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IN THE  
SUPREME COURT OF FLORIDA

**FILED**

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SEP 10 1985

CLERK, SUPREME COURT

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Chief Deputy Clerk

CASE NO. 66,576

THE TRIBUNE COMPANY  
and JAMES TUNSTALL

Petitioners,

vs.

THE HONORABLE L.R. HUFFSTETLER, JR.  
and  
THE STATE OF FLORIDA,

Respondents.

ON PETITION FOR REVIEW OF A DECISION OF  
THE FIFTH DISTRICT COURT OF APPEAL

REPLY BRIEF OF AMICI CURIAE  
THE MIAMI HERALD PUBLISHING COMPANY  
AND THE FLORIDA PRESS ASSOCIATION

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## INTRODUCTION<sup>\*</sup>

Amici curiae The Miami Herald and the Florida Press Associates believe the position taken in this appeal by Petitioners The Tampa Tribune and James Tunstall is both modest and fairly grounded in well-settled, controlling law: Where a reporter is served with an investigatory subpoena which "implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered." Morgan v. State, 337 So.2d 951, 954 (Fla. 1976), quoting Branzburg v. Hayes, 408 U.S. at 709 (Powell, J.).

The subpoena issued here has been shown to serve no legitimate interest of law enforcement for two separate and independent reasons. First, it was issued to investigate the alleged violation of a facially unconstitutional criminal statute. That law, Section 112.317(6), Florida Statutes, makes it a crime for anyone to disclose to the public the existence and content of an ethics commission complaint against a public official until the Commission makes a determination of "probable cause." Because the statute would punish expression which "lies near the core of the First Amendment," it must be shown to protect (i) a state interest of the highest order (ii) from a "clear and

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\* References to the State's Brief are indicated by "SB."

present danger." Smith v. Daily Mail, 442 U.S. 97, 103 (1979); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 838, 841-44 (1978). The statute here, as a matter of settled constitutional law, fails to meet this test, because the temporary protection of official reputation (and such other interests as may be served by confidential proceedings) are not sufficient justifications to warrant the punishment of speech. Landmark, supra. Since the State has no legitimate interest in "investigating" the alleged violation of a facially unconstitutional statute, there is "no legitimate need of law enforcement" to enforce the subpoena.

The subpoena also serves "no legitimate need of law enforcement," irrespective of the statute's unconstitutionality, because none of the interests the statute was enacted to protect is threatened by the "disclosure" here. The possibility of an ethics violation, and the need for a ruling by the Ethics Commission, were matters of public record prior to the "disclosure". In short, a prosecution here would punish no "evil" prohibited by the statute; its application to the facts of this case would be absurd and contrary to legislative intent.

Affirmation of the contempt order would cause extraordinary damage to freedom of the press because the protection of confidential sources is of critical importance to the reporting of news about government conduct. The unfortunate fact of human nature is that many people will

not report misconduct unless they can remain anonymous. While the multitude of routine news stories published do not require a guarantee of confidentiality to news sources, truly important investigative stories relating to official misconduct often would not be published without confidentiality. In light of the extraordinary importance of confidential sources to investigative reporting, there is nothing extravagant or unreasonable in the Petitioners' insistence that a State Attorney's decision to subpoena a reporter be subject to some judicial review. The role of the courts in such cases is traditional, the "striking of a proper balance between freedom of the press and the obligation of all citizens to give testimony with respect to criminal conduct." Morgan v. State, supra at 954, quoting Branzburg v. Hayes, supra at 710 (Powell, J.).

The reaction of the State to these simple and uncontroversial propositions has been one of hysterical misrepresentation.<sup>1</sup> The State wildly charges that Petitioners seek to reverse Branzburg (SB 3-4), when in fact the

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<sup>1</sup> The misstatements in the State's brief are legion. For example, The Miami Herald does not consider this case one of "first impression" (SB 19, n. 6, 23, 25, 27), since Branzburg itself recognized the privilege in the context of a grand jury investigation. The Herald's brief below states only that the trial court's jailing of a reporter in violation of the Morgan rule "was unprecedented." Similarly, the State's claims that Landmark approved "temporary delays" in disclosure (SB 38) and that state shield laws do not apply to criminal investigations (SB 19) are just plain wrong. See discussion infra at pp. 11-12; and see, e.g., In re Vrago, 176 N.J. Super. 455, 423 A.2d 695 (1980) (holding New Jersey shield law bars grand jury subpoena).

press asks only that it be followed. The State accuses the Petitioners of ignoring the "official opinion" in Branzburg and failing to disclose its holdings to this Court (SB 10-11, 13-18), but Justice Powell's opinion is the controlling authority in the "official opinion" since he cast the deciding vote. This Court, as well as every other subsequent court, has concurred in this view. Morgan, supra at 954-6. The State simply ignores the holding of Morgan and Mr. Justice Powell's concurrence.

The State would further have this Court believe that the press sees itself as "above the law" (SB 7, 28); in fact, petitioners seek only the qualified right to challenge subpoenas in court, while the State views its right to force compliance with subpoenas as absolute, to be unfettered by judicial review. The State's brief accuses the petitioners of insulting Judge Huffstetler (SB 30), intentionally misrepresenting the law (SB 33), personally attacking the State Attorney (SB 33), and seeking to establish an absolute reporter's privilege so that large newspapers can reap huge profits while covering up "crimes" (SB 7, 16). A dispassionate analysis reveals a clearer view of this case -- a citizen reporter is faced with a six-month jail sentence for properly exercising his qualified First Amendment privilege to protect his confidential source from needless disclosure.

In its arrogance, the State argues that once a state attorney concludes that any crime may have been

committed -- or purports to reach such a conclusion -- the First Amendment rights of a reporter are immediately extinguished and the courts are denied any role in examining the propriety of the State's actions. The reporter has no right to have a court inquire as to whether any "crime" could actually have been committed. He has no right to ask a court to determine whether his testimony is necessary to the investigation. He has no right to request a court to determine whether the state has exhausted less drastic means before it invades his rights. He has no right to ask a court to determine if the statute under which the "investigation" is based is even facially constitutional. To the contrary, the State argues that once it begins any "investigation," the reporter has two choices: he can submit to the State's subpoena, or he can go to jail. The court has no choice: it must blindly enforce the will of the State Attorney.

There is another choice. The decision of an Assistant State Attorney to subpoena a journalist is reviewable by the courts and must be tested against the qualified privilege afforded journalists by the First Amendment.

## ARGUMENT

I. THE CONTEMPT CONVICTION SHOULD BE REVERSED, BECAUSE THE STATE HAS FAILED TO OVERCOME THE REPORTER'S QUALIFIED FIRST AMENDMENT PRIVILEGE.

A. In Morgan This Court Adopted The Reporter's Privilege Recognized in Branzburg.

The State's response to the initial briefs setting forth the settled law of the reporter's qualified first amendment privilege is to deny the undeniable: the State simply refuses to recognize that in Branzburg v. Hayes, 408 U.S. 665 (1982), a majority of the United States Supreme Court adopted the reporter's privilege.<sup>2</sup>

This refusal is simply contrary to the settled law of this Court. In Morgan v. State, 337 So.2d 951, 954-6 (Fla. 1976), this Court recognized and adopted the qualified privilege granted the press by the majority of the U.S. Supreme Court in Branzburg. Indeed, the decision in Morgan quoted liberally from the decisive concurring opinion of Mr. Justice Powell. 337 So.2d at 954.

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<sup>2</sup> Rather, the State continues to cite to the four-justice plurality opinion in Branzburg which took the position that no qualified privilege existed. The State errantly refers to this as the "official opinion" of the court. As this Court noted in Morgan, however, a majority of the U.S. Supreme Court -- the four dissenting justices and Justice Powell -- also wrote "official" opinions; these opinions recognized the existence of the qualified privilege. 337 So. 2d at 954. Justice Powell sided only with the plurality on the ultimate result in Branzburg, finding the privilege inapplicable under the facts of that case.

In applying Branzburg, and carrying out its mandate to strike "a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct," 408 U.S. at 709, this Court has adopted a test which the State must satisfy before the reporter's privilege is overcome. That test is:

- (1) whether enforcement of the subpoena would serve a legitimate interest of law enforcement;
- (2) whether this legitimate interest is "immediate, substantial, and subordinating";
- (3) whether there is a "substantial connection" between the testimony sought and the subordinating societal interests;
- (4) whether enforcement of the subpoena is the least drastic means of serving society's interest;

337 So.2d at 955-56 & n. 10; 957.

Time and time again, Florida appellate courts have applied this privilege to quash subpoenas on reporters. Gadsden County Times v. Horne, 426 So.2d 1234 (Fla. 1st DCA, cert. denied, 441 So.2d 631 (Fla. 1983)); Johnson v. Bentley, 457 So.2d 507 (Fla. 2d DCA 1984); Tribune Co. v. Green, 440 So.2d 484 (Fla. 2d DCA 1983); Times Publishing Co. v. Burke, 375 So.2d 297 (Fla. 2d DCA 1979); State v. Laughlin, 43 Fla.Supp. 166 (16th Cir. 1974); aff'd, 323 So.2d 691, 691 (Fla. 3d DCA 1975).<sup>3</sup>

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<sup>3</sup> Florida trial court cases recognizing the privilege are cited at IB 28, n.15. Federal cases recognizing the privilege are cited at IB 29-30, n. 16, n. 17.

The State utterly fails to explain these cases away. The State first argues that, to the degree the privilege exists, it applies only in civil matters (SB 9-17). Forced to further re-trench in the face of overwhelming case law applying the privilege in both civil and criminal contexts,<sup>4</sup> the State ultimately argues that the privilege applies to criminal trial subpoenas, but not investigatory subpoenas (SB 22-26). This position does not survive even casual scrutiny.

Indeed, the State's purported distinction was rejected by the Supreme Court in Branzburg itself, where Justice Powell was joined by four Justices in recognizing the existence of the qualified privilege in the context of a grand jury investigation. Branzburg, supra, at 709-10.

The distinction is not only without legal basis -- it is dangerous. The State would have this Court hold that although the qualified privilege exists during a criminal trial, it does not exist during an investigation -- at a point where the State has yet to garner enough evidence to issue an information or convince a grand jury that an

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<sup>4</sup> For instance, in Tribune Co. v. Green, 440 So.2d 484 (Fla. 2d DCA 1983), the Second District applied the Gadsden test to quash a subpoena requiring a reporter to testify as a witness in a trial. In doing so, the Court flatly rejected the criminal/civil distinction the state attempts to draw: "There is abundant case law that this test is applicable to criminal as well as civil cases, and to confidential and nonconfidential sources of information." 440 So.2d at 486.

indictment should issue. In essence, the State argues that once the State Attorney has chosen to begin a fishing expedition, no matter how tenuous, the First Amendment rights of the reporter are extinguished, only to be somehow resuscitated when and if a matter comes to trial. The rules suggested by the State would mean that once a state attorney deems an "investigation" to have begun, no reporter could maintain the confidentiality of any source. The authority of the courts to monitor the State's behavior are similarly extinguished, barred by the absolute power of the state attorney. This contention is meritless on its face, and the Court need look no further than the record before it to note how such a rule could be abused by a politically motivated prosecutor.

B. The State Wholly Failed To Satisfy  
The Burden Necessary To Overcome  
The Reporter's Qualified Privilege.

The State wholly failed to meet the four-part test established by Morgan for adjudicating a reporter's qualified First Amendment privilege. The first two requirements of the test inherently cannot be met because the state attorney is "investigating" the "violation" of a facially unconstitutional statute. There is no legitimate need of law enforcement (let alone a subordinating state interest) to enforce a subpoena under such a circumstance.

The Statute is unconstitutional because it punishes truthful expression about public officials which "lies near the core of the First Amendment" even though that expression (i) poses no "clear and present danger" to (ii) any "state interest of the highest order." Worrell Newspapers v. Westhofer, 739 F.2d 1219 (7th Cir. 1984) aff'd per curiam \_\_\_\_ U.S. \_\_\_\_, 84 L.Ed.2d 309 (1985); Smith v. Daily Mail Publishing Co., 442 U.S. 97, 103 (1979); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 841-44 (1979); Gardner v. Bradenton Herald, Inc., 413 So.2d 10 (Fla. 1982) cert. denied, 103 S.Ct. 143 (1982). The State in its brief fails even to suggest that the statute is necessary to protect a clear and present danger to any state interest of the highest order.<sup>5</sup> Rather, the State attempts

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<sup>5</sup> The State, citing Garner v. Commission on Ethics, 415 So.2d 67, 69 (Fla. 1st DCA 1982), suggests that it need not meet this test in order to establish the constitutionality of the statute; rather, the state claims that Garner requires only a "balancing standard." (SB 37). Garner is cited with typical inaccuracy. Garner did not involve the First Amendment rights of citizens to freely criticize public officials. To the contrary, the case involved the very weak putative federal right of disclosural privacy held by public officials facing disclosure of Ethics Commission investigations. In reviewing this right of disclosural privacy, the Court held that a "balancing standard" was appropriate because disclosural privacy rights are so weak the state need not show a "compelling interest" to overcome them. The state's position on this issue is also belied by the 1978 opinion of the Attorney General, 1978 Op. Atty. Gen. Fla. 078-16 (Jan. 31, 1978), which clearly states the Attorney General's belief that the statute would be found constitutionally infirm absent a showing of a compelling state interest and a clear and present danger to that interest. While the State declares that it "resents" the "carefully edited discussion of the opinion," amici invite the Court to review the opinion in its entirety. The opinion speaks for itself and casts grave doubt on both the constitutionality of the statute and the viability of the State's latest interpretation of it.

to avoid the criteria it cannot meet by arguing that (i) Landmark and its progeny grant First Amendment protection only to persons who are not "participants" in the Ethics Commission process; and (ii) Landmark applies only to total closures, not temporary or partial closures. (SB 38-9).

The State's first claim is irrelevant to this case because Section 112.317(6) does not punish speech only by participants in the ethics commission process. The statute applies not only to a complainant who "wilfully discloses, or permits to be disclosed, his intention to file a complaint," but also "any person who wilfully discloses, or permits to be disclosed, ... the existence or contents of a complaint which has been filed with the commission, or any document, action, or proceeding in connection with a confidential preliminary investigation of the commission." The State has simply lost track of the language of the statute at issue. The statute is facially unconstitutional because its scope is identical to that of the statute in Landmark.

The State's second contention is also wrong, because the closures in Landmark and Worrell<sup>6</sup> were also

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<sup>6</sup> In Worrell, the Seventh Circuit overturned an Indiana statute which stated that "no person may disclose the fact that an indictment or information is in existence or pending until the defendant has been arrested or otherwise brought within the custody of the court." 739 F.2d at 1221. The Supreme Court affirmed that holding. Id., 84 L.Ed.2d 309. The statute here also restricts the speech of all persons and is similarly infirm. The State's brief fails to mention, much less distinguish, Worrell.

temporary or partial. In Landmark, the proceedings were confidential by statute only until they reached the state supreme court. Id., at 832, n. 2. In Worrell an information was confidential only until an arrest was made. The State has simply erred again.

Since the State's brief fails even to attempt to establish that the speech Section 112.317(6) seeks to punish could pose a clear and present danger to a state interest of the highest order, the State has failed to rebut the facial unconstitutionality of the statute.

Similarly, the State completely avoids Petitioners' argument that, even assuming the constitutionality of the statute, it has failed to show Tunstall's testimony to be necessary to protect an "immediate, substantial and subordinating state interest." The matters disclosed by Tunstall here were already a matter of public record. The need for an Ethics Commission ruling had been discussed by the County Commission at an open meeting and was a matter of common knowledge in Hernando County. The two commissioners involved had publicly discussed what would later become the basis of the Ethics Commission complaint -- the filing of the lawsuit -- which was itself another public act. No reputational damage could possibly have been done by the disclosure in question.

The State attempts to sidestep the facts which establish that its "investigation" has nothing to do with an "immediate, substantial and subordinating state interest."

To avoid these facts, the State contends that, because it is purportedly investigating a violation of the statute, "[t]he underlying complaints, their disposition and eventual publication are irrelevant." (SB 1a). These facts are hardly irrelevant. They expose the State Attorney's investigation as meaningless and in furtherance of no legitimate state interest. The State's refusal to respond to these facts speaks volumes on the merits of this abusive investigation.<sup>7</sup>

II. THE STATE HAS FAILED TO COUNTER TUNSTALL'S RIGHT TO APPEAL THE FACIAL UNCONSTITUTIONALITY OF THE STATUTE AS "FUNDAMENTAL ERROR," OR HIS STANDING TO CHALLENGE THE STATUTE'S CONSTITUTIONALITY.

Confronted with the demonstrable facial unconstitutionality of § 112.317(6), Fla. Stat., the State maintains that Tunstall "lacks standing to raise [this] constitutional claim" and that Tunstall "waived" this claim by not raising it in the trial court. (SB 33). This two-fold

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<sup>7</sup> Nor has the State responded to amici's argument that the State failed to satisfy the last criterion of the Morgan test -- that enforcement of the subpoena was the least drastic means of serving society's interest, and that the state had exhausted alternative sources. As the brief of the amici has noted, the prosecutor's "testimony" not only violated Tunstall's due process rights; it also exposed the prosecutor's investigation as hopelessly inept and incomplete (AB 40-45). The State simply refuses to respond to the argument that it failed to exhaust alternative sources, choosing instead to argue that its investigation is of no business to the court.

argument is plainly wrong; moreover, it is belied by the very authorities upon which the state purports to rely.

In Trushin v. State, 425 So.2d 1126, 1129 (Fla. 1982), this Court reaffirmed the settled principle that the facial unconstitutionality of a statute may be raised for the first time on appeal. Indeed, two of the decisions cited by the State (SB 33) apply this principle, conducting de novo appellate review of "fundamental error." See Steinhorst v. State, 412 So.2d 332 (Fla. 1982); State v. Jones, 377 So.2d 1163 (Fla. 1979). Trushin makes clear -- and the State concedes at page 35 of its brief -- that if a party has standing, it may raise the facial unconstitutionality of a statute as "fundamental error" for the first time on appeal. The State then claims that the Statute is not facially unconstitutional for the reasons discussed and rejected in Part IB of this Brief. Since those arguments fail, the State's position amounts to the assertion Tunstall lacks standing to challenge the Statute.

Without question, Tunstall has the requisite standing. This Court's decision in Morgan and the Supreme Court's decision in Branzburg establish that a reporter has standing to quash a subpoena on the grounds that no proper criminal investigation exists. Tunstall seeks to quash a subpoena because there is no valid underlying criminal statute and, therefore, no cognizable crime. The State does not reply to this argument.

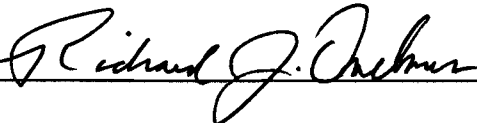
Relying on Higdon v. Metropolitan Dade County, 446 So.2d 203 (Fla. 3d DCA 1984), the initial briefs also demonstrated that Tunstall has "third party" standing to challenge the constitutionality of § 112.317(b), Fla. Stat. The state neither cites nor responds to Higdon.

Finally, the state simply misrepresents the holding of Craig v. Boren, 429 U.S. 190 (1976) (SB at 36-37). The Craig decision held that a beer vendor had standing to assert her rights and also those of minors who were affected by statutory provisions restricting the sale of beer. 429 U.S. at 195. The press here asserts its standing to challenge Section 112.317(6) because it infringes the right of the press to gather and publish news and also because it violates the free speech rights of sources.

#### CONCLUSION

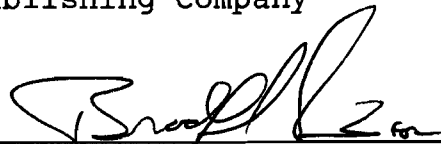
The reporter's qualified privilege to maintain the confidentiality of his sources has been recognized by the United States Supreme Court, this Court, and all other authorities. The test the state must satisfy to overcome this privilege clearly has not been met. In light of Branzburg, Morgan and numerous subsequent decisions, this Court should reverse the contempt judgment against James Tunstall and quash the subpoena issued by the assistant state attorney.

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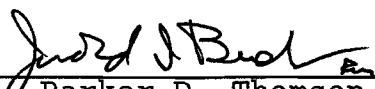
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I HEREBY CERTIFY that a true copy of the foregoing was served by mail this 9th day of September, 1985, upon the following:

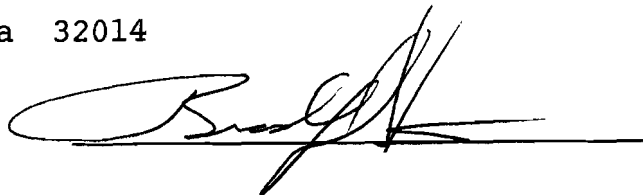
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