IN THE SUPREME COURT OF FLORIDA

CASE NO. 90,839

DAVID KIDWELL,

Petitioner,

vs.

THE STATE OF FLORIDA
and JOHN ZILE,

Respondents

INITIAL BRIEF OF PETITIONER DAVID KIDWELL

ON DISCRETIONARY REVIEW
OF THE FOURTH DISTRICT
COURT OF APPEAL OF FLORIDA

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Certificate of Interested Persons

Counsel for the David Kidwell certifies that the following persons and entities have or may have an interest in the outcome of this case.

1. David Kidwell

2. Sanford Bohrer, Gregg Thomas, David Bralow, Jim Lake, and Holland & Knight
(Counsel for David Kidwell)

3. **The Miami Herald**
(David Kidwell's employer)

4. Walter John Zile
(Defendant in criminal case below)

5. Craig Wilson and Ed O'Hara
(Counsel for Walter John Zile)

6. State of Florida

7. Scott Cupp
(Assistant State Attorney prosecuting Zile)

8. Don M. Rogers
(Counsel for State of Florida)

9. Circuit Court Judge Roger Colton
(Trial Court)

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STATEMENT OF THE CASE AND FACTS

Introduction

This case is unique. It is the only case known to Petitioner's counsel in which an American journalist has been jailed for refusing to provide information which the Government's own conduct shows is both unnecessary and available from alternative sources.

Statement of the Case

On September 12, 1996, after a criminal discovery subpoena to Petitioner David Kidwell was quashed by the circuit court, the office of the State Attorney for the Fifteenth Judicial Circuit served Kidwell with an investigative subpoena, pursuant to Section 27.04, Florida Statutes. (A. 75; R.4).[1] The purpose of the subpoena was to require Kidwell to reveal to the State Attorney everything Kidwell knew about Respondent Walter John Zile, who was being prosecuted by the State for first degree murder. (A. 117-121).

Kidwell declined to answer the State Attorney's questions. (A. 76-114).

At the State Attorney's request, an Order To Show Cause (Indirect Criminal Contempt) was issued. (A. 117). Although given an opportunity to answer the questions, both before and after his adjudication, Kidwell declined to answer the questions based upon his belief he both an ethical obligation and a qualified First Amendment privilege to decline to answer. He was adjudicated in indirect criminal contempt and sentenced to 70 days in jail and a $500 fine. (A. 123-126;147-148).

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[1] The designation (A.) refers to the Appendix to Appellant's Initial Brief. The designation (R.) refers to the record on appeal in the district court of appeal.

While Kidwell was in jail, U.S. District Judge Wilkie Ferguson entered a writ of habeas corpus releasing Kidwell while he exhausted his State Court remedies, including this proceeding. (A. 218). Judge Ferguson entered his order only after both the circuit court and the district court of appeal denied motions for stay filed by Kidwell.

Kidwell appealed to the Fourth District Court of Appeal.

On June 11, 1997 the Fourth District filed its opinion, certifying the reporter's privilege issue to this Court. Kidwell v. State, 22 Fla. L. Wkly. D1416 (Fla. 4th DCA June 11, 1997).

Statement of the Facts

The underlying case - prosecution of Walter John Zile, who confessed to the police and the State Attorney in a taped confession in Zile's own voice and words.

This proceeding arises from the prosecution of Walter John Zile ("Zile") for first degree murder. Zile confessed to the police before Kidwell interviewed Zile. This is reflected in a transcript of proceedings on August 13, 1996. (See, e.g., A. 26). Zile also confessed to the State Attorney himself, perhaps separately from his confession to the police. (A. 3). The confession was recorded on audio tape in Zile's own words in Zile's own voice. (A. 26). Neither Kidwell nor his counsel has ever listened to Zile's confession or seen a copy of the transcript of the confession.

The interest in Kidwell - he interviewed Zile after Zile confessed and reported the interview in The Miami Herald.

Petitioner David Kidwell, acting in his professional newsgathering capacity as a newspaper reporter for **The Miami Herald**, interviewed Zile and reported that interview in an article published in the **Herald** (the "article"). (A. 1) Kidwell did not personally observe Zile engage in any of the conduct which is the subject of the prosecution of Zile.

The State has not shown and cannot show Kidwell has information important or significant to the prosecution of Zile or that such information is unavailable from other sources.

At a hearing on August 13, 1996 relating to a subpoena to Kidwell for the second trial of Zile, the State did not show the information sought by Kidwell was (1) highly relevant to the Zile prosecution, (2) necessary to the proper presentation of the State's case against Zile, and (3) unavailable from other sources. At the August 13, 1996 hearing, the circuit court made no findings that the test had been met. The circuit court's basis for ruling against Kidwell was that as a matter of law, Kidwell had no privilege (not that Kidwell had a privilege, but the State had made the showing necessary to overcome the privilege). The circuit court made its ruling solely on the basis of the district court's decision in Gold Coast Publications v. State, 669 So.2d 316 (Fla. 4th DCA 1996), rev. denied, 682 So.2d 1099 (1996).

There was no need, much less a compelling one, for Kidwell's testimony.

There was no need for Kidwell's testimony in the Zile prosecution. There is no better evidence of that than the State

Attorney's conduct at the first trial.[2] At the first trial of Zile, Kidwell was not called as a witness. (A. 25; R. 51). At the first trial, although Zile testified, the article was not even used by the State in cross-examining Zile. (A. 187-216). At the first trial, nothing from the article was used. The State did not offer or seek to have the article admitted into evidence.

There were alternative sources for Kidwell's testimony.

The record makes it clear that whatever information Kidwell has was available from alternative sources. Zile confessed to the police. His confession was recorded in his own words on audio tape and played for the jury. Zile confessed to the State Attorney himself, who personally questioned Zile, but chose not to testify at Zile's trial about what Zile said to him. (A. 3). Unlike the article, which is Kidwell's edited version of his interview of Zile, which was not recorded, is not verbatim, and which (except for a few quotations) is not in Zile's words, the confession is Zile's explanation to the police of what he did. Thus, the police to whom Zile confessed, the State Attorney himself, the confession, and Zile, who testified on his own behalf again at the second trial, were all alternatives to Kidwell for whatever testimony it is the State Attorney was seeking from Kidwell.

While the subpoena at issue was an investigatory subpoena, the State sought testimony, which would subject Kidwell to inquiry well beyond simply verifying what was said in the article

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[2] Although this information was not before the district court of appeal, at the second trial, although Zile testified, the article was not used to cross-examine Zile. This Court can take judicial notice of this fact.

The first Zile trial ended in a hung jury, with eleven jurors voting to convict for first degree murder, and the remaining juror holding out for second degree murder. The State subpoenaed Kidwell for what was then believed to be the commencement of the second trial. The August, 1996 hearing related to this subpoena.

The second Zile trial was postponed because of problems in jury selection. After the second trial was postponed, the State attempted to depose Kidwell under the discovery provisions of the Florida Rules of Criminal Procedure. (While preserving the right to depose Kidwell under the criminal discovery rules, Zile's counsel disclaimed any intention to call Kidwell as a witness on Zile's behalf.) Kidwell moved to quash the State's discovery subpoena, arguing the State may not depose its own witness under such provisions. The circuit court granted the motion to quash. That order was not reduced to writing.

The State then attempted to take an ex parte statement from Kidwell pursuant to the subpoena that precipitated the contempt adjudication here at issue under Section 27.04, Florida Statutes. Kidwell appeared as required under the subpoena, but declined to answer any questions. The State made it clear in its questioning that it intended to inquire into both published and unpublished information gathered by Kidwell relating to Zile. (A. 76-112).

The State obtained the order to show cause against Kidwell, again making it clear it was seeking everything Kidwell knew about Zile. (A. 117-120). Kidwell was thereafter adjudicated and sentenced. Given the opportunity to explain why he should not be

sentenced, Kidwell recognized the state of the law in the Fourth District indicated the courts in that jurisdiction had rejected his position, but explained that his obligations as a journalist prevented him from testifying. The circuit court then sentenced Kidwell to 70 days in jail and a $500 fine. (A. 147-148). Kidwell was given until October 13 to purge himself of contempt by answering all of the State's questions (R. 9; A. 148), which meant he would also have to submit to a deposition and ultimately cross-examination at trial by Zile's attorneys. In keeping with the circuit court's promise on October 3 that there would be no stay of execution of the sentence, Kidwell was immediately placed in custody and transported to the jail where he remained in custody until United States District Judge Wilkie Ferguson ordered him released. (A. 218). The appeal to the district court followed, resulting in the certified question on which this Court's jurisdiction is premised.

Introduction

Until he was ordered released by the United States District Court, David Kidwell was in jail for believing the First Amendment prohibits the press from being an indiscriminate investigative tool of a prosecutor. The State sought information both published and unpublished, the only limit being Kidwell's knowledge about Zile. Unlike the hypothetical propositions or harmless error presented by cases like **Gold Coast** and State v. Merlan Davis, Case No. 90,457, in this case the issue was joined, and the journalist stood fast,

saying his work product - published and unpublished - was for use in reporting about the justice system, not testimony in the justice system. The district court of appeal -- relying on **Gold Coast** and its interpretation of this Court's decision in Miami Herald Pub. Co. v. Morejon, 561 So. 2d, 577 (Fla. 1990) ("**Morejon**") -- held regardless of how Kidwell came to have the information (as a professional newsgatherer or as an ordinary citizen who happened to observe an event which became part of a prosecution), he must provide it, in the same way ordinary citizens must provide it. The district court, relying on **Gold Coast** and its understanding of **Morejon**, saw no distinction between the work product of a journalist, whose function it is to gather information about the justice system, including pending prosecutions, and report it and comment on it to the public, and information obtained by being an eyewitness to the alleged crime itself, the arrest, or some other event in the case. Two of the district court judges reasoned that the interview of a defendant (or by extension to State v. Davis, a key witness) is as much a "relevant event" as actually being an eyewitness to the crime itself or the arrest. The other district judge (Judge Klein), just like Judge Ferguson -- who was one of the Third District Judges in **Morejon** -- was of the view there is "a significant distinction between being an eyewitness to a news event and merely conducting an interview long after." Kidwell v. State, 22 Fla.L.Wkly. D1416 at D1420 (Klein, J., concurring specially).

This Court, then, has the opportunity to decide whether Judges Klein and Ferguson are correct. This Court, then, has the

opportunity to affirm or deny the right of the government to freely subpoena journalists - even as fishing expeditions - who cover the judicial system and the workings of the government generally, to see if they have any useful information to use in the prosecution of defense of cases, regardless of how cumulative or unnecessary that information may be. This Court, then, has the opportunity to affirm or deny the right of the government - upon pain of imprisonment and fines - to use the press as an unpaid investigative arm of the State without any court protection in the absence of a confidential source. Finally, this Court has the opportunity to balance the interests of the press and litigants, and order the balancing test recognized by so many courts, including our federal courts in these circumstances.

SUMMARY OF ARGUMENT

The First Amendment to the Constitution of the United States provides reporters and other journalists with a qualified privilege to decline to testify in lawsuits. That qualified privilege applies regardless of whether the information sought is confidential or non-confidential. The qualified privilege requires that the party seeking the testimony of the reporter make an evidentiary showing meeting a three part test. Although stated in different words by different courts, the test means the party must show the reporter has information highly relevant to that party's claims or defenses, that the information is necessary to the proper presentation of such claims or defenses (e.g., there is a compelling need for it), and the information is unavailable from other sources. Under

Morejon, the privilege does not apply where the reporter personally observes an event relating to the alleged crime or arrest, such as the actual commission of the crime or the actual arrest of the defendant. Petitioner David Kidwell did not observe any such event; he merely interviewed a defendant who had already confessed to the police and reported that interview in a newspaper. The circuit court erred in this case by declining to apply the privilege here and not requiring the State to make the three-part showing required by the First Amendment. Had the circuit court done so, the State would not have made the required showing, and Kidwell would not have been jailed for refusing to answer the State's questions.

ARGUMENT

I. The district court's decision conflicts with decisions from other states, including decisions relied upon by this Court in *Morejon*.

The narrow scope of the **Morejon** decision is apparent from the decision 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 situations in which reporters personally "observed" or "saw" criminal activity or the arrests. For example, the first decision 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 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), 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 plurality in this case.

In other words, this Court used the word "eyewitness" for a reason -- to restrict **Morejon** 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.[3] These states, therefore, have expressly rejected the view of the district court in this case.

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), a Florida

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[3] **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 Delaney v. Superior 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 Jury 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. Henry, 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).

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 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 (11th 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. 1219, 1220 (footnote omitted) (S.D.

Fla. 1996 Ferguson, J.).[4] The appellate decision in this case, therefore, which reads into **Morejon** and CBS, Inc. v. Jackson, 578 So. 2d 698 (Fla. 1991) a rejection of the privilege as applied to nonconfidential information, is simply wrong.

II. The district court's decision conflicts with the First Amendment.

The reporter's privilege, though broad, is qualified, not absolute. As this Court of Florida noted in **Morejon**, the privilege does not apply when a reporter directly observes an event that later becomes the subject of a legal proceeding.

In **Morejon**, Joel Achenbach, a **Miami Herald** reporter on assignment for the paper's *Tropic* magazine, accompanied three police officers on their beat at the Miami airport. Id. at 578. Achenbach saw the officers search and arrest Morejon, who had four kilos of cocaine hidden in his luggage. The reporter also heard the exchange between police and Morejon as police advised Morejon of his constitutional rights. Subsequently, the issue of whether Morejon understood his rights became central to the criminal case. Prior to trial, Morejon served the reporter with a deposition subpoena, which the **Miami Herald** moved to quash based upon the qualified newsgathering privilege. A circuit court denied that motion, finding that no privilege existed with respect to the reporter's eyewitness observations of whether Morejon consented to

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

being searched. The Third District agreed, but certified the question of the applicability of the privilege as a matter of great public importance for review by this Court. After reviewing the interests involved in the facts before it, this Court answered the certified question in the negative, holding 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.[5]

In **Jackson**, 578 So. 2d 698 (Fla. 1991), this Court reviewed yet another arrest eyewitness case, although this time the eyewitness information was recorded on videotape. A CBS news team videotaped the arrest of Jackson, who was thereafter charged with cocaine possession. CBS moved to quash a subpoena duces tecum served by Jackson, who sought the network's non-broadcast video recording of his arrest. Id. at 699. The circuit court denied the motion, finding that the privilege did not apply. The Second District denied certiorari but like the Third District, certified to this Court the question of the privilege's application as one of great public importance.

This Court again affirmed the existence and value of the privilege, Id. at 699-700, but concluded that the privilege did not exist "under the circumstances of this case," holding a television journalist has no qualified privilege "to refuse to produce non-

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[5] Other courts have recognized the limited application of Morejon. See, e.g., Hatch v. Marsh, 134 F.R.D. 300, 302 (M.D. Fla. 1990) (rejecting argument that Morejon compelled production of newsgathering information).

televised video tapes 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** at 699.

The **Morejon** and **Jackson** decisions thus identify an exception to the reporter's privilege: if a journalist sees -- or a journalist's camera records -- the actual event underlying a subsequent criminal court proceeding, the reporter's privilege does not apply to non-confidential information. These holdings do not enable a litigant to bypass the three-part test and question a reporter about his interviews and other information gathering activities far removed in time and place from the underlying issue being litigated in the court proceeding.

Morejon and **Jackson** simply acknowledge the principle established by the United States Supreme Court more than 20 years ago in Branzburg v. Hayes, 408 U.S. 665 (1972): when a reporter is an eyewitness to the subject matter of a subsequent trial, the First Amendment must yield. Otherwise, the reporter's privilege applies.

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. "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 (11th 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 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).[6]

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[6] 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.

In this case, however, the Fourth District -- like the Second District in State v. Davis -- went well beyond the holdings of **Morejon** and **Jackson** and rejected any case-by-case approach (absent confidentiality). Finally, the district court majority disregarded

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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**: Fawley 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. Henry, 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. Ann. Tit. 12, § 2506 (West 1996) (protecting published and unpublished sources and unpublished information). **Tennessee**: Austin v. Memphis Pub. Co., 655 S.W.2d 146 (Tenn. 1983) (interpreting state shield law as protecting non-confidential information).

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. 1987); United States v. Meros, 11 Med. L. Rptr. 2496 (M.D. Fla. 1985); United States v. Waldron, 11 Med. L. Rptr. 2461 (S.D. Fla. 1985); United States v. Harris, 11 Med. L. Rptr. 1399 (S.D. Fla. 1985); United States v. Horne, 11 Med. L. Rptr. 1312 (N.D. Fla. 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).[7] "Surely, if the supreme court in Morejon had

[7] 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 (1st 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.

intended its decision to apply to [non-eyewitness 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 D1420 (Klein, J., concurring specially).[8]

Given the constitutional interests at stake, this Court should not adopt the district court's broad rejection of constitutional principles and precedent. To define eyewitness as broadly as did the district court in this case "would obliterate the privilege altogether," by sweeping within the **Morejon** 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

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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 noted below, the Sixth Circuit view is based upon a reading of Branzburg that this Court twice has squarely rejected. 22 Fla. L. Wkly. at D1419.

[8] 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).

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. Kidwell v. State, 22 Fla. L. Weekly at D1420 (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"). Were the State's view to prevail, any interview with a person charged with or suspected of a crime or a witness to a crime or arrest, including the police, would invite subpoena, on the grounds that the reporter was an "eyewitness" to relevant statements. Indeed, it might be malpractice or ineffective assistance of counsel to fail to subpoena the reporter. This is a truly chilling proposition, which if adopted would immediately and inevitably curtail such interviews. Cf. Shoen v. Shoen, 5 F.3d 1289, 1294-95 (9th Cir. 1993) (citing dangers of "administrative and judicial intrusion into the newsgathering and editorial process" and of "converting the press in the public's mind into an investigative arm of prosecutors and the courts"). 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).[9]

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." Kidwell v. State, 22 Fla. L. Weekly at D1420 (Klein, J., concurring specially). 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).

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

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[9] Some have suggested the lack of empirical evidence of a "chilling effect" weighs against recognition of a privilege. First Amendment jurisprudence, however, favors the creation of a presumption of protection of First Amendment interests unless there is some counterbalancing interest, such as a defendant's Fifth or Sixth Amendment rights, which are not at issue here. There is no counterbalancing interest in this case. Moreover, as a practical matter, at a hearing in an existing lawsuit on a motion to quash a subpoena, there is no opportunity to present such empirical evidence, which would require what amounts to a separate trial on that issue within that existing lawsuit.

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 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 Broadcasting of Florida, Inc. v. Reese, 523 So. 2d 1161, 1162 (Fla. 2d DCA 1988) (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 only fair result.

III. Since the Florida Supreme Court's decision in *Miami Herald Publishing Co. v. Morejon*, the serious problem of subpoenas directed to newsgathering operations has gotten worse.

This case typifies a more general and quite serious problem for journalists. To serve their function under the First Amendment, reporters like David Kidwell must simultaneously (1) involve themselves in matters that are or are likely to end up in litigation, by interviewing the participants and finding and reviewing documents, and (2) remain disinterested in those very matters, to neutrally report to the public, which cannot gather the information itself. Often it is the press which breaks the story or finds new facts, not unlike here, where Kidwell was the only reporter to obtain an interview with Zile. Because the press can be abused as high-quality, low-cost (or free) investigators, more than 3,500 subpoenas were served on the press in the United States during 1993.[10]

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[10]. Reporters Committee for Freedom of the Press, Agents of Discovery: A Report on the Incidence of Subpoenas Served on the News Media in 1993, at 6 (Jane E. Kirtley, Esq., ed., Feb. 1995) ("*Agents of Discovery*").

Moreover, *Agents of Discovery* ranked Florida fourth in the nation in the number of subpoenas served on the press (216), behind Texas (504), California (374), Pennsylvania (232). In *Agents of Discovery* (p.12), the Reporters Committee concluded that its data "demonstrates conclusively that subpoenas pose a significant burden to news operations."

A Florida study found that the number of subpoenas served on Florida newsrooms increased by more than 70 percent in the 21-month period after the Florida Supreme Court's decision in **Morejon** compared to the 21-month period before **Morejon**. The Brechner Center for Freedom of Information, a project of the University of Florida College of Journalism and Communications, published this finding in a 1993 paper entitled *Subpoenas Issued To News Organizations In Florida Before And After Miami Herald v. Morejon* ("Brechner Center Report). The Brechner Center found that 268 subpoenas were served pre-**Morejon** and 458 post-**Morejon**. Brechner Center Report at p.3.

Nearly half of the subpoenas identified in the Brechner Center Report (44 percent) were served on 20 daily newspapers. Brechner Center Report at p. 4). Those 20 daily newspapers received 309 subpoenas during the 3½-year period. "Subpoenas to dailies increased by 55 percent, from 121 to 188, for an average of 5 before **Morejon** and 7.8 after **Morejon**," the study found. (page 5) Television newsrooms were harder hit. Fourteen television stations received 358 subpoenas during the same period, with the number in

the post-**Morejon** era (224) increasing by 68 percent over the number in the pre-**Morejon** era (133). Id.

The authors of the Florida study noted that **Morejon** and **Jackson** shortly preceded Roche v. State, 589 So. 2d 978 (Fla. 4th DCA 1991), *review denied*, 599 So. 2d 1279 (Fla. 1992), *U.S. cert. denied*, 113 S.Ct. 1027 (1993), which led to a *Stuart News* reporter being jailed for refusing to divulge a confidential source. The authors of the Brechner Center Report concluded that these three cases, being decided, as they were, in a short period, caused many attorneys in Florida to think that the reporter's privilege was severely curtailed.

These empirical studies simply verified what our founders intended. It was de Tocqueville who observed that without a free and fearless press, the well-informed and sensible opinions on which democracy depends are impossible. Thus the press, he found, is the chief democratic instrument of freedom. A. de Tocqueville, Democracy in America 181-90 (1841). And it was Thomas Jefferson who stated, "Were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter." T. Jefferson, Four Writings of Thomas Jefferson 359-60 (P. Ford ed. 1894). A rule of law which makes the press an appendage of the government or the judiciary is directly contrary to these purposes of a free press.

In addition, the public perception of the press's independence is compromised when reporters are converted into agents of the government by their cooperation in an investigation, or by their

submission to the State's subpoena power. Even when sources do not require confidentiality, which is the situation with David Kidwell, the sources reasonably expect reporters to be independent, and reporters' credibility is therefore damaged when they are used as freelance investigators for the government or private litigants. See, e.g., Shoen v. Shoen, 48 F.3d 412, 416 (9th Cir. 1995) (lamenting "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* Shoen v. Shoen, 5 F.3d 1289, 1294 (9th Cir. 1993), *quoting* United States v. LaRouche Campaign, 841 F.2d 1176, 1182 (1st Cir. 1988).

CONCLUSION

For these reasons, the district court of appeal's decision should be reversed, and the circuit court's adjudication of contempt and sentence should be reversed and vacated.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was served by mail this 28th day of July, 1997, upon:

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