An Aspect Of The Qualified First Amendment Right To Gather News

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no laws . . . abridging the freedom of speech, or of the press . . . .

Although the First Amendment does not by its terms expressly protect the right to gather news, the United States Supreme Court has recognized the newsgathering right as a necessary, if unarticulated, aspect of the protection afforded by the First Amendment. The Supreme Court first expressly recognized the First Amendment newsgathering right in Branzburg v. Hayes, 408 U.S. 665 (1972):

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> We do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated.

Id. at 681.

In Branzburg, a majority of the Justices held that the newsgathering right gave rise to at least a qualified journalist's privilege.[2/] In Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576-77, 579-80 (1980), the Court relied on the newsgathering right to derive the qualified First Amendment right of access to criminal trials. Noting that the First Amendment did not expressly confer the access right, the Court held that the right was nonetheless "implicit" in the "enumerated guarantees" of the First Amendment. Id. The Court expressly grounded its conclusion on the newsgathering right recognized eight years earlier in Branzburg:

> We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects

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2/ Although the plurality opinion in Branzburg declined to recognize a journalist's privilege, a majority of the Branzburg Justices voted to recognize at least a qualified privilege. See 408 U.S. at 709 (Powell, J., concurring); 408 U.S. at 711 (Douglas, J., dissenting); 408 U.S. at 725 (Stewart, Brennan, and Marshall, JJ., dissenting).

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> of freedom of speech and "of the press could be eviscerated." Branzburg, 408 U.S., at 681, 92 S.Ct. at 2656.

Id. at 580; accord id. at 576-77.

The qualified constitutional protection afforded to newsgathering stems from a recognition of the fundamental constitutional role served by the press. The press, as "watchdog," protects all of our constitutional rights. Without the press, and without adequate safeguards for the efficacy and independence of the press, other facets of our constitutional system would be jeopardized.

This fact is crucial. The qualified journalist's privilege, like the qualified right of access to judicial proceedings, is an aspect of the newsgathering right and therefore essential not only to the newsgathering capability of the press but to the preservation of other precious constitutional rights as well. This Court explained the "interdependence" of the First Amendment newsgathering right and the Sixth Amendment fair trial right in State ex rel. Miami Herald Publishing Co. v. McIntosh, 340 So.2d 904 (Fla. 1976):

> Clearly, the essence of this case is reconciliation and application of Federal and State constitutional rights to achieve both a fair trial and freedom of the press. Those who adopted the Bill of Rights had personally experienced the actions of King George, III, in denying

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> these and other rights. It is reasonable to assume they recognized the interdependence of each provision of the Constitution of the United States upon all other provisions. Without fair trial freedom of the press could not exist, and without freedom of the press fair trials could not be assured. The federal Constitution constitutes a uniform and cohesive umbrella to protect the people against oppression, injustice and tyranny.

Id. at 910.

First Amendment and Sixth Amendment rights may somtimes conflict, as when a criminal defendant seeks to compel a journalist's testimony or to close a pretrial suppression hearing. However, as this Court recognized in McIntosh, neither right automatically "trumps" the other. Both rights are fundamental and the courts must balance them to assure that "justice and fairness prevail" in every case. Id. at 910.

In recognition of the structural importance of the First Amendment and the unique role served by the press in its newsgathering capacity, certain special procedural rights are accorded the press which are not otherwise extended to the general public. This Court expressly recognized that this was the case in McIntosh. In McIntosh, the Court held that the press and public enjoyed a qualified right of access to criminal trials but that the press only was entitled to notice of any proposed closure:

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> Although freedom of the press belongs to all the people those who gather and distribute news have special concerns which entitle them to notice and a hearing before any trial court enjoins or limits publication of court proceedings.

Id. at 910.

The reason for the special procedural right recognized in McIntosh is directly related to the newsgathering function of the press. Everyone has the same right to obtain information, see Pell v. Procunier, 417 U.S. 817 (1974), but not everyone has the time or financial ability to do so. As a result, the public must depend on the press to learn what happens in the courtroom and elsewhere. Thus, although the rights of the press and public are generally coextensive, under certain limited circumstances necessary to safeguard the newsgathering right and to permit the press to fulfill its constitutional task, greater procedural rights may be and have been accorded the press. Id. See also Fla.Stat. § 918.16 (allowing the press but not the general public to attend the testimony of minor witnesses concerning sex offenses in civil or criminal cases).

It is the special constitutional duty of the press to gather information on behalf of, and for dissemination to, the public. Additional procedural protections inure to the benefit of the press as a necessary corollary of this special constitutional duty. The special notice right recognized in McIntosh is one; the qualified journalist's privilege is

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another. Both are procedural rights accorded the press alone in recognition of the unique newsgathering function of the press and the constitutional importance of the newsgathering function.

B. Absolute Exceptions To The Qualified Journalist's Privilege For Particular Subjects Of Testimony Would Be Contrary To The First Amendment

Once the constitutional origins and rationale of the qualified journalist's privilege are understood, it becomes apparent why the exceptions engrafted by the lower courts in Morejon and this case must be rejected.[3/]

The qualified journalist's privilege is an arm of the newsgathering right, like the qualified right of access to judicial proceedings. Like the right of access, the privilege may be overcome in certain circumstances but a compelling showing must be made before either newsgathering

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3/ In many ways, the qualified journalist's privilege is a misnomer. The traditional prerequisites to the establishment of a privilege are premised on the existence of a confidential relationship. See VIII J. Wigmore, Evidence § 2285 (1961). The qualified journalist's privilege is not based on the existence of a confidential relationship, however; it is based on the unique constitutional role of the press and is an aspect of the First Amendment newsgathering right. The distinction is more than semantic. The privilege terminology erroneously creates the unfortunate temptation to limit the applicability of the qualified journalist's privilege to confidential sources.

right gives way. See, e.g., Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-07 (1982). Absolute exceptions to the privilege are no more constitutional than mandatory closure rules. Id. at 608. Closures of judicial proceedings must be considered on a case-by-case basis "for it is clear that the circumstances of the particular case may affect the significance of the interest." Id. The same reasoning applies where a journalist is asked to testify:

> 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. 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) (footnote omitted). The decisions of this Court are in accord. See Huffstetler, 489 So.2d at 723; Morgan, 337 So.2d at 954.

Just as the qualified right of access to judicial proceedings applies to all judicial proceedings, so the qualified journalist's privilege should apply whenever a journalist is on a newsgathering mission. Cf. Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) (holding that the qualified right of access to judicial proceedings does not extend to civil discovery). Where a journalist is an

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incidental witness to an event, he stands in the same shoes as any other member of the public and he must testify. But, where the journalist is acting in his professional capacity, the qualified protection afforded by the newsgathering right should limit his availability to testify.[4/] The subject of the testimony sought is irrelevant. Nonconfidential information collected by a journalist is the product of newsgathering and should be protected by the qualified newsgathering right. Likewise, where a journalist is an eyewitness to an event <u>because</u> he is a journalist on a newsgathering mission, his perceptions are part of his newsgathering activities and the qualified privilege for such activities should apply. Indeed, were the journalist <u>not</u> a journalist engaged in newsgathering activities, the testimony sought to be compelled would not even exist. There is no clearer evidence that such testimony is the product of newsgathering activities unique to the press and deserving of this Court's protection.

4/ As is the case with the assertion of any privilege, it falls to the party asserting the privilege to demonstrate the prerequisites to its availability -- in this case, that the journalist gathered the information sought to be compelled in his journalistic capacity.

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II. THE JOURNALIST'S PRIVILEGE, BECAUSE IT IS QUALIFIED, TAKES INTO ACCOUNT THE FACTORS FOR WHICH THE LOWER COURTS IMPROPERLY CREATED EXCEPTIONS TO THE PRIVILEGE

As explained above, the creation of absolute exceptions to the qualified journalist's privilege is contrary to the constitutional rationale of the newsgathering right. To say that absolute exceptions are improper, however, is not to say that the application of the privilege to confidential and nonconfidential sources and materials must be identical, nor is it to say that eyewitness testimony must be accorded the same degree of protection as other journalistic work product. Because the journalist's privilege is a qualified right, these factors, for which the lower courts manufactured exceptions, may be considered in the case-by-case balancing of interests mandated by the United States Supreme Court in Branzburg and by this Court in Morgan and Huffstetler. Absolute exceptions for nonconfidential information or eyewitness testimony are thus as unnecessary as they are unconstitutional.

Indeed, prior to the lower courts' decisions in this case and Morejon, federal and Florida courts routinely considered the factors for which the lower courts created exceptions as part of the balancing of interests required by the qualified journalist's privilege. For example, in In re Selcraig, 705 F.2d 789 (5th Cir. 1983), the Fifth Circuit

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indicated that it would apply the balancing test adopted in Miller v. Transamerican Press, 621 F.2d 721 (5th Cir.), modified on rehearing, 628 F.2d 932 (5th Cir. 1980), cert. denied, 450 U.S. 1041 (1981), to determine whether a journalist should be required to disclose the identity of certain informants. The Court reasoned that the identity of the informants was itself a fact in issue and that the journalist was a "percipient witness" to that fact. Id. at 798-99. Rather than create an exception for this eyewitness testimony, however, the Court applied the Miller balancing test, considering relevance, need, and the existence of alternative sources before requiring the journalist to testify. Id. A similar analysis was conducted in Application of Consumers Union of United States, Inc., 495 F.Supp. 582, 587 (S.D.N.Y. 1980) (applying qualified journalist's privilege where journalist was an "occurrence" witness). See also CBS, Inc. v. Cobb, 536 So.2d 1067 (Fla. 2d DCA 1988) (applying qualified journalist's privilege where journalist witnessed confession). But see Satz v. News and Sun-Sentinel Co., 484 So.2d 590 (Fla. 4th DCA 1985) (declining to apply qualified journalist's privilege to "physical evidence of crime").

Courts have also taken the confidentiality or nonconfidentiality of information and sources into consideration in applying the qualified journalist's

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privilege.[5/] The compelled production of nonconfidential resource materials, like the compelled production of a confidential source's identity, "can constitute a significant intrusion into the newsgathering and editorial process." United States v. Cuthbertson, 630 F.2d 139, 147 (3d Cir. 1980); accord Continental Cablevision, Inc. v. Storer Broadcasting Co., 583 F.Supp. 427, 434 (E.D. Mo. 1984) ("first amendment interest in protecting the newsgathering process . . . is not absent where discovery of nonconfidential . . . materials is sought"). Accordingly, such materials are afforded the protection of the qualified journalist's privilege. Notwithstanding this fact, "the lack of a confidential source may be an important element" to be weighed in the balancing of interests in any particular case. Cuthbertson, 630 F.2d at 147; Continental Cablevision, 583 F.Supp. at 434 (nonconfidential materials not necessarily "entitled to the same protection" as confidential sources). Thus, the court may require a lesser showing of need where nonconfidential information is sought than where the identity of a confidential source is in issue.

5/ But see United States v. Blanton, 534 F.Supp. 295, 297 (S.D. Fla. 1982) (holding the distinction between confidential and nonconfidential materials "irrelevant"); Loadholtz v. Fields, 389 F.Supp. 1299, 1303 (M.D. Fla. 1975) (same).

The qualified journalist's privilege permits a court to consider all of the facts and circumstances and all of the competing constitutional interests when determining whether a journalist should testify in a particular case. For example, the court may consider whether the case is civil or criminal, or whether the journalist is called to testify in his own case or as a third party. The court may consider whether the testimony sought concerns confidential information from a known source or nonconfidential information from a confidential source. Or, when the journalist is an eyewitness, the court may consider the importance of the event witnessed by the journalist or the interests served by the underlying criminal statute.

The exceptions recognized in Morejon and this case would shortcut this analysis. Were the journalist an eyewitness, he would automatically be required to testify, even if he were one of a hundred witnesses to a comparatively unimportant event. The problem with absolute exceptions to the qualified journalist's privilege is that no two cases are the same: in one instance, a journalist's eyewitness testimony might be crucial; in another, the First Amendment interests of the press and public in permitting the journalist to avoid compulsory testimony could be overwhelming.

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The balancing approach adopted by this Court in Morgan and Huffstetler recognized this fact. Indeed, in Huffstetler, the Court implicitly declined to create an eyewitness exception for this very reason. In Huffstetler, the testimony of a reporter concerning the identity of a confidential source was sought. The source was alleged to have provided the journalist with certain information in violation of a criminal statute prohibiting such disclosure. The journalist, as the recipient of the information, was a witness to the source's crime. The Court held that the qualified journalist's privilege nonetheless applied and reversed the Fifth District's order of contempt:

> Utilizing the balancing test adopted in Morgan, we find that the societal interests underpinning most criminal statutes are not present in the instant statute . . . . When balancing [the violated criminal statute] against [the journalist's] first amendment rights, Morgan mandates that the first amendment prevail. Accordingly, [the journalist's] contempt citation must fall.

Id. at 724. The Court expressly declined to hold that the qualified journalist's privilege did not apply simply because the journalist was an eyewitness to a crime:

> While the grand jury in Morgan was not investigating a criminal matter, we do not find this distinction critical in the instant case.

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Id. at 723 (citation omitted). Justice Overton, who dissented in Morgan, concurred in the opinion of the Court, remarking:

> I dissented in Morgan, but, under the circumstances of this cause, I concur that the reporter's privilege must prevail. This, in my view, is a proper application of Justice Powell's balancing test expressed in Branzburg.

Id. at 725 (Overton, J., concurring).

The Huffstetler decision exemplifies the benefits of the balancing approach. The Court's analysis did not conclude with the fact that the journalist was an eyewitness, it began there. The Court also considered the First Amendment interests of the press and public in protecting the journalist's confidential source and the relatively weak societal interests in the underlying criminal statute. The absolute eyewitness exception -- urged by the Huffstetler dissent,[6/] adopted in Morejon and applied in this case -- would have precluded such an analysis.

6/ 489 So.2d at 725 (Shaw, J., dissenting) (dissenting on the grounds that the qualified journalist's privilege does not apply to eyewitness testimony).

III. THE COURT SHOULD REVERSE THE DECISIONS OF THE LOWER COURTS IN MOREJON AND THIS CASE

In Morejon and this case, the lower courts recognized exceptions to the qualified journalist's privilege where the journalist is an eyewitness and the information sought is nonconfidential. Finding both circumstances present in both cases, the courts declined to apply the balancing test adopted by this Court in Morejon and Huffstetler and ordered the journalists to testify.[7/]

The facts of this case exemplify the danger inherent in the lower courts' approach. The uncontraverted testimony in this case demonstrates that the CBS camera crew did not arrive or begin filming until after the defendant Jackson had been taken into police custody. Thus, although on the scene, CBS was not an eyewitness to the defendant's crime or his arrest. The only "event" witnessed by CBS was the defendant Jackson in policy custody, an event of no demonstrable relevance to Jackson's defense. Indeed, to date, Jackson has not filed a motion to suppress any evidence in this case, much less a motion meriting the testimony of the CBS camera crew.

7/ The trial court below summarily indicated that had it applied the qualified journalist's privilege, it would nonetheless have required CBS to comply with the defendant's subpoena. The statement is dicta. Moreover, there is no indication in the trial court's order that it engaged in a meaningful balancing of the interests involved.

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Notwithstanding these facts, all of which could and should have been considered in the application of the qualified journalist's privilege, the trial court refused to apply the privilege. Instead, the absolute exceptions announced in Morejon effectively dictated the result here, despite the obvious factual differences between the cases.

CONCLUSION

For the foregoing reasons, the decisions of the Third District in Morejon and the Fourth District in this case should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail on Alan H. Schreiber, Esquire, Alan S. Levine, Esquire, Office of the Public Defender, 400 S.E. 6th St., Fort Lauderdale, Florida 33301; Thomas R. Julin, Esquire, Steel Hector & Davis, 4000 Southeast Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131-2398; Douglas P. Jacobs, Esquire, Susanna M. Lowy, Esquire, John W. Zucker, Esquire, CBS, Inc., Legal Department, 51 West 52nd Street, New York, New York 10019 this 30th day of April, 1990.

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