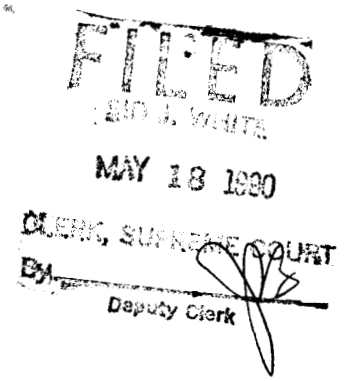
IN THE
SUPREME COURT OF FLORIDA

CASE NO: 75,719

CBS Inc.,
Petitioner,

vs.

Kareem Jackson,
Respondent.

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On Review from the District Court
of Appeal of Florida, Fourth District

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Respondent's Answer Brief

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## PRELIMINARY STATEMENT

On February 28, 1990, the Honorable Downey, Anstead and Letts of the Fourth District Court of Appeal certified the following question, one of great public importance, to be considered by this court:

> Does a television journalist have a qualified privilege in a criminal proceeding to refuse to produce non-televised video tapes depicting the defendant in the custody of the police when the defendant requests the tapes in order to assist in the preperation of his defense?

The Fourth District Court of Appeal affirmed the trial court's decision which in summary held the following: (1) the qualified journalist privilege, as interpreted by this court, does not include within its protection non-confidential sources of information, and (2) had the privilege been applicable, the defendant showed the materials sought were relevent, there was a compelling need for the materials and all other possible sources had been exhausted.

## STATEMENT OF FACTS[1]

Defendant, Kareem A. Jackson was arrested on July 27, 1989 at 629 N.E. 2nd Ave., Fort Lauderdale, Florida and charged with Possession of Cocaine in violation of Florida Statute 893.03(2)(a)4 and 893.13(1)(f). At the time of Kareem's arrest a CBS news crew was present and videotaped Kareem's arrest and actions taken by the arresting officers subsequent to his arrest. This factual point is in dispute by CBS. CBS supplied the court with affidavits supporting their contention that the CBS news crew arrived subsequent to Kareem's arrest (R. 25-28). Defense counsel for Kareem orally stated at the January 4th hearing that CBS began filming when Kareem was slammed up against the car based on information from Kareem. (R. 76). Defense counsel, in conforming to the ethical rules stated by this court, would not make frivolous statements to the circuit court.

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1/ Please refer to the CBS Appendix to Initial Brief for all record citations.

Kareem was arraigned and appointed a Public Defender on July 28, 1989. The Public Defender's Office filed its Demand for Discovery in open court on July 28, 1989. On August 4, 1989 the Public Defender received the State's discovery. (R. 38-39) Included in the discovery was Officer Howard Rudolph's probable cause affidavit and the State's preprinted answer forms. The State's answer listed the following individuals as persons presently known to the prosecutor to have information which may be relevant to the offense charged or any possible defense (R. 38): Officer Rudolph (the arresting officer), BSO chemist (not present before, during, or subsequent to the arrest), and both Leroy and Carolyn Jackson, Kareem's parents (also not present before, during or subsequent to the arrest).

On August 31, 1989, Defense Counsel, through subpoena, took the deposition of Officer Rudolph, the only known witness to this alledged crime (R. 40-46). In his deposition Officer Rudolph stated that he did not recall who else was in the car with him at the time he encountered Kareem (R. 43). Further, when asked about video cameras being present, Officer Rudolph responed "No, there wasn't" (R. 44). In light of Officer Rudolph's poor memeory, defense Counsel contacted the defendant for more possible information. Kareem remembered a Sgt. John Burnell being present at the

arrest. Defense Counsel issuse a subpeona for deposition to Sgt. Burnell (R. 48). Sgt. Burnell was not a member of the Broward County Sheriff's office and therefore the subpeona could not be served. Defense counsel attempted to locate Sgt. Burnell by contacting other police stations but was unsuccessful.

Defense Counsel then contacted John Zucker, attorney for the CBS news show 48 Hours, in an attempt to obtain further information regarding Kareem's case. Mr. Zucker advised defense Counsel that CBS has a long standing policy to not produce such information. On November 22, 1989, defense Counsel issued a Subpeona Duces Tecum upon the Custodian of Records of CBS seeking all unedited video tape regarding Kareem Jackson. The purpose of the request was to obtain information which would shed light on circumstances surrounding Kareem's arrest (before, during and after) and to identify other possible sources of information, such as other police officers, which are unavailable due to Officer's Rudolph's lack of memory.(R.1-2). CBS then filed it's Motion for Protective Order. (R. 3-20).

A hearing on CBS' motion was held before Judge Ward on January 4, 1990. (R. 59). As the record will reflect, defense counsel provided the lower court with argument and

case law that the journalist's privilege is not applicable and that if the court were to find it is applicable, the defendant met his burden to over come the privilege. (see transcript of hearing R. 59-100). On January 8, 1990, Judge Ward issued a decision and order denying CBS' motion. (R. 101-103).

## SUMMARY OF ARGUMENT

Point I.

The Circuit Court correctly interpreted Florida case law and properly held that the journalist's privilege does not include the protection of non-confidential sources of information.

The Florida Supreme Court found that a jounalist does have a qualified privilege under the First Amendment to the United States Constitution to refuse to testify in a criminal or civil proceeding regarding information learned from confidential news sources. In creating the privilege the Supreme Court of Florida recognized the underlying rationale for such a qualified privilege that news gathering is an essential precondition to the dissemination of news

and that without some protection for seeking out the news, freedom of the press could be eviscerated. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.

The Florida Supreme Court found this limited and qualified privilge is applied by weighing the reporter's privilege to protect confidential sources against the public interest in the particular case ultimately striking a proper balance between constitutional and societal interests. The Florida Supreme Court has not extended this analysis to include non-confidential sources of information

In reviewing the case law of the Florida District Courts it must be noted that only the Second District Court of Appeals has extended the privilege to include non-confidential sources of information. However the Fourth District Court found the opposite result and made a distinction between information gained from confidential sources and physical evidence of a crime and held that the latter is not protected information under the privilege. The Third District Court found that the qualified journalist privilege established by the Supreme Court of Florida has

utterly no application to information learned by a journalist as a result of being an eyewitness to a relevant event in a subsequent court proceeding. The journalist's privilege should not be extended to include all non-confidential sources of information and evidence so as to create a work product privilege for journalists. The underlying rationale for creating the news journalist's qualified privilege for confidential news sources does not apply to most non-confidential sources of information. Confidential news sources are likely to be reluctant to work with reporters if disclosed. However, non-confidential news sources are unlikely to disappear if journalists are required to testify concerning such sources and information; therefore,the newsgathering and dissemination process will not be threatened by such disclosure. The ability of the journalist to gather and report on a witnessed event is not threatened by requiring the disclosure of what was seen through the eye of a camera. No free-press interests are imperiled.

Since CBS video tapes are in no way protecting any type of confidential sources and merely depict witnessed events, the order entered by Judge Ward should be upheld and the subpoena enforced.

Point II.

The Circuit Court was correct in holding that had the journalist privilege been applicable the defendant satisfied the necessary burden to overcome the privilege. The circuit court's finding do not have to be articulated if evidenced by the recorded. The Florida Supreme Court has not varied the balancing process used in determining whether the journalist privilege, when applicable, has been overcome. In determining the proper balance between the interest of the press and the party seeking disclosure the court must address the following issues: (1) is the information relevant, (2) can the information be obtained by alternative means, and (3) is there a compelling interest in the information? These questions represent elements that the court must consider but do not establish a three-part test which the party seeking information from the journalist must satisfy in order to obtain such information.

As to the first element of relevance, the actions of the officers after the apprehension and handcuffing is relevant for purposes of the legality of searches or questioning which may have taken place. Also, In light of Officer Rudolphs lack of memory, the video outtakes become

highly relevant in that they will provide information as to other sources of information.

Refering to the second element Officer Rudolph was the only individual provided to defense counsel by the State who had any personal knowledge of the alleged offense - his lack of memory prevents him from revealing other alternative sources of information. Further, defense counsel spoke with defendant for more possible information. The defendant remembered a Sgt. John Burnell being present at the arrest. Defense Counsel issued a subpeona for deposition to Sgt. Burnell and found he was not a member of the Broward County Sheriff's office and therefore the subpeona could not be served. Defense counsel attempted to locate Sgt. Burnell by contacting other police stations but was unsuccessful.

The information sought is clearly of compelling interest to the defendant. It is the only source of information defendant has to possibly determine what took place on July 27, 1989 or to find other officers which may have knowlege of the incident. This is not merely a "fishing expedition" for evidence. It is a necessary step in defendant's due and proper preperation for trial. Further, Kareem's liberty, standing alone, creates a compelling need for the information.

## ARGUMENT

I.

### THE CIRCUIT COURT WAS CORRECT IN HOLDING THAT THE SUPOENAED MATERIALS ARE NOT PROTECTED FROM COMPELLED DISCLOSURE BY THE QUALIFIED JOURNALIST'S PRIVILEGE UNDER THE FIRST AMENDMENT AND THE FLORIDA CONSTITUTION.

#### A. The Circuit Court Correctly Interpreted Florida Case Law and Properly Held The Journalist's Privilege Does Not Include The Protection Of Non-confidential Sources Of Information.

The unpublished video out-takes requested by the defendant are not protected by the Journalist's Privilege found under the First Amendment to the United States Constitution and Article I, Section 4 of the Florida Constitution.

The United States Supreme Court first addressed the issue of whether a reporter had a privilege in Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972). Justice White, in his plurality-majority decision, found the hindrance of testifying before grand juries too insubstantialand speculative to overcome the paramount public interest in prosecuting crime. 408 U.S. at 695. Further, he reasoned that judges supervising grand

juries would be sufficiently sensitive to the First Amendment to minimize the danger of abuse. Id. at 707-708.

Three other justices concurred with Justice White to find there was no reporter's privilege. Three justices found a qualified privilege and one an absolute privilege. Justice Powell, in his pivotal opinion concurring with Justice White, implied there may be some form of privilege to be considered on a case-by-case basis. Justice Powell stated:

> "The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions."

Id. at 710. In Zurcher v. Stanford Daily, 436 U.S. 547 (1978), Justice Powell had the opportunity to revisit his opinion in Branzburg and wrote:

> "The concurring opinion in Branzburg v. Hayes...does not support the view that the Fourth Amendment contains an implied exception for the press, through the operation of the First Amendment. The opinion noted only that in considering a motion to quash a subpoena directed to a newsman, the court should balance the competing values of a free press and the societal interest in detecting and prosecuting crime."

Id. at 570-571, fn.3.

In Liggett v. Kern County Superior Court, 16 Media L. Rep. (BNA) 2006 (Cal. Ct. App. 5th dist. 1989), A cameraman was subpoenaed to give oral testimony regarding an auto accident which he filmed and witnessed. The court, after a full discussion of Branzburg stated:

> "Even if Justice Powell's concurrence in Branzburg can be interpreted as recognizing a First Amendment newsperson's privilege for confidential sources, there are no special First Amendment procedural safeguards beyond traditional judicial proceedings for protecting the privilege."

Id. at 2009. The California court further went on to adopt the position cited in Tribe, American Constitutional Law (2d ed. 1988) 12-22, 976 and stated "We agree with Professor Tribe's assessment and conclude that the First Amendment does not shield Gregerson from disclosing information based on a happenstance observation of an accident occurring in public." Id. at 2010.

Contrary to the Petitioner's position, Florida case law limits the privilege to allow for protection of confidential sources only. In Morgan v. State, 337 So.2d 951 (Fla. 1976), The Florida Supreme Court expanded the United States Supreme Court decision of Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct.

2646, 33 L.Ed.2d 626 (1972) finding that a jounalist does have a qualified privilege under the First Amendment to the United States Constitution to refuse to testify in a criminal or civil proceeding regarding information learned from confidential news sources. Id. In creating the privilege the Supreme Court of Florida recognized the underlying rationale for such a qualified privilege is that "news gathering [is] an essential precondition to [the] dissemination of news...," and that "'without some protection for seeking out the news, freedom of the press could be eviscerated'". Morgan, 337 So.2d at 954 (quoting Branzburg, 408 U.S. at 681, 92 S.Ct. at 2656, 33 L.Ed.2d at 639). The Morgan court then embraced Mr. Justice Powell's assertion in his concurring opinion in Branzburg and found that "[t]he asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct." Morgan, at 954 (quoting Branzburg, 408 U.S. at 709, 92 S.Ct. at 2671, 33 L.Ed.2d at 656). With this rationale in mind, The Florida Supreme Court in Morgan held that a privilege does exist to refuse to divulge the identity of a confidential news source to a grand jury investigating a

disclosure to the journalist of a sealed grand jury presentment.

The Florida Supreme Court also used the same rationale and balancing analysis as stated in Morgan in Tribune Co. v. Huffstetler, 489 So.2d 722 (Fla. 1986). In Huffstetler the Florida Supreme Court found a privilege to refuse to divulge the identity of a confidential source to a state attorney investigating a disclosure of a complaint filed before the state ethics commission. The court stated: "Much like the situation in Morgan, the principle interest...amounts to a private interest in reputation. When balancing [this interest]...against Tunstall's first amendment rights, Morgan mandates that the first amendment prevail." Id. at 724.

In Both Morgan and Huffstetler the Florida Supreme Court found this limited and qualified privilge is applied by weighing the reporters privilege to protect confidential sources against the public interest in the particular case ultimately striking a proper balance between constitutional and societal interests. In each case, the Court concluded that the free press interests involved in protecting the confidential news source outweighed the public interest furthered by the non-criminal investigations. This

journalistic privilege involves the protection of confidential sources. The Florida Supreme Court has not and should not extended this analysis to include non-confidential sources of information.

In reviewing the case law of the Florida District Courts it must be noted that only the Second District Court of Appeals has extended the privilege to include non-confidential sources of information. In Tribune Co. v. Green, 440 So.2d 484 (Fla. 2nd DCA 1983) rev. denied, 447 So.2d 886 (Fla. 1984), the Second District Court found the privilege includes the right of a journalist to refuse to testify in a criminal case concerning conversations had with a defendant and a known third party. Also in Johnson v. Bently, 457 So.2d 507 (Fla. 2nd DCA 1984), the Second District Court held the privilege includes the right to refuse to produce photographs of an auto accident when ordered pursuant to civil pretrial discovery.

However the Fourth District Court found the opposite result in Satz v. News and Sun-Sentinel Co., 484 So.2d 590 (Fla. 4th DCA 1985). In Satz a journalist was subpeonaed to produce photographic evidence of a crime. The court made the distinction between information gained from confidential sources and physical evidence of a crime and found that the

latter is not protected information under the privilege. Also in Miami Herald Pub. Co. v. Morejon 529 So.2d 1204 (Fla. 3rd DCA 1988) the Third District Court found that "the qualified journalist privilege established in Morgan and Huffstetler has utterly no application to information learned by a journalist as a result of being an eyewitness to a relevant event in a subsequent court proceeding,..." Id. at 1208.

As the Court in Morejon noted, Morgan and Huffstetler should not be extended to include all non-confidential sources of information and evidence so as to create, in effect, an across-the-board work product privilege for journalists. Id. at 1207. The underlying rationale for creating the news journalist's qualified privilege for confidential news sources does not apply to most non-confidential sources of information or other like physical evidence. Id. Confidential news sources are likely to be reluctant to work with reporters if disclosed. However, non-confidential news sources are unlikely to disappear if journalists are required to testify concerning such sources and information; therefore, the newsgathering and dissemination proccess will not be threatened by such disclosure. Id. Further, as stated by the Third District Court in Morejon and Judge Ward in his Order:

> "Just as any other private citizen is expected to give his eyewitness testimony to such relevent events in subsequent court proceedings, so, too, give similiar testimony. The fact that the journalist is on a news gathering mission when he or she witnesses such a relevent event cannot change this result because the ability of the journalist to gather and report on the witnessed event is not substantially threatened by requiring the disclosure of what no substantial free-press interest are imperiled. Moreover the fact that it is inconvenient for a journalist to respond to a witness subpoena and give his eyewitness testimony is of no constitutional significance; all persons who witness such events are equally inconvenienced by having to respond to such witness subpoenas, and a journalist occupies no privileged position in this respect from any other person in the community." Miami Herald Pub. Co. v. Morejon, 529 So. 2d 1204,1208 (Fla. 3rd DCA 1988).

Lastly, quoting from Judge Ward's Order: "The Sixth Amendment to the United States Constitution, and Article I Section 16, of the Florida Constitution both provide that an accused in a criminal proceeding shall have the right of compulsory process for obtaining witnesses in his favor. When a conflict arises between these constitutional provisions and shield laws, such as a qualified journalist privilege, deference must fall upon the rights of the accused."

In sum, the Supreme Court of the United States has never found any type of privilege to exist for journalists. Florida has only held that the journalists privilege can be

used only to protect confidential sources of information. The Supreme Court of Florida has not expanded this view. The Second District Court is the only Florida District to expand the privilege to include other non-confidential sources of information. The Third and Fourth District Courts have declined to extend the privilege for reasons stated above.

On the day of Kareem's arrest CBS was filming events that took place in public. There are no confidential sources being protect by CBS. The CBS video outtakes are merely events witnessed by a member of the public. Just as if defense counsel would subpoena any other citizen who may have information, CBS should not be exempt simply by asserting they were on a news gathering mission and are therefore privileged. Since CBS' video tapes are in no way protecting any type of confidential sources, the order entered by Judge Ward should be upheld and CBS' writ of certiori should be denied.

## II.

## THE CIRCUIT COURT WAS CORRECT IN HOLDING THAT HAD THE JOURNALIST PRIVILEGE BEEN APPLICABLE THE DEFENDANT SATISFIED THE THREE PART TEST NECESSARY TO OVERCOME THE PRIVILEGE.

The Florida Supreme Court has not varied the balancing process used in determining whether the journalist's privilege, when applicable, has been overcome. However, the First District Court has held that in striking "the 'proper balance' between the interest of the press and the party seeking disclosure as required by Morgan," the court "must address the following issues: (1) is the information relevant, (2) can the information be obtained by alternative means, and (3) is there a compelling interest in the information?" Gadson County Times, Inc. v. Horne, 426 So.2d 1234, 1241 (Fla. 1st DCA), rev. denied, 441 So.2d 631 (Fla. 1983). (In which a journalist, also a defendant in a defamation action, was privileged to refuse to divulge to plaintiff the identity of a confidential source). These questions represent elements that the court must consider "...but do not, as urged, establish a 'three-part test' which the party seeking information from the journalist must satisfy in order to obtain such information;..." Miami Herald Pub. Co. v. Morejon 529 So.2d 1204, 1207 (Fla. 3rd DCA 1988). In their writ for certiorari CBS states "The Court made no findings to support this bald conclusion and, indeed, no such facts exist in the record." (CBS' Writ of Certiorari, page 24). In CBS, Inc. v. Cobb, 536 So.2d 1067 (Fla. 2nd DCA 1988) the court which has extended the

privilege stated "...we do not accept the argument that the failure of the court to make detailed findings of fact, or to reduce such findings to writing, is necessarily fatal to the party seeking to compel disclosure. As stated by counsel for Long [the defendant], it is clear from the record before us 'regardless whether the lower court specifically articulated findings [that] the three part test has been met.'" Id. at 1070. Assuming the privilege is applicable to the CBS outakes (which the respondent asserts it is not), the record clearly does reflect the lower court's finding that the respondant overcame the burden necessary to overcome the privilege.

As to the first element of relevance, CBS asserts through the affidavits of the producer, Barbara Baylor (R. 25-28, and 56-58) that the CBS crew did not arrive until after the police took possession of the drugs, apprehended the defendant, begun to question him, and had handcuffed him. Even assuming this to be accurate, the actions of the officers after the apprehension and handcuffing is relevant for purposes of the legality of searches or questioning which may have taken place. Also, as will be more fully discussed below, in the deposition of Officer Rudolph (R 40-46) he states that he does not recall who else was in the car with him (R. 43) and that he does not recall who else

may have been present when he approached the defendant. (R. 44). In light of Office Rudolphs lack of memory, the video outtakes become highly relevant in that they will provide information as to other sources of information; i.e. other police officers and individuals who may have witnesses events leading up to and subsequent to the defendant's arrest.

Referring to the second element CBS states "...the record reveals that even defense counsel believes that there may, in fact, be numerous sources. For example, he said at the hearing: I need to see what they [the police] were doing. And he's [the defendant] going to testify to that. So even defense counsel admitted that the defendant is an alternative available source. In addition, the public defender went on to suggest other alternative sources: If those police officers are doing something wrong, I'm going to have that person in there testifying also." (Pet.Br. at 30). Defense counsel's statement has been completely misconstrued. When the sentences are read within the context of the full paragraph the idea is clear:

> "CBS was there filming from their own affidavits. They were filming from the time that my client was handcuffed. From that point on the police officers were committing an illegal activity that whole point on. There's your crime. You can draw that analogy. I need to see what they were doing. And he's going to testify to that. When I do a motion to suppress, anybody else watching the police is going to come in and testify. If those police officers are doing something wrong, I'm going to have that person in there testifying also. The same thing. CBS was there watching what happened from that time on, and if there was anybody else standing there, I would bring them in for a motion to suppress so I could find out what happened. But now they're saying, "Well, you can't use me because I'm a news reporter. You can't use my information. I have a privilege." (R.96-97)

In the Memorandum in Support of Defendant's Subpoena Duces Tecum it was clearly stated to the lower court in the Statement of facts that the State's answer to the defendant's demand for discovery listed "the following individuals as persons presently known to the prosecutor to have information which may be relevant to the offense charge or any possible defense: Officer Rudolph(the arresting officer), BSO chemist (not present before, during, or subsequent to the arrest), and both Leory and Carolyn Jackson, Kareem's parents (also not present before, during, or subsequent to the arrest)." (R. 29-30).

Officer Rudolph was the only individual provided to defense counsel by the State who had any personal knowledge of the alleged offense-his lack of memory prevents him from revealing other alternative sources of information. Further, as was stated in the defendant's Memorandum in Support of Defendant's Subpoena Duces Tecum in the Statement of facts (R. 30) and the January Fourth hearing (R. 78) defense counsel spoke with defendant remembered a Sgt. John Burnell being present at the arrest. Defense Counsel issued a subpoena for deposition to Sgt. Burnell (R. 48). Sgt. Burnell was not a member of the Broward County Sheriff's Office and therefore the subpoena could not be served. Defense counsel attempted to locate Sgt. Burnell by contacting other police stations but was unsuccessful.

The defendant, overcoming his burden in the first and second elements, has therefore met his burden in the third element. The information sought is clearly of compelling interest to the defendant. It is the only source of information

defendant has to possibly determine what took place on July 27, 1989 or to find other officers which may have knowledge of the incident. It is information which, regardless of the outcome, is necessary for the defendant to receive a fair administration of justice. Further, as the Second District Court held in CBS, Inc. v. Cobb,526 So.2d 1067 (Fla. 2nd DCA 1988):

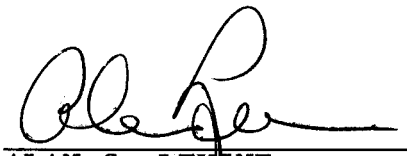
"We hold that Long [the defendant] has demonstrated a compelling need for the information currently in the possession of CBS, notwithstanding his apparent inability to summarize the exact nature of that information without first being allowed to examine it. This is not merely a fishing expedition for evidence which theoretically could be useful to Long in the preparation of his defense. Rather, it is a necessary step in [defendant's] due and proper preparation for trial." Id. at 1071.

## CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that this Court to enforce the circuit court's decision and order CBS to produce the video outtakes.

Respectfully submitted,

ALAN H. SCHREIBER
Public Defender
17th Judicial Circuit



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Assistant Public Defender
Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this brief was mailed to Thomas R. Julin, Steele Hector & Davis, Attorney's for CBS Inc., 4000 Southeast Financial Center, Miami, Florida 33131-2398 and to Douglas P. Jacobs, Susanna P. Lowy, john W. Zucker, CBS Inc., 51 West 52nd Street, New York, N.Y. 10019, and the State Attorney's Office, Broward County Courthouse, Fort Lauderdale, Florida this 17th day of May, 1990.

ALAN S. LEVINE