IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,426

OSCAR L. ANDREWS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

The Petitioner, OSCAR L. ANDREWS, was the Defendant in the trial court and the Respondent, the State of Florida, was the prosecution. The parties will be referred to as they appeared below. The symbol "R" represents the Record on Appeal, and "TR" represents the transcript of trial proceedings. All emphasis is supplied unless otherwise indicated.

The Defendant, OSCAR L. ANDREWS, was charged by Information on October 10, 1980, with the crime of Possession of a Controlled Substance, to-wit: Heroin. [R. 2]. A trial by jury commenced on April 1, 1981. Of all the members of the venire from which the petit jury was selected, four were black. [TR. 81-83]. The prosecutor used peremptory challenges to strike each of them. [TR. 81-83]. The prosecutor conducted no voir dire of any of the black jurors with the exception of two questions addressed to one of the black jurors regarding his familiarity with the area of the crime. [TR. 26-48]. The Defendant, who is black, consistently objected to the prosecutor's improper use of peremptory challenges to strike all prospective black jurors. [TR. 81]. The Defendant's motions to permit a black to be seated as a juror, his motion for a new jury panel, and his motion for mistrial were all denied. [TR. 83]. A subsequent renewal of his motion to strike the venire was similarly denied. [TR. 105]. An all white jury was selected to

try the Defendant.

At the close of the State's case, the Defendant renewed his motion to strike the venire or alternatively to grant a mistrial. The court denied all relief. [TR. 216]. The Defendant moved for a judgment of acquittal which the trial court also denied. [TR. 217]. At the close of all the evidence, the Defendant again renewed his motion to strike the venire, his motion for mistrial, and his motion for judgment of acquittal. The court denied all of the Defendant's motions. [TR. 313-315].

The jury found the Defendant guilty as charged. [R. 13]. On April 8, 1981, the Defendant filed a timely Motion for New Trial which the trial court denied. [R. 16-18a]. The Defendant was ultimately sentenced to five years imprisonment in the state penitentiary. [R. 19].

The Defendant filed a timely Notice of Appeal on May 18, 1981. On September 27, 1983, the District Court of Appeal of Florida, Third District, filed a per curiam affirmance of the Defendant's conviction and sentence. Affirming on the authority of Neil v. State, 433 So.2d 51 (Fla. 3d DCA 1983), the court certified to this Court the following question of great public importance:

> Absent the criteria established in Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), may a party be required to state the basis for the exercise of a peremptory challenge?

Judge Ferguson, authoring a specially concurring opinion in

"total disappointment," reasoned that "Neil is wrong," and urged this Court to adopt the Wheeler-Soares test more fully described in this brief.

On October 25, 1983, this Court scheduled briefs to be filed on the merits of the certified question. This brief follows.

QUESTION CERTIFIED

ABSENT THE CRITERIA ESTABLISHED IN Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), MAY A PARTY BE REQUIRED TO STATE THE BASIS FOR THE EXERCISE OF A PEREMPTORY CHALLENGE?

ARGUMENT

I.

THE STATE'S RACIST EXERCISE OF PEREMPTORY CHALLENGES TO EFFECT THE SYSTEMATIC EXCLUSION OF BLACKS FROM A TRIAL JURY IS MORALLY, SOCIALLY, AND CONSTITUTIONALLY INTOLERABLE.

OSCAR ANDREWS is black. [TR. 81]. There were a total of four black jurors on the entire venire from which his petit jury was selected -- Vinnell Daniel (#315), Gloria Gavins (#322), Betty McCoe (#356), and Martin Shaw (#358). [TR. 81-83]. The prosecutor used peremptory challenges to strike each and every one of them. [TR. 81-83]. Moreover, other than two perfunctory questions addressed to Mr. Shaw regarding his familiarity with the area of the crime, the prosecutor conducted no voir dire of any of the black jurors, whatsoever. [TR. 26-48]. The inescapable conclusion is compelled that the prosecutor in this case excluded by peremptory challenge every black juror in the jury panel solely because of his or her color. This denied the Defendant his right to due process, his right to a fair trial, and his right to be tried by a jury of his peers. This was violative of the Defendant's rights under the Fifth and Sixth Amendments to the United States Constitution and §§2, 9, and 16 of Article I of the Florida Constitution which guarantee to every citizen of this State the right to a fair trial, due process of law, and freedom from racial discrimination. The systematic

exclusion by the State of blacks from OSCAR ANDREWS' jury constituted an unconscionable, racially motivated infringement upon his constitutional rights.[1] OSCAR ANDREWS is entitled to a new trial by a jury which has been fairly chosen.

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[1]As quoted in "A Jury of One's Peers," American Bar Association Journal, Volume 69, November 1983, p. 1607, Dennis Archer, President of the National Bar Association, is credited with having stated: "It is widely known that prosecuting attorneys exclude blacks through peremptory challenges." Also noted by Archer, "Any system that excludes blacks from participating on juries precludes blacks from participating in the mainstream of justice."

II.

THIS JURISDICTION SHOULD NOT, AS A MATTER OF FLORIDA CONSTITUTIONAL LAW, PERSIST IN ITS MYOPIC AND UNJUSTIFIABLE ADHERENCE TO THE ANACHRONISTIC, UNFAIR, AND CONSTITUTIONALLY UNJUSTIFIABLE Swain TEST.

In Swain v. Alabama, 380 U.S. 202 (1965), the Supreme Court of the United States first discussed the issue of the prosecutor's use of peremptory challenges to exclude persons from a petit jury based on race alone. The Court recognized that "a State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." Id. at 203-4. The Court, however, held that "purposeful discrimination may not be assumed or merely asserted." Id. at 380 U.S. 205. Rather, the Court placed upon the defendant the burden of establishing a prima facie case of purposeful or deliberate discrimination by showing that the prosecutors, and not defense counsel, were responsible for the exclusion through the use of peremptory challenges of blacks, not only in one case, but consistently over an extended period of time. Id. at 223. Thus, the Court indicated that a defendant shows a prima facie violation of Equal Protection only when he offers proof that:

> . . . the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as

> qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries . . . Id. at 380 U.S. 223.

In articulating the above standard, the Swain Court relied upon Norris v. State of Alabama, 294 U.S. 587 (1935), and other cases where the selection of jurors for grand juries and petit jury panels had been challenged on equal protection grounds. See Swain, supra, at 380 U.S. 206. In Norris, the Court required proof of total, purposeful exclusion of blacks from service as jurors.

The first defect of such a standard is that it imposes an impossible burden of proof upon a defendant. Judicial recognition has been given to the fact that "every defendant who has tried to rebut the Swain presumption of prosecutorial impropriety has found it to be an illusory goal." Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, 509-10, n.10, cert. denied, 444 U.S. 881, 100 S.Ct. 170, 62 L.Ed.2d 110 (1979). Swain imposes a virtually insurmountable barrier due to the difficulty of a defendant in obtaining information regarding racial discrimination in the exercise of peremptory challenges occurring in other trials held in the same court. Furthermore, the first prong of the Swain test is difficult to meet, and as Judge Ferguson noted in his specially concurring opinion below, is in this case "a practical absurdity because in the Dade County state attorney's office there are over 100 attorneys and the

average tenure of trial prosecutors is, . . . less than three years."

Second, Swain provides no protection to the first defendant who suffers discrimination in any given court, or to any defendants following him, until an extended pattern of prosecutorial abuse becomes apparent over a period of time. This lack of protection exists despite the state constitutional provision entitling every defendant to trial by a jury drawn from a representative cross-section of the community. In short, even if the Swain burden of proof could be met, it falls short of remedying the constitutional violations which occur through the discriminatory use of peremptory challenges. This weakness has been most succinctly stated by the dissenting opinion of Justice Nix in Commonwealth v. Martin, 461 Penn. 289, 336 A.2d 290 (1975):

> The glaring weakness in the Swain rationale is that it fails to offer any solution where the discriminatory use of peremptory challenges is made on a selected basis. In northern communities systematic exclusion of an entire racial group from juries is rarely seen. More frequently, the problem arises in cases where the facts give rise to racial overtones and where an objective and unbiased jury is most needed. Swain provides no protection against this type of abuse. To the contrary, it facilitates its perpetuation.

The further opinion of Justice Nix applies as equally to Florida constitutional law as it does to Pennsylvania constitutional law:

> It is, however, abundantly clear that both the Federal and Pennsylvania Constitutions

> guaranteed the accused the right of trial by his peers. U.S. Const., Amend. 6; Pa. Const., Art. XI, §9. It would seem incumbent upon this Court to interpret our constitutional provision in such a manner that it meets the kind of injustices which are prevalent within this jurisdiction. 461 Pa. at 299-300.

Since these farsighted expressions by Justice Nix, the focus and basis of the attack against the exclusion of definable groups from jury service has changed, and with it has changed both the requirements of standing and the burden of proof. Thus, in Taylor v. Louisiana, 419 U.S. 522 (1975), the United States Supreme Court held that:

> Systematic exclusion of women during the jury-selection process, resulting in jury pools not "reasonably representative" of the community, denies a criminal defendant his right, under the Sixth and Fourteenth Amendments, to a petit jury selected from a fair cross section of the community.[2]

Moreover, the Court held that the defendant had standing to challenge the jury selection process despite the fact that he was not a woman. Id. at 419 U.S. 526.

In Taylor, a woman could not serve on a jury unless she filed a written declaration of her willingness to do so. Id. at 419 U.S. 523. Although women represented fifty-three percent of the persons eligible for jury service, only one percent of the persons who actually served on petit juries were women. Id. at 419 U.S. 524. More recently, in Duren v. Missouri, 439 U.S. 357,

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[2]Quoted from Duren v. Missouri, 439 U.S. 357 (1979).

99 S.Ct. 664 (1979), a selection procedure which resulted in petit juries comprised of only fifteen percent women was held to be invalid. In the Duren case, the record reflected that women had been allowed to obtain an automatic exclusion from jury service based on their sex. Significantly, the Court distinguished Duren from those cases involving challenges to jury selection procedures based on a violation of equal protection. Id. at n.26. After noting that in the earlier cases the plaintiff had the burden of proving both discriminatory effect and discriminatory purpose, the Court went on to state:

> In contrast, in Sixth Amendment fair-cross-section cases, systematic disproportion itself demonstrates an infringement of the defendant's interest in a jury chosen from a fair community cross section. The only remaining question is whether there is adequate justification for this infringement. Id. at n.26.

In addition, contrary to the determinations of the Third District Court of Appeal of Florida, Swain v. Alabama, supra, is not binding in this jurisdiction because when it was decided in 1965 under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, the Sixth Amendment right to a fair trial by an impartial jury, the relevant constitutional principle involved, had not yet become binding on the states through the Fourteenth Amendment's Due Process Clause. The Sixth Amendment right was not incorporated in the Fourteenth Amendment until three years after Swain, in Duncan v. Louisiana,

391 U.S. 145 (1968).[3] There is, therefore, no logical, constitutional, or precedential reason for Florida to persist in its slavish devotion to the antiquated Swain rationale.

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[3]Last May, the Supreme Court refused to hear three cases concerning peremptory challenges. In the opinion denying certiorari, Justice Stevens, joined by Justices Blackmun and Powell, acknowledged the importance of the issue presented but suggested that states be used as "laboratories" before the Supreme Court addresses the question again. Justice Marshall, in a dissent joined by Justice Brennan, noted that Swain pre-dates Duncan, and emphasized the need to reconsider the Swain standard in light of Sixth Amendment principles established in Taylor v. Louisiana, supra, and other post-Swain Supreme Court cases. McCray v. New York, Miller v. Illinois, and Perry v. Louisiana, 461 U.S. ___, 103 S.Ct. 2438, 2439, 77 L.Ed.2d 1322, 1323 (1983).

III.

FLORIDA SHOULD ADOPT THE STANDARD ENUNCIATED BY CALIFORNIA AND MASSACHUSETTS IN DETERMINING WHETHER PEREMPTORY CHALLENGES HAVE BEEN IMPROPERLY USED TO EXCLUDE PROSPECTIVE JURORS SOLELY ON THE BASIS OF IDENTIFIABLE GROUP BIAS SUCH AS RACE.

The courts of both California and Massachusetts have remedied the weakness and ineffectiveness of the Swain doctrine by requiring the prosecution to justify its use of peremptory challenges upon a prima facie showing by the defendant that the prosecution improperly used its peremptory challenges to exclude an identifiable group.

In People v. Wheeler, 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (1978), a black defendant was charged with the murder of a white victim. No initial challenge was made to the composition of the petit jury panel. However, after the prosecutor used his peremptories to strike the first two black jurors from the petit jury, defense counsel began eliciting the race of each successive black juror. Id. at 22 Cal.3d 263. After three more black jurors were excluded in the same manner, defense counsel stated his objection and moved for a mistrial. Id. at 22 Cal.3d 264. Counsel explained that the purpose of his request was to protect his client's right to "a jury of his peers" consisting of "a proper cross-section of the community." The prosecutor declined to respond and the motion was denied.

When voir dire resumed, two more black jurors were stricken from the petit jury by the prosecutor through the use of his peremptories. Once again, defense counsel moved for a mistrial and the prosecutor declined to respond. Id. at 22 Cal.3d 265. The motion was denied. No more black jurors were called to the box.

The California Supreme Court reviewed both the State and Federal cases dealing with the right to an impartial jury and held "that in this State the right to trial by a jury drawn from a representative cross-section of the community is guaranteed equally and independently by the Sixth Amendment to the Federal Constitution and by Article I, §16 of the California Constitution."[4] Id. at 22 Cal.3d 272. The court reasoned that the jury selection process should not be allowed to jeopardize this guarantee, but, rather, that the process should further this goal by eliminating jurors on the basis of specific bias. Id. at 22 Cal.3d 272. In examining the selection process, the court focused on the purpose of the peremptory challenge and noted that:

> In practice, a party will use a peremptory challenge only when he believes that the juror he removes may be consciously or unconsciously biased against him, or that his successor may be less biased. Id. at 22 Cal.3d 274-75.

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[4]The California court held that the right to an "impartial" jury was implicitly guaranteed by Article I, §16 of the California Constitution which states, in relevant part, as follows: "Trial by jury is an inviolate right and shall be secured to all . . ."

The California court, however, carefully distinguished between the use of peremptories to challenge "a bias relating to the particular case on trial or the parties or witnesses thereto," and the use of peremptories that assume bias among an identifiable group. Id. at 22 Cal.3d 275-76. The latter, it noted, "not only upsets the demographic balance of the venire but frustrates the primary purpose of the representative cross-section requirement." Id. at 22 Cal.3d 276. Thus, the Wheeler court concluded that:

> The use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community under Article I, §16, of the California Constitution. Id. at 22 Cal.3d 276-77.

The Wheeler court adopted a remedy along traditional lines. It retained the presumption that peremptory challenges would be used in a constitutionally permissible fashion, but established a realistic means for rebutting that presumption. The appellant would be required, first, to make as complete a record as was feasible of the circumstances of the dispute. Id. at 22 Cal.3d 280. Second, he would have to establish that the persons excluded were members of a cognizable group. Third, "from all the circumstances of the case he [would have to] show a strong likelihood that such persons [were] being challenged because of their group association rather than because of any specific bias." The type of evidence that would be required was

illustrated as follows:

> [T]he party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic -- their membership in the group -- and that in all other respects they are as heterogeneous as the community is as a whole. Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all. Lastly, although the defendant need not be a member of the excluded group in order to complain of the violation of the representative cross-section rule; yet if he is, and especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong, these facts may also be called to the court's attention. Id. at 22 Cal.3d 280-81.

If a prima facie case of this nature is made, the burden shifts to the other party. That party would then be required to show that the disputed peremptories were exercised "on grounds that were reasonably relevant to the particular case on trial or its parties or witnesses." Id. at 22 Cal.3d 282. If this burden of justification is not met, the trial court must dismiss the jurors thus far selected and quash the remaining venire. The California court ruled that in Wheeler the defense counsel met the burden and, therefore, reversed and remanded the case for a new trial.

In Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 881, 100 S.Ct. 170, 62 L.Ed.2d 110 (1979), the Supreme Judicial Court of Massachusetts dealt with a

case similar to Wheeler in most respects. In Soares, three black defendants were charged with murdering a white victim. 387 N.E.2d at 508. During jury selection, thirteen black jurors survived challenges for cause. Twelve of these were peremptorily challenged by the prosecutor. Defense counsel attempted repeatedly, but unsuccessfully, to register and state objections. Eventually, only one black juror was seated. The prosecutor exercised forty-four peremptory challenges. He excluded ninety-two percent of the available black jurors, and only thirty-four percent of the available white jurors. The Massachusetts court rejected the Swain standard and embraced the approach set forth in People v. Wheeler, supra, and relied upon Article XII of the Massachusetts Constitution, which states in relevant part that a subject shall not be "deprived of his life, liberty, or a state, but by the judgment of his peers. . . ." Id. at 387 N.E.2d 510. The court explained as follows:

> What we view Art. XII of the Declaration of Rights as proscribing is the use of peremptory challenges to exclude prospective jurors solely by virtue of their membership in, or affiliation with, particular, defined groupings in the community. Were we to decline to so hold, we would leave the right to a jury drawn from a representative cross-section of the community wholly susceptible to nullification through the intentional use of peremptory challenges to exclude indentifiable segments of that community. The argument sometimes made that members of specific identified groups in the community are statistically more likely than the population at large to hold a given view which might bear on their deliberations in the case

> misapprehends the issue. It is this very diversity of opinion among individuals, some of whose concepts may well have been influenced by their group affiliations, which is envisioned when we refer to "diffused impartiality." No human being is wholly free of the interests and preferences which are the product of his cultural, family, and community experience. Nowhere is the dynamic comingling of the ideas and biases of such individuals more essential than inside the jury room.
>
> In the case before us, three black defendants were convicted of the murder of a white man by a jury from which twelve of thirteen eligible blacks had been excluded by the prosecution. We cannot assume that the elimination of black jurors would produce an "impartial" jury. The opposite result is just as probable. Assuming that "group bias" does operate in some fashion, white jurors are equally likely to be sympathetic to a white victim. Given an unencumbered right to exercise peremptory challenges, one might expect each party to attempt to eliminate members of those groups which are predisposed towards the opposition. However, when the defendant is a minority member, his attempt is doomed to failure. The party identified with the majority can all together eliminate the minority members since their number exceeds that of the peremptory challenges available. The result is a jury in which the subtle group biases of the majority are permitted to operate, while those of the minority have been silenced. Id. at 387 N.E.2d 515-516.

The validity of the Wheeler and Soares decisions cannot be denied.[5] The reasoning applied and the conclusions reached by

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[5]The Supreme Court of New Mexico and Intermediate Appellate Court in Illinois have indicated that they would follow Wheeler in an appropriate case. State v. Crespin, 94 N.M. 486, 16 P.2d 716 (1980); People v. Smith, 414 N.E.2d 117 (Ill. 1st Dist. 1980). More recently the Illinois Appellate Court, First District, in Illinois v. Payne, 106 Ill.App.3d 1034 (1982), held that Payne, who is black, had not received a fair trial because blacks had been deliberately excluded from the jury through peremptory challenges. The court reversed the conviction and

those courts should be reached in the case at bar. Article I, §2 of the Florida Constitution provides:

> All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, . . . no person shall be deprived of any right because of race or religion.

Article I, §9 provides:

> No person shall be deprived of life, liberty or property without due process of law . . .

and Article I, §16 provides in pertinent part:

> In all criminal prosecutions the accused shall . . . have the right . . . to have a speedy and public trial by impartial jury in the county where the crime was committed.

Similarly, the Fifth and Sixth Amendments to the United States Constitution, as made applicable to the States through the Fourteenth Amendment, guarantee to every defendant the right to a fair trial and to due process of law.

This Court must not permit the jury selection process to

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ordered a new trial. The case is presently pending before the Illinois Supreme Court. Similarly, in People v. Thompson, ___ App.Div.2d ___, 435 N.Y.S.2d 739 (2d Dept. 1981), an intermediate New York appellate court reversed the defendant's conviction upon the factual finding that the prosecutor had specifically and purposely excluded blacks from the jury, and adopted the "representative cross-section" analysis of Wheeler and Soares as well as the procedures suggested by those cases. Both Pennsylvania and Alaska have deferred a decision on the issue, however, both the concurring opinion in Commonwealth v. Futch, 492 Pa. 359, 424 A.2d 1231 (1981), and the dissenting opinion in Mallott v. State, 608 P.2d 737, 752 (Alaska 1980), urge adoption of the Wheeler-Soares test.

jeopardize these guarantees. The use by the prosecution of peremptory challenges to remove prospective jurors on the sole ground of race violates both the State and Federal Constitutions. This Court should adopt a standard similar to those adopted by the courts of last resort in California and Massachusetts and condemn the constitutional and moral wrong suffered by the Defendant in this case and all other similarly situated defendants in this State. The decision of the District Court of Appeal, affirming the Defendant's conviction and sentence on the authority of Neil v. State, 433 So.2d 51 (Fla. 3d DCA 1983), as Judge Ferguson so succinctly stated in his specially concurring opinion, is "wrong." Swain is wrong. Discrimination in jury selection on the basis of race is wrong. This court should quash the decisions of the District Court in this case as well as Neil and adopt for Florida the eminently correct and practicable Wheeler-Soares rule. The Defendant Andrews' conviction should be reversed and he should be granted a new fair trial.

CONCLUSION

WHEREFORE, based upon the foregoing arguments and authorities, the Petitioner respectfully urges this Court to quash the decision of the District Court of Appeal of Florida, Third District, reject the State's invitation to adhere to Swain v. Alabama, condemn the State's systematic exclusion of blacks from trial juries in this State, and adopt the Wheeler-Soares principle as the law of Florida.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided by United States mail to THE OFFICE OF THE ATTORNEY GENERAL, 401 Northwest Second Avenue, Suite 820, Miami, Florida 33128; ELLIOT SCHERKER, ESQUIRE, Office of the Public Defender, Metropolitan Justice Building, 1351 Northwest 12th Street, Miami, Florida 33125; and CARIN E. KAHGAN, ESQUIRE, ACLU, 321 Northeast 26th Street, Miami, Florida 33137, this 10th day of November, 1983.

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