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Making the Press Talk After Miami Herald Publishing Co. v. Morejon: How Much of a Threat to the First Amendment?

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Abstract

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Making the Press Talk After *Miami Herald Publishing Co. v. Morejon*: How Much of a Threat to the First Amendment?

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I. INTRODUCTION

Florida media lawyers and journalists are raising First Amendment alarms about what they see as a softening of issues that had been regarded in the state as settled law. In what some view as a newly developing line of cases, the Florida Supreme Court has taken steps to compel testimony in criminal actions from reporters with eyewitness knowledge. Citing strong public policy concerns first announced in the twenty year-old United States

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Supreme Court case, *Branzburg v. Hayes*,¹ the court has twice, in as many years, ruled that journalists have no First Amendment privilege which would allow them to refuse to testify about eyewitnessed events in a criminal case.

The case that started the controversy is the 1990 decision in *Miami Herald Publishing Co. v. Morejon*,² which allows criminal defendants to successfully subpoena reporters for deposition testimony about events the reporters witnessed relevant to their defense. The following year the court extended that ruling slightly in *CBS v. Jackson*,³ holding that unbroadcast videotaped outtakes of a witnessed criminal event and its aftermath could be successfully subpoenaed.⁴ The concern raised here is that the ruling in *Jackson* makes not only oral testimony susceptible to subpoena, but also a reporter's work product, in the form of notes or tapes.

News organizations have protested the *Morejon* and *Jackson* decisions, fearing that reporters could become professional "testifiers" which would take them from their beats. Other concerns include a fear that journalists will become less aggressive in their efforts to uncover wrongdoing and that compelled testimony and perhaps identification of confidential sources may have a general "chilling effect" on the news gathering process.

While there has been no indication that compelled identification of confidential sources is imminent in Florida, the specter has been raised. In *In re Investigation: Florida Statute 27.04*,⁵ the Fourth District Court of Appeal affirmed the indirect criminal contempt conviction of a reporter who refused to identify the source of a confidential order in a child abuse case.⁶

Confidential sources have long been depended upon to facilitate newsgathering in a number of ways, including helping to develop information that may otherwise be unavailable. Confidentiality also helps cultivate news sources, builds trust, and gives confidence and protection to a fearful source who wishes to remain anonymous.⁷

1. 408 U.S. 665 (1972).

2. 561 So. 2d 577 (Fla. 1990).

3. 578 So. 2d 698, 700-01 (Fla. 1991).

4. *Id.* at 700-01.

5. 589 So. 2d 978 (Fla. 4th Dist. Ct. App. 1991).

6. *Id.* at 981. Attorneys for the reporter have petitioned the United States Supreme Court for a writ of certiorari. Associate Justice Anthony Kennedy stayed *Stuart News* reporter Tim Roche's 30 day jail sentence on July 22, 1992 pending the Supreme Court's review of the petition. The Florida Supreme Court denied review of the Fourth District Court of Appeal decision, by a 4-3 vote, on June 2, 1992. *In re Investigation: Florida Statute 27.04, Subpoena of Roche*, 599 So. 2d 1279 (Fla. 1992).

7. K. Tim Wulfemeyer, *Use of Anonymous Sources in Journalism*, 4 NEWSPAPER RES. 2 J. 43-50 (1983).

In *Branzburg*, the Supreme Court held that the First Amendment provided no privilege for journalists which would allow them to refuse to identify confidential news sources when subpoenaed to testify before a federal grand jury.⁸ Justice Byron White's five-vote majority opinion was based on the reasoning that the laws which would compel such testimony were laws of general application and applied with equal force to newspeople and citizens in general.⁹ The majority found no special immunity for the press from the civic duty to testify before a grand jury when called. That majority, however, was not of one mind. Justice Powell, who cast the deciding fifth vote, wrote a separate opinion, concurring in the result only.¹⁰ Stressing the "limited nature" of the Court's ruling, Justice Powell rejected the majority's formalistic analysis,¹¹ which focused on the general nature of the law without regard for the potential damage to the newsgathering process. Justice Powell preferred an approach that included a case-by-case examination of when the First Amendment was implicated by compelled grand jury testimony by journalists. Justice Powell stated that judges should take into account the effect of forced disclosure on the newsgathering process and determine whether justice could be served by a means less damaging to First Amendment values.¹²

Following the 1972 decision in *Branzburg*, twenty-eight states enacted laws which would allow reporters to refuse to respond to subpoenas in an effort to limit the effect of the decision.¹³ Florida is not one of the jurisdictions which has codified the reporters' privilege not to testify in the form of a "shield law." However, Congress has considered a shield law briefly, but abandoned its efforts when journalists could not agree on who

8. *Branzburg*, 408 U.S. at 690.

9. *Id.*

10. *Id.* at 709 (Powell, J., concurring).

11. See Richard A. Posner, *What has Pragmatism to Offer Law?*, 63 S. CAL. L. REV. 1653 ("Legal formalism is the idea that legal questions can be answered by inquiry into the relation between concepts and hence without need for more than a superficial examination of their relation to the world of fact.") *Id.* at 1663; see also Keith Werhan, *The Supreme Court's Public Forum Doctrine and the Return of Formalism*, 7 CARDOZO L. REV. 335 (1986) ("A formalistic approach to judicial decisionmaking seeks to develop and apply 'objective' criteria as a means of resolving disputes. 'Formalism' is noted for its tendency to employ rules of decision that have little or no reference to their context or purpose.") *Id.* at 336 n.1.

12. *Branzburg*, 408 U.S. at 709.

13. See KENT R. MIDDLETON & BILL F. CHAMBERLIN, *THE LAW OF PUBLIC COMMUNICATION* 467 (1991) (listing the states with "shield laws").

was and was not a journalist.¹⁴ Moreover, the press opposed allowing the government to define those who would be included in that category, and therefore protected.¹⁵

Since *Branzburg*, the Florida appellate courts have compelled testimony in several criminal cases on facts far less intrusive on First Amendment rights than those involved in *Branzburg*. In fact, all have involved non-confidential sources. Despite the *Morejon* and *Jackson* decisions, Florida courts have never handed down a ruling that has required a reporter to reveal a confidential source in a criminal matter.¹⁶ Even given the *Branzburg* Court's intent, which limited application of its decision to federal grand juries, the Florida appellate courts have not yet gone that far in applying the case's reasoning in a criminal case which would compel a reporter to breach a confidence. So far, the state's jurists have given a wide berth to any efforts to force journalists to name a confidential source, whether in a criminal or civil action.

The *Morejon* and *Jackson* decisions do impinge on the newsgathering process to the extent that time may occasionally have to be taken to provide testimony. Neither decision suggests any change in protections afforded to the reporter-confidential source relationship, though, and the threat to the First Amendment may be overstated. In support of this thesis, this article will review the history of the reporters' privilege in Florida, examining all ten cases which have reached the appellate courts since the *Branzburg* decision.

Branzburg concerned the consolidation of three criminal cases in which reporters were subpoenaed to testify before grand juries around the country about narcotics trafficking, plans to assassinate the President and other criminal activity.¹⁷ The journalists claimed that forced testimony would be so burdensome to the newsgathering process that a special protection was required. The reporters' position was that if they were forced to identify their sources as required by the subpoenas, their sources would refuse to supply leads and other information in the future. They argued that if their sources feared exposure, the flow of information would "dry up" and eventually become unavailable to the public.¹⁸

14. TOM GOLDSTEIN, *THE NEWS AT ANY COST*, NEW YORK: SIMON AND SCHUSTER 150-51 (1985).

15. *Id.*

16. *Jackson*, 578 So. 2d at 699.

17. *Branzburg*, 408 U.S. at 667.

18. *Id.*

A plurality of the Court agreed, however a bare majority held that a subpoena compelling a reporter to appear and testify before a federal grand jury on confidential matters did not abridge the freedom of speech or press guaranteed by the First Amendment.¹⁹ Justice White, while limiting the holding to grand juries' good faith investigations of crime, wrote that "[t]he First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability."²⁰ Justice White also noted that the Constitution does not exempt newspeople from performing a citizen's normal duty of appearing and furnishing information relevant to a grand jury investigation.²¹ However, despite the holding of the majority, *Branzburg*, in fact, opened the door to the qualified reporters' privilege.²²

In the majority's opinion, the Court found that newsgathering qualifies for some First Amendment protection, since "without some protection, freedom of the press could be eviscerated."²³ A majority of the justices found that a qualified privilege exists to insulate, to some extent, reporters responding to subpoenas.²⁴ Two Justices, Powell and Stewart outlined tests in their opinions to be applied by courts facing reporters' privilege claims.²⁵

19. *Id.*

20. *Id.* at 681.

21. *Id.* at 685.

22. The weight of academic commentary agrees with this interpretation of *Branzburg*. See, e.g., James Goodale, *Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen*, 26 HASTINGS L.J. 709 (1975); Donna Murasky, *The Journalist's Privilege: Branzburg and its Aftermath*, 52 TEX. L. REV. 829 (1974); Comment, *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 50, 137-48 (1972).

23. *Branzburg*, 408 U.S. at 681.

24. See *id.* at 709-10 (Powell, J., concurring); see also *id.* at 747-52 (Stewart, J., with whom Brennan & Marshall, JJ., join, dissenting).

25. Justice Powell's test hinges on the balancing of constitutional and societal interests on a case by case basis. He states that "[t]he asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligations of all citizen to give relevant testimony with respect to criminal conduct." *Id.* at 710 (Powell, J., concurring). Justice Stewart, on the other hand, believes the grand jury power of testimonial compulsion should not be exercised in a manner that would impair first amendment interests "until there has been a clear showing of a compelling and overriding rational interest that cannot be served by any alternative means." *Id.* at 747 (Stewart, J., with whom Brennan & Marshall, JJ. join, dissenting) (citing *Caldwell v. United States*, 434 F.2d at 1086).

II. DEVELOPMENT OF THE QUALIFIED REPORTERS' PRIVILEGE IN FLORIDA

To provide a framework for the chronological section which follows, Florida's ten post-*Branzburg* reporters' privilege cases will be broken down into two categories—criminal and civil cases. In the criminal area, the cases are discussed chronologically; *Green*, *Satz*, *Cobb*, *Morejon*, and *Jackson*. The five civil cases are *Morgan*, *Horne*, *Bentley*, *Huffstetler*, and *Carroll*.

Florida's first opportunity to deal with the issue of journalists and their confidential sources came in the late 1940s in *Clein v. State*,²⁶ after a Miami magazine reporter quoted extensively in an article from testimony presented by other citizens before a grand jury investigating charges of bribery of a Dade County official. By revealing the contents of grand jury testimony, Clein violated a state statute and was charged with criminal contempt. His conviction was upheld as the court put the public interest in grand jury secrecy ahead of the rights of the private press.²⁷ Because this was a case of first impression in Florida, the Florida Supreme Court adopted the position outlined in a 1914 Hawaii case: "Though there is a canon of journalistic ethics forbidding disclosure of a newspaper's source of information . . . it must yield when in conflict with the interests of justice; the private interest involved must yield to the interests of the public."²⁸ In following this analysis, the Florida Supreme Court decided that journalists had no "privilege of confidential communication, as between themselves and their informants."²⁹

Clein was the last appellate decision in Florida on the subject of confidential communications between journalists and their informants before the *Branzburg* decision in 1972. When the Florida Supreme Court was confronted with this issue in 1976, it retreated from the extreme position of an outright denial of the privilege, finding a social value in protecting confidential sources.

A. Florida's First Post-*Branzburg* Case

In November 1973, Lucy Ware Morgan published a summary of a presentment made to a Pasco County grand jury investigating a public official. Her source was a member of that grand jury who supplied the

26. 52 So. 2d 117 (Fla. 1950).

27. *Id.* at 121.

28. *Id.* at 120 (quoting *Re Wayne*, 4 Haw. Dist. Ct. R. 475 (1914)).

29. *Id.*

information in confidence. When she was subpoenaed, Morgan refused to divulge the identity of her informant and was convicted of criminal contempt.³⁰

After losing an appeal to the Second District Court of Appeal,³¹ Morgan's case went to the Florida Supreme Court. On appeal the supreme court, for the first time, recognized a limited, or qualified, reporters' privilege against the forced revelation of confidential sources, and reversed her conviction.³² In finding the privilege, the court adopted the approach taken by Justice Powell in his concurring opinion in *Branzburg*.³³ Justice Powell suggested in *Branzburg* that the proper analysis of the privilege question required a case-by-case examination of the facts.³⁴ Justice Powell wrote that discussion of the reporters' privilege involves seeking a balance between societal and constitutional interests.³⁵

In what was to emerge later as an important distinction in Florida, the Supreme Court of Florida found that Morgan's grand jury reporting was not a criminal, but rather a civil matter.³⁶ Initially, she was charged with and convicted of a violation of a criminal statute which prohibited revealing grand jury testimony.³⁷ However, Morgan's story revealed only the substance of a presentment to the grand jury, not the testimony itself, and the grand jury she was reporting on wasn't investigating a crime. The *Morgan* court explicitly distinguished the case from *Clein* on the grounds that only a civil matter was involved.³⁸ The court also seized the opportunity to overrule *Clein*.³⁹ The court pointedly ruled that the "intervening years suggest that important public interests . . . may be served by publication of information the press receives from confidential informants."⁴⁰

Although the *Morgan* court repeatedly referred to the majority opinion in *Branzburg*, the latter decision marked the beginning of the Florida courts' development of a qualified reporters' privilege. Florida's test for determin-

30. *Morgan v. State*, 325 So. 2d 40, 40 (Fla. 2d Dist. Ct. App. 1975), *rev'd*, 337 So. 2d 951 (Fla. 1976).

31. *Id.*

32. *Morgan*, 337 So. 2d at 956.

33. *See Branzburg v. Hayes*, 408 U.S. 665, 709-10 (1972) (Powell, J., concurring).

34. *Id.* at 710.

35. *Id.* at 710-14.

36. *Morgan*, 337 So. 2d at 956.

37. *Id.* at 954 (citing FLA. STAT. § 905.24 (1974)).

38. *Id.* at 953.

39. *Id.* at 953 n.4.

40. *Morgan*, 337 So. 2d at 953.

ing whether the privilege existed was drawn from the *Branzburg* plurality opinions. In *Morgan*, the court balanced the private reputation of the public official discussed by the grand jury and the public's need for access to information.⁴¹ This test was a modification of the balancing test suggested by Justice Powell in *Branzburg*, crafted to fit the facts of *Morgan* and the interests involved. The activity underlying the *Morgan* case—an investigation of public corruption—involved a set of facts quite unlike that in *Branzburg*. Further, the Florida Supreme Court's characterization of *Morgan* as a civil case was a significant point of departure, and clearly distinguished *Branzburg*. This departure resulted in providing the Florida courts a basis for developing their own cogent body of case law.

B. *The Three-Part Test Comes to Florida*

It was not until 1983 that another reporters' privilege case worked its way up to the appellate level in Florida. In *Gadsden County Times, Inc. v. Horne*,⁴² the First District Court of Appeal, faced with a libel action involving a confidential news source, did not use Justice Powell's balancing test. Instead, the court introduced a new test as the standard of review. The District Court of Appeal's decision in *Horne*, which ruled in nearly all the appellate cases in this area for the next seven years, developed the foundation for the law governing the reporters' privilege in Florida.

In deciding in favor of the newspaper, the *Horne* court applied a three-part test,⁴³ first developed by the U.S. Court of Appeals for the Second Circuit twenty-five years earlier in *Garland v. Torre*.⁴⁴ The court's opinion in *Garland*, written by Justice Stewart before he joined the Supreme Court, presaged his analysis of the problem in his *Branzburg* dissent 14 years later.⁴⁵ Justice Stewart's test, as formulated in *Garland*, required: "1) that the information sought is relevant to issues in the case, 2) that there is no alternative source of the information, and 3) that there is a compelling interest in the revelation of the information sought."⁴⁶

Applying the test in Florida for the first time in *Horne*, the First District Court of Appeal held that all three parts of the *Garland* test had to

41. *Id.* at 955-56.

42. 426 So. 2d 1234 (Fla. 1st Dist. Ct. App. 1983), *review denied*, 441 So. 2d 631 (Fla. 1983).

43. *Id.* at 1240.

44. 259 F.2d 545 (2d Cir. 1958), *cert. denied*, 358 U.S. 910 (1958).

45. *See Branzburg*, 408 U.S. at 747-52.

46. *Horne*, 426 So. 2d at 1241 (citing *Miller v. Transamerican Press, Inc.*, 621 F.2d 751, 726 (5th Cir. 1980)).

be satisfied in order to overcome the reporters' privilege.⁴⁷ In *Horne*, the newspaper was the defendant in a libel case. The plaintiff, Mallory Horne, wanted the paper to identify the source of the defamatory information. Because *Horne* was a civil case, lesser, private interests were involved than if the case had been a criminal proceeding. Thus, the court based its finding of the qualified privilege in the First Amendment's guaranteed right to freedom of the press. The court said that the privilege exists in civil cases whether the subpoenaed reporter is a party or not.⁴⁸ In such cases, there is no need to balance free press rights against any competing societal interest.⁴⁹ The extension of the privilege to a case in which the reporter himself was a defendant in a libel action, represented an important addition to the law established in *Morgan*, where the subpoenaed reporter herself had not been a party to the underlying case.⁵⁰ The court, adopting the *Garland* test, said, "[w]e find that the weight of authority in the post-*Branzburg* cases supports the existence of a qualified privilege based on the First Amendment freedom of the press which protects against the compelled disclosure of the identity of the confidential sources."⁵¹ The state's first application of the three-part test also received the tacit approval of the Florida Supreme Court in a case later that year when the high court declined to grant certiorari.

C. *The First Criminal Case*

In 1983, on the heels of the *Horne* decision, the Second District Court of Appeal heard *Tribune Co. v. Green*⁵² which involved the publication of a story written by a reporter and based entirely on non-confidential sources. The story and subsequent case involved a circuit judge who had attempted to influence the sentencing of a defendant in a colleague's courtroom.⁵³ The court in *Green*, relying heavily on *Horne*, adopted the three-part test for the first time in a criminal case involving non-confidential sources.⁵⁴ The court found that the second prong of the *Garland* test was not satisfied.⁵⁵ The court ruled that no attempt had been made to elicit the information from

47. *Id.* at 1241-42.

48. *Id.* at 1240.

49. *Id.* at 1241.

50. *Id.*

51. *Horne*, 426 So. 2d at 1240.

52. 440 So. 2d 484 (Fla. 2d Dist. Ct. App. 1983), *review denied*, 447 So. 2d 886 (Fla. 1984).

53. *Id.* at 486.

54. *Id.*

55. *Id.*

any of the many "first hand players" who had knowledge of the case from their investigation of the judge and his malfeasance.⁵⁶ By extending the reporters' privilege for the first time to a criminal case and to a non-confidential source-based report, the *Green* court went well beyond *Horne*. As mentioned previously, the Florida Supreme Court let the decision stand, declining to review the case.⁵⁷

The *Green* decision was followed in 1984 by a civil case, also heard in the second district, which reached a similar result. In *Johnson v. Bentley*,⁵⁸ a plaintiff sought unpublished photographs of a car accident taken by a news photographer in the course of his work.⁵⁹ The photos were simply the product of routine newsgathering and involved no confidential source. The Second District Court of Appeal again found protection for the photographer, citing its earlier use of the three-part *Garland* test in *Green*.⁶⁰ This time, the court focused on the "compelling interest" prong of the test. The court ruled that the three-part test had not been applied at the trial level as required, and that the plaintiff in the case had not demonstrated a compelling interest in the photographs sufficient to overcome the news photographer's First Amendment interest in unfettered newsgathering.⁶¹

The second post-*Branzburg* criminal case following *Green* was *Satz v. News & Sun-Sentinel*,⁶² which reached the Florida appellate courts in 1985. The case arose following the publication of photographs showing the misuse of city equipment in the Fort Lauderdale suburb of Tamarac. The photos, many of which were not printed in the newspaper, showed city employees using city-owned trucks and bulldozers to clear and grade a construction site on privately-owned land.

The Fourth District Court of Appeal refused to quash the subpoena issued by the state attorney seeking the unpublished photos. The state was pursuing a criminal investigation of the matter, and the court disallowed the protection of the reporters' privilege. The court pointed out the distinction between information gained from confidential sources and information that

56. *Id.*

57. *Tribune*, 440 So. 2d 484 (Fla. 2d Dist Ct. App. 1983), *review denied*, 447 So. 2d 886 (Fla. 1984).

58. 457 So. 2d 507 (Fla. 2d Dist. Ct. App. 1984).

59. *Id.* at 508.

60. *Id.* at 509.

61. *Id.*

62. 484 So. 2d 590 (Fla. 4th Dist. Ct. App. 1985), *review denied*, 494 So. 2d 1152 (Fla. 10 1986).

injured motorist against a street paving company, the plaintiff sought to subpoena photos to bolster her claim that the defendant contractor had caused the accident which resulted in her injuries. She claimed that the contractor had failed to warn drivers at the road repair site where *Carroll* was doing repair work. The photographs, some of which were published and some not, were taken by an off-duty photographer from a local newspaper who happened upon the scene.⁶⁸

Veering from the previous twelve-year pattern of finding the reporters' privilege applicable in civil cases, the Fifth District Court of Appeal found the circumstances of the newsgathering to be a determining factor in denying the privilege. With no confidential source involved in *Carroll* to buttress a First Amendment argument, the Fifth District highlighted the fact that the photographer was not working at the time he took the photos.⁶⁹

Characterizing his arrival at the accident scene as "an off-duty happenstance,"⁷⁰ the court deflated the First Amendment claim by narrowly construing what constitutes newsgathering and let the subpoena go forward. The court refused to allow a newsgathering claim under the facts of the case, pointing out that the photographer was on his own time when he took the photos and had not been assigned to cover the accident.

F. *The Non-Confidential Source Criminal Cases*

The Second District Court of Appeal revisited the issue of the privilege in the non-confidential criminal context in 1988, and built on the only other criminal case decision three years earlier in *Satz*. In *CBS, Inc. v. Cobb*,⁷¹ a death row inmate subpoenaed unbroadcast material from his interview with a CBS television reporter for his defense.

In denying the broadcasters' motion to quash the subpoena in this case, however, the court stressed that the privilege is described as "qualified" because it is not absolute and may be overcome under circumstances where the fair administration of justice establishes a compelling need for the disclosure of the information sought. The court applied the reasoning of its 1984 decision in *Johnson*,⁷² a civil case, to *Cobb*, a criminal case. The court explained that unpublished photos or unbroadcast videotape occupy the same status as any other information acquired by a reporter under similar

68. *Id.* at 592.

69. *See id.* at 593.

70. *Id.*

71. 536 So. 2d 1067 (Fla. 2d Dist. Ct. App. 1988).

72. *Johnson v. Bentley*, 457 So. 2d 507, 509 (Fla. 2d Dist. Ct. App. 1984).

circumstances, and must therefore be disclosed.⁷³

However, the court did make it clear that where a compelling need for testimony is not established, the court would not distinguish between confidential and non-confidential sources.⁷⁴ The opinion showed a willingness to protect even the lower-interest non-confidential sources, such as those that were the subject of the case. This interpretation put the Second District Court of Appeal alone in suggesting that the privilege could extend to those circumstances where a non-confidential source was involved, a question the Florida Supreme Court had yet to address.

In *Cobb*, the Second District Court of Appeal found the compelling need satisfied by the defendant's constitutional right to have all evidence necessary to defend himself. Further, the court concluded that this right outweighed the First Amendment right of CBS to withhold journalistic work product.⁷⁵ The court grounded its holding in the Sixth Amendment to the United States Constitution and Article 1, Section 16 of the Florida Constitution which provides that the accused in a criminal proceeding has the right of compulsory process for obtaining witnesses in his favor.⁷⁶ When the constitutional provisions conflict with defenses designed to protect the integrity of the media some deference must be accorded to the rights of the accused.⁷⁷

By the end of the 1980s, Florida appellate courts had established a general pattern of finding a reporters' qualified privilege only in civil cases and only when confidential sources were involved. This steady alignment of cases turning on the distinction of whether the source was confidential or non-confidential and the case was criminal or civil, culminated in a criminal case involving non-confidential sources.⁷⁸

Aristides Morejon was arrested at the Miami International airport after a consensual search of his luggage yielded approximately nine pounds of cocaine. *Miami Herald* staffer, Joel Achenbach, witnessed the search and subsequent arrest.⁷⁹ Subsequent to being arrested, Morejon was charged

73. *Cobb*, 536 So. 2d at 1070.

74. *Id.* at 1070.

75. *Id.* at 1071.

76. *Id.*; U.S. CONST. amend. VI; FLA. CONST. art. I, § 16.

77. *Cobb*, 536 So. 2d at 1071.

78. *Miami Herald Publishing Co. v. Morejon*, 561 So. 2d 577 (Fla. 1990).

79. *Id.* at 578. The reporter was accompanying three Metro-Dade police officers on routine patrol at the airport with the permission of their superiors. In the course of the evening, the officers arrested Morejon in a public area of the airport. Achenbach, taking notes while standing a few feet away, witnessed the entire episode. Certain details of the event, some of which were alleged to be inconsistent with the police report of the arrest,

with trafficking in cocaine, plead not guilty and filed a motion to suppress the incriminating evidence.⁸⁰ This motion was based on a claim that despite seven years' residency in New York, the defendant was not sufficiently fluent in English to grasp that he could have refused to consent to the search of his luggage. Simultaneously, Morejon filed a discovery demand for the names and addresses of all persons known to have information relevant to the case, and the state attorney identified Achenbach.⁸¹ After the arresting officers' depositions established Achenbach as a witness to the arrest, he was subpoenaed to appear for a deposition. The *Miami Herald* filed a motion to quash, claiming a reporters' qualified privilege to refuse to testify under the First Amendment. Both at trial and on appeal before the Third District Court of Appeal, Morejon's right to Achenbach's testimony was upheld.

When the case reached the state supreme court, a balancing test similar to that suggested by Justice Powell in *Branzburg* and used most recently by the Second District Court of Appeal in *Cobb*, was applied.⁸² The court weighed the criminal defendant's right to compulsory process for obtaining favorable witnesses against the First Amendment rights of the press. Relying heavily on the fact that there was no confidential source to "chill" or "dry up" if revealed, the justices rejected the qualified privilege when a journalist is simply an eyewitness to the search and arrest of a defendant and the burden on the press to testify is minimal.⁸³

In holding that journalists, like all citizens, have a duty to testify to their eyewitness observations of a relevant event in a later court proceeding, the court gave no weight to the newspaper's argument that Achenbach was on a news assignment.⁸⁴ Because the court's analysis of the facts found no First Amendment interests at stake, the court decided not to "address the merits of the three-point [*Garland*] test."⁸⁵ *Morejon* represented the supreme court's first decision on the question and ruled against the claim of a First Amendment qualified reporters' privilege in criminal cases involving eyewitness journalists. With that holding, the court joined a number of

were printed in Achenbach's story the following day.

80. *Id.*

81. FLA. R. CIV. P. 3.220(b)(1)(i).

82. *Morejon*, 561 So. 2d at 580.

83. *Id.*

84. *Id.*

other states which have also done so in similar cases.⁸⁶

Given the holding in *Morejon*, the court's holding in a similar case, *CBS, Inc. v. Jackson*,⁸⁷ was predictable. In that case, a CBS television cameraman taped the arrest of a person on a cocaine possession charge. The network objected when the defendant issued a subpoena for outtakes⁸⁸ of the arrest. The court, in rejecting the First Amendment claim advanced by the broadcasters, declared the three-part *Garland* test inapplicable.⁸⁹ In finding that the qualified reporters' privilege did not apply in *Jackson*, the justices also said there was no need to balance the respective interests involved. The court stressed that since the defendant sought only physical evidence of the events surrounding his arrest, no sources of information were implicated. However, in both *Morejon* and *Jackson*, the Florida Supreme Court reaffirmed the confidential source privilege.⁹⁰ The court alluded to its earlier decision in *Morejon*, relying heavily on the eyewitness aspects of the case and the lack of source concerns: "From a [F]irst [A]mendment privilege standpoint, we can perceive no significant difference in the examination of an electronic recording of an event and verbal testimony about the event."⁹¹

G. *Morejon's Effect on the Federal Courts*

The *Morejon* and *Jackson* decisions have even had an impact in a Florida federal court. Although not controlled in all cases by the decisions of the Florida Supreme Court, a federal district court which has considered the privilege has ruled, though narrowly, in concert with the state high court. *Morejon* was cited favorably, although the court did distinguish the case. In *Hatch v. Marsh*,⁹² the court decided that a television station not involved in a non-confidential source case need not disclose unbroadcast information in a civil action. That decision was a holding on sufficiently different facts

86. See, e.g., *In re Grothe*, 687 S.W.2d 736 (Tx. Crim. App. 1984); *In re Zeigler*, 550 F. Supp. 530 (W.D.N.Y. 1982); *Rosato v. Superior Ct.*, 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (Cal. Ct. App. 1975), cert. denied, 427 U.S. 912 (1976).

87. 578 So. 2d 698 (Fla. 1991).

88. An outtake is "a sense . . . photographed for . . . a television show, but not included in the shown version." WEBSTER'S NEW WORLD DICTIONARY 1011 (2d ed. 1986).

89. *Jackson*, 578 So. 2d at 700. The *Garland* test was first used in *Gasden County Times, Inc. v. Home*, 426 So. 2d 1234, 1242 (Fla. 1st Dist Ct. App. 1983), review denied, 441 So. 2d 631 (Fla. 1983).

90. *Morejon*, 561 So. 2d at 579-80; *Jackson*, 578 So. 2d at 700.

91. *Jackson*, 578 So. 2d at 700.

92. 134 F.R.D. 300 (M.D. Fla. 1990).

that left contrary state court decisions undisturbed.⁹³ By distinguishing *Morejon*, a criminal case, the Middle District respected the *Morejon* court's analysis and suggested that had *Hatch* been a criminal case, it might have gone the other way. The court stated that "[t]he [S]ixth [A]mendment concerns of the *Morejon* court are not present here."⁹⁴ This statement provides yet another court's view of the limiting criminal/civil distinction that is so important in the *Morejon* and *Jackson* decisions. This distinction works together with the confidential source factor to generally deny the privilege in Florida when the stringent Sixth Amendment/First Amendment balancing test is used.

III. CONCLUSION

A. *The Roche Case and the Supreme Court*

Since the Florida Supreme Court did not determine the validity of the *Garland* three-part test in *Morejon*, the criteria for determining the protection for confidential sources remains unclear. *Morgan*, the court's only experience with confidential sources, pre-dated the adoption of the three-part test in Florida's district courts of appeal. The Florida Supreme Court however, had the opportunity to speak on this issue in review of the Fourth District Court of Appeal's decision in *In re Investigation*,⁹⁵ which held that a reporter must reveal the identity of the person who furnished him a copy of a confidential court order terminating parental rights in a child abuse case.⁹⁶ In *In re Investigation*, *Stuart News* reporter Tim Roche faces thirty days in jail on a charge of indirect criminal contempt for his refusal to identify the source of the order, which is required by law⁹⁷ to remain confidential.

It appears that the Fourth District Court of Appeal has allotted a higher position to the interest in protecting the rights of children than the First Amendment by affirming Roche's conviction. The United States Supreme Court has rejected that proposition, however, in *Globe Newspaper Co. v.*

93. Cf. *United States v. Blanton*, 534 F. Supp. 295 (S.D. Fla. 1982) where a subpoena was quashed in a criminal case after the state attorney failed to meet the second part of the three-part *Garland* test, which requires a demonstration that alternative sources of the information have been exhausted.

94. *Hatch*, 134 F.R.D. at 301.

95. 589 So. 2d 978 (Fla. 4th Dist. Ct. App. 1991).

96. *Id.* at 981.

97. Fla. Stat. §§ 39.411, .467 (1991).

Superior Court.⁹⁸ In that case, the Court held a Massachusetts law forbidding the press from attending a rape trial during the testimony of the minor victim unconstitutional.⁹⁹ The Court ruled that while "safeguarding the physical and psychological well-being of a minor" is a compelling interest, "it does not justify a mandatory closure rule, for it is clear that the circumstances of the particular case may affect the significance of [that] interest."¹⁰⁰

The Fourth District Court of Appeal may have also ignored the role the Florida media can play in safeguarding the state's children. The significance of that role was recognized by the State Attorney General when he determined that a Florida newspaper was a "recognized organization" under section 39.411(e) of the Florida Statutes. That recognition meant that a newspaper could review sealed orders from termination proceedings for the purpose of reporting on child abuse in Florida and the HRS response to the problem.¹⁰¹ The opinion said, "[t]he examination of the operation of government and the reporting of its findings by the news media is a well-established and socially recognized tradition within this country."¹⁰²

B. Summary of the Cases

Even a cursory examination of the treatment of the reporters' qualified privilege in Florida to refuse to testify under subpoena reveals a clear pattern in the decisions of the state's judiciary. In cases where the courts have sanctioned the reporters' privilege in Florida, four of the five were civil cases, and three of those involved confidential sources. Because they were civil cases, there were, of course, no Sixth Amendment concerns involved and no need for any sort of criminal-interest balancing with the First Amendment as Powell outlined in *Branzburg*.¹⁰³ As a result, the cases were decided on the basis of *Garland's* lesser three-part test¹⁰⁴ which contains no explicit Sixth Amendment component. In that test, it is the third part—the "compelling interest" requirement that a party's interest exceed the First Amendment interest of the press—that is so difficult for a civil plaintiff to meet. The sole civil case which denied the privilege may be an anomaly

98. 457 U.S. 596 (1982).

99. *Id.* at 596.

100. *Id.* at 607-08.

101. Op. Fla. Att'y Gen. 1 (No. 91-32) (May 14, 1991).

102. *Id.* at 3.

103. *Branzburg v. Hayes*, 408 U.S. 665, 709 (1972) (Powell, J., concurring).

104. *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958).

because the court relied to an extraordinary degree on the fact that the photographer was off-duty during the time for which his employer was trying to claim the privilege.

On the other hand, the courts show a history of denying the privilege in criminal cases. Among Florida's criminal cases reaching the appellate level and involving the question of the privilege, judges have denied protection for reporters four out of five times. The exception to the pattern of finding the privilege only in civil cases is the *Green* case. As previously stated, *Green* was a criminal case in which the reporter was not a party to the original action and the information was readily available elsewhere.¹⁰⁵

Analysis of court decisions on the basis of source type shows deference to the First Amendment in Florida in every one of the three cases involving confidential sources. The privilege was extended in all three civil cases as well as one non-confidential source civil case. Among the seven non-confidential source cases, the privilege was denied five times—four of them in criminal cases. The one non-confidential source civil case where the privilege was denied was the anomalous off-duty photographer case. The only criminal case to grant the privilege was a non-confidential source case. There, the privilege applied only because the three-part test wasn't met and the court decided the case explicitly on the point that the information requested was available from sources not violative of First Amendment rights.

C. Overview

This analysis shows clearly that the appellate courts of Florida are making every effort to maximize, or at least be sensitive to, both criminal defendants' Sixth Amendment rights and the First Amendment rights of the press through a careful balancing of interests in criminal cases. Almost invariably, the courts find in favor of the Sixth Amendment when implicated, but absent those concerns, First Amendment protections for the press dominate and are allowed to control.

On one side, the courts are avoiding burdening the press unduly by generally freeing them from testifying in the multitude of civil actions, mainly flowing from accidents which they routinely cover. To do otherwise would turn many into professional witnesses, taking them off their beats and causing their newsgathering mission to suffer as a result. The need for journalists' testimony in civil cases is less pressing because the societal

105. *Tribune v. Green*, 440 So. 2d 484 (Fla. 2d Dist. Ct. App. 1983), *review denied*, 447 So. 2d 886 (Fla. 1984).

interest is less direct—there is no freedom or life at stake. The suits brought civilly are generally personal to the plaintiff and seek vindication or damages for some perceived wrong. These cases are not of concern to all as is the case in criminal law when prosecution of a defendant is on behalf of all members of the society which has been injured. Even then, the incidence of actual firsthand witnessing of criminal acts about which reporters would be able to provide evidence, is comparatively rare.

On the other side, the courts also clearly value a complete exchange of information in criminal cases between the defendant and those who can contribute by virtue of their special knowledge of the facts of a particular case. When that case involves the life or liberty of an individual in a criminal action, the balancing test is used, the Sixth Amendment supersedes the First Amendment protections and testimony is compelled. This is not to say that the amendments are not equal—they are. If we consider a shield law for a moment, we see that shield laws are a form of First Amendment protection. But a shield law, as a mere state statute, must give way to a defendant's right to the information that will allow him a complete defense.¹⁰⁶

The confidential source question has never been raised in a Florida appellate criminal case, but it appears that should the issue come before the state supreme court, the defendant's Sixth Amendment rights might well prevail. What that means is that the threat to the First Amendment in non-confidential source cases that is posed by *Morejon* is moderate at worst, since there is no "chilling effect," but merely a slight burden. The real threat to the First Amendment is *Branzburg*, which would likely provide the model for Florida law in the area of the qualified reporters' privilege should a criminal case involving confidential sources reach the Florida Supreme Court.

106. See, e.g., *In re Farber*, 394 A.2d 330 (1978) in which the New Jersey Supreme Court held, in a 5-2 vote, that a criminal defendant's Sixth Amendment rights were superior to the state's shield law.