IN THE SUPREME COURT OF FLORIDA
CASE NO. 73,195
DCA 87-1903

THE MIAMI HERALD PUBLISHING COMPANY, a division of Knight-Ridder, Inc. and JOEL ACHENBACH,)

Petitioners,)

vs.)

ARISTIDES MOREJON, et al.,)

Respondents.)

ON REVIEW FROM THE DISTRICT COURT
OF APPEAL OF FLORIDA, THIRD DISTRICT

AMENDED BRIEF OF THE NEW YORK TIMES
REGIONAL NEWSPAPER GROUP
FLORIDA NEWSPAPERS, AMICI CURIAE

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SUMMARY OF ARGUMENT

This brief, amici curiae, is submitted on behalf of The New York Times Regional Newspaper Group's Florida newspapers, specifically, The Gainesville Sun, The Lake City Reporter, The (Lakeland) Ledger, The (Leesburg) Daily Commercial, The Ocala Star-Banner, The Palatka Daily News, The Sarasota Herald-Tribune, The (Avon Park) News-Sun, The (Fernandina Beach) News-Leader, The Marco Island Eagle, and The (Sebring) News-Sun. It is offered in support of Petitioners The Miami Herald Publishing Company and Joel Achenbach for the purpose of urging this Court to follow state and federal courts throughout the country in recognizing a qualified reporter's privilege protecting confidential and non-confidential sources and information collected in the news-gathering process.

Amici's seven daily and four weekly newspapers have a combined daily circulation of over 370,000. These newspapers, which gather news throughout Florida, are often subject to subpoenae similar to the one at issue in this case. They have generally objected to compulsory process on their reporters, editors and photographers for a variety of reasons, and believe strongly that the press's vital First Amendment rights must be recognized and protected in this case.

Amici take no position with respect to the particular facts in dispute herein. However, and far more importantly, amici believe that the press can only be successful in pursuing its

constitutionally protected role if a qualified privilege, reflected in the three-part test, is clearly recognized as the law of this State. Based on amici's experience, and as set forth in Point I, there are at least three strong policy reasons for firmly establishing such a privilege in Florida.

First, it is amici's experience that if their reporters were not protected from compulsory process, sources would be less likely to speak to them. While sources often choose to speak to reporters on a non-confidential basis knowing that their names might appear in print, those sources may well choose not to talk to reporters if they believe that their words will be repeated in a judicial proceeding by the reporter, perhaps to their detriment. The result would be the drying up of sources, and a resultant decrease in the amount of news which could be reported and in the quality of public dialogue about events of the day.

Second, amici's biggest asset in the eyes of the public is its objectivity and impartiality. These would both be threatened if reporters could routinely be compelled to testify for one side or the other in a given case. The public understandably would have to question the impartiality of an organization which is testifying for a litigant, and not only with respect to its reporting on that particular case. If it is believed that the news organization typically testifies for the Government, or even if, as in this case, it is believed that the press is testifying against the Government, the

perception of impartiality which is *so* vital to any news operation will be severely threatened.

Finally, amici's ability to report on the news would be harmed were reporters routinely called to testify in litigation. Trial lawyers would tend to use reporters to present evidence, both because they are respected as credible portrayers of important events, and because they typically have gathered information on incidents which give rise to both news and litigation. Some of amici's newspapers employ as few as two reporters; for example, a daily newspaper, The Palatka Daily News, has only four reporters. For these reporters to be routinely forced to testify, without privilege, in litigations ranging from car accidents and fires to police actions and arrests, (usually because of their after-the-fact interviews), will result in their being testifiers, not reporters -- resulting in a decrease in the flow of news.

As amici point out in Point 11, these concerns apply whether or not confidential sources are involved. Amici's concerns with respect to a drying up of sources, the perception of partiality, and the burden on the newsrooms, exist for non-confidential sources and information as well.

Finally, as we explain in Point 111, based on amici's experience in objecting to, and litigating against, subpoenae on reporters, it would be unworkable to have a procedure such as that adopted by the Third District Court of Appeal herein,

where the burden is on press to attempt to show cause why a subpoena should be quashed. Since the press in general knows very little about the litigation issues at play when they are subpoenaed, the initial burden to overcome the privilege must fall on the subpoenaing party.

Thus, as set forth below, amici believe that Florida should straightforwardly adopt the three-part test which has been followed by many Florida courts, as well as state and federal courts throughout the country, and grant a qualified privilege to reporters from testifying about sources and information collected in the news-gathering process.

ARGUMENT

POINT I

PUBLIC POLICY CONSIDERATIONS AND FIRST AMENDMENT INTERESTS MANDATE THAT A QUALIFIED REPORTERS PRIVILEGE BE RECOGNIZED IN FLORIDA

A. Without a Privilege, Sources for Information Will Dry Up, and Less News Will Be Gathered.

Journalistic independence must be protected if the press is to fulfill its vital role of gathering and reporting news. A reporter's ability to secure the trust of sources, and a reporter's ability to attend and to observe news events, turns on a public perception of reporters as agents for an independent press, not connected to Government or to other private interests.

The threat that sources bearing newsworthy information may well choose not to make their information public if it might be repeated -- perhaps against them -- in a judicial proceeding has long been recognized by case law. Indeed, lack of a privilege would result in bias in favor of the powerful and against the meek -- who have particular reason to fear both their identification and the later use of their words against them in court. Without such a privilege, the press would be limited to news from sources strong enough, independent enough, powerful enough to say, without fear of courtroom testimony, "I said so". That is, of course, information; but it is only "official" information or information which powerful sources desire to be made public. The powerless, who cannot afford the consequences of the lack of anonymity or of testimony against them, would be silent. And, in the long run, it would be the public who would be the loser: the ability of reporters to gather the news would be impaired -- and the right of the public to receive the news, therefore, diminished.

The foundation of the newsman's privilege is based on the principle, perhaps best expressed by a Florida federal court, that "compelling disclosure of information obtained by a reporter in news-gathering can have a 'chilling effect' upon his functioning as a reporter and upon the flow of information to the general public." Loadholtz v. Fields, 339 F.Supp. 1299, 1300 (M.D. Fla 1975). Put another way, "to make the press, in

effect, the investigative arm of every ... litigant ... will constrict the flow of information to the press and ultimately to us all." Suede Originals v. Aetna Casualty, 8 Med. L. Rptr. 2566 (Tex. Dist. Ct. 1982).

In sum, if newsgathering were routinely curtailed, one troubling result would be the inevitable reduction of the flow of news to the public at large when sources of news realize that the press are to serve as an appendage of the criminal and civil litigation systems. Without a newsman's privilege, citizens would be deterred from talking, or giving access, to journalists, and the journalists in turn, would be deterred from pursuing stories. See Zirelli v. Smith, 656 F.2d 705, 710-711, 712, n. 45 (D.C. Cir. 1981). If the general population perceives that talking to the press is indirectly talking to the court and lawyers, reporters may well be shunned by sources who would have trusted them, and denied access to the meetings, rallies and other places to which they otherwise would have been admitted.

Indeed, if there were not an expectancy that the reporter's privilege would protect The Miami Herald's reporters, it is likely that the police in this case would not have allowed a journalist to accompany them on the morning when reporter Achenbach followed the police officers in Miami International Airport. Stories such as these are the staple of good enterprise reporting, and serve the public in giving first-hand

information on how public officials do their job. If Government officials, such as the police in Miami, are deterred from allowing such access because of a fear that later testimony may not be in their interest, the result would chill reporting and diminish the public's ability to learn about their public officials. This role of the press, as a "watchdog" of Government, is precisely what the First Amendment contemplated, and this would be precisely the value upset if reporters would be forced to testify in such cases.

B. The Public's Perception of the Press as Impartial Would Be Eviscerated.

Additionally, the public's belief in a newspaper's objectivity and independence -- the press's most vital assets -- would be severely diminished if journalists were to provide information to one side or the other in litigation. If reporters were subject to being required to testify at legal proceedings, their credibility as impartial, objective reporters of the facts would be damaged, as the public came to believe that they were nothing more than investigative witnesses associated with the interests of a party in a litigation. While such a threat is particularly abhorrent were the public to view the press as a testifying arm of the Government, a newspaper's neutrality is equally threatened if

the public views the press as routinely testifying against Government.

As another Florida federal court stated, "when a reporter appears on the witness stand ... he runs the risk of being perceived as a partisan for whichever side benefits from his testimony." Johnson v. Miami, 6 Med. L. Rptr. 2110 (S.D. Fla 1980), quoting Blasi, "The Checking Value in First Amendment Theory", American Bar Foundation Research Journal (1977). Or as stated by another Florida state court, "the privilege is intended ... to avoid even the appearance of partiality on the part of the press." Damico v. Lemen, 14 Med. L. Rptr. 1031, 1032 (Fla. 13th Cir. Ct. 1987).

C. Forcing Reporters To Testify Would Be a Huge Burden on the News-gathering Capacity of Newsrooms and Would Be Intrusive into the Editorial Process.

The entire news process would be severely disrupted if journalists had no protection and could routinely be called as witnesses in trials where their knowledge is not critical. As part of their job, reporters typically gather news and process information which may be peripherally relevant to lawyers in litigation. The problem is a serious one because the reporters often spend time pursuing news in matters which give rise to lawsuits: accidents, fires, crime scenes, political controversies and statements, etc.

If reporters were subject to subpoena whenever they wrote and researched an article about an event which later became the subject of litigation, it would seriously impair their ability to gather and disseminate news to the public. A considerable amount of their time would be diverted from gathering information and reporting to appear in court, give depositions or otherwise testify in judicial proceedings with which the reporters' only connection was the article they had written.

Particularly because of the sensitivity of such an editorial intrusion, a subpoenaed reporter would spend substantial amounts of time gathering notes, drafts, negatives and other material for testimony, preparing for such testimony and then being in court waiting to actually testifying. All this time would be taken from the reporter's prime function -- gathering the news. Many news departments across Florida, including those in a number of _amici_'s newspapers, are leanly staffed. For example, _amicus_' non-daily newspapers have only two or three reporters; and even a daily, _The Palatka Daily News_, employs only four reporters, The loss of one reporter, especially a "beat" reporter or expert in a particular area, could be critical in the functioning of the news department if the reporter had to appear in court.

Just last year, the New York Court of Appeals, that State's highest court, recognized this interference into the news

function where reporters have no protection resulting in their being little more than a litigator's ready investigator. Since New York has a shield law which absolutely protects confidential information, the only issue in O'Neill v. Oakgrove Construction, Inc. was the degree of protection to be held for non-confidential materials collected in the course of news-gathering. In adopting a qualified privilege, a unanimous court clearly understood the danger to news-gathering: "

> "The ability of the press freely to collect and edit news, unhampered by repeated demands for resource material, requires more protection than that afforded by the disclosure statute. The autonomy of the press would be jeopardized if resort to its resource materials, by litigants seeking to use the news-gathering efforts of journalists for their private purposes, were routinely permitted." O'Neill v. Oakgrove Construction, Inc., 71 N.Y.2d 521, 526; 523 N.E.2d 277 (1988).

The Court understood that because reporters typically cover events giving rise to litigation, the consequences would be dire:

> "Because journalists typically gather information about accidents, crimes and other matters of special interest that often

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1/ The Court stated the privilege with respect to non-confidential materials this way: "If the material sought is pertinent merely to an ancillary issue in the litigation, not essential to the maintenance of the litigant's claim, or obtainable through an alternative source, disclosure may not be compelled." O'Neill v. Oakgrove Construction, Inc., 71 N.Y.2d at 527.

> give rise to litigation, attempts to obtain evidence by subjecting the press to discovery as a non-party would be widespread if permitted on a routine basis. The practical burdens of time and resources, as well as the consequent diversion of journalistic effort and disruption of news-gathering activity, would be particularly inimical to the vigor of a free press." Id.

The Court also noted that, similar to the other policy interests which should be protected, the burden on the press exists equally where non-confidential information was concerned: "As many of the courts have already noted, confidentiality, or the lack thereof, has little, if anything, to do with the burdens on the time and resources of the press that would inevitably result from discovery without special restrictions." Id.

As an earlier New York Court said, "The unbridled service of subpoenas to newspapers and their employees would soon change the function of a newspaper from that of a publisher to that of a testifier. Freedom of the press in effect would become a principle in name only." McKay v. Driscoll, 3 Med. L. Rptr. 2582, 2583 (Sup. Ct. N.Y. 1978). Indeed, as another Court explained, whether or not confidential sources are involved, subpoenae for unpublished journalistic material "seek to exploit ... journalists as unwilling investigators and seriously interfere with and undermine their ability to gather news. [They] thereby [have] a 'chilling effect' upon the

exercise of First Amendment rights." Wilkins v. Kalla, 118 Misc.2d 34 (Sup. Ct. N.Y. 1983). The use of the press to become testifiers is particularly real because press files make an excellent target for fishing expeditions, and because reporters are thought by their training and independence (which ironically would be lost after many courtroom appearances) to be excellent witness.

Beyond the simple but critical loss of newsroom manpower and time, the secondary effects of subpoenae on newsmen also raise vital First Amendment concerns. To protect its reporters, if there were no judicial protection, editors may determine to forego reporting on stories which might give rise to later subpoenae. The United States Supreme Court has emphasized that "the choice of material ... and the decisions made as to limitations on the size and content ... and the treatment of public issues and public officials ... constitute the exercise of editorial control and judgment." Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974). To allow this sort of intrusion into the editorial process, which may dictate what kind of news to cover, is fundamentally inconsistent with the First Amendment values our country's heritage is based on

To compel disclosure of a reporter's unpublished information also has the problem of opening to public view information and materials which journalists, in their editorial judgment, have chosen not to publish. The decision not to

publish may be based on the lack of substantiation, lack of full development of the facts, or any number of other considerations. To compel disclosure would potentially subject this unpublished information to public view, and would, therefore, have a chilling and inhibiting effect on both the collection and preservation of resource material and the editorial judgment involved in the reporting of that material. Editorial decisions which are subject to external pressures may "seriously hamper [the press'] ability to function in its editorial role." In Re Consumers Union, 495 F. Supp. 582, 586 (S.D.N.Y. 1980). As the Court said in Maughan v. N.L. Industries, 524 F. Supp. 93, 95 (D. D.C. 1981):

> "The right of a newspaper to determine for itself what it is to publish and how it is to fulfill its mandate of dissemination must be given great respect if an unfettered press is to exist and information is to flow unhindered from it to the public. To compel the production of a reporter's resource materials such as his personal notes can no doubt constitute a significant intrusion into, and, certainly, a chilling effect upon the news-gathering and editorial processes.[2/]

2/ Or, as a Texas Court put it: "The job of a newspaper is to gather as much information as it possibly can with respect to all facets of activities of interest and importance to readers. If it does its job well, it logically would be the repository of much information concerning controversial events which take place in the area which it serves. If the price of doing its job well, however, is to be a repeated role as the resource for those seeking information of only speculative value to themselves, coupled with a government command that they play that role, the effect will be severe." Suede Originals v. Aetna Casualty, supra at 2566.

POINT II

THE PRIVILEGE IS EQUALLY APPLICABLE TO NON-CONFIDENTIAL MATERIALS

The courts have generally recognized the importance of protecting notes, photographs and other resource materials in the news-gathering and editorial process even if they are not confidential. Thus, "this distinction [between confidential and non-confidential sources] is utterly irrelevant to the 'chilling effect' that the enforcement of these subpoenas would have on the free flow of information to the press and to the public. The compelled production of a reporter's resource materials is equally as invidious as the compelled disclosure of his confidential informants." Loadholtz v. Fields, 339 F. Supp. 1299, 1303 (M.D. Fla. 1975). See Von Bulow v. Von Bulow, 811 F.2d 136, 142-3 (2d Cir. 1987) (First Amendment privilege "can be invoked to shield disclosure of non-confidential sources and non-confidential information.").

The leading case recognizing the application of the reporter's privilege to non-confidential sources is U.S. v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980), cert. denied, 449 U.S. 1126 (1981), in which the Court held:

> "We do not think that the privilege can be limited solely to protection of [confidential] sources. The compelled production of a reporter's resource materials can constitute a significant intrusion into the news-gathering and editorial processes. Like the compelled

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disclosure of confidential sources, it may substantially undercut the public policy favoring the free flow of information to the public that is the foundation of the privilege. Therefore, we hold that the privilege extends to unpublished materials...." (citations omitted) 630 F.2d at 147.

As set forth in another non-confidential subpoena case, "[The defendant's] contention that the discovery is outside of First Amendment concern because it does not seek to identify confidential sources is a total misconception of the scope of the free press interest. Regardless whether they seek confidential sources, they seek to examine the reportorial and editorial processes ... Such discovery would represent a substantial intrusion on fact gathering and editorial privacy which are significant aspects of a free press." In re Consumers Union, 495 F. Supp. 582, 586 (S.D.N.Y. 1980). See also People v. Korkala, 99 A.D.2d 161, 167 (1st Dept. N.Y. 1984) ("The compelled production of a reporter's resource material is equally as invidious as the compelled disclosure of his confidential informants.")

Florida lower courts have come to the same conclusion. For example, in Schwartz v. Almart Stores, Inc., 42 Fla. Supp. 165 (Fla. 11th Cir. Ct. 1975), the Court denied the production of unpublished photographs in a slip-and-fall case holding that "although no confidential source or information is involved, this is irrelevant to the 'chilling effect' enforcement of the subpoenas would have on the flow of information to the

public." Other Florida courts have similarly denied the compulsory production of unpublished photographs -- where obviously there was no claim of confidential materials. Johnson v. Bentley, 457 So.2d 507 (Fla. 2d DCA 1984); Damico v. Lemen, supra; Shiner v. Florida Transportation Department, 9 Med. L. Rptr. 1672 (Fla. 4th Cir. Ct. 1983).

The ironic result of treating confidential and non-confidential information differently may be to promote poorer journalism. In the absence of protection of non-confidential sources, journalists may more quickly agree to confidentiality to protect themselves and their work product from court-ordered disclosure and subpoenae. Even more likely, sources aware of the legal distinction would likely seek confidentiality far more often, so that what they disclose cannot later be used against them in a civil or a criminal proceeding. In effect, confidentiality would become a reporter's primary tool to prevent the drying up of sources.

Pervasive use of confidential agreements would be contrary to good journalistic practice. Although there has been much publicity given to the use of confidential sources -- and use of anonymous sources is often the only way to cover Government[3] -- journalists in the main strive to report as

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3/ Typically, Government policy is often intentionally leaked to the press through anonymous sources either to serve as trial balloons of new government policies, or to pressure other interest groups or agencies to react in a certain way.

much detail as possible about the identity of their sources. Identification of sources and on-the-record reporting enable readers to make independent and informed judgments as to the credibility and weight to be given to the reported information. This is the practice preferred by journalists.

Indeed, most news is gathered without a promise of confidentiality. Reporters should be encouraged, not discouraged, to limit the amount of confidential information they receive and utilize and should, whenever possible, be encouraged to reveal and print the sources of their information so that the public may better understand and evaluate the news they receive. Any distinction in the recognition of the privilege between information received from confidential and non-confidential sources simply encourages sources to seek, and reporters to grant, confidentiality -- to the detriment of an informed public.

* * *

Thus, for the policy reasons set forth in Point I, we believe that Florida should recognize a qualified reporter's privilege for confidential and non-confidential information alike. Distinguishing between these two types of sources is unsupported by the values the privilege seeks to protect and may lead to poorer journalistic practices. For the reasons set forth in <u>The Miami Herald's</u> initial brief (pp. 11-21) and as Florida lower courts have been consistently applying for the

past 15 years, the qualified privilege should be implemented by adoption of the three-part test. That test -- which makes a party subpoenaing a journalist show that the information he is seeking is relevant to his claim, is of compelling need to be disclosed, and that there are no alternative sources for the information sought -- has fairly balanced the First Amendment interests of the press and the interests of the State in assuring that essential evidence can be adduced.

POINT III

THE BURDEN OF PROOF TO OVERCOME THE PRIVILEGE MUST BE ON THE PARTY SEEKING TO COMPEL A REPORTER'S TESTIMONY

In its opinion in this case, the District Court of Appeal ruled that the burden of proof rests with the journalist seeking to assert the reporter's privilege, not with the party seeking the information. The placing of a burden in this way is, to our knowledge, unprecedented and, in our experience, unworkable.

Amici have often received subpoenae seeking to compel a journalist's testimony. For the most part, when such a subpoena is served the newspaper knows perilously little about the litigation or the reasons why the journalist has been subpoenaed. It knows even less, if anything, about whether the subpoenaing party truly has a compelling interest for such

information. And the newspaper certainly knows nothing about what alternative sources the movant has or has not attempted to contact or depose.

In this light, it seems obviously misplaced to put the burden on the newspaper to overcome the three-part test. The journalist simply does not have the information available to even begin to argue about whether or not the subpoena meets the test, let alone to hope to succeed on such an argument.[4/]

Rather, as courts throughout the country have recognized, the burden must be on the party seeking to compel the testimony to show why the need is compelling and that other alternative

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4/ It is interesting to note that former President Reagan made the exact same argument in opposing a subpoena in U.S. v. Oliver North. He reasoned that a showing should be made by Mr. North's lawyers as to why the information was needed, and that on constitutional ground a former president ought not testify until a similar showing as that advanced herein is made:

> "Mr. Reagan's lawyer, Theodore B. Olson, said that "serious constitutional issues" were raised by Mr. North's effort to subpoena Mr. Reagan. He asked for details of the information that Mr. North's lawyers expect to elicit from Mr. Reagan.
>
> The legal brief said that until Mr. North's lawyers show that Mr. Reagan possesses information that is essential to the defense and that cannot be obtained elsewhere, Mr. Reagan should not be compelled to testify."

"Reagan Objects to Appearing as Witness for North", New York Times, March 30, 1989, Page A.22.

sources either do not exist or have been exhausted. After that showing has been made, the newspaper must have the opportunity to contest that showing. But, as with all other privileges, the party seeking to overcome the privilege should bear the burden of proof. As this Court recognized in Baron v. Florida Freedom Newspapers, 531 So.2d 113 (Fla. 1988), the party seeking closure against the press's access rights, just as here the party seeking news-gathering information against the press's First Amendment rights, has a "heavy burden" of justifying closure "because those challenging the order will generally have little or no knowledge of the specific grounds requiring closure." 531 So.2d at 118-19.

Interestingly, in New York an amendment to New York's shield law would, by legislation, put even more of a burden on a subpoenaing party than is suggested here. Thus a Governor's bill which has already passed the State Assembly, mandates that news organizations would not even have to move to quash subpoenae on the press. Rather, the news organization merely would have to serve a written objection to the subpoena; the burden would then be on the party issuing the subpoena to move to compel production (Governor's Program Bill #10, amending the New York State Shield Law, § 79-h N.Y. Civil Rights Law). Not only does this procedure put the burden of proof, as it should be, on the subpoenaing party, but it also puts the burden of going forward on the subpoenaing party, so as to minimize the

intrusion on the press in combating time-consuming subpoenae. In the words of the statement of support of the bill, this "streamlines the process and reduces expenses and valuable court time" presumably because, in the end, litigators will reduce the number of subpoenae if they realize that the initial burden of moving forward would fall on them.

CONCLUSION

As Judge Leval has written,

> "The ability of a reporter or news publication to gather information in confidence and to sift and edit privately without being subject to governmental or court orders of disclosure is an important facet of the ability of the press to learn and publish news. It should not be overriden without compelling reason." Matter of Forbes Magazine, 494 F. Supp. 780, 782 (S.D.N.Y. 1980).

For the reasons set forth above, and in the brief of The Miami Herald Publishing Company and Joel Achenbach, it is respectfully submitted that sound public policy reasons strongly support Florida's adoption of a qualified reporter's privilege to be implemented via the three-part test.

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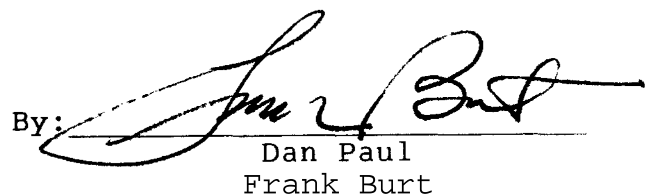

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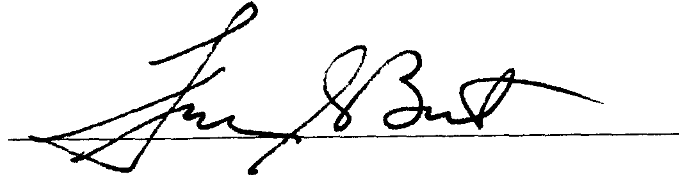
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed on the 13 day of April, 1989 to: BRUCE ROSENTHAL, Assistant Public Defender, 1351 N.W. 12th Street, Miami, Florida; RICHARD SIFFRIN, Assistant State Attorney, 1351 N.W. 12th Street, Miami, Florida 33125; SANFORD L. BOHRER, JEROLD I. BUDNEY, Thomson Bohrer Werth & Razook, 2200 One Biscayne Tower, Two South Biscayne Boulevard, Miami, Florida 33131; SAMUEL A. TERILLI, JR., General Counsel, The Miami Herald Publishing Company, One Herald Plaza, Miami, Florida 33132; and RICHARD J. OVELMEN, Baker & McKenzie, 701 Brickell Avenue, Suite 1600, Miami, Florida 33131.



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