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IN THE SUPREME COURT OF FLORIDA

CASE NO. 90,457

District Court of Appeal,
Second District Case No. 94-04304

STATE OF FLORIDA,
Petitioner,
vs.
MERLAN DAVIS,
Respondent.

AMICUS CURIAE BRIEF OF CAPE PUBLICATIONS INC., D/B/A FLORIDA TODAY; FERNANDINA BEACH NEWS-LEADER, INC.; FLORIDA SOCIETY OF NEWSPAPER EDITORS; GAINESVILLE SUN PUBLISHING COMPANY; JACKSONVILLE TELEVISION, INC., D/B/A WJWB-TV CHANNEL 17; KNIGHT-RIDDER, INC., D/B/A THE MIAMI HERALD; LAKE CITY REPORTER, INC.; LAKELAND LEDGER PUBLISHING CORPORATION; MARCO ISLAND EAGLE; NEWS-PRESS PUBLISHING CO.; OCALA STAR-BANNER CORPORATION; PACIFIC AND SOUTHERN COMPANY, INC., D/B/A WTSP-TV; THE PALATKA DAILY NEWS, INC.; PENSACOLA NEWS-JOURNAL INC.; SARASOTA HERALD-TRIBUNE CO.; SEBRING NEWS-SUN, INC.; SENTINEL COMMUNICATIONS COMPANY; SUN-SENTINEL COMPANY; TAMPA TELEVISION, INC., D/B/A WFLA-TV CHANNEL 8; TELEVISION 12 OF JACKSONVILLE, INC., D/B/A WTLV-TV; TRIBUNE COMPANY, D/B/A THE TAMPA TRIBUNE; AND WFTV, INC., D/B/A WFTV AND THE PALM BEACH POST.

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STATEMENT OF INTEREST OF AMICI

Amici[1] include most of Florida's major daily newspapers and a number of Florida's television stations. As members of the news media, Amici regularly receive invasive subpoenas that disrupt their newsgathering efforts.[2] Until recently, a qualified First Amendment privilege had, for decades, protected Amici from subpoenas seeking newsgathering work product if the interests of parties seeking such material were outweighed by the media's First Amendment interests.

The district court of appeal's decision in this case eliminates this qualified privilege in all but a very few cases. Indeed, if the appellate decision below is correct, "there is a question whether any newsgathering activity remains protected by the First Amendment." Kidwell v. McCutcheon, 25 Med. L. Rptr. 1219, 1220 (S.D. Fla. Oct. 30, 1996).[3]

Amici seek reaffirmation of this qualified First Amendment privilege, because subpoenas have become a major burden for the news media, and because courts of late simply

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[1] Cape Publications Inc., d/b/a FLORIDA TODAY; Fernandina Beach News-Leader, Inc.; Florida Society of Newspaper Editors; Gainesville Sun Publishing Company; Jacksonville Television, Inc., d/b/a WJWB-TV Channel 17; Knight-Ridder, Inc., d/b/a The Miami Herald; Lake City Reporter, Inc.; Lakeland Ledger Publishing Corporation; Marco Island Eagle; News-Press Publishing Co.; Ocala Star-Banner Corporation; Pacific and Southern Company, Inc., d/b/a WTSP-TV; The Palatka Daily News, Inc.; Pensacola News-Journal Inc.; Sarasota Herald-Tribune Co.; Sebring News-Sun, Inc.; Sentinel Communications Company; Sun-Sentinel Company; Tampa Television, Inc., d/b/a WFLA-TV Channel 8; Television 12 of Jacksonville, Inc., d/b/a WTLV-TV; Tribune Company, d/b/a The Tampa Tribune; and WFTV, Inc., d/b/a WFTV and The Palm Beach Post.

[2] A representative sample of subpoenas that certain Amici received in 1996 appear in the accompanying appendix as Composite Exhibit A. Also included in Exhibit A are 1996 subpoenas targeting the News Journal Corporation, which is filing a separate amicus brief in this case.

[3] A copy of this decision appears in the accompanying appendix as Exhibit B.

have failed to accord the press adequate protection against compelled production of their work product. Reporters are the only professionals whose jobs require them to involve themselves as non-parties in matters that are likely to end up in litigation, while simultaneously needing to remain disinterested in those very matters. Events that are the subject of news coverage often are the subject of litigation as well. (Indeed, that fact is often what makes events newsworthy.) From the routine car wreck to the most far-reaching investigation of governmental and judicial corruption, the subject matter of the daily news is, by definition, the stuff of lawsuits, criminal prosecutions, investigations and public hearings. Journalists often are first on the scene of events that will lead to litigation, and therefore are first to learn the facts from those with direct knowledge. Other times, the news media have only second-hand information or rumors, which reporters alone cannot substantiate, but perhaps the government and litigants, with subpoena powers, could. Finally, the news media are occasionally subject to abuses by lawyers who are unconcerned with journalistic objectivity and who subpoena journalists as a matter of convenience (rather than first conducting their own investigations). Newsrooms, therefore, are obvious and frequent targets of subpoenas.

Regardless of the motives of those seeking testimony from journalists, the public perception of media independence is compromised when reporters are converted into agents of litigants by their cooperation in an investigation, or by their submission to the State's subpoena power. "When a reporter appears on the witness stand ... he runs the risk of being perceived as a partisan for whichever side benefits from his testimony." Johnson v. Miami, 6 Med. L. Rptr. 2110, 2111 (SD. Fla. 1980).[4] Even when sources do not require

[4] A copy of this decision appears in the accompanying appendix as Exhibit C.

confidentiality, they reasonably expect reporters to be independent. Subpoenas force reporters to breach this expectation and to testify against their sources. See, e.g., Kidwell v. State, 22 Fla. L. Weekly D1416 (Fla. 4th DCA June 11, 1997) (ordering reporter jailed for 70 days for refusing to testify against defendant-source).[5] Reporters' credibility, therefore, suffers when they are compelled to serve as litigants' freelance investigators. See id. at D1420 (Klein, J., concurring specially) (noting "the disadvantage of a journalist appearing to be 'an investigative arm of the judicial system' or a research tool of government or of a private party") (quoting United States v. LaRouche Campaign, 841 F.2d 1176, 1182 (1st Cir. 1988)). Moreover, as a practical matter, trial subpoenas interfere with newsgathering by leading to the sequestration of reporters. When journalists, who would otherwise be free to cover trials, are made witnesses, they are barred from those trials except when testifying. A qualified privilege limits such injuries to First Amendment interests and -- as the district court of appeal correctly noted in this case -- "protects the integrity of the newsgathering process." State v. Davis, 692 So. 2d 924, 926 (Fla. 2d DCA 1997).

For these reasons, Amici have a substantial interest in this litigation and the fate of the reporter's privilege in Florida. The outcome of this case will necessarily affect Amici's rights to be free from the abuse of their work product by those with subpoena power. Amici, therefore, seek to present to the Court arguments in support of the limited reporter's privilege rejected by the court below.

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[5] Copies of the Fourth District Court of Appeal's opinions in Kidwell v. State appear in the accompanying appendix as Exhibit D.

SUMMARY OF ARGUMENT

The district court of appeal misapplied this Court's decisions in Miami Herald Publishing Co. v. Morejon, 561 So. 2d 577 (Fla. 1990), and in CBS, Inc. v. Jackson, 578 So. 2d 698 (Fla. 1991). In Jackson and Morejon, this Court determined that journalists who are eyewitnesses to a crime or other event relevant to a criminal case are not privileged to refuse to testify concerning what they have seen. Jackson, 578 So. 2d at 700; Morejon, 561 So, 2d at 580. Neither decision advanced the broad proposition espoused by the district court of appeal in this case -- i.e., that in a criminal proceeding a reporter has no privilege "unless based upon the potential implication of a confidential source." State v. Davis, 692 So. 2d at 927. Yet the district court of appeal grounded its decision with citations to Morejon and Jackson. This misreading of Morejon and Jackson conflicts with settled law (which was not altered by Jackson and Moreion), with case law from other states (including decisions this court relied upon in Morejon), and with case law interpreting the Morejon decision. The decision below also is inconsistent with Branzburg v. Haves, 408 U.S. 665 (1972), which limits attempts to compel reporters to testify. Finally, the decision below conflicts with this Court's recent opinion in In re Graziano, 22 Fla. L. Weekly S304 (Fla. May 30, 1997), in which this Court approved an order quashing a witness subpoena of a newspaper reporter.

The district court of appeal's departure from Morejon and Jackson is significant for a number of reasons. The decision below (if upheld) will force journalists to become frequent witnesses, will encourage invasive probing of constitutionally protected activity, and will hamper journalists' efforts to provide detached, impartial accounts of the judicial and criminal processes. To prevent these significant injuries to First Amendment interests, this Court

should reaffirm Morejon and Jackson; should recognize that the First Amendment provides qualified' protection for reporters' non-confidential, non-eyewitness information; and should answer the certified question in the affirmative.

ARGUMENT

I. The district court of appeal's decision conflicts with this Court's Morejon and Jackson decisions,

Morejon and Jackson allow discovery of newsgathering material in limited circumstances. When a reporter sees or records on videotape a crime, an arrest, or a similar event relevant to a criminal case, Morejon and Jackson hold that no privilege applies to what was seen or videotaped. This was essentially the United States Supreme Court's holding in Branzburg v. Haves, 408 U.S. 665 (1972), which likewise concerned demands for testimony by reporters who were eyewitnesses to crimes and other events relevant to criminal cases.

The district court in this case went well beyond Morejon, Jackson and Branzburg. The court below found that the "diacritical notion flowing from" Jackson and Morejon is confidentiality. Davis, 692 So. 2d at 927. According to the district court, only a reporter's promise of confidentiality gives rise to a privilege. Absent such a promise, any attorney is

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[6] Amici do not seek an absolute privilege. The First Amendment requires only a qualified privilege, as this Court and the district courts of appeal previously have recognized. See, e.g., Tribune Co. v. Huffstetler, 489 So. 2d 722, 722 (Fla. 1986) (applying "limited and qualified" privilege); Morgan v. State, 337 So. 2d 951, 955 (Fla. 1976) (weighing interests asserted in support of discovery against First Amendment interests); Tribune Co. v. Green, 440 So. 2d 484, 485-86 (Fla. 2d DCA 1983) (privilege inapplicable if party seeking information shows relevance, compelling need, and lack of alternative sources), review denied, 447 So. 2d 886 (Fla. 1984); Gadsden County Times, Inc. v. Horne, 426 So. 2d 1234, 1241 (Fla. 1 st DCA) (same), review denied, 441 So. 2d 631 (1983).

free to force any journalist to answer any questions, to surrender any documents, and to produce any notes -- even if, as was conceded in this case, an alternative source could provide the same information. Id. at 926 n.3. This broad rejection of First Amendment protections is inconsistent with Jackson, Morejon and Branzburg and must be reversed.

The basis for this Court's Morejon and Jackson decisions was the United States Supreme Court's Branzburg opinion and its companion cases, In re Pappas and United States v. Caldwell. The facts of these cases conclusively demonstrate the over-reaching of the district court of appeal in this case. Branzburg involved the activities of a staff reporter for the Courier-Journal, a daily newspaper in Louisville, Kentucky. The reporter, Paul Branzburg, observed two individuals synthesizing hashish from marijuana and later watched more than a dozen drug users smoking marijuana. 408 U.S. at 669. Branzburg refused to describe to a grand jury what he had seen. Branzburg's companion cases involved reporters who had gained access to information about the Black Panther Party. In these cases, reporters refused to testify before grand juries concerning what they had personally observed and heard. The government contended the reporters' observations related to the incitement of riots and a possible conspiracy to assassinate the President. Id. at 665.

When the Branzburp cases reached the United States Supreme Court, the media advocated a broad First Amendment privilege that would apply to eyewitness accounts of crimes. The Court declined to recognize such a privilege. A plurality of four justices observed:

> [W]e cannot seriously entertain the notion that the First Amendment protects the newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory

> that it is better to write about crime than to do something about it. Insofar as any reporter in these cases undertook not to reveal or testify about the crime he witnessed, his claim of privilege presents no substantial question. The crimes of news sources are no less reprehensible and threatening to the public interest when witnessed by a reporter than when they are not.

Id. at 691 (emphasis added).

The Branzburg plurality, therefore, declined to recognize a privilege when a reporter was an eyewitness to a crime. The Court, however, did not reject the reporter's privilege entirely. In Justice Powell's concurrence -- the pivotal decision that created the Branzburg majority -- he wrote:

> I add this brief statement to emphasize what seems to me to be the limited nature of the Court's holding. The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources.... [A reporter's] 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 ways of adjudicating such questions.

Id. at 708. This pivotal opinion by Justice Powell, considered alongside the four dissenters' opinions that also recognized a reporter's privilege,[7] makes clear that Branzburg was not a wholesale rejection of all notions of privilege. Rather, the sum of the opinions of Justices

[7] Branzburg, 408 U.S. at 732-33 ("an unbridled subpoena power will substantially impair the flow of news to the public") (Stewart, Brennan, and Marshall, JJ., dissenting); id. at 712 (advocating absolute First Amendment privilege for newsgathering) (Douglas, J., dissenting).

Powell, Stewart, Brennan, Marshall and Douglas is that a journalist's claim of privilege requires a case-by-case balancing of societal and constitutional interests.

This Court has recognized and applied Branzburg's analysis of the reporter's privilege. Under Branzburg, this Court has explained, litigants are entitled to compel reporters to testify concerning "personal observation" of "criminal activity." Morgan v. State, 337 So. 2d 951, 953 (Fla. 1976) (interpreting Branzburp, 408 U.S. at 701). When a reporter is not an eyewitness, however, Branzburg requires -- according to this Court -- that an assertion of the reporter's 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." Morgan, 337 So, 2d at 954 (quoting and then applying Justice Powell's concurrence); see also Tribune Co. v. Huffstetler, 489 So. 2d 722, 723 (Fla. 1986) ("In Morgan this Court embraced Justice Powell's assertion that the application of the reporter's privilege in a given case involves striking a proper balance between constitutional and societal interests").

This Court's Morejon decision solidified the Branzburg/Morgan distinction between non-privileged eyewitness testimony and situations that require the case-by-case balancing that Justice Powell enunciated, In Morejon, 561 So. 2d at 577, a Miami Herald reporter accompanied three police officers on their beat at the Miami airport. The reporter saw the officers search and arrest Morejon and seize four kilos of cocaine hidden in his luggage. Id. at 578. The reporter also looked on as police advised Morejon of his constitutional rights.

Subsequently, the issue of whether Morejon understood his Miranda' rights became central to the criminal case, and Morejon served the reporter with a deposition subpoena. Id. A circuit court upheld the subpoena, finding that no privilege existed with respect to the reporter's eyewitness observations of whether Morejon consented to the search. Id.

The Third District Court of Appeal denied certiorari review of the trial court's decision but certified the question of the applicability of the privilege as a matter of great public importance. After reviewing the interests involved, this Court held that a journalist has no qualified privilege "to refuse to divulge information learned as a result of being an eyewitness to a relevant event in a criminal case." Id. at 578. The relevant event, this Court indicated, was Morejon's arrest, which the reporter witnessed while accompanying police on patrol. Id.

Like Morejon, this Court's decision in CBS, Inc. v. Jackson, 578 So. 2d at 698, involved journalists who were eyewitnesses to an arrest while working with police. In Jackson a CBS news team observed -- and also videotaped -- the arrest of a criminal defendant, who was thereafter charged with cocaine possession. CBS moved to quash a subpoena duces tecum from the defendant, who sought the network's non-broadcast video recording of his arrest. Id. at 699. The circuit court denied the network's motion, finding that the reporter's privilege did not apply. The Second District denied certiorari but -- like the Third District Court of Appeal in Morejon -- certified to this Court the question of the privilege's application as one of great public importance.

[8] Miranda v. Arizona, 384 U.S. 436 (1966).

This Court noted its prior ruling in Morejon and again affirmed the existence and vitality of the reporter's privilege. Id. at 699-700 ("The asserted claim to privilege should be judged on its facts by the striking of a proper balance") (quoting Powell's concurring opinion in Branzburg). It then concluded, however, that a television journalist has no qualified privilege "to refuse to produce non-televised videotapes depicting the defendant in the custody of the police when the defendant requests the tapes in order to assist in the preparation of his defense." Jackson, 578 So. 2d at 699.[9]

The Morejon and Jackson decisions thus identify a particular situation in which no reporter's privilege exists: If a journalist (particularly one observing police) sees or records an event that is central a subsequent criminal proceeding, the reporter's privilege does not apply to the reporter's "eyewitness" information. These holdings do not give a litigant license, however, to obtain any non-confidential information a journalist might possess. Under the Morejon and Jackson holdings, "the facts of the case, not the label as confidential or nonconfidential," determine whether a privilege exists. Kidwell v. McCutcheon, 25 Med. L. Rptr. at 1221 (citing Branzburg). Quite simply, nothing in Morejon or Jackson requires a

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[9] In reaching this result, this Court in a footnote disapproved of two decisions in which the Second District Court of Appeal protected video or photographic reproductions of eyewitness information. See id. at 700 n.2 (citing CBS, Inc. v. Cobb, 536 So. 2d 1067 (Fla. 2d DCA 19SS) (videotaped interview with criminal defendant) and Johnson v. Bentley, 457 So. 2d 507 (Fla. 2d DCA 1984) (photographs of automobile accident)). Importantly, this Court did not disapprove of or overrule the Second District's decision in Tribune Co. v. Green, 440 So. 2d 484 (Fla. 2d DCA 1983), review denied, 447 So. 2d 886 (Fla. 1984). The Green decision -- based in part upon this Court's decision in Morgan v. State, 337 So. 2d 951 (Fla. 1976) -- applied a qualified privilege and found that a reporter was not required to testify concerning non-confidential matters and sources. Green, 440 So. 2d at 486. Significantly, this Court in Morejon and Jackson left the Green decision undisturbed. Green, therefore, remains good law. See also Tribune Co. v. Huffstetler, 489 So. 2d 722, 723 (Fla. 1986) (citing Green with approval).

reporter to answer questions about interviews (like the interview at issue in this case) and other non-eyewitness, newsgathering activities far removed in time and place from events at issue in a criminal case. Indeed, this Court barely one month ago recognized that Florida's reporter's privilege continues to protect such information. In In re Graziano, 22 Fla. L. Weekly S304 (Fla. May 30, 1997), this Court found that the Judicial Qualifications Commission acted within its discretion in quashing altogether a subpoena seeking confidential and non-confidential information from a newspaper reporter. Id. at S307.[10] This decision was consistent with Morejon, Jackson, and the principle established by the United States Supreme Court in Branzburg more than twenty years ago: When a reporter is an eyewitness to events at issue in a criminal case, the First Amendment must yield. Otherwise, as this Court impliedly recognized by its limited holdings in Morejon and Jackson and in Graziano, the reporter's privilege applies.

II. The district court of appeal's decision conflicts with case law from other states, including cases relied upon by this Court in Morejon.

The narrow scope of the Morejon decision is apparent from the case law of other states, which this Court expressly relied upon in its Morejon opinion. See Morejon, 561 So. 2d at 581-82. By relying upon these decisions, this Court limited the Morejon eyewitness rule to cases in which reporters personally "observed" or "saw" criminal activity. For example, the first case that this Court cited in Morejon as an example of "eyewitness observations" is In re Ziegler, 550 F. Supp. 530 (W.D.N.Y. 1982). In that case, a newspaper reporter was an

[10] Copies of two subpoenas issued in the Graziano case appear as the first two items in Composite Exhibit A,

eyewitness to an altercation involving two organized crime figures. Id. at 531. The Ziegler court held that the reporter could be compelled to testify notwithstanding his privilege claims, because he was an "eyewitness to a crime." Id. Likewise, in Rosato v. Superior Court, 51 Cal. App. 3d 190, 218, 124 Cal. Rptr. 427, 446 (5th Dist. 1975), cert. denied, 927 U.S. 912 (1976), also cited by this Court, a California appellate court rejected the proposition that the reporter's privilege "shields newspersons from testifying about criminal activity in which they have participated or which they have observed." Similarly, in Lightman v. State, 294 A.2d 149 (Md. Ct. App.), aff'd, 295 A.2d 212 (1972), cert. denied, 411 U.S. 951 (1973), a Maryland court required a reporter to testify concerning "his own personal observations" of criminal activity. 294 A.2d at 157. By relying upon these and other decisions concerning journalists' eyewitness observations of criminal activity, this Court in Morejon clearly did not issue the broad holding advanced by the district court of appeal in this case.

In other words, this Court used the word "eyewitness" for a reason -- to restrict Morejon (like Branzburp) to circumstances in which a reporter actually saw or observed criminal events. This limited holding is consistent with the law of other states. In New York and California -- two states whose law this Court relied upon in Morejon -- and in a number of other jurisdictions, reporters are subject to subpoena concerning eyewitness observations of criminal activity, but reporters need not testify concerning other, non-confidential information.[11] These states, therefore, have expressly rejected the view of the district court

[11] New **York:** Compare O'Neill v. Oakgrove Constr., Inc., 523 N.E.2d 277, 278 (N.Y. 1988) (First Amendment creates qualified privilege for non-confidential information) with Ziegler, 550 F. Supp. at 531 (reporter who was "eyewitness to a crime" could be compelled to testify) (cited in Morejon, 561 **So.** 2d at 581). **California:** Compare Delanev v. Superior

(continued., .)

of appeal in this case. Contrary to the decision under review, confidentiality is not the "diacritical notion" that determines the existence of a qualified privilege. 692 So. 2d at 927.

Courts applying Morejon also have recognized the narrow scope of the term "eyewitness," In Walker v. United Steel Works, Inc., 19 Med. L. Rptr. 1191 (Fla. 13th Cir. Ct. Feb. 21, 1991),[12] a Florida circuit court found the reporter's privilege applicable because the reporters under subpoena had not witnessed the "critical" event at issue. Id. at 1192. As the Walker court explained, "an eyewitness is generally defined as a person who views the actual event that is the subject of the proceeding -- as distinguished from a mere witness with

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"(...continued)

Court, 789 P.2d 934, 941 (Cal. 1990) (privilege applies to non-confidential information) with Rosato, 51 Cal. App. 3d at 218, 124 Cal. Rptr. at 446 (journalists must testify about criminal activity they observe) (cited in Morejon, 561 So. 2d at 581).

See also, e.g., **Colorado:** Jones v. Woodward, 15 Med. L. Rptr. 2060, 2061 (Colo. Dist. Ct. 1988) (First Amendment provides qualified privilege protecting reporters from forced disclosure of information, regardless of whether source was confidential); Pankratz v. District Court, 609 P.2d 1101, 1103 (Colo. 1980) (requiring reporter who was "first-hand observer of criminal conduct" to testify). **Iowa:** Bell v. City of Des Moines, 412 N.W. 2d 585, 587 (Iowa 1987) (qualified privilege applies to non-confidential information reporter obtains in course of newsgathering, but reporter may not raise privilege "to avoid testifying, as any other citizen, to observations made as an eyewitness"). **Louisiana:** In re Grand Jurv Proceedings, 520 So. 2d 372, 376 (La. 1988) (First Amendment requires that qualified privilege applies "unless reporter has witnessed criminal activity or has physical evidence of a crime"); New **Jersey:** In re Woodhaven Lumber & Mill Work, 589 A.2d 135, 136, 141 (N.J. 1991) (though privilege generally applies "regardless of whether the information sought is confidential," reporter who is eyewitness to property damage or physical violence may not assert privilege). **Oregon:** State v. Pelham, 901 P.2d 972, 976 (Or. Ct. App. 1995) (though privilege generally applies to non-confidential information, including journalists' "work product," cameraman's "personal observations . . . of events that took place in public" not protected), review denied, 916 P.2d 312 (Or. 1996). **West Virginia:** State ex rel. Hudok v. Henrv, 389 S.E.2d 188, 192-93 (W. Va. 1989) ("general rule is that a qualified First Amendment privilege" protects newsgathering material "whether confidential, published, or not published," but privilege may not apply if reporter's "personal knowledge" or observations are sought).

[12] A copy of this decision appears in the accompanying appendix as Exhibit E.

knowledge of some aspect of the proceeding." Id. A reporter, therefore, is subject to subpoena under Morejon only if he or she personally observes a relevant event. Id. Other judicial interpretations of Morejon reach the same conclusion, See In re Woodhaven Lumber & Mill Work, 589 A.2d 135, 138 (N.J. 1991) (citing Morejon for proposition that "an eyewitness exception to press privileges involve[s] newspersons who witnessed human participation in a crime or accident."); Kidwell v. State, 22 Fla, L. Weekly at D1420 (Fla. 4th DCA June 11, 1997) (Klein, J., concurring specially) (Morejon decision "was carefully worded so that it would not be construed more broadly" than to apply to actual eyewitness situation); State v. Abreu, 38 Fla. Supp. 2d 67 (1 lth Cir. Ct. 1989) (Rothenberg, J.) (Third District's Morejon decision "should be limited to its facts" and should not apply if reporter was not eyewitness to arrest or criminal act). Because Morejon concerned the narrow "eyewitness" issue, this Court simply did not reach the distinct question of "whether the qualified privilege extends to nonconfidential second-hand information obtained by a journalist in newsgathering activities." Kidwell v. McCutcheon, 25 Med. L. Rptr. at 1220 (footnote omitted) (Ferguson, J.).[13] The appellate decision in this case, therefore, which reads into Morejon and Jackson a rejection of the privilege as applied to nonconfidential information, is simply wrong.

[13] Judge Ferguson is particularly qualified to interpret Morejon, because before his appointment to the federal bench he was a member of the district court of appeal's panel this Court affirmed in Morejon. See Kidwell v. McCutcheon, 25 Med. L. Rptr. at 1220 n.2.

III. The district court of appeal's decision conflicts with the First Amendment.

This Court's distinction in Morejon between eyewitness activity and general newsgathering is constitutionally significant. "In this federal circuit the law is clear that even where no confidential source is involved," a reporter need not testify regarding newsgathering activity unless the subpoenaing party proves a lack of alternative sources for, a compelling need for, and the relevance of the information sought. Kidwell v. McCutcheon, 25 Med. L. Rptr. at 1221.[14] "That no confidential source or information is involved is irrelevant to the chilling effect enforcement of a subpoena would have on information obtained by a journalist in his professional capacity." Id. (citing United States v. Blanton, 534 F. Supp. 295, 297 (S.D. Fla. 1982), conviction aff' d on other grounds, 730 F.2d 1425 (1 lth Cir. 1984)).

> The First Amendment to the Constitution of the United States requires that a reporter be immune from subpoenas in criminal cases regarding his or her work product unless the party seeking the reporter's testimony first makes a showing of sufficient interest and need to overcome the reporter's constitutional privilege, and then only under appropriate safeguards to prevent abuse by those having court process available to them.

Id. (quoting Blanton). To afford these safeguards, courts must weigh the First Amendment interest of subpoenaed journalists on a "case-by-case basis." Morejon, 561 So. 2d at 579 (quoting Powell's concurring opinion in Branzburg, 408 U.S. at 710). As Justice Barkett of this Court noted in her concurrence in Jackson and Morejon: When a reporter acts in his professional capacity on a newsgathering assignment, First Amendment interests are

[14] In this case, the district court of appeal conceded that the Defendant could not meet this standard, because an alternative source could provide the same information sought from the reporter. Davis, 692 So. 2d at 926 n.3.

implicated. 578 So. 2d 701; 561 So. 2d at 582. Consequently, when newsgathering information is sought, "a qualified privilege must be found or rejected only after balancing all of the interests." Jackson, 578 So. 2d at 701 (Barkett, J., concurring in part and dissenting in part). [15]

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[15] Recognition of a qualified reporter's privilege protecting nonconfidential information would be consistent with a number of state decisions applying the First Amendment. See, e.g., **Alabama:** Norandal USA Inc. v. Local Union No. 7468, 13 Med. L. Rptr. 2167, 2168 (Ala. Cir. Ct. 1989) (although Shield Law protection is limited to confidential sources, qualified privilege under First Amendment protects unpublished information). **Colorado:** Jones v. Woodward, 15 Med. L. Rptr. 2060, 2061 (Colo. Dist. Ct. 1988) (First Amendment provides qualified privilege protecting reporters from forced disclosure of information, regardless of whether source was confidential). **Delaware:** McBride v. State, 477 A.2d 174, 179 (Del. 1984) (reporter's privilege recognized under the First Amendment protects non-confidential information). **Louisiana:** In re Grand Jury Proceedings, 520 So. 2d 372, 375 (La. 1988) (qualified privilege protecting nonconfidential information recognized under First Amendment). New **York:** O'Neill v. Oakgrove Constr.. Inc., 523 N.E.2d 277, 278 (N.Y. 1988) (First Amendment creates qualified privilege protecting non-confidential information). **North Carolina:** North Carolina v. Wallace, 23 Med. L. Rptr. 1473, 1474-75 (N.C. Super. Ct. 1995) (First Amendment provides protection to reporter regardless of whether information sought is confidential). **Ohio:** Fawlev v. Quirk, 11 Med. L. Rptr. 2336, 2337 (Ohio Ct. App. 1985) (qualified privilege protecting nonconfidential sources recognized under state and federal constitutions). **Pennsylvania:** McMenamin v. Tartaglione, 590 A.2d 802, 811 (Pa. Comw. Ct. 1991) (First Amendment provides qualified privilege protecting reporters from forced disclosure of information, regardless of whether source was confidential). **West Virginia:** State ex rel. Hudok v. Henrv, 389 S.E.2d 188, 192-93 (W. Va 1989) ("qualified First Amendment privilege" protects newsgathering material "whether confidential, published or not published").

Other states protect non-confidential information statutorily under State Shield Laws, See, e.g., **District of Columbia:** Free Flow of Information Act of 1992, D.C. **CODE ANN.** §§ 16-4701 to 16-4707 (1996) (protecting identity of source whether or not promised confidentiality). **Illinois:** Reporter's Privilege Act, 735 **ILL. COMP. STAT.** §§ 5/8-901-909 (West 1992) (protecting confidential and nonconfidential sources). **Indiana:** IND. **CODE ANN.** §§ 34-3-5-1 (Michie 1992) (protecting sources identity whether published or unpublished). **Nebraska:** **NEB.** REV. **STAT.** §§ 20-144 to 20-147 (1992) (protecting published and unpublished sources and information). **Nevada:** **NEV. REV. STATE ANN.** §§ 49.275, 49.385 (Michie 1986) (protecting published and unpublished information). **Oklahoma:** Okla. Stat. Arm. tit. 12, § 2506 (West 1996) (protecting published and unpublished sources and unpublished information). **Tennessee:** Austin v. Memphis Pub. Co., (continued.. .)

In this case, however, the Second District Court of Appeal -- like the Fourth District in Gold Coast Publications v, State, 669 So. 2d 3 16 (Fla. 4th DCA), review denied, 682 So. 2d 1099 (Fla. 1996), and in Kidwell v. State, 22 Fla. L. Weekly D1416 (Fla. 4th DCA June 11, 1997) -- went well beyond the holdings of Morejon and Jackson and rejected any case-by-case approach (absent confidentiality). Specifically, the appellate court below ordered that a newspaper reporter could be compelled to testify concerning statements in an interview with a victim/witness. By reaching this result, the district court of appeal abandoned its prior decisions in Green and Waterman Broadcasting of Fla., Inc. v. Reese, 523 So. 2d 1161 (Fla. 2d DCA 1988), which applied a qualified privilege to non-eyewitness, non-confidential information -- i.e., to interviews.[16] The district court of appeal's decision also ignores Jackson and Morejon concurring opinions, in which Justices Barkett and McDonald recognized a qualified First Amendment privilege. 578 So. 2d at 701; 561 So. 2d at 582. Finally, the district court of appeal disregarded federal case law from Florida recognizing a qualified reporter's privilege based upon the First Amendment. See, e.g., United States v. Caporale, 806 F.2d 1487, 1502-1504 (11th Cir. 1986), cert. denied, 482 U.S. 917 (1987); In re Subpoena Duces Tecum, 191 B.R. 476, 480 (S.D. Fla. 1995); Hatch v. Marsh, 134 F.R.D. 300 (M.D. Fla. 1990); United States v. Paez, 13 Med. L. Rptr. 1973 (S.D. Fla. Feb. 2,

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[15](...continued)
655 S.W.2d 146 (Tenn. 1983) (interpreting state shield law as protecting non-confidential information).

[16] In Green, the qualified privilege barred the subpoena. 440 So. 2d at 486-87. In Waterman, the subpoenaing party met its burden of proof and defeated the qualified privilege. **523 So. 2d** at 1162.

1987);[17] United States v. Meros, 11 Med. L. Rptr. 2496 (M.D. Fla. Aug. 23, 1985); United States v. Waldron, 11 Med. L. Rptr. 2461 (S.D. Fla. July 26, 1985); United States v. Harris, 11 Med. L. Rptr. 1399 (S.D. Fla. Jan. 21, 1985); United States v. Horne, 11 Med. L. Rptr. 1312 (N.D. Fla. Jan. 3, 1985); Blanton, 534 F. Supp. at 295; Johnson v. Miami, 6 Med. L. Rptr. 2110 (S.D. Fla. 1980); Loadholtz v. Fields, 389 F. Supp. 1299 (M.D. Fla. 1979).[18]

"Surely, if the supreme court in Morejon had intended its decision to apply to [non-eyewitness

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[17] Copies of the Media Law Reporter decisions cited in this sentence appear in the accompanying appendix as Exhibit C and Composite Exhibit F.

[18] The United States Courts of Appeals for the First, Second, Third, Fourth, Fifth, Eighth, Ninth, Tenth and District of Columbia Circuits also have recognized a journalists' privilege based upon the First Amendment. See, e.g., United States v. LaRouche Campaign, 841 F.2d 1176 (1 st Cir. 1988); United States v. Burke, 700 F.2d 70 (2d Cir.), cert. denied, 464 U.S. 816 (1983); United States v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980), cert. denied, 449 U.S. 1126 (1981); LaRouche v. National Broadcasting Co., 780 F.2d 1134 (4th Cir.), cert. denied, 479 U.S. 818 (1986); Miller v. Transamerican Press, 621 F.2d 721 (5th Cir. 1980), cert. denied, 450 U.S. 1041 (1981); Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1972), cert. denied, 409 U.S. 1125 (1973); Farr v. Pitchess, 522 F.2d 464 (9th Cir. 1975), cert. denied, 427 U.S. 912 (1976); Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977); Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981). The First, Second, Third, and Ninth Circuits have found this qualified privilege applies to non-confidential information. See LaRouche Campaign, 841 F.2d at 1181-82 (listing news media's "legitimate concerns" that arise even if discovery request does not seek confidential source or information); von Bulow by Auersperg v. von Bulow, 811 F.2d 136, 142 (2d Cir.) (privilege applies to resource material and to non-confidential sources), cert. denied, 481 U.S. 1015 (1987); Cuthbertson, 630 F.2d at 147 (qualified privilege applicable despite lack of confidential source); Shoen v. Shoen, 5 F.3d 1289, 1295 (9th Cir. 1993) (same). Only one federal circuit -- the Sixth -- has refused to recognize a First Amendment-based privilege for non-confidential sources. However, as Judge Klein of the Fourth District Court of Appeal noted in Kidwell v. State, 22 Fla. L. Weekly at D1419, the Sixth Circuit view is based upon a reading of Branzburg that this Court twice has squarely rejected. Compare In re Grand Jury Proceedings, 810 F.2d 580, 584-86 (6th Cir. 1987) (merging Powell's separate concurring opinion with plurality decision that declined to recognize privilege) with Morgan, 337 So. 2d at 954 (noting that in Branzburg five justices, including dissenters and Powell, agreed "that a reportorial privilege should be recognized in some circumstances"); Huffstetler, 489 So. 2d at 723 (citing and following Powell's Branzburg concurrence in decision finding First Amendment privilege).

Situations], it would have addressed Blanton and Loadholtz" and these other federal cases recognizing a privilege in Florida in such situations. Kidwell v. State, 22 Fla. L. Weekly at D 1420 (Klein, J., concurring specially). [19]

Given the constitutional interests at stake, this Court should not condone the district court of appeal's broad rejection of constitutional principles and precedent. To define eyewitness as broadly as did the district court of appeal in this case "would obliterate the privilege altogether," by sweeping within the Moreion holding every reporter who talks to anyone about any matter that relates to a criminal prosecution. Walker, 19 Med. L. Rptr. at 1192; see also Kidwell v. McCutcheon, 25 Med. L. Rptr. at 1220-21 (if journalist's non-confidential interview is not qualifiedly privileged as work product, "there is a question whether any newsgathering activity remains protected by the First Amendment."). If the view below prevails, any interview with a criminal defendant or witness would invite subpoena, on the grounds that the reporter was an "eyewitness" to the interview." This is a truly chilling proposition, which if adopted would immediately and inevitably curtail such interviews, Cf.

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[19] Because First Amendment interests support the existence of a privilege even when a confidential source is not present, the absence of a confidential source does not vitiate the privilege altogether. Rather, according to three federal circuits, a lack of confidentiality should at most constitute "a factor that diminishes" a journalist's interest in resisting a subpoena. Shoen, 5 F.3d at 1295; see also LaRouche Campaign, 841 F.2d at 1181 (First Amendment interests are "more elusive" but nevertheless are present when confidentiality is lacking); Cuthbertson, 630 F.2d at 147 (lack of confidential source may be important element in balancing subpoenaing party's need for information against journalist's interest in preventing production).

[20] Indeed, it might be malpractice or ineffective assistance of counsel for a defense attorney to fail to subpoena any reporter who wrote about a criminal case. If the decision under appeal is upheld, therefore, this case might be only the first of many in which convictions are challenged because defense counsel did not depose every journalist who might have had information about the case.

Kidwell v. State, 22 Fla. L. Weekly at D1420 (Fla. 4th DCA June 11, 1997) (Klein, J., concurring specially) (citing with approval federal circuit decision noting dangers of "administrative and judicial intrusion" into newsgathering and editorial process and of converting press in public's mind into "an investigative arm of the judicial system").

A distinction between eyewitness activity and general newsgathering, therefore, is appropriate. The interests at stake for a journalist are considerably greater -- and a litigant's interests are considerably lesser -- when the reporter was not an eyewitness to anything. "There is a significant distinction between being an eyewitness to a news event and merely conducting an interview long after, such as was done in this case." Id. This distinction exists because "requiring reporters to testify only to eyewitness accounts of relevant events would be less likely to impinge upon and hinder the news gathering and reporting process than requiring them to testify to all relevant statements made to them during the newsgathering process." Agency for Healthcare Administration v. Ghani, 24 Med. L. Rptr. 2373, 2375 (Fla. DOAH June 27, 1996).[21]

From the journalist's perspective, when a subpoenaing party seeks merely an account of what a reporter saw, core First Amendment activities -- such as editorial decisions and news judgment -- are not invaded. But when, as in this case, a reporter is asked to recount an interview, the door is opened to such issues as the basis for interview questions ("Why ask him this and not that?"), the reasons for editorial decisions ("Why did you report this and not that?"), and the factors behind news judgments ("Why did you emphasize this and not that?). A proper, limited reading of Morejon and Jackson protects these core First Amendment

[21] A copy of this decision appear in the accompanying appendix as Exhibit G.

matters from unwarranted probing. Cf. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974) ("The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials -- whether fair or unfair -- constitute the exercise of editorial control and judgment," a process that should be immune from government intrusion).

From a litigant's perspective, the availability of a journalist's actual eyewitness observations under Morejon and Jackson provides unimpeded access to first-hand accounts of relevant events. Such direct, first-person accounts would seem to be the most valuable information any witness could offer. See, e.g., Morejon, 561 So. 2d 577 (requiring journalist to testify as to whether defendant gave informed consent to search that yielded critical evidence). Less valuable, non-eyewitness testimony also is available to litigants, upon the mere showing of relevance, a compelling need, and a lack of alternative sources. See. e.g., Waterman, 523 So. 2d at 1162 (subpoenaing party that proved relevance, compelling need, and lack of alternative sources met its burden of proof and defeated qualified privilege). The qualified privilege, therefore, means only that a litigant will be denied non-eyewitness testimony that is cumulative, irrelevant, or for which there is no compelling need. Given the First Amendment interests at stake, this is the proper result of the balancing that this Court demanded in Huffstetler and Morgan. 489 So. 2d at 723; 337 So. 2d at 954-55.

CONCLUSION

This Court "must guard closely against the chilling effects that would result from subjugating reporters to the whims of attorneys seeking discovery of information obtained in the course of reporting a story, especially when the relevance and necessity of obtaining the information are questionable." Brinston v. Dunn, 919 F. Supp. 240, 244 (S.D. Miss. 1996). To that end, the decision of the district court of appeal should be vacated, and the certified question should be answered in the affirmative.

Respectfully submitted,

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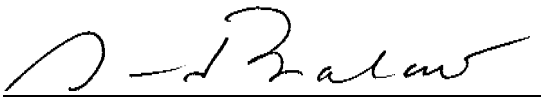

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 30, 1997, a true and correct copy of the foregoing brief, together with the accompanying appendix, has been furnished by FedEx to Helene S. Parnes, Esq., Assistant Attorney General, Westwood Center, Suite 700, 2002 N. Lois Avenue, Tampa, FL 33607; Ann Giambalvo, Esq., Assistant Public Defender, 5100 144th Avenue N., Suite B100, Clearwater, FL 34620; Patricia Fields Anderson, Esq., Rahdert, Anderson, McGowan & Steele, P.A., 535 Central Avenue, St. Petersburg, FL 33701; and Jonathan D. Kaney, Jr,, Cobb Cole & Bell, 150 Magnolia Avenue, Daytona Beach, FL 32115-2491.

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