4-6-84 043

IN THE SUPREME COURT OF FLORIDA

Case No. 64,086

JEFFREY K. SMITH,
Petitioner,

vs.

GEORGE P. RUSSELL,
Respondent.

DISCRETIONARY REVIEW OF A DECISION OF THE SECOND DISTRICT COURT OF APPEAL

BRIEF OF AMICUS CURIAE THE MIAMI HERALD PUBLISHING COMPANY

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STATEMENT OF THE CASE AND FACTS

Amicus curiae adopts the Statement of the Case and Statement of Facts presented by Respondent.

INTEREST OF AMICUS CURIAE

Petitioner has asked this Court to hold that a police patrolman is not a "public official" within the meaning of *New York Times v. Sullivan,* 376 U.S. 254 (1964), and its progeny. Petitioner would thus have this Court approve the trial judge's refusal to instruct the jury that they could render a verdict for Petitioner only if he proved Respondent acted with constitutional "actual malice" (the publication of a false statement of fact with knowledge it was false or with reckless disregard of its falsity). Petitioner further asserts the jury, in awarding punitive damages, found common law "express malice", that is, ill will, spite, or an intent to harm Petitioner, and therefore the trial court's failure to also require a finding of "actual malice" was harmless error. Thus, the Petitioner's position is this Court should rule that if a police officer plaintiff proves the essential Florida common law element of "ill will" he need not meet the federal constitutional requirement of "actual malice." Such a holding would be contrary to all decisions on point in every jurisdiction in this country, and contrary to the underlying rationale for the *New York Times v. Sullivan* rule. The argument fails as a matter of logic because it is based on the false premise that "ill will" towards the person who is the subject of speech is the same as having knowledge that the statements made about that person are false. These are very different tests, applied for different reasons, and each must be met for a public official to prevail. *The Miami Herald* submits this brief in opposition to Petitioner because any deprivation of one person's First Amendment freedom deprives everyone of that freedom.

ARGUMENT

I. UNDER THE FEDERAL CONSTITUTIONAL LAW OF LIBEL POLICE OFFICERS ARE "PUBLIC OFFICIAL" PLAINTIFFS WHO MUST PROVE "ACTUAL MALICE"

In the two decades since *New York Times v. Sullivan*, an unbroken line of decisions[1] have held police officers are "public officials." Petitioner offers in response to this unanimous and overwhelming body of precedent only the erroneous argument that the rationale of *New York Times v. Sullivan* does not support these holdings. In fact, as shown below, all courts which have considered the issue have held all police officers, of whatever rank or title, to be "public officials" because police play a unique and critical role in the maintenance of this society. Police directly wield extraordinary and virtually unsupervised governmental power over the public at large. For this reason, public debate about the conduct of police must be "wide-open and robust". Only application of the "actual malice" rule can secure such freedom of expression.

A. Courts Have Universally Found Law Enforcement Libel Plaintiffs To Be "Public Officials"

Long before the United States Supreme Court constitutionalized the law of defamation, the Florida Supreme Court determined that police officers are "public officials" under the Florida common law of libel. *White v. Fletcher*, 90 So.2d 129 (Fla. 1956); *see also Wardlow v. City of*

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1. While most of these decisions appear to involve only the press, it has been clear since *New York Times v. Sullivan* that the citizen is equally protected. As the Supreme Court noted in *Sullivan*, "we sustain the contentions of all the petitioners under the First Amendment's guarantees of freedom of speech and of the press." *Id.* at 265.

Miami, 372 So.2d 976, 979 n.4 (Fla. 3d DCA 1979). Florida courts created a qualified privilege allowing members of the public to freely comment on the actions of public officials. One "who makes his living by dealing with the public . . . submits his private character to the scrutiny of those whose patronage he implores". *Kennett v. Barber,* 159 Fla. 81, 83, 31 So.2d 44, 46 (1947). Accordingly, a "uniformed policeman was certainly subject to fair comment and criticism from any member of the public of the City" where he was employed. *White v. Fletcher, supra* at 131. Thus, in large measure Florida law anticipated the development of the federal constitutional protection that has been afforded speech about public officials in the 20 years since *New York Times v. Sullivan.*

In *New York Times v. Sullivan,* the United States Supreme Court constitutionalized libel law by holding a "public official" may not recover damages for a "defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80. In explicating the *New York Times v. Sullivan* standard, the Supreme Court has held the public official must show with "clear and convincing proof", *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 342 (1974), "that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson,* 390 U.S. 727, 731 (1968).

Although not every person on government payroll is a public official, *Hutchinson v. Proxmire,* 443 U.S. 111, 119 n.8 (1979), "every court that has faced the issue has decided that an officer of law enforcement, from ordinary patrolman to Chief of Police, is a 'public official' within the meaning of federal constitutional law." *Roche v. Egan,*

433 A.2d 757, 762 (Me. 1981); *see generally Libel and Slander: Who Is A Public Official Or Otherwise Within The Federal Constitutional Rule Requiring Public Officials To Show Actual Malice,* 19 A.L.R.3d 1361 § 5(d) (1968 and Supp. 1983).

Law enforcement personnel of every rank and description have been held to be "public officials" for libel purposes, including wardens of prisons,[2] chiefs of police,[3] sheriffs,[4] deputy sheriffs,[5] deputy chiefs of detectives,[6] police captains,[7] sergeants,[8] de-

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2. *West v. New York Daily News,* 5 Med.L.Rptr. 1269 (N.Y. Sup.Ct. 1979) (warden at the Brooklyn House of Detention conceded he was a public official).

3. *Jurkowski v. Crawley,* 637 P.2d 56 (Okla. 1981); *Brophy v. Philadelphia Newspapers, Inc.,* 281 Pa.Super. 588, 422 A.2d 625 (1980); *Goolsby v. Wilson,* 146 Ga.App. 288, 246 S.E.2d 371 (1978); *Henry v. Collins,* 380 U.S. 356 (1965); *Ashton v. Commonwealth,* 405 S.W.2d 562 (Ky. 1965), *rev'd. on other grounds,* 384 U.S. 195 (1966); *Kidder v. Anderson,* 354 So.2d 1306 (La. 1978), *cert. denied,* 439 U.S. 829 (1978).

4. *Foster v. Upchurch,* 624 S.W.2d 564 (Tex. 1981); *Hoag v. Clegg,* 5 Med.L.Rptr. 1732 (Mich.Cir.Ct. 1979) (both sides stipulated that plaintiff was a public official).

5. *Romero v. Abbeville Broadcasting Service,* 420 So.2d 1247 (La.App. 1982); *Ammerman v. Hubbard Broadcasting, Inc.,* 91 N.M. 250, 572 P.2d 1258 (Ct.App. 1977), *cert. denied,* 91 N.M. 249, 572 P.2d 1257 (1977), *cert. denied,* 436 U.S. 906 (1978); *Hirman v. Rogers,* 257 N.W.2d 563 (Minn. 1977); *Cline v. Brown,* 24 N.C.App. 209, 201 S.E.2d 446 (1974), *cert. denied,* 286 N.C. 412, 211 S.E.2d 793 (1975); *St. Amant v. Thompson,* 390 U.S. 727 (1968).

6. *Time, Inc. v. Pape,* 401 U.S. 279 (1971).

7. *McCarney v. Des Moines Register & Tribune Co.,* 239 N.W.2d 152 (Iowa 1976) (court implicitly found plaintiff to be a public official); *Thuma v. Hearst Corp.,* 340 F.Supp. 867 (D. Md. 1972); *Mahnke v. Northwest Publications, Inc.,* 280 Minn. 328, 160 N.W.2d 1 (1968).

8. *Seymour v. A.S. Abell Company,* 557 F.Supp. 951 (D. Md. 1983); *Rosales v. City of Eloy,* 122 Ariz. 134, 593 P.2d 688 (Ct.App. 1979); *Ramacciotti v. Zinn,* 550 S.W.2d 217 (Mo.Ct. App. 1977); *Corbett v. Register Publishing Co.,* 33 Conn.Supp. 4,

(Continued on following page)

tectives,[9] federal drug agents,[10] federal customs inspectors,[11] state highway patrolmen,[12] and city investigators.[13]

More important still, the state and federal courts have uniformly found that police patrolmen are public officials. *Harrison v. Williams,* 430 So.2d 585 (Fla. 4th DCA 1983); *Hines v. Florida Publishing Co.,* 7 Med.L.Rptr. 2605 (Fla. 4th Jud.Cir.Ct. 1982); *Willis v. Perry,* 10 Med.L.Rptr. 1217 (Colo.App. 1983); *Seymour v. A.S. Abell Company,* 557 F.Supp. 951 (D.Md. 1983); *Gomes v. Fried,* 136 Cal.App.3d 924, 186 Cal.Rptr. 605 (1st Dist. 1982); *Dunlap v. Philadelphia Newspapers, Inc.,* 301 Pa.Super. 475, 448 A.2d 6 (1982); *Gray v. Udevitz,* 656 F.2d 588 (10th Cir. 1981); *Cibenko v. Worth Publishers, Inc.,* 510 F.Supp. 761 (D.N.J. 1981); *Shafer v. Lamar Publishing Co.,* 621 S.W.2d 709 (Mo.App. 1981); *McClain v. Arnold,* 275 S.C. 282, 270 S.E.2d 124 (1980); *Angelo v. Brenner,* 84 Ill.App.3d 594, 40 Ill.Dec. 337, 406 N.E.2d 38 (1980); *La Rocca v. New York News, Inc.,* 156 N.J.Super. 59, 383 A.2d 451 (App.Div. 1978); *Malerba v. Newsday, Inc.,* 64 App.Div.2d 623, 406 N.Y.S.2d 552 (2d Dept. 1978); *Orr v. Lynch,* 60 App.Div.2d 949, 401 N.Y.S.2d 897 (3d Dept. 1978), *aff'd.,* 45 N.Y.2d

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Footnote continued—

356 A.2d 472 (Super.Ct. 1975); *Suchomel v. Suburban Life Newspapers, Inc.,* 40 Ill.2d 32, 240 N.E.2d 1 (1968); *Starr v. Beckley Newspapers Corp.,* 157 W.Va. 447, 201 S.E.2d 911 (1974); *Jackson v. Filliben,* 281 A.2d 604 (Del.Sup. 1971).

9. *Roche v. Egan,* 433 A.2d 757 (Me. 1981); *Colombo v. Times-Argus Assn.,* 135 Vt. 454, 380 A.2d 80 (1977).

10. *Hansen v. Stoll,* 130 Ariz. 454, 636 P.2d 1236 (Ct.App. 1981); *Hart v. Playboy Enterprises, Inc.,* 5 Med.L.Rptr. 1811 (D.Kan. 1979); *Meiners v. Moriarty,* 563 F.2d 343 (7th Cir. 1977).

11. *Torres v. Playboy Enterprises, Inc.,* 7 Med.L.Rptr. 1182 (S.D.Tex. 1980).

12. *Roberts v. Dover,* 525 F.Supp. 987 (M.D.Tenn. 1981); *NAACP v. Moody,* 350 So.2d 1365 (Miss. 1977).

13. *Bishop v. Wometco Enterprises, Inc.,* 235 So.2d 759 (Fla. 3d DCA 1970), *cert. denied,* 240 So.2d 813 (Fla. 1970).

903, 411 N.Y.S.2d 10, 383 N.E.2d 562 (1978); *Delia v. Berkey,* 41 Md.App. 47, 395 A.2d 1189 (1978), *aff'd.,* 287 Md. 302, 413 A.2d 170 (1980); *Akins v. Altus Newspapers, Inc.,* 609 P.2d 1263 (Okla. 1977), *cert. denied,* 449 U.S. 1010 (1980); *Dellinger v. Belk,* 34 N.C.App. 488, 238 S.E.2d 788 (1977), *cert. denied,* 294 N.C. 182, 241 S.E.2d 517 (1978); *Weber v. Woods,* 31 Ill.App.3d 122, 334 N.E.2d 857 (1975); *Rawlins v. Hutchison Publishing Co.,* 218 Kan. 295, 543 P.2d 988 (1975); *Moriarty v. Lippe,* 162 Conn. 371, 294 A.2d 326 (1972); *Rowden v. Amick,* 446 S.W.2d 849 (Mo.App. 1969); *Coursey v. Greater Niles Township Publishing Corp.,* 40 Ill.2d 257, 239 N.E.2d 837 (1968); *Scelfo v. Rutgers University,* 116 N.J.Super. 403, 282 A.2d 445 (1971).

These courts hold that patrolmen "perform governmental duties directly related to the public interest and have or appear to have substantial responsibility for or control over the conduct of governmental affairs", *Scelfo v. Rutgers University,* 282 A.2d at 449, and their position "has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees." *Gray v. Udevitz, supra* at 591.

"Although a comparably low-ranking government office, a patrolman's office, if abused, has great potential for social harm." *Moriarty v. Lippe,* 294 A.2d at 330. A police officer investigates crimes, makes arrests, and is "vested with substantial responsibility for the safety and welfare of the citizenry in areas impinging most directly and intimately on daily living: the home, the place of work and of recreation, the sidewalks and streets." *Roche v. Egan, supra* at 762. The nature and extent of the responsibility of a police officer "is punctuated by the fact that a firearm, no less than a badge, comes with

his office." *Id.* As a Missouri court correctly pointed out, for the 250 families residing in the village of Lake Tapawingo the actions and activities of their local police "were probably of more direct concern . . . than were the doings of the Director of the F.B.I." *Rowden v. Amick, supra* at 857.

In *Coursey v. Greater Niles Township Publishing Corp., supra,* a patrolman on a municipal police force brought suit against a local newspaper alleging he had been defamed. In concluding that a patrolman is a public official under federal constitutional law the Illinois Supreme Court held that:

> Although as a patrolman he is "the lowest in rank of police officials" and would have slight voice in setting departmental policies, his duties are peculiarly "governmental" in character and highly charged with the public interest. It is indisputable that law enforcement is a primary function of local government and that the public has a far greater interest in the qualifications and conduct of law enforcement officers, even at, and perhaps especially at, an "on the street" level than in the qualifications and conduct of other comparably low-ranking government employees performing more proprietary functions. The abuse of a patrolman's office can have great potentiality for social harm; hence, public discussion and public criticism directed towards the performance of that office cannot constitutionally be inhibited by threat of prosecution under State libel laws.

239 N.E.2d at 841.

Similarly, the Tenth Circuit Court of Appeals explained why a patrolman in Rock Springs, Wyoming must be regarded as a public official:

> The cop on the beat is the member of the department who is most visible to the public. He possesses both the authority and the ability to exercise force. Misuse of his authority can result in significant deprivation of constitutional rights and personal freedoms, not to mention bodily injury and financial loss. The strong public interest in ensuring open discussion and criticism of his qualifications and performance warrant the conclusion that he is a public official.

Gray v. Udevitz, 656 F.2d 588, 591 (10th Cir. 1981).

Seldom is precedent on a single issue so extensive and uniform. This Court should respect and follow the unanimous view of all prior courts by holding police officers are "public officials" under our libel law.

B. The Social Values Underlying The "Actual Malice" Rule Apply With Full Force To Police Patrolmen

New York Times v. Sullivan was not decided in a vacuum; the Court intended the "actual malice" rule to provide speech the necessary "breathing room" for debate on public issues and regarding public officials to be "wide-open and robust". Thus, applying the rationale of *New York Times v. Sullivan,* it is apparent there are at least nine independent policy reasons for concluding that a police officer is a public official. A patrolman is to his community a highly visible representative of governmental authority, possessing extraordinary and virtually unreviewed governmental power. He necessarily practices broad discretion, has monopoly power in the law enforcement area, plays a significant role in modern society, is insulated from public accountability, has complete immunity for his official statements and partial immunity for his official acts.

Free and open debate about a patrolman's conduct maintains responsive government and promotes orderly social and political change.

1. A Police Patrolman Is A Highly Visible Public Official Who Deals Directly With The General Public

As a class, police patrolmen are probably the most visible and recognizable public employees in their communities. For many citizens, the police patrolman may be the only public official with whom they have direct contact and dealings. Police stand out because they wear uniforms and badges, drive marked automobiles, and most importantly, because they carry weapons. "In a complex modern society . . . police presence is pervasive" and obvious. *Foley v. Connelie,* 435 U.S. 291, 297 (1978). To most Americans a uniformed, street-level policeman is the formal representative of government's legitimate authority to coerce lawful behavior. Russell and Beigel, *Understanding Human Behavior For Effective Police Work* at 313 (1976). For that reason, a police officer is to the average citizen the quintessential "public official".

2. A Police Patrolman Is Entrusted With The Exercise Of Extraordinary Governmental Power Directly Affecting Members Of The General Public

A patrolman exercises extraordinary authority over members of the general public. In many situations he has the right to control the movements and restrict the freedom of citizens, and under certain rare circumstances he may even legitimately take a life. A patrolman is charged with the prevention and detection of crime, the apprehension of suspected criminals, the investigation of

suspect conduct, and the execution of warrants. *See, e.g., Departmental Manual,* Dade County Public Safety Department (1975). He has powers of search, seizure, and arrest without a formal warrant under limited circumstances. In the course of carrying out these responsibilities a patrolman is empowered by law to resort to lawful force, which may include the use of any weapon that he is required to carry while on duty. *Foley v. Connelie, supra*; *Dixon v. State,* 101 Fla. 840, 132 So. 684 (1931); *City of Miami v. Nelson,* 186 So.2d 535 (Fla. 3d DCA 1966), *cert. denied,* 194 So.2d 621 (Fla. 1966). "The execution of the broad powers vested in [the police] affects members of the public significantly and often in the most sensitive areas of daily life." *Foley v. Connelie, supra* at 297.

The United States Supreme Court has held that a police officer is so important to the state's interests that it may exclude aliens from that position of employment. *Foley v. Connelie, supra.* "Police officers very clearly fall within the category of important nonelective officers who participate directly in the execution of broad public policy." *Id.* at 300. The "essence" of the Supreme Court's holding "is that although we extend to aliens the right to education and public welfare, along with the ability to earn a livelihood and engage in licensed professions, the right to govern (*e.g.,* become a policeman) is reserved to citizens." *Id.* at 297.

The vast governmental power wielded by a patrolman presents great potential for both social benefit and harm. Therefore, a patrolman must expect criticism and close scrutiny from the public. Free and open debate on the qualifications and conduct of the police, without undue fear of a damage suit, is a valuable and necessary check on police power in a free society.

3. A Police Patrolman Necessarily Engages In Discretionary Governmental Decision-Making

A patrolman's work is anything but routine. Police officers frequently make immediate "life and death" decisions. Their decisions enforce or impinge upon the legal rights of citizens every day. Such decisions among other things, involve the exercise of sound professional discretion and judgment, often under dangerous and extraordinary conditions.

Police may in the exercise of their discretion, invade the privacy of an individual in public places, *e.g., Terry v. Ohio,* 392 U.S. 1 (1968). They may under some conditions break down a door and enter a dwelling in the execution of a warrant, *e.g., Miller v. U.S.,* 357 U.S. 301 (1958), or even without a warrant in very limited circumstances. They may stop vehicles traveling on public highways, *e.g., Pennsylvania v. Mimms,* 434 U.S. 106 (1977). And of course, they may arrest an individual or resort to the use of lethal force. These decisions typically must be made in the field and on an *ad hoc* basis.

Every study on police behavior has concluded that the police patrolman must exercise broad discretion in the performance of his duties:

> At the beginning of the process, more properly, before the process begins at all something happens that is scarcely discussed in law books and is seldom recognized by the public: law enforcement policy is made by the policeman. For policemen cannot and do not arrest all offenders they encounter. It is doubtful that they arrest most of them. A criminal code, in practice, is not a set of specific instructions to policemen but a more or less rough map of the territory in which po-

> licemen work. How an individual moves around that territory depends largely upon his personal discretion.

The President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* at 10 (1967). *See also* ABA Project on Standards for Criminal Justice, *The Urban Police Function* at 119 (1973). Another commission advised that "every police agency should acknowledge the existence of the broad range of administrative and operational discretion that is exercised by all police agencies and individual officers." National Advisory Commission on Criminal Justice Standards and Goals, *Police* at 12 (1973).

Discretion is endemic to police work. It would be impossible to draft specific rules for every situation a patrolman may encounter. Police manuals can only lay out the basic policies which are used as "operational standards to assist employees in the necessary exercise of discretion in discharging their responsibility." *Departmental Manual,* Dade County Public Safety Department, § 1.010.10 (1975).

State statutes and local codes are also vague and leave great room for police discretion. A typical municipal code states that "the responsibilities of the police department shall include, but not be limited to, the activities of police administration, traffic control, police patrols, training, criminal investigation, vehicle inspection, police property, police records and the complaint center." § 42-3, Miami Code (1967). How these responsibilities are carried out in the field is left largely to police discretion.

Courts also find it unwise and impossible to articulate specific rules for police behavior. For example, on the critical subject of how much force a police officer may use, Florida courts broadly state "the limit of the force

to be used by the police is set at the exercise of such force as reasonably appears necessary to carry out the duties imposed upon the officer by the public." *City of Miami v. Albro,* 120 So.2d 23, 26 (Fla. 3d DCA 1960); *see also City of Fort Pierce v. Cooper,* 190 So.2d 12 (Fla. 4th DCA 1966).

Clearly the exercise of police authority calls for a very high degree of judgment and discretion, the abuse or misuse of which can have serious impact on individuals. "A policeman vested with the plenary discretionary powers . . . is not to be equated with a private person engaged in routine public employment or other 'common occupations of the community' who exercises no broad power over people generally." *Foley v. Connelie, supra* at 298. Indeed, the rationale for the qualified immunity historically granted to the police rests on the difficult and delicate judgments these officers must often make. *See Pierson v. Ray,* 386 U.S. 547, 555-57 (1967). The discretionary decision-making power of a patrolman sets him apart from other public employees; he is a public official.

4. A Police Patrolman Exercises Virtually Unsupervised Power

Police usually patrol their beat alone or with a single partner. A higher ranking police officer cannot be spared to constantly evaluate a patrolman's performance in the field. Therefore, a patrolman's work goes largely unsupervised. He is both the decisionmaker and the actor. Public comment, criticism, and scrutiny of police work is necessary to evaluate a patrolman's actions in the field and rid a police force of incompetent members. Public criticism, however, is unlikely unless speech about patrolmen is afforded the protection provided by the "actual malice" rule. *See Speiser v. Randall,* 357 U.S. 513 (1958).

5. A Police Patrolman Has Monopoly Authority In The Law Enforcement Area

In many communities only the police are entrusted with the powers and duties of public law enforcement. If a citizen does not like the law enforcement service he is receiving, there is no alternative agency to which he may turn. No free market of law enforcement services exists; competition cannot be relied on to eliminate ineffective policemen and maintain high quality police service. Citizen input, free from the threat of damage suits, may well help improve the quality of public decision-making regarding police services in a society in which law enforcement is essentially a "natural monopoly".

6. A Police Patrolman Plays A Significant Role In Modern Society Apart From The Enforcement Of The Law

A discussion of the role of a patrolman "is essentially a description of the basic functions of government." *Foley v. Connelie, supra* at 297. Police do far more than merely enforce the law. For example, former Chief Bernard L. Garmire of the Miami Police Department notes that a sample of all calls for service in 1970 disclosed 61 percent of the calls did not involve crime at all. They were calls in which a citizen wanted some kind of service unrelated to crime. Garmire, Rubin and Wilson, *The Police and the Community* (1972). The policeman's role in the 19th century was described as that of "apprehending criminals", while that of the present day police officer is seen as "controlling, directing and regulating human behavior." Russell and Beigel, *Understanding Human Behavior, supra* at 112.

No other professional or official must perform as many complex, diverse, and important tasks. On the one hand

we expect a patrolman to possess the nurturing, caretaking, sympathetic, gentle characteristics of a nurse, teacher, and social worker as he deals with school traffic, acute illness and injury, juvenile delinquency, suicide threats and missing persons. On the other hand, we expect him to command respect, demonstrate courage, control hostile impulses, and meet great physical hazards as he controls crowds, prevents riots, and apprehends criminals. The role of the patrolman is so broad in modern society that he "must be a combination lawyer, scientist, psychologist, social worker, race relations expert, marriage counselor, youth advisor and many other things." Murphy, *Social Change and the Police* at 689, The American Scholar (1971). "No other profession . . . constantly demands such seemingly opposite characteristics." Levy, *quoted in Proceedings of Conference for Police Professions* (1966). Law enforcement scholar Jerome Skolnick points out that as the community increasingly expects "more of the police in the way of a variety of public services" they become "more than an alternative to an army"; they become "law enforcement *officials*". Skolnick, *Professional Police in a Free Society* at 22-23 (1969) (emphasis added). Because the role of the police officer is so important to the public, even when he is not enforcing the law, public comment regarding the performance of that role must be unfettered.

7. A Police Patrolman Is Largely Insulated From Public Accountability

As it does with other public officials, the state accompanies its broad allocation of power to a policeman with extraordinary insulation from public accountability. For example, except in certain cases, the state may not deny, suspend, or revoke the certification of many law enforcement officers without plodding through the cumber-

some procedures of the Administrative Procedure Act. § 943.145, Fla. Stat. (1983). A policeman is also partially immune for his official conduct. The United States Supreme Court has held that police "should not be liable if they acted in good faith and with probable cause in making an arrest under a statute that they believed to be valid." *Pierson v. Ray, supra* at 555. It is therefore especially clear that the public must be granted great freedom at least to voice their criticisms of the police as a way of increasing accountability.

8. A Police Patrolman Has Complete Immunity For His Official Statements

One significant strand of public official analysis in *New York Times v. Sullivan* is the thesis that if the official himself is given immunity or privilege for his speech, the public should be afforded a like privilege for its expression about his conduct. "It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves." *Id.* at 282-83. A policeman is wholly immune from defamation actions in light of this Court's decision in *City of Miami v. Wardlow,* 403 So.2d 414, 416 (Fla. 1981), holding a police officer, as a "public employee is absolutely immune from actions for defamation" if "the communication was within the scope of the officer's duties."

Designating police as public officials would balance the immunities of free speech as suggested by *New York Times v. Sullivan, supra* at 282-83. The citizen-critic of the government deserves at least as much protection as the government official. "As Madison said, 'the censorial power is in the people over the Government, and not in the Government over the people.' " *Id.* at 282.

9. Free And Open Debate About A Police Patrolman's Conduct Maintains Responsive Government And Promotes Orderly Social And Political Change

Western democracies have always been concerned that a permanent police force will abridge the civil liberties and upset the delicate balance between personal freedom and necessary authority. Bittner, *The Functions of the Police in Modern Society* at 12, National Institute of Mental Health (1972). Public debate, criticism, and comment on the qualifications and actions of police will help maintain this balance and lead to orderly change. Wide latitude should also be given to public debate on the competence of police services because debate provides a socially valuable "safety valve" or escape for pent up frustrations which might otherwise result in violence.

Citizens sometimes "wish to bring about the removal of police (and other) officers. It becomes a matter of importance to them, and under our democratic process of government, fitness or unfitness to hold office may be and usually is, debated, discussed and finally determined." *Rowden v. Amick, supra* at 858. The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. U.S.*, 354 U.S. 476, 484, *quoted in New York Times v. Sullivan, supra* at 269. Only if police are public officials can free debate about their conduct take place and orderly change in the law enforcement community occur. Such a finding would also be in accord with our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times v. Sullivan, supra* at 270.

II. THE SECOND DISTRICT COURT OF APPEAL CORRECTLY HELD THAT THE FEDERAL CONSTITUTIONAL REQUIREMENT OF "ACTUAL MALICE" MEANS "KNOWING FALSITY" WHILE THE ESSENTIAL FLORIDA COMMON LAW ELEMENT OF LIBEL DENOMINATED "EXPRESS MALICE" MEANS "ILL WILL"

The trial court's instructions to the jury in this case demonstrated a misunderstanding of the fundamentals of the common law tort of defamation and the federal constitutional protection of speech engrafted upon the tort. This misunderstanding led the court to confuse the terms "express malice" and "actual malice", terms which have different origins and meanings, and which serve distinct purposes. "Express malice" is an essential state common law element of the tort of libel. It means the defendant published a statement with malicious intent or ill will toward the plaintiff. It refers to the evil attitude of the speaker toward the person mentioned in the libelous statement. "Actual malice" is the entirely different *federal constitutional element* of the defamation tort. It means the defendant published language with knowledge of its falsity or in reckless disregard of its truth or falsity. It refers to the knowledge of the speaker of the falsity of the libelous statement.

A. The Florida Common Law Requirement Of "Express Malice" Means "Ill Will"

The common law tort of libel in Florida requires a showing of evil intent or ill will by the defendant toward the plaintiff, and is unrelated to the defendant's knowledge of the truth or falsity of the actionable statement about the plaintiff. Thus, at common law, the plaintiff could establish a prima facie case of defamation by showing the defendant had published a statement:

(1) to a third party,

(2) of and concerning the plaintiff,

(3) which was defamatory,

(4) with malicious intent, meaning ill will, spite, or hatred and intent to injure and defame, and

(5) which damaged the plaintiff.

Layne v. Tribune Co., 108 Fla. 177, 146 So. 234 (1933); 19 Fla.Jur.2d *Defamation and Privacy* § 1 (1980).

If the publication inherently tended to subject the plaintiff to contempt, hatred, or ridicule, that is, if it was defamatory on its face, it was said to be defamatory "*per se*". This distinction relieved the plaintiff of proving the third, fourth and fifth elements of the tort. The existence of those elements would be presumed as a matter of law. *Campbell v. Jacksonville Kennel Club,* 66 So.2d 495 (Fla. 1953); *Hartley & Parker, Inc. v. Copeland,* 51 So.2d 789 (Fla. 1951). On the other hand, if the publication was not defamatory on its face, that is the words themselves without more would not subject the plaintiff to contempt, hatred, or ridicule, it was said to be defamatory "*per quod.*" In such a case the plaintiff could prevail only upon pleading and proving each of the common law elements of the tort. None of the five elements of the tort, including "malice", would be presumed. Florida courts have held that in actions for libel *per quod,* plaintiffs must plead with specificity and prove through the greater weight of evidence (1) extrinsic facts showing why the statement would subject the plaintiff to contempt, hatred, and ridicule; (2) express malice, meaning ill will; and (3) special damages quantifiable in some real economic terms. *Layne v. Tribune Co., supra*; *Barry College v. Hull,* 353 So.2d 575, 578 (Fla 3d DCA 1977) ("for libel *per quod,* actual malice (meaning ill will) and special damages must be proved"); *Wolfson v. Kirk,* 273 So.2d 774, 777

(Fla. 4th DCA 1973), *cert. denied,* 279 So.2d 32 (Fla. 1973) ("Communications which are not actionable *per se* . . . must be shown by the pleading and proof to have been damaging and communicated with malice").

Certain exceptions to these general rules were created where the social value of certain types of speech indicated a presumption of ill will was inappropriate. Thus, for certain classes of expression, if the plaintiff established his prima facie case utilizing the *per se* presumptions, the defendant could avoid liability by pleading and proving the statement was qualifiedly privileged. Rahdert and Snyder, *Rediscovering Florida's Common Law Defenses to Libel and Slander,* 11 Stetson L.Rev. 1 (1981). For example, the speech could not be presumed to be for a bad purpose where the statement was true, *Florida Publishing Co. v. Lee,* 76 Fla. 405, 80 So. 245 (1918), or where the speaker had a right, duty or interest in making the statement. *Abraham v. Baldwin,* 52 Fla. 151, 42 So. 591 (1906); *Coogler v. Rhodes,* 38 Fla. 240, 21 So. 109 (1897). The existence of the privilege would defeat the presumption of malice and give rise to a presumption of good faith. As before, the focus was on the attitude of the defamer toward the person defamed. Thus, if the plaintiff could submit evidence of express malice, demonstrating by the greater weight of the evidence that the defendant in fact had a bad motive, the plaintiff could defeat the privilege. *Myers v. Hodges,* 53 Fla. 197, 44 So. 357 (1907); *Axelrod v. Califano,* 357 So.2d 1048 (Fla. 1st DCA 1978).

In summary, under the common law of defamation, privileges offered some protection for speech, but that protection vanished whenever the greater weight of the evidence established the defendant acted with a bad motive toward the plaintiff, known as express malice. Of course, in every case where the plaintiff could offer substantial competent evidence of express malice, the issue of whether

the defendant in fact had a bad motive would be submitted to the jury. Under the early common law, the truth of the statement did not always guarantee the defendant would be free of liability. *See Wilson v. Marks,* 18 Fla. 322 (1881). Later decisions placed the burden of proving falsity and malice on the plaintiff. *Gibson v. Maloney,* 231 So.2d 823 (Fla. 1970), *cert. denied,* 398 U.S. 951 (1970); *Abram v. Odham,* 89 So.2d 334 (Fla. 1956); *Coogler v. Rhodes, supra.*[14]

The negligence or fault of the defendant in making a false statement was utterly irrelevant to liability at common law. In all cases, the defendant's knowledge or fault regarding the falsity of the statement was irrelevant, except with respect to damages.

B. The Federal Constitutional Requirement Of "Actual Malice" Means "Subjective Awareness Of Falsity", Not "Ill Will"

New York Times v. Sullivan constitutionalized defamation law. The decision held a public official plaintiff could not prevail without proving with clear and convincing evidence that the defendant acted with "actual malice", meaning not the old common law "express malice" relating to the defendant's attitude toward the plaintiff, but instead, his level of knowledge of the falsity of the defamatory statement about the plaintiff. *Id.* at 279-80. The fact that the defendant's motive in publishing a statement about

14. These decisions occurred very late in the development of Florida common law and show the courts had begun to increase the protection afforded speech about matters of "real public or general concern" to the point that qualified privilege for such expression could be overcome only by the plaintiff's proof that the defendant had acted with a malicious intent to injure him by publishing statements he knew to be false and defamatory. Thus, shortly before *New York Times v. Sullivan, supra,* was decided, Florida common law had begun to afford that class of expression concerning important *public issues* virtually the same level of protection that speech about *public officials* is afforded today under state and federal libel law.

the plaintiff is malicious, while essential to establish the state tort claim, would not meet the federal constitutional requirement that the defendant have "serious doubts" as to the truth or falsity of the statement. *Beckley Newspapers Corp. v. Hanks,* 389 U.S. 81 (1967); *Times Publishing Co. v. Huffstetler,* 409 So.2d 112, 113 (Fla. 5th DCA 1982), *pet. denied,* 417 So.2d 329 (Fla. 1982) ("proof of elements of common law malice, viz.; spite, hostility, deliberate intention to harm, does not satisfy the constitutional requirement of 'actual malice' "); *Palm Beach Newspapers, Inc. v. Early,* 334 So.2d 50 (Fla. 4th DCA 1976), *cert. denied,* 354 So.2d 351 (Fla. 1977), *cert. denied,* 439 U.S. 910 (1978) (reversing a jury verdict notwithstanding evidence of the defendant's bad motive). Thus, after *New York Times v. Sullivan,* although the plaintiff must establish the defendant published a defamatory falsehood with ill will, spite, hatred, and an intention to defame and injure (*i.e.,* express malice), the public official plaintiff cannot prevail without *also* proving, through clear and convincing evidence, knowledge of falsity or reckless disregard of falsity (*i.e.,* actual malice).[15]

As a result of *New York Times v. Sullivan* and its progeny, a public official plaintiff must prove *actual malice* —a liability standard which turns on the defendant's knowledge of the *truth* of his statements. And under the common law he must prove *express malice*—a state of mind which turns on the defendant's attitude toward the *plaintiff.*

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15. The United States Supreme Court did intrude into state tort law by creating the "actual malice" rule, but it was not so intrusive that it even purported to destroy the state law requirement of "ill will". "An analysis of the case reveals that if the Court did intend the 'actual malice' definition to be exclusive, thus omitting ill will from consideration, it did not in any way reveal this intention." Motlow, *The Constitutionality of Punitive Damages and the Present Role of "Common Law Malice" in the Modern Law of Libel and Slander,* 10 Cum. Law Rev. 487 (1979).

CONCLUSION

For the foregoing reasons, this Court should hold that a police patrolman who brings a defamation suit must be regarded as a "public official" plaintiff within the meaning of *New York Times v. Sullivan, supra,* and thus must show by "clear and convincing" evidence that the defendant published the statement with "actual malice."

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Brief of *Amicus Curiae* The Miami Herald Publishing Company was served by mail this 2nd day of March, 1984 upon:

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