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IN THE SUPREME COURT OF FLORIDA

MORRIS COMMUNICATIONS CORPORATION, etc., et al.,

Petitioners

v

SUSANNE Y. FRANGIE, et al.

Respondents.
_____/

CASE NO. 92,321

District Court of Appeal,
1 st District -- No. 97-2864

DISCRETIONARY REVIEW OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT
STATE OF FLORIDA

BRIEF OF PETITIONERS ON THE MERITS

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DOES FLORIDA LAW PROVIDE A QUALIFIED REPORTER'S PRIVILEGE AGAINST THE DISCLOSURE OF NONCONFIDENTIAL INFORMATION RELEVANT TO A CIVIL PROCEEDING?

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STATEMENT OF THE CASE AND FACTS

Mike Bianchi is a reporter for *The Florida Times-Union (The Times-Union)*, a daily newspaper serving northeast Florida. On May 11, 1997, *The Times-Union* published an article written by Bianchi entitled "Mother Finds Way to Cope." (Petition for Writ of Certiorari, Appendix 2). The article focused on a charity golf tournament to benefit the Justice Coalition, a non-profit organization dedicated to helping victims of violent crimes. The article also described the efforts of Susanne and Frank Frangie, the plaintiffs in the instant case, to help organize the tournament.

In writing about the Frangies, Bianchi included information about the sexual assault of Susanne Frangie that occurred two years prior to the publication of *the Times-Union's* article. The sexual assault is the basis of a pending premises liability lawsuit brought by Susanne and Frank Frangie against Respondents Lincoln, Baita International, Inc., and Wells Fargo Guard Service of Florida, Inc. (Response of Lincoln Investment Management to Petition for Writ of Certiorari at 2). Bianchi did not witness the assault of Susanne Frangie nor did he witness any of the events relevant to the assault. Nevertheless, the defendants in the instant case, a civil lawsuit brought by the Frangies, had served upon Bianchi a subpoena for deposition duces tecum. The subpoena commanded him to appear for the taking of his deposition and to have with him at the deposition any and all paperwork, notes, memoranda, correspondence or other writings prepared in connection with or pursuant to his May 11, 1997 article.

According to the defendants in the civil action, Bianchi's May 11, 1997, article was based in large part upon an interview Bianchi conducted with Susanne Frangie. (Response of Lincoln Investment Management to Petition for Writ of Certiorari at 3). The defendants alleged that

there exists in the article at least one questionable factual reference concerning the assailant having blackened Susanne Frangie's eyes during the assault which differs from Susanne Frangie's deposition testimony and own written account of the assault. (Response of Lincoln Investment Management to Petition for Writ of Certiorari at 3).

The Times-Union and Bianchi filed a motion to quash the subpoena (Petition for Writ of Certiorari, Appendix 3) arguing that Bianchi is not a party to the lawsuit, that any information he might have about the facts at issue in the lawsuit was gathered in his capacity as a news gatherer well after the rape took place and that the qualified reporter's privilege protected him from being compelled to testify. In their opposition to the motion to quash (Petition for Writ of Certiorari, Appendix 4 at 5-6), defendants asserted that they seek Bianchi's testimony to potentially impeach Mrs. Frangie.

The trial court entered an order denying the motion to quash the subpoena, holding that because the defendants are seeking non-confidential observations and materials obtained during a non-confidential interview, no qualified privilege exists. Petitioners filed a Petition for Writ of Certiorari with the First District Court of Appeal. The First District Court of Appeal, in Morris Communications Corn. v. Frangie, 23 Fla. L. Weekly D428 (Fla. 1st DCA Jan, 30, 1998), denied the petition with Judge Van Nortwick dissenting.

In the majority opinion, the court stated that, "We do, however, wish to note that we share some of the same concern expressed by Judge Klein in his opinion in [Kidwell v. State, 696 So.2d 399 (Fla. 4th DCA 1997)] concerning total elimination of the balancing test in all nonconfidential cases and the potential impact this has on the news gathering and editorial functions of our newspapers." Morris, at D428. In denying the petition, the First

District Court of Appeal certified the question of whether Florida law provides a qualified reporter's privilege against the disclosure of nonconfidential information in civil cases as one of great public importance.

SUMMARY OF THE ARGUMENT

Florida courts long have recognized first amendment protection for newsgatherers from being compelled to disclose their work product. The First District Court of Appeal's decision improperly eliminates Florida's traditional qualified protection afforded journalists in civil cases where a party seeks to compel the journalist to disclose non-confidential, non-eyewitness information.

The First District Court of Appeal's decision flies in the face of this Court's extremely narrow exception to the general application of a reporter's privilege. The First District Court of Appeal has reached the illogical conclusion that an "eyewitness to a relevant event" is the equivalent of a person conducting an interview about the event long after its conclusion. The decision disregards the fairness and consideration of first amendment concerns that the three-part balancing test has provided in myriad Florida cases. Finally, the decision fails to recognize that parties in civil cases should have to overcome a higher burden than should criminal defendants and prosecutors before being able to compel reporters to testify. Therefore, this court should reverse the decision and remand this case to the trial court, directing the trial court to reconsider Petitioners' motion to quash the subpoena and to apply the three-part test.

ARGUMENT

CERTIFIED QUESTION:

DOES FLORIDA LAW PROVIDE A QUALIFIED REPORTER'S PRIVILEGE AGAINST THE DISCLOSURE OF NONCONFIDENTIAL INFORMATION RELEVANT TO A CIVIL PROCEEDING?

I. Florida law does provide a qualified reporter's privilege against the disclosure of nonconfidential information relevant to a civil proceeding.

This Court should answer the First District Court of Appeal's certified question in the affirmative. Florida law does provide a qualified reporter's privilege against the disclosure of nonconfidential information relevant to a civil proceeding. The history of the reporter's privilege law in Florida supports an affirmative answer. Particularly, this Court's decision in Miami Herald Publ'g Co. v. Morejon, 561 So.2d 577 (Fla. 1990) recognizes application of a qualified reporter's privilege for confidential and non-confidential information with an exception only in the narrowest circumstances. Contrary to the First District Court of Appeal's holding, no general exception to nonconfidential information in a civil proceeding exists.

A. The First District Court of Appeal's decision misinterprets the narrow "eyewitness" exception to applying the privilege defined in this Court's *Morejon* decision.

Contrary to the First District Court of Appeal's decision in Morris Communications Corp. v. Frangie, as well as the flawed decisions of the Second and Fourth District Courts of Appeal in Gold Coast v. State, 669 So.2d 3 16 (Fla. 4th DCA), review denied, 682 So.2d 1099 (Fla. 1996); Kidwell v. State, supra; and State v. Davis, 692 So.2d 924 (Fla. 2d DCA 1997),

Morejon did not eliminate application of the qualified reporter's privilege in all cases involving non-confidential sources and information. Instead, consistent with Florida's common law development of the qualified reporter's privilege, the opinion in Morejon described the limited circumstance under which a privilege does not apply.

This Court's holding in Morejon was consistent with Florida's strong tradition in favor of a broad application of a qualified reporter's privilege. Morejon was not decided in a vacuum and did not undo the previous body of law that had developed on this issue. This Court's, as well as other Florida courts, have recognized that under the first amendment of the United States Constitution and Article I, Section 4 of the Florida Constitution, newspeople may not be required to divulge information acquired through news gathering or relating to the identity of news sources unless the party seeking to acquire such information has satisfied each and every element of the following three-part test:

(a) whether the information sought is relevant;

(b) whether the same information is available through alternative sources; and

(c) whether there is a compelling need for the information

See, Gadsden County Times v. Home, 426 So.2d 1234 (Fla. 1st DCA 1983), rev. denied, 441 So.2d 63 1 (Fla. 1983); Tribune Co. v. Green, 440 So.2d 484 (Fla. 2d DCA 1983); Miami Herald Publishing Co. v. Morejon, 561 So.2d 577, 580 n. 3 (Fla. 1990); State v. Davis, 692 So.2d 924, 926 n.2 (Fla, 2d DCA 1997).

The United States Supreme Court case of Branzburg v. Hayes, 408 U.S. 665 (1972), laid

the groundwork for the qualified reporter's privilege. Attached to the plurality opinion in Branzburg was Justice Powell's special concurrence, in which he wrote that a reporter's "asserted claim to privilege should be judged on its facts by the proper balance between freedom of the press and the obligations of all citizens to give relevant testimony . . ." Id. at 709 (Powell, J., concurring). In Morgan v. State, 337 So.2d 951, this Court recognized the reporter's privilege and adopted the Branzburg balancing test. Id. at 954 (citing Branzburg). Again, this Court recognized the privilege in Tribune Co. v. Huffstettler, 489 So.2d 722 (Fla. 1986). The privilege has been applied in both civil and criminal cases. See Gadsden at 1240.

While those cases involved confidential information, historically, Florida courts have recognized the first amendment necessity of applying the privilege in cases involving non-confidential information as well. In fact, in this Court's recent decision in In re Graziano, 696 So.2d 744 (Fla. 1997), this Court found that the Judicial Qualifications Commission acted properly in quashing altogether a subpoena seeking confidential and *non-confidential* information from a newspaper reporter. Id. at 752. (Copies of subpoenas issued in In re Graziano attached to Reply of Petitioners at Supplemental Appendix S-l). This Court noted in Graziano that it, "carefully reviewed the record in respect to this claim and [found] that the JQC was within its discretion in quashing these subpoenas." Id.

Most importantly, this Court, with respect to the quashing of subpoenas served on reporters, did not find that there existed any distinction between the existence of confidential sources versus non-confidential sources, nor did this Court recommend that the JQC refuse to quash those portions of the subpoenas relevant to non-confidential sources. This Court's decision

in Graziano impliedly overrules the First District Court of Appeal's decision in the instant appeal, as well as the incorrect decisions of Gold Coast, Kidwell and Davis. If those decisions had been followed, this Court would have disallowed the protection of the newspaper reporter from testifying as to non-confidential information.

The Graziano holding follows the pattern of Florida trial courts that have recognized the need for protection of non-confidential sources and information. In Florida v. Morales, 24 Med. L. Rep. 1606 (Fla. 5th Cir. Ct. 1995), the court recognized that attempts to subpoena reporters to testify about an interview with trial participants "raise[d] issues of constitutional significance." Id. at 1607. The Morales decision was in accord with other trial courts that have applied the privilege to non-confidential information. See. e.g., Florida v. Brown, 19 Med. L. Rep. 103 1, 1032 (Fla. 2d Cir. Ct. 1991)(holding that the only knowledge a reporter had was obtained in her capacity as a news reporter, and that because she was not an eyewitness, the privilege applied); State v. Hubrecht, Case No. 90-439-CF, Division B (Fla. 4th Cir. Ct. 1990)(in which a reporter only reported what was told to her subsequent to the arrest of a criminal defendant, and therefore, the privilege applied).

The principle followed by this Court and Florida trial courts, that non-confidential sources are protected, does not conflict with this Court's decision in Morejon. In interpreting Morejon,, Second and Fourth District Courts of Appeal have mistakenly and irrationally broadened the scope of the "eyewitness" exception. In Morejon, this Court held that, even in circumstances where a non-confidential source is implicated, an exemption to the reporter's privilege exists *only* under the narrow circumstances where a reporter is an

"eyewitness" to a relevant "event". Morejon at 589. Inexplicably, the First, Second and Fourth District Courts of Appeal have failed to analyze Morejon within its limited factual context.

In Morejon, a journalist accompanying police officers on their beat saw the officers arrest and search Morejon. Id. at 578. The reporter also heard the exchange between police and Morejon as the police advised him of his constitutional rights. Id. Subsequently, the issue of whether Morejon understood his rights became central to the criminal case. Id. The Third District Court of Appeal certified the question of the applicability of the reporter's privilege in the Morejon case as a matter of great public importance for review by the this Court.

In Morejon, this Court once again affirmed the existence of a qualified reporter's privilege, citing and quoting at length from Branzburg, and revisiting its own decisions in Morgan and Huffstetler. Id. at 579-80. The case, this Court held that there is no qualified reporter's privilege for "eyewitness observations of a relevant event in a subsequent court proceeding." Id. at 580.

Subsequent holdings by this Court confirm a narrow interpretation of the exception. Following Morejon, this Court reviewed another arrest eyewitness case in CBS. Inc. v. Jackson, 578 So.2d 698 (Fla. 1991). In Jackson, the eyewitness information was recorded on videotape, as a CBS news crew videotaped the arrest of a criminal defendant. This Court noted its ruling in Morejon and again affirmed the existence and value of the qualified reporter's privilege. Id. at 699-700. This Court concluded that the privilege did not exist "under the circumstances of this case," when a reporter viewed, or the reporter's camera recorded, the actual event underlying a subsequent court proceeding. Id.

In Jackson, this Court was specific as to its approval of certain reporter's privilege holdings and its disapproval of others. This Court, in a footnote, disapproved of two decisions in which the Second District Court of Appeal applied the reporter's privilege to situations involving video or photographic reproductions of *eyewitness information*. Id. at 700 n.2 (citing CBS. Inc. v. Cobb, 536 So.2d 1067 (Fla. 2d DCA)(videotaped footage) and Johnson v. Bentley, 457 So.2d 507 (Fla. 2d DCA 1984)(photographs of automobile accident).

Notably, in Jackson, 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), although it cited Green. Jackson at 699. The Green decision applied a qualified privilege to a reporter's *non-confidential* information and sources. Green at 486. This Court, clearly familiar with the Green decision, and given the opportunity in Morejon and in Jackson to render Green invalid, instead left Green undisturbed. In fact, this Court previously had cited Green with approval in Tribune Co. v. Huffstetler, 489 So.2d 722,723 (Fla. 1986).

Furthermore, the narrow scope of the Morejon decision is clarified by the decisions from other states that the Court relied upon in Morejon. See Morejon, 561 So.2d at 581-82. For example, the first decision the 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, the reporter viewed an altercation between two organized crime figures and had to testify because he was an "eyewitness to a crime." Id. This Court also cited Rosato v. Superior Court, 51 Cal. App. 3d 190,218, 124 Cal. Rptr. 427,446 (5th Dist. 1975), in which the court held that reporters were not shielded from testifying about criminal activity "in which they have participated or which they

have observed." Likewise, in Lightman v. State, 294 A.2d 149 (Md. Ct. App.), aff'd, 295 A.2d 212 (1972), cert. denied, 411 U.S. 95 1 (1973), a Maryland court required a reporter to testify concerning "his own personal observations" of criminal activity. Clearly, in Morejon, this Court used the word "eyewitness" in conformity with the courts whose holdings it referenced.

A narrow interpretation of the word "eyewitness" is consistent with the long tradition of Florida court rulings as well as rulings of courts throughout the nation, Both semantically and practically, such a narrow interpretation is correct. As the court in Walker v. United Steel Works. Inc. 19 Med. L. Rep. 1191 (Fla. 13th Cir. Ct. 1991) so aptly explained:

> Because the critical question in this case is how the trusses were fastened onto the truck, it is imperative that the "eyewitness" have seen the truck as it stood with its trusses in the moments prior to the trusses falling. The journalist in this case did not witness the truck immediately prior to the accident, or at the time of the accident. . . .
>
> To define eyewitness any more broadly would obliterate the privilege altogether. An eyewitness for purposes of the privilege simply cannot be any reporter who views something connected with a subsequent civil proceeding. Because of the dictates of a journalist's profession, journalists will inevitably be among the first individuals at the scene of a newsworthy event *after- the fact.* This does not automatically qualify journalists as eyewitnesses. Clearly, the Court in *Morejon* intended such a distinction.

Id. at 1192.

Respondents have stated that Petitioners' reliance upon various Florida trial court decisions decided after Morejon is misplaced, presumably because Respondents seek to discount the overwhelming precedent in which trial courts have applied a qualified privilege to non-

Confidential information.' The trial courts have not created new law, but rather have simply conformed to the narrow limits expressed by this Court Morejon and Jackson, while following the Green decision and this Court's approval of Green. Meanwhile, of the cases relied upon by Respondents in the instant appeal, Gold Coast ignored Green and Davis incorrectly stated that "Green is no longer viable." Davis at 926. The conclusion in Davis, however, is illogical in the context of this Court's positive recognition of Green in Jackson and Huffstetler.

The Florida trial courts have interpreted Morejon correctly, and in doing so, have logically followed the lead of many federal decisions. Although the Eleventh Circuit has not decided the issue, the qualified privilege exists and the balancing test is used in the Southern District of Florida in situations where no confidential source of information is involved. United States v. Blanton, 534 F.Supp. 295 (S.D. Fla. 1982), aff'd, 730 F.2d 1425 (1 lth Cir. 1984) (without discussion of the privilege). The issue in Blanton was whether, when no confidential source is involved, a reporter can be compelled to testify by the government when the government has made no showing that it has exhausted all other means of acquiring the information. Id at 297. The court held that, "although no confidential source or information is involved, this distinction is irrelevant to the chilling effect enforcement of the subpoena would

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[1] See Florida v. Kenon, No. CR 97-000843 (Fla, 9th Cir. Ct. 1997); Farhat v. Farhat, 25 Med. L. Rptr. 215 1 (Fla. Cir. Ct. 1997); Florida v. Nelson, 25 Med. L. Rptr. 1383 (Fla. Cir. Ct. 1996); Florida v. Trepal, 24 Med. L. Rptr. 2595 (Fla. Cir. Ct. 1996) Florida v. Morales, 24 Med. L. Rptr. 1606 (Fla. Cir. Ct. 1995); Florida v, Wade, 23 Med. L. Rptr. 1383 (Fla. Cir. Ct. 1995); Roberts v. Roberts, 23 Med. L. Rptr. 1285 (Fla. Cir. Ct. 1994); In re Adoption, 23 Med. L. Rptr. 1126 (Fla. Cir. Ct. 1994); Florida v. Kingston, 23 Med. L. Rptr. 103 1 (Fla. Cir. Ct. 1994); Redd v. United States Sugar Corp., 21 Med. L. Rptr. 1508 (Fla. Cir. Ct. 1993); In re Shiffman, 19 med. L. Rptr. 103 1 (Fla. Cir. Ct. 1991); Walker v. United States Steel Works. Inc,, 19 Med. L. Rptr. (Fla. Cir. Ct. 1991).

have on the flow of information to the press and public" and quashed the government's subpoena. Id. (citing United States v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980); Loadholtz v. Fields, 389 F.Supp. 1299, 1303 (M.D. Fla. 1975).

The decision in Blanton is consistent with the position of four of the five federal circuit courts of appeal which have considered the precise issue of whether there is a qualified privilege for news information obtained from non-confidential sources. The four circuit courts have concluded that there is a qualified privilege subject to a balancing test. See Shoen v. Shoen, 5 F.3d 1289, 1294-95 (9th Cir. 1993)(finding the body of circuit case law and scholarly authority supporting application of the privilege in non-confidential circumstances so persuasive as to render unnecessary further discussion of the issue and holding that "[the] journalist's privilege applies to a journalist's resource materials even in the absence of confidentiality"); United States v. LaRouche Campaign, 84 1 F.2d 1176, 1182 (1 st Cir. 1988); von Bulow bv Auersperg v. von Bulow, 811 F.2d 136, 142 (2d Cir. 1987), cert. denied, 481 U.S. 1015 (1987)("the relationship between the journalist and his source may be confidential or non-confidential for purposes of the privilege" and "unpublished resource material likewise may be protected"); United States v. Cuthbertson, 630 F.2d 139, 147 (3d Cir. 1980), cert. denied, 449 U.S. 1126 ("The compelled production of a reporter's resource materials can constitute a significant intrusion into the newsgathering and editorial processes"). The lone circuit not applying the test, the sixth circuit, does not recognize a privilege in the first place, and so has no relevance in Florida because this Court clearly has recognized a privilege in Morgan and Huffstettler.

Ignoring the conclusions of federal cases that, if followed, support a narrow interpretation

of Morejon, leads to absurd results. First, it suggests that federal courts are incapable of properly determining the proper protection afforded by the first amendment to the United States Constitution. Second, if Bianchi had been subpoenaed to testify in federal court in Jacksonville, the privilege would have applied, while at the same time it was not applied in state court. He therefore enjoys less protection in state court in spite of the language of the first amendment *and* the seemingly added protection of Article I, Section 4 of the Florida Constitution. Third, if he were subpoenaed in the neighboring states of Alabama or Georgia, Bianchi also would enjoy the privilege, as those states have codified the results produced by the correct interpretation of Morejon. See Ala.Code § 12-2 1-142 (1986); Ga. Code Ann. §24-9-30(1993).

The Florida trial courts and the federal circuit courts supporting a privilege in cases involving non-confidential, non-eyewitness situations have followed the logical principles echoed by myriad courts throughout the nation. These courts have agreed with the principle that "eyewitnesses by definition are not passing along idle rumor, for they either have been the victims of a crime or have otherwise seen some portion of it." United States v. Bell, 457 F.2d 123 1 (5th Cir. 1972). While *The Times-Union* would not characterize its reporting as idle rumor, it is clear that, unless the reporter sees the event in question, the reporter is not an "eyewitness." In other states where the definition of the term "eyewitness" was at issue in reporter's privilege cases, the courts have not interpreted the definition as broadly as Florida's First, Second and Fourth District Courts of Appeal.

For example, in Woodhaven Lumber and Mill Work v. Asbury Park Press, 589 A.2d 135 (N.J. 1991), the New Jersey Supreme Court held that the "eyewitness" exception to the state's

shield law, under which information obtained by a newsperson who is an "eyewitness" to "any act" involving physical violence or property damage is not privileged, included only the doing of a thing or deed and not all resulting consequences. Id. at 142. Thus, photographs taken by newspersons after their arrival at an already burning fire were privileged. Id. The court reasoned that, "If reporters sent to cover a fire were to lose their Shield Law protection because they have witnessed the consequences of an act involving property damage, there would remain no reasonable grounds on which press photographers would not be considered eyewitnesses as they arrive on the scene to gather news after a crime or accident has occurred." Id. The court emphasized the difference between a reporter witnessing an "act" versus the "result". Id.

Similarly, in Morejon, this Court limited its exception to Florida's common law and constitutional reporter's privilege to situations where a reporter is an "eyewitness" to an "event", not where a reporter is a witness to the result or aftermath of the event. Bianchi, as well as all other newsgatherers, under the First, Second and Fourth District Courts of Appeal's opinions, wrongly is considered an eyewitness every time he arrives at the scene of an event after its completion. These misguided opinions define an "eyewitness" as a reporter who interviews a person involved in an event years after the event.

The Woodhaven Lumber decision is only one in a long line of decisions that limits exception to the reporter's privilege to circumstances where a reporter is compelled to testify about crimes or torts he personally saw. See. e.g., State v. Turner, 550 N.W.2d 622 (Minn. 1996)(where photographer took pictures of criminal defendant's arrest while on ride-along and propriety of arrest was at issue in subsequent proceedings); Delanev v. Sunerior Court

(Kopetman), 789 P.2d 934 (Cal. 1990)(in which a reporter and photographer were accompanying members of police department and witnessed search of defendant); In re Ziegler, supra, (where a newspaper reporter was compelled to testify as to altercation which occurred in his presence outside a courtroom); Dillon v. San Francisco, 748 F. Supp. 722, 726 (N.D. Cal. 1990)(where a cameraman witnessed the alleged beating of defendant by police and was compelled to testify in subsequent civil rights action); Bell v. City of Des Moines, 412 N.W.2d 585 , 588 (Iowa 1987)(in which television footage showed a suicide and the station was compelled to disclose the footage in a civil suit rising from the suicide).

The narrow definition of "eyewitness" in the overwhelming body of reporter's privilege case law is consistent with the general concept of an eyewitness in other types of cases. This Court, as recently as July 3, 1997, clearly distinguished between eyewitness testimony and spoken accounts of events. Franaui v. State, 699 So.2d 13 12 (Fla. 1997), rehearing denied, (October 6, 1997)(at trial the confessions of codefendants were introduced and "in addition, an "eyewitness" identified the defendant). See also Orme v. State, 677 So.2d 258,261 (Fla. 1996)(direct evidence placed a criminal defendant at the scene of the crime and was established by *both* eyewitness testimony *und* the defendant's statement to the police)(emphasis added); Gibson v. State, 661 So.2d 288,292 (Fla. 1995)("Absent eyewitness identification *and* a confession, it is difficult to imagine the State could assemble a more compelling body of evidence)(emphasis added); Brvan v. Dugger, 641 So.2d 61, 65 n.4 (Fla. 1994) (evidence included eyewitness testimony *and* defendant's oral and written testimony)(emphasis added).

Also, in the very rules it promulgates, this Court has distinguished between eyewitness

accounts of an event and other types of relevant information. Criminal prosecutors in Florida must disclose the names of witnesses to defendants. Rule 3.220(b)(1)(A), Fla.R.Crim.P. (1997). Eyewitnesses are singled out as being unique from witnesses to statements. According to the rule, the names and addresses of witnesses shall be designated by category, including:

> (1) eye witnesses
>
> (2) alibi witnesses and rebuttal to alibi witnesses
>
> (3) witnesses who were present when a recorded or unrecorded statement was taken or made by a defendant, which shall be separately identified within this category . . .

Rule 3.220(b)(1)(A)(i), Fla.R.Crim.P. (1997).

According to this Court's own rules, eyewitnesses are not the same as witnesses who were present when statements were made. This Court's definition of eyewitness found in the procedural rules would not include Bianchi's after-the-fact interviews. The appellate courts that have since misinterpreted Moreion apparently have concluded that this Court does not understand its own definition of eyewitness.

In the language used by this Court, a clear distinction is made between eyewitnessing an event and statements, confessions and accounts recorded by a reporter years after an event. The person listening to the after-the-fact statements is never considered an eyewitness. There exists no reason why this distinction should be eliminated when the statements, confessions and accounts are made to reporters rather than to police officers, or in a courtroom, particlarly in view of the tradition of a qualified privilege for journalists. The *Times-Union* urges this Court to

accept the reasoning of Judge Klein in his special concurrence in Kidwell, where he pointed out that, "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 [Kidwell]. Kidwell at 407-408 (citing Commonwealth v. Lamb, 455 A.2d 678 (1983), a case in which the court held that a police officer who arrived at scene after robbery had taken place is not an eyewitness).

The phrase "eyewitness observations" used by the Court in Morejon means "eyewitness observations". It does not mean, as the Kidwell decision suggests, ". . . [a] reporter's conversation with an accused after the crime had already been committed and the accused was awaiting trial , . . " Kidwell at 405. mean "a victim's explanation of how a crime occurred" or a "criminal defendant's confession" as the court in Davis held. Davis at 927. It does not mean all "non-confidential information" as the court in Gold Coast held. Gold Coast at 3 18. It does not mean a reporter's interview with a crime victim two years after commission of the crime as the Morris decision suggests.

The reporter in Morejon watched a search and an arrest. The arrest became an issue. In the instant case, Bianchi did not witness the rape, he was not present at the location of the rape when it occurred, he did not witness the security measures taken at the site. He did not witness anything relevant to the case. Therefore, the First District Court of Appeal, just as the other appellate courts that have misinterpreted Morejon, has done so by improperly defining "eyewitness" and applying to the term the broadest possible definition. Unless this Court answers the certified question affirmatively, the appellate courts' incorrect interpretation of Morejon will undo the first amendment protections afforded by Florida trial courts for years. A

failure to correct these decisions also will allow Florida state courts to afford less protection for freedom of the press than do federal courts and courts of neighboring states. This will certainly lead to a chilling of the news gathering process designed to inform the public.

B. The First District Court of Appeal's decision eliminates Florida's three-mu-t balancing test in all situations where reporters are compelled to disclose nonconfidential information and adverselv impacts the public's first amendment right to receive information.

The three-part test applied through the qualified reporter's privilege affords protection to the press and the public, while still providing a party in a civil suit the opportunity to compel a reporter's testimony. It allows for a weighing of conflicting interests. The First District Court of Appeal's decision obliterates the balancing scale and allows trial participants unfettered access to the newsgathering process. The one-sided burden placed on the press interferes with its traditional role of informing the public.

Because citizens cannot directly encounter all of the important events that happen in their communities, the press acts in a traditional "watchdog" role, gathering and presenting the news. A journalist is a professional information-gatherer. When recognizing a first amendment-based right of access to criminal trials in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555,577 n. 12 (1980), Chief Justice Burger acknowledged the public's reliance on the media for information about what goes on at trials. The press serves as "the eyes and ears of the public," allowing the public to see and understand how the public's business is conducted. Id. at 572-73. By the nature of their jobs, journalists invariably will be involved in matters that eventually are

litigated.

In deciding not to apply the privilege, the court in Kidwell offered the hypothetical situation of a reporter who "stumbles into a non-confidential setting in which he overhears a defendant expressly admit his guilt to another person". Kidwell at 405-6. The hypothetical seems to equate a journalist, who regularly has the potential of receiving relevant information to a court proceeding, with a non-journalist, who might in extraordinary circumstances stumble upon such information. In fact, it is the job of the press to purposely seek out such information for the public's benefit. When a court asks why a member of the press should receive any greater protection than a person who stumbles onto relevant information, the answer can be found both in the role of the press and in the protections afforded the press by the United States Constitution and the Florida Constitution.

The role of the press makes journalists recipients of a great deal of information, and as such, journalists constantly are the targets of those seeking more information than was published. Attorneys undertaking the discovery process repeatedly subpoena journalists in order to engage in fishing expeditions for information. Such a scenario also would adversely affect a journalist's reputation for objectivity and could dry up his access to sources.

That is why in Morejon, this Court, given the opportunity to deny a privilege when non-confidential sources are implicated, instead denied the privilege only in "eyewitness" situations. When a reporter witnesses an event and is compelled to testify, the reporter will face questioning about what the reporter saw. The reporter will not be questioned about the news gathering process or editorial decisions. When a reporter interviews a third-party, however, the

relationship that develops between the reporter and interviewee creates an entirely different scenario than one only involving the reporter's eyewitness accounts. As one commentator has noted:

> Relationships between reporters and sources can be fragile things, and society should protect rather than discourage those relationships. . ..As in communications between doctors and patients, lawyers and clients, and husbands and wives, full and candid disclosures between reporters and sources serve important social interests -- in this case, the gathering and reporting of significant news.

John P. Borger, "Why Journalists Should Have a Privilege Not to Disclose Unpublished Information," 4 A.B.A. Sec. Tort & Ins. Practice 6 (1997).

Because the news media can be abused as high-quality, low-cost investigators, journalists in Florida have been subpoenaed in increasing numbers. The number of subpoenas served on Florida newsrooms increased by more than 70 percent in the 21 -month period after Morejon than in the 21 months before the Morejon decision.[2] In the past three *years, The Times-Union* has received an increasing number of subpoenas.[3]

The burden created by the issuance of the subpoenas does not just fall on the media, but the public. The United States Supreme Court has confirmed that ". . . [i]t is now well established that the Constitution protects the right to receive information and ideas." Stanley v. Georgia, 399

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[2] The Brechner Center for Freedom of Information, a project of the University of Florida College of Journalism and Communications published its findings in a March 1993 paper (Laurence B. Alexander et al., "Press Privilege in Florida" at 10).

[3] For example, reporters for *The Times-Union* were subpoenaed in the following court proceedings: McKenzie v. Griffis Gas of the Beaches, Duval County Circuit Court, Case No. 94-06254; Browning v. Wbiddon, Leon County Circuit Court, Case No. 94-2964; State v. Arrango, Duval County Circuit Court, Case No. 95064940; Maddox v. City of Jacksonville, Middle District of Florida, Case No. 95-502-Civ-J-20; Farhat v. Farhat, 25 Med. L. Rptr, (Fla. Cir. Ct. 1997).

U.S. 557, 564 (1969). The ability of the public to receive information from the press, and to perceive the receipt of that information as complete and objective, is threatened by compulsory subpoenas.

Even non-confidential sources, who understand that whatever they say might be published, do not necessarily expect that everything they say will be repeated in a court of law. If reporters are consistently forced to reveal every detail of every source's conversation with them, sources will become less willing to talk to reporters at all, or will be less candid when they do talk with reporters. Even in situations involving non-confidential information, the compelled production of a reporter's resource materials is equally as invidious as the compelled disclosure of his confidential informants. Loadholtz at 1303.

In State v. Hubrecht, supra, the court noted that, if it did not apply the privilege to non-confidential sources, any time a newspaper reporter reports any event concerning any crime, then a party would have the right to subpoena them. State v. Hubrecht at 9. The court then reasoned that reporters would "[s]tay in court or deposition full time trying to explain their story . . ." Id. at 10.

The arguments of the defendants who have subpoenaed Bianchi in the instant case turn disregard the balance provided by the reporter's privilege by ignoring the "qualified" nature of the privilege. At the hearing on the motion to quash, the defendants asserted that if the privilege were applied to a reporter involved in a newsgathering endeavor, the only time the reporter would have to testify was when the reporter eyewitnessed a particular event as it occurred. (Petition for Writ of Certiorari, Appendix 5 at 20-2 1) Similarly, in the Kidwell hypothetical

cited above, the court suggested that if the privilege was applied, the state would be deprived of important evidence, Kidwell at 405-6. This would be valid if the privilege were absolute. The reporter's privilege in Florida, however, is *qualified.* Reporters simply seek the protection of having a burden placed upon the subpoenaing party when the subpoena implicates first amendment concerns. *The Times-Union* merely wants the defendants to have to meet the three-part burden placed upon them by this Court. The defendants in the instant case have argued for the non-application of the privilege because they are aware that if the privilege is applied, they can not meet the burden of overcoming it.

The need for Bianchi's testimony and notes from a story written two years after a relevant event is anything but compelling. Furthermore, the defendants have not even exhausted the most obvious alternative sources for the same information. Instead, they have chosen the path of least resistance and have attempted to turn Bianchi into a professional witness, undermining his credibility with the public as a journalist. That is why Bianchi and *The Times-Union* moved to quash the subpoena and that is why this Court should ensure that a fair and proper balancing test be applied , particularly in a civil case.

Finally, the First District Court of Appeal, in certifying the question, specifically sought guidance from this Court with regard to civil proceedings. The Gold Coast, Kidwell and Davis cases involved criminal proceedings, The distinction between a criminal and civil proceeding is important in analyzing the application of the reporter's privilege.

The Times-Union asserts that Morejon clearly stands for the proposition that the privilege applies to criminal cases where reporters are subpoenaed to reveal nonconfidential, non-

eyewitness information. In addition, the elements of a criminal case that might have caused the appellate courts concern in applying that privilege are absent in civil cases. When a defendant in a criminal case seeks newsgathering information, the court "must weigh a criminal defendant's sixth amendment right to compulsory process for obtaining favorable witnesses against the first amendment rights of the press." Hatch v. Marsh, 134 F.R.D. 300,302 (M.D. Fla. 1990). In a civil case, those interests are not implicated.

The instant appeal is not a case where a reporter witnessed events which are the subject of a criminal case. This case does not place in apposition the journalist's privilege and the constitutional right of a defendant to be afforded every reasonable opportunity to develop and uncover exculpatory information. See. e.g., New York Times Co. v. Jascalevich, 439 U.S. 1317, 99 S.Ct. 6, 58 L.Ed.2d 25 (1978)(White J., in chambers). Federal courts consistently have recognized that a civil litigant's interest in discovery is not as great as that of the state or a defendant in a criminal case. See. e.g., Hatch at 302.0

Most importantly, in the instant civil case, Respondents have indicated that they seek to:

(a) Prevent application of a qualified reporter's privilege;

(b) Preclude the balancing test; and

(c) Burden the first amendment interests of the press and the public,

They wish to do all this for the sake of finding out if a civil litigant told a reporter two years after she had suffered an assault whether the assault resulted in her having black eyes. The First District Court of Appeal decision in Morris, as well as those of the Second and Fourth

District Courts of Appeal, ensures that future litigants will be able, without burden, to compel the testimony of journalists for practically any purpose. That is why Petitioners assert that this Court must prevent such an outrageous extension of its decision in Morejon.

CONCLUSION

The qualified reporter's privilege must be applied in this case, This Court has long recognized a qualified reporter's privilege which generally protects journalists from being compelled to testify. This Court clearly indicated in Morejon that the only exception to the qualified privilege protecting journalists from testifying exists when the journalist is asked to testify regarding eyewitness observations of a relevant event in a subsequent court proceeding. Based on the context of the Morejon decision, the decisions of Florida trial courts, the holdings of federal courts and non-Florida trial courts, this Court's rules and common sense, Bianchi was not an eyewitness.

Therefore, the First District Court of Appeal erred in not applying the privilege and in not imposing the burden of the three-part test upon the defendants. If the test had been applied, the defendants would most likely not pass. The First District Court of Appeal also erred in failing to protect the first amendment interests of the press and the public. The holding will serve to undermine the ability of the press to provide information to the public and will adversely affect the relationship between journalists and their sources. Finally, the First District Court of Appeal decision fails to recognize that civil trial participants do not enjoy the same constitutional discovery interests enjoyed by parties in a criminal action. The decision, while destroying the privilege and the accompanying three-part test, allows civil litigants unchallenged access to professional information-gatherers no matter how slight the relevance of the reporter's information.

The First District Court of Appeal's failure to apply the qualified privilege departed from

the essential requirements of the law and conflicts with this Court's decision in Morejon. Therefore, this court should reverse the decision and remand this case to the trial court, directing the trial court to reconsider Petitioners' motion to quash the subpoena and to apply the three-part test.

Respectfully submitted this 9th day of March, 1998.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been furnished by hand delivery to:

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