IN THE
SUPREME COURT OF FLORIDA

Case No. 75,719

CBS Inc.,
Petitioner,

vs.

Kareem Jackson,
Respondent.

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

Initial Brief of Petitioner CBS Inc.

Thomas R. Julin
Florida Bar. No. 325376
Steel Hector & Davis
Attorneys for CBS Inc.
4000 Southeast Financial Center
Miami, Florida 33131-2398
(305) 577-2810

Douglas P. Jacobs
Florida Bar No. 0153760
Susanna P. Lowy
John W. Zucker
CBS Inc.
51 West 52nd Street
New York, New York 10019
(212) 975-8758

TABLE OF CONTENT

TABLE OF AUTHORITIES

Case — Page

STATUTES

OTHER

PRELIMINARY STATEMENT

This case is before this Court on the following question, which was certified by a panel of the Fourth District Court of Appeal as being of great public importance:

> 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 preparation of his defense?

(R. 114). The Fourth District Court of Appeal affirmed the trial court's holding that a television journalist has no such privilege. Petitioner CBS Inc. ("CBS") seeks reversal of that holding on the following grounds.

First, lower courts in Florida and throughout the country have recognized that powerful policy reasons support broad application of the qualified reporters' privilege to all journalists' unpublished materials and information, not only identity of confidential sources.

Second, the requirements for overcoming the privilege have clearly not been met in this case. Respondent has failed to demonstrate the relevance of the materials sought, a compelling need for those materials, or the exhaustion of

alternative, nonjournalistic sources.

STATEMENT OF FACTS[1/]

Respondent, who has been charged with possession of cocaine, was among the persons arrested in Fort Lauderdale on July 27, 1989 as part of an operation by Broward County police. A CBS News crew videotaped portions of that law enforcement operation and excerpts from those tapes were included in the September 14, 1989 broadcast of the CBS News program 48 HOURS, entitled "Return to Crack Street." (R. 25, 56). The CBS News

---

1/ The only decision in this case was issued on January 8, 1990 by the Honorable Lavon Ward, Circuit Court, Broward County. (R. 101-103). On February 28, 1990, the Fourth District Court of Appeal denied CBS' petition and certified the question addressed herein to this Court. (R. 114). The appellate court issued no opinion. Thus, all references herein to "the lower court's opinion" or "the decision below" refer to Judge Ward's January 8, 1990 order.

The complete record is contained in the appendix which is being filed herewith. The appendix contains: the subpoena; the motion for protective order to quash the subpoena filed by CBS; the affidavits of CBS News producer Barbara Baylor and CBS attorney John Zucker, Esq. in support of CBS' motion; the memorandum of the defendant submitted in support of the subpoena duces tecum; the notice of hearing; the reply memorandum of CBS submitted in further support of its motion; the reply affidavit of Barbara Baylor submitted in further support of CBS' motion; the transcript of the January 4, 1990 hearing before the Honorable Lavon Ward regarding CBS' motion; Judge Ward's decision denying CBS' motion; CBS' motion for a stay pending review of the January 4, 1990 decision; Judge Ward's February 15, 1990 decision granting a stay pending appeal; and the decision of the District Court of Appeal for the Fourth District dated February 28, 1990, denying CBS' petition and certifying the question addressed herein to this Court.

crew arrived at the scene of respondent's arrest after he had been apprehended; the crew did not witness or tape, and no materials in CBS' possession show, respondent's activity before the arrest or the manner in which he was apprehended and placed under arrest or the seizure of drugs from the respondent. (R. 26, 57). The outtakes thus contain no direct evidence of the respondent's guilt or innocence and have no apparent relevance to any defense he might raise regarding the circumstances of his arrest.

On November 27, 1989, the respondent served CBS with a subpoena duces tecum, seeking the outtakes regarding him. (R. 21).[2/] CBS moved for a protective order to quash the subpoena on December 8, 1989. (R. 3-20). The respondent served a Memorandum In Support of Defendant's Subpoena Duces Tecum on December 28, 1989 (R. 29-48); the respondent filed no affidavit in response to CBS' motion.

The respondent also annexed to his brief the State's Answer to Demand for Discovery which listed, inter alia, four persons with knowledge, police reports, photographs, documents and a statement. (R. 38-39). Defense counsel said that he had

---

2/ The subpoena actually sought "[a]ll unedited video tapes or film taken on July 27th, 1989 at 629 N.E. 2nd Avenue, Ft. Lauderdale, Florida and the local area of such address for the show 48 Hours entitled 'Return to Crack Street'." (R. 1). After it was served, defense counsel said that the subpoena should be construed as referring only to materials depicting or referring to the respondent which were not broadcast. (R. 21).

taken the deposition of one witness, Officer Howard Rudolph, and had attempted unsuccessfully to locate another police officer whose name the respondent remembered. (R. 30). According to defense counsel, the other three witnesses were not present after respondent's arrest. Id. Officer Rudolph had testified that he had taken a Polaroid picture of the respondent at the time of the arrest. (R. 43-44). According to defense counsel, Officer Rudolph did not recall the names of the other officers present. Id. Officer Rudolph also testified that there were no video cameras present at the time of the arrest. Id. Officer Rudolph was never questioned about what happened subsequent to the respondent's arrest (i.e., about his search or any statements he made). Similarly, Officer Rudolph was not asked whether a CBS crew arrived subsequent to the arrest or whether the crew videotaped any relevant events.

A hearing on CBS' motion was held before Judge Ward on January 4, 1990. (R. 59). Defense counsel offered no specific factual basis for needing the outtake materials from CBS and argued only that he was entitled to the materials because of a perceived possibility that they would be relevant to an as yet unknown defense, but he never explained what defense would be asserted which would be affected by these outtakes. He asserted: "It's the only way I can prepare for this trial. I have no other way -- It's like walking in blind." (R. 86). He repeatedly exclaimed: "I need to see what happened . . . I have

no other source" (R. 73-74, 79), and also said, "[t]here's something called the 4th Amendment." (R. 73).

The public defender acknowledged that he had not yet made a motion to suppress or any other motion alleging that the defendant's arrest was unlawful, that he had been beaten by the police, that he had not been read his Miranda warnings, or that his Fourth Amendment rights had been violated in any way. Defense counsel referred to his "need to see where the cocaine was possibly found" (R. 77) -- ignoring CBS' sworn and uncontroverted representation that it did not witness the seizure of the drugs. (R. 26, 57).[3/]

On January 8, 1990, Judge Ward issued a decision and order denying CBS' motion. (R. 101-103). The Court held that it "declines to create what would ultimately be a work product privilege as to all information learned, or obtained by a journalist while on a news gathering mission" (R. 102) and further held that "had the Court found the qualified journalist privilege applicable, the Defendant, as evidenced by the record, overcame the burden necessary to overcome the privilege." (Id). The Court did not elaborate or make any findings as to how the defendant had overcome the privilege.

3/ At the hearing, defense counsel quoted his client saying to him that "they started filming" when he was "slammed up against the car." (R. 76). This is not sufficient to contradict CBS' sworn affidavits as well as the testimony of Officer Rudolph (see discussion infra at 27-29).

On January 11, 1990, after CBS had been denied a copy of the transcript of the January 4 hearing by the court reporter because juvenile proceedings are sealed, Judge Korda held a hearing, which he called sua sponte, on whether the transcript of the hearing should be released to CBS. (R. 106). At the conclusion of the hearing, Judge Korda ordered that the transcript should be released to CBS. He also held that CBS could not have access to Kareem Jackson's court file. (Id.)

On January 12, 1990, Judge Miller conducted a calendar call and continued the trial of Kareem Jackson to February 16, 1990. (Id.)[4/]

On January 12, 1990, CBS made a motion for a stay of Judge Ward's January 4, 1990 decision and order. (R. 104-113). This motion was granted on February 15, 1990. CBS sought appellate review of Judge Ward's January 8, 1990 order on January 22, 1990.

On February 28, 1990, the District Court of Appeal for the Fourth District denied CBS' petition for writ of certiorari and certified the following question as one of great public importance:

> Does a television journalist have a qualified privilege in a criminal proceeding to refuse to produce

---

4/ That calendar call was either routine or precipitated by the public defender's application for a continuance -- CBS was advised by the public defender's office of the calendar call on January 11, 1990, at which time the public defender also stated a continuance would be sought.

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 preparation of his defense?

(R. 114).

SUMMARY OF ARGUMENT

Point I: A. Florida courts, as well as courts throughout the country, have established a qualified privilege which protects a journalist's unpublished materials and which can only be overcome if the subpoenaing party demonstrates: (1) the information sought is relevant and material to the defendant's proof of his defense to the offense charged; (2) alternative, nonjournalistic sources have been exhausted; and (3) there is a compelling need for the information sufficient to override the journalist's privilege.

B. The court below misconstrued Florida law when it held that the subpoenaed outtakes are not protected by the journalist's privilege because they do not involve a confidential source, and when it relied on two cases (one of which is now pending before this Court)[5/] which carved out a limited exception to the journalist's privilege for cases which involve a journalist's "eyewitness testimony" or "physical evidence" of a crime -- facts which clearly are not present

---

5/ Miami Herald Publishing Co. v. Morejon, 529 So.2d 1204 (Fla. 3d DCA 1988); Case No. 73,195, DCA 87-1903.

here. However the Court deals with this question in Morejon, the present case is not one in which the journalist has physical evidence of or was a witness to a crime -- to the contrary, CBS' sworn affidavits attest that the news crew arrived on the scene of the respondent's arrest after he had been apprehended. The crew did not witness, and certainly could not have filmed, the placing of the respondent under arrest or the seizure of drugs from the respondent. Moreover, the respondent has filed no motions or sworn affidavits alleging that the arrest was illegal, that the evidence seized should be suppressed, or that anything happened after the arrest that was relevant to his defense (e.g., that he was beaten by the police).

Point II: The court below erred when it held -- without making a single specific finding and based on a record devoid of any sworn factual representations by the respondent and any compelling need articulated by his counsel -- that if there is a qualified journalist's privilege, the respondent made a showing sufficient to satisfy the three-part test. The circuit court should have quashed the subpoena because the unrefuted record affirmatively shows that CBS did not witness or tape respondent's activity before the arrest or the manner in which he was apprehended and placed under arrest or the seizure of cocaine from the respondent. The outtakes cannot contain evidence of the respondent's guilt or innocence and have no apparent relevance to any defense he might raise regarding the circumstances of his arrest.

Moreover, the record reveals that there are alternative nonjournalistic sources which the respondent has not pursued (e.g., police records; the photograph of the respondent taken by one of the police officers present at the time of the arrest; the witnesses, documents, statements, and police reports listed on the State's Answer to Demand for Discovery; and other officers, arrestees and witnesses present after respondent's arrest). Of course, the respondent also has his own testimony available as a source.

As discussed in detail below and as revealed in the appendix submitted herewith, the lower court's decision must be reversed and the subpoena quashed.

ARGUMENT

I.

CBS' OUTTAKES ARE PROTECTED FROM COMPELLED DISCLOSURE BY THE QUALIFIED JOURNALIST'S PRIVILEGE UNDER THE FIRST AMENDMENT AND THE FLORIDA CONSTITUTION

A. A Qualified Privilege Protects All Of a Journalist's Unpublished Materials

It is well-established that journalists are accorded a qualified privilege under the First Amendment to the United States Constitution and Article I, Section 4 of the Florida Constitution which protects from disclosure their unpublished materials (such as that sought by the present subpoena). The

journalist's privilege reflects the vital, constitutionally protected role of an independent and vigorous press. As the United States Supreme Court stated in Branzburg v. Hayes, 408 U.S. 665, 681 (1972), "without some protection for seeking out the news, freedom of the press could be eviscerated."

In the years since Branzburg, most courts that have considered the question have held that journalists have a qualified First Amendment privilege against compelled disclosure of their sources and materials. The privilege has been recognized repeatedly by the Florida state courts.[6/] The privilege has also been recognized by the Court of Appeals for

---

6/ See, e.g., Morgan v. State, 337 So.2d 951 (Fla. 1976); Tribune Co. v. Huffstetler, 489 So.2d 722 (Fla. 1986); Johnson v. Bentley, 457 So.2d 507 (Fla. 2d DCA 1984); Times Publishing Co. v. Burke, 375 So.2d 297 (Fla. 2d DCA 1979); Tribune Co. v. Green, 440 So.2d 484 (Fla. 2d DCA 1983), rev. denied, 447 So.2d 886 (Fla. 1984); Gadsden County Times, Inc. v. Horne, 426 So.2d 1234 (Fla. 1st DCA), pet. denied, 441 So.2d 631 (Fla. 1983); State v. Widel, 15 Media L. Rep. (BNA) 1711 (Fla. 9th Cir. 1988); State v. Kersey, 14 Media L. Rep. (BNA) 2352 (Fla. 6th Cir. 1987); State v. Lee, 14 Media L. Rep. (BNA) 1863 (Fla. 3d Cir. 1987); State v. Williams, 12 Media L. Rep. (BNA) 1783 (Fla. Cty. Ct. Broward County 1986); State v. Crawford, 12 Media L. Rep. (BNA) 1309 (Fla. 17th Cir. 1985); State v. DiBattisto, 11 Media L. Rep. (BNA) 1396 (Fla. Cir. Ct. Dade County 1984); Sunset Chevrolet v. Heiden, 14 Media L. Rep. (BNA) 1252 (Fla. 12th Cir. 1987); Damico v. Lemen, 14 Media L. Rep. (BNA) 1031 (Fla. 13th Cir. 1987); Bartsch v. Southland Corp., 13 Media L. Rep. (BNA) 2165 (Fla. 9th Cir. 1987); Miller v. Richardson, 13 Media L. Rep. (BNA) 1235 (Fla. 11th Cir. 1986).

the Fifth Circuit,[7] in decisions that have been adopted as controlling in the Court of Appeals for the Eleventh Circuit;[8] by Florida federal courts;[9] and by numerous other courts throughout the country.[10] Forty-three states have recognized a common law qualified privilege for journalists

---

7/ See In re Selcraig, 705 F.2d 789 (5th Cir. 1983); Miller v. Transamerican Press, Inc., 621 F.2d 721 (5th Cir.), modified on rehearing, 628 F.2d 932 (5th Cir. 1980), cert. denied, 450 U.S. 1041 (1981).

8/ See Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc)(adopting as precedent decisions of the former Fifth Circuit rendered before October 1, 1981).

9/ See, e.g., United States v. Accardo, 11 Media L. Rep. (BNA) 1102 (S.D. Fla. 1984); United States v. Paez, 13 Media L. Rep. (BNA) 1973 (S.D. Fla. 1987); United States v. Harris, 11 Media L. Rep. (BNA) 1399 (S.D. Fla. 1985); United States v. Horne, 11 Media L. Rep. (BNA) 1312 (N.D. Fla. 1985); United States v. Blanton, 534 F. Supp. 295 (S.D. Fla. 1982); Loadholtz v. Fields, 389 F. Supp. 1299 (M.D. Fla. 1975).

10/ See, e.g., O'Neill v. Oakgrove Construction, Inc., 71 N.Y.2d 521, 528 N.Y.S. 2d 1, 523 N.E.2d 277 (1988); Miller v. Mecklenburg County, 602 F.Supp. 675 (W.D.N.C. 1985); Continental Cablevision v. Storer Broadcasting, 583 F.Supp. 427 (E.D.Mo. 1984); United States v. Morison, 12 Media L. Rep. (BNA) 1425 (D.Md. 1985); Altemose Construction Co. v. Building & Construction Trades Councel, 443 F.Supp. 489 (E.D.Pa. 1977); Hallissy v. Superior Court, 200 Cal.App.3d 1038, 248 Cal. Rptr. 635 (1988); Zerrilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981); United States v. Burke, 700 F.2d 70 (2d Cir.), cert. denied, 464 U.S. 816 (1983); United States v. Cuthbertson, 651 F.2d 189 (3d Cir.), cert. denied sub nom., Cuthbertson v. CBS, Inc., 454 U.S. 1056 (1981). See generally State v. DiBattisto, 11 Media L. Rep. (BNA) at 1397 n.1 ("Courts throughout the country have recognized the reporter's qualified privilege from compelled testimony.").

and/or enacted a journalists' shield law.[11/] The First Amendment privilege has also been recognized by at least nine of the federal circuit courts of appeals.[12/]

The two Florida Supreme Court decisions which addressed the journalist's privilege both involved confidential sources. Tribune v. Huffstetler, 489 So.2d 722 (Fla. 1986); Morgan v. State, 37 So.2d 951 (Fla. 1976). The Court, therefore, has not squarely ruled on the applicability of the privilege to other unpublished information and materials obtained or prepared in the course of newsgathering. However, as discussed below, numerous lower court decisions in Florida have so applied the privilege[13/] as have most federal and state courts across the country which have considered the issue.

As these courts have recognized, the rationale behind the privilege warrants its application to both confidential and nonconfidential materials: The forced disclosure of any unpublished journalistic work product or information interferes with the newsgathering and editorial functions of an independent press, regardless of whether a source's confidences are at

---

11/ J. Goodale, Reporter's Privilege Cases, Communications Law 1989 (PLI).

12/ Id.

13/ See, e.g., Johnson v. Bentley, 457 So.2d 507 (Fla. 2d DCA 1984); Tribune Co. v. Green, 440 So.2d 484 (Fla. 2d DCA 1983); State v. Crawford, 12 Media L. Rptr. 1309 (Fla. 17th Cir. 1985); State v. Abreu, 16 Media L. Rptr. 2494 (1989); and other cases cited in n.6 supra.

stake. As the New York Court of Appeals said in O'Neill v. Oakgrove Construction, Inc., 71 N.Y.2d 521, 527, 528 N.Y.S.2d 1, 3, 523 N.E.2d 277, 279 (1988):

> [C]onfidentiality 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.[14/]

In Loadholtz v. Fields, 389 F.Supp. 1299 (M.D.Fla. 1975), the court quashed a civil plaintiff's subpoena to compel a reporter to testify about and produce notes of an interview with the defendant. Although no confidential source or off-the-record information was sought, the court held that this was

> utterly irrelevant to the chilling effect that the enforcement of these subpoenas would have on the 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.

Id. at 1303. Similarly, in United States v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980), cert. denied, sub. nom., Cuthbertson v. CBS, Inc., 449 U.S. 1126 (1981), the court held that the First Amendment protected against disclosure of film outtakes from interviews with named sources:

14/ This year New York amended its shield law incorporating O'Neill and extended its protection to all nonconfidential, as well as confidential, unpublished information. N.Y. Civil Rights Law § 79-h (McKinney 1970, as amended March 23, 1990).

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

Id. at 147 (citations omitted). Accord, Miller v. Mecklenburg County, 602 F.Supp. 675, 679 (W.D.N.C. 1985) (if journalists' unpublished non-confidential information were unprotected, litigants would as a matter of routine "begin their discovery by subpoenaing and deposing reporters covering the story"); Continental Cablevision v. Storer Broadcasting, 583 F.Supp. 427 (E.D.Mo. 1984) ("The first amendment interest in preserving the vitality of the press is implicated any time civil litigants seek discovery or testimony from the media, regardless of whether confidential or non-confidential sources or materials are sought"); Palandjian v. Pahlavi, 103 F.R.D. 410 (D.D.C. 1984) (forced disclosure of journalist's notes of interview with named source "would have a chilling effect on the flow of information indeed"); In re Consumers Union, 495 F.Supp. 582, 586 (S.D.N.Y. 1982) ("Their 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 ... Such discovery would represent a substantial intrusion on fact gathering and

editorial privacy which are significant aspects of a free press.")[15/]

In applying the privilege regardless of whether confidential sources are involved, Florida courts have recognized that the privilege protects the newsgathering process itself, not just the information sought by a subpoena: "'The purpose of this constitutional privilege is not simply to protect confidential news sources, but rather extends protection to the newsgathering process, the exercise of editorial judgment, and more fundamentally, the privileges designed to promote the free flow of information in which the public is the ultimate beneficiary.'" State v. Crawford, 12 Media L. Rep. (BNA) 1309, 1310 (Fla. 17th Cir. 1985) (quoting State v. Petrantoni, 48 Fla. Supp. 49, 4 Med. L. Rep. 1554 (Fla. 6th Cir. 1978)) (a copy of the Crawford decision is attached to CBS' Motion for Protective Order, R. 117-118). Cf. Maughan v. NL Industries, 524 F. Supp. 93, 95 (D.D.C. 1981) (court quashed subpoena for reporter's notes involving no confidential source, stating: "The right of a newspaper to determine for itself what it is to publish and how it is to fulfill its mandate of

---

15/ See also, United States v. Burke, 700 F.2d 70 (2d Cir.), cert. denied, 464 U.S. 816 (1983); United States ex rel. Vuitton et Fils S.A. v. Karen Bags, Inc., 600 F.Supp. 667 (S.D.N.Y. 1985); Millicom v. Giallanza, 10 Media L. Rep. (BNA) 1591 (S.D.N.Y. 1984); United States v. Blanton, 534 F.Supp. 295 (S.D.Fla. 1982); Maughan v. NL Industries, 524 F.Supp. 93 (D.D.C. 1981); Altemose Construction Co. v. Building & Construction Trades Council, 443 F.Supp. 489 (E.D. Pa. 1977).

dissemination must be given great respect if an unfettered press is to exist and information is to flow unhindered from it to the public.")

These decisions are founded on courts' realization that journalists' autonomy and independence must be protected if the press is to fulfill its vital role of gathering and reporting news. As the New York Court of Appeals said in O'Neill:

> [B]ecause journalists typically gather information about accidents, crimes, and other matters of special interest that often give rise to litigation, attempts to obtain evidence by subjecting the press to discovery as a nonparty would be widespread if not restricted. The practical burdens on time and resources, as well as the consequent diversion of journalistic effort and disruption of newsgathering activity, would be particularly inimical to the vigor of a free press.

71 N.Y. at 526-27, 528 N.Y.S. 2d at 3. News organizations are attractive and frequent targets of subpoenas from prosecutors, defendants, and civil litigants who speculate that something in the newsroom files might potentially prove useful to their cases. At the same time, however, the credibility of the press and its ability to gather the news are functions of its perceived independence from external influences, such as the government or other private interests. (R. 27). When journalists are compelled to open their files for use by others in judicial proceedings, the ability of the press to vigorously fulfill its newsgathering function, and the public's confidence in the independence of the press, necessarily suffer. Compelled disclosure induces journalists to avoid controversial stories

that might invite subpoenas. (R. 27, 28). Further, "to enforce subpoenas against journalists ... could well create a situation where people will simply refuse to deal with reporters, thus stifling the free flow of information so vital to a democracy." Miller v. Richardson, 13 Media L. Rep. (BNA) 1235, 1237 (Fla. 11th Cir. 1986). See also R. 27. In addition, "constant worry about being subpoenaed can distract journalists, making it extremely difficult for them to pursue their craft in a vigorous, innovative, truly autonomous fashion." Miller, 13 Media L. Rep. (BNA) at 1237 (quoting Blasi, Checking Value in First Amendment Theory, American Bar Foundation Research Journal 521, 604 (1977)).

As Judge Lebow wrote in State v. Williams, 12 Media L. Rep. (BNA) 1783, 1784 (Fla. Cty. Ct. Broward County 1986), to compel production of a journalist's unpublished information and materials, without a demonstration of compelling need for those materials,

> would create such an overwhelming burden on the press, that journalists would cease to be able to provide the necessary flow of information to the public. With the simple service of a subpoena, journalists could be dragged into court for virtually every article published in the newspaper. Under such circumstances, the mere threat of a subpoena could have such a 'chilling effect' on a journalist in the preparation of an article that one intended First Amendment protection of the media and the public would become meaningless.

(A copy of this decision is attached to CBS' Motion for Protective Order, R. 19-20). See also State v. Crawford, 12

Media L. Rep. (BNA) 1309, 1310 (Fla. 17th Cir. 1985) ("Compulsory process by its very nature has a chilling effect on the newsgathering process and the exercise of editorial discretion, and, therefore, upon the freedom of the press").

When a journalist asserts the privilege, the burden shifts to the party seeking the information to prove: (1) the reporter has information relevant and material to the party's claim or defense; (2) all alternative sources less chilling of First Amendment freedoms have been exhausted; and (3) the party has a "compelling interest" in the information. Gadsden County Times, Inc. v. Horne, 426 So.2d 1234, 1240 (Fla. 1st DCA 1983); Johnson v. Bentley, 457 So.2d 507 (Fla. 2d DCA 1984). See also State v. Laughlin, 323 So.2d 691 (Fla. 3d DCA 1975), cert. denied, 339 So.2d 1170 (Fla. 1976), affirming 43 Fla. Supp. 166 (Fla. 16th Cir. Ct. 1974) (affirming a trial court order which apparently applied the three-part test and placed the burden of proof on the party seeking to compel the discovery, but did not explicitly discuss these issues); Kridos v. Vinskus, 483 So.2d 727, 729 (Fla. 4th DCA 1986) (recognizing the establishment of the three-part test in civil cases involving a subpoenaed news media person); Carroll Contracting, Inc. v. Edwards, 528 So.2d 951, 954 (Fla. 5th DCA 1988), rev. denied, 536 So.2d 243 (Fla. 1988) (court did not reach issue of whether qualified privilege applied to disclosure of photographs taken in an off-duty happenstance by a photographer, but applied each element of the three-part test in determining that any qualified privilege must

yield in that case); Miller, 621 F.2d at 726; Blanton, 534 F. Supp. at 297 & n.1.

The journalist's privilege applies in criminal cases as well as civil matters and to subpoenas from criminal defendants as well as from prosecutors and grand juries. See, e.g. Tribune v. Huffstetler, 489 So. 2d at 723; Tribune Co. v. Green, 440 So.2d 484 at 486; State v. Crawford, 11 Media L. Rep. (BNA) at 1310. "The chilling effect is equally implicated by compulsory process against journalists in civil and criminal cases." United States v. Meros, 11 Media L. Rep. (BNA) 2496 (M.D. Fla. 1985). As Judge Seay wrote in State v. Crawford, 12 Media L. Rep. (BNA) at 1310:

> A criminal defendant cannot displace [the privilege] by a simple assertion of his right to discovery. Even where a defendant has been charged with a major felony, Florida judges have refused to sanction fishing expeditions into journalists' personal observations, notes, tapes, or outtakes, without a clear-cut showing of relevance, materiality, and unavailability.

As discussed more fully in Point II of this memorandum, the instant subpoena represents no more than such a "fishing expedition," and should have been quashed.

B. The Court Below Misinterpreted Florida Law Regarding Application Of The Journalist's Privilege To Nonconfidential Materials And Information

In holding that the journalist's privilege does not

apply to nonconfidential materials, the circuit court misconstrued well-established Florida law and disregarded the rationale behind the privilege. In reaching its decision, the court below relied on four cases, two decided by this Court and two by district courts of appeal: Morgan v. State, 337 So.2d 951 (Fla. 1976); Tribune v. Huffstetler, 489 So.2d 722 (Fla. 1986); Miami Herald Publishing Co. v. Morejon, 529 So.2d 1204 (Fla. 3rd DCA 1988); and Satz v. News and Sun-Sentinel Co., 484 So.2d 590 (Fla. 4th DCA 1986).

This Court has twice quashed subpoenas served on the press. In Morgan, the Florida Supreme Court first recognized the reporter's privilege, and, in light of Branzburg v. Hayes, 408 U.S. 665 (1972), reversed its decision in Clein v. State, 52 So.2d 117, 120 (Fla. 1950). Although Morgan involved a reporter's refusal to divulge confidential sources, the Supreme Court did not specifically limit its decision to confidential sources. Rather, it recognized "news gathering as an essential precondition to dissemination of news," and emphasized that this concern should be balanced with governmental interests in compelling disclosure. 337 So.2d at 954.

Similarly, although Huffstetler also involved a reporter who refused to reveal confidential sources, the Court did not hold that the privilege was limited to confidential sources. Rather, as it had done in Morgan, the Court adopted the Branzburg balancing test and relied on Justice Powell's statement in his concurring opinion in Branzburg that every

claim of 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.'" 489 So.2d at 723 (quoting Branzburg, 408 U.S. at 710).

Thus, this Court has squarely held that the privilege applies to confidential sources. Although no case involving nonconfidential materials has previously been decided by this Court, in Huffstetler, it cited with approval Tribune Co. v. Green, 440 So.2d 484 (Fla. 2d DCA 1983), rev. denied, 447 So.2d 886 (Fla. 1984), in which the Second District Court of Appeals, in line with "abundant case law," held that the privilege applies to confidential and nonconfidential information (see Point I(B) infra).

Despite Huffstetler, the court below relied on Morejon (which is currently awaiting decision by this Court) for the proposition that only confidential sources are entitled to the protection of the journalist's privilege. But Morejon did not so hold. In fact, the Morejon court said that such a holding would conflict with well-established case authority.

What the court did say in Morejon is that in a case in which a reporter was an eyewitness to a relevant event in a criminal case (e.g., the police arrest and search of the defendant), and where the defendant was challenging this arrest and search in a previously filed motion to suppress, and the reporter related certain details about the arrest and search in

his published article, such information may not be protected by the privilege. As one court said about Morejon: "That case involved a journalist who witnessed the commission of a crime at the time of arrest, and its holding should be restricted to its facts." State v. Abreu, 16 Media L. Rep. (BNA) 2494 (1989).16/

Similarly, in Satz v. News and Sun-Sentinel Co., 484 So. 2d 590 (Fla. 4th DCA 1985), rev. denied, 494 So.2d 1152 (Fla. 1986), the fourth case cited by the circuit court, the Fourth District Court of Appeal held that "physical evidence of a crime" (i.e., "unpublished photographs depicting criminal activity") was not protected by the journalist's privilege.17/

Satz and Morejon are inapposite to the present case. As CBS stated in its sworn affidavits, the CBS News crew did not arrive at the scene of respondent's arrest until after he had been apprehended. The crew did not witness or tape, and no materials in CBS' possession show, respondent's activity before the arrest or the manner in which he was apprehended and placed

---

16/ CBS believes that Morejon was incorrectly decided and should be reversed by this Court. As discussed in Point I supra, we believe that the privilege should be construed to apply to all of a journalist's unpublished information and research materials.

17/ In State v. Crawford, 12 Media L. Rep. (BNA) 1309, a case in which the facts were similar to those in the present case, the court specifically distinguished Satz on the ground that Crawford (who alleged that the subpoenaed Miami television station had witnessed his arrest) was not seeking "physical evidence of a crime."

under arrest or the seizure of drugs from him. (R. 26, 57). Further, the respondent has not alleged in motions filed in the criminal action or in any affidavits in opposition to CBS' motion that, for example, he was beaten by the police after his arrest. The outtakes thus contain no direct evidence of the respondent's guilt or innocence and have no apparent relevance to any defense he might raise regarding the circumstances of his arrest.

In short, the lower court misconstrued Florida law and its decision should be reversed.

II.

THE RECORD REVEALS THAT THE RESPONDENT DID NOT SATISFY THE THREE-PART TEST NECESSARY TO OVERCOME THE PRIVILEGE

The circuit court held:

> [H]ad the Court found the qualified journalist privilege applicable, the defendant, as evidenced by the record, overcame the burden necessary to overcome the privilege.

(R. 102). But the court made no findings to support this unsupported conclusion and, indeed, no such facts exist in the record. The respondent did not even submit an affidavit in opposition to CBS' affidavits. As discussed supra, in order to override the journalist's privilege, the subpoenaing party must prove: (1) The information sought is relevant and material to defendant's proof of his defense to the offense charged; (2)

Alternative, nonjournalistic sources have been exhausted; and (3) There is a compelling need for the information sufficient to override the journalist's privilege. As discussed below, the respondent has not satisfied even one prong of this test.

A. The Respondent Did Not Prove That The Outtakes Are Relevant And Material To His Defense

As to the first prong of the test (the relevance and materiality of the outtakes to defendant's case), the respondent speculated vaguely that the outtakes may pertain to the legality of his arrest, questioning or search. In his brief to the Fourth District Court of Appeal, the respondent also argued (for the first time) that one witness, the arresting officer, did not provide certain information in his deposition. (Resp. Br. at 8).

Before the trial court, respondent's arguments regarding the possible relevance to the legality of his arrest and search consisted primarily of generalized conjecture: "I need to know what happened . . .. I have nothing without this" (R. 73-74, 79); "there's something called the 4th Amendment" (R. 73). Respondent gave no specifics, as did the subpoenaing parties in Satz and Morejon.

On appeal, respondent added a blatantly erroneous misstatement of the facts: "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."

(Resp. Br. at 1). No citation to any portion of the record was provided in support of this assertion. The record in fact establishes, without dispute, the contrary -- the CBS News crew simply did not film the relevant events:

> [T]he CBS News crew was not present at, and did not witness or tape, the circumstances preceding the defendant's arrest, his apprehension by the police, or the placing of defendant under arrest. The [CBS] crew . . . arrived at the scene of the defendant's arrest and began taping the defendant only after he had been apprehended and handcuffed. The outtakes thus do not contain any material showing, and none of the CBS crew witnessed, the conduct of the defendant or of the police toward the defendant prior to that point.

Affidavit of CBS News Associate Producer Barbara Baylor at ¶6 (R. 26.)

Moreover, the respondent blithely ignores CBS' sworn, uncontested representations that it simply does not have the material he wishes it had or theorizes it could have. 18/ But theories or wishes are not sufficient to overcome the

---

18/ The court below also ignored CBS' sworn affidavits attesting to the fact that the CBS News crew arrived at the scene of the respondent's arrest after he had been apprehended and the drugs seized. At least, the court should have ordered an in camera inspection of the outtakes. See, e.g. People v. Korkala, 99 A.D.2d 161, 472 N.Y.S.2d 310 (1st Dep't 1984).

privilege.[19/] This is the quintessential fishing expedition -- something which courts have been extremely vigilant to prevent.

At one point in the hearing, in an attempt to get his case within the Satz holding that physical evidence of a crime is not protected by the privilege, the public defender argued:

> 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.

(R. 96). But the respondent has never asserted that there was illegal activity by the police, nor has he offered any evidence to suggest that CBS filmed such activity.

The materials in CBS' possession simply are not relevant and material to respondent's defense: They contain no evidence of events prior to his arrest and respondent has not alleged that anything illegal occurred after his arrest. The outtakes are not relevant to the question of legality of the search or questioning, since, as made clear in the Barbara Baylor affidavits, the videotaping did not begin -- and the CBS personnel did not arrive -- until after the police had taken possession of the drugs in question, had apprehended the respondent, had begun to question him, and had handcuffed him.

19/ As this Court said in Morgan v. State, 337 So.2d 951, (Fla. 1976), quoting New York Times v. United States, 403 U.S. 713 (1971): "A nonspecific interest, even in keeping the inner workings of the Pentagon secret, has been held insufficient to override certain First Amendment values."

They also did not witness the seizure of any drugs from the respondent. Moreover, the respondent did not allege that, for example, he was beaten by the police after his arrest. It is thus clear that, no matter what the videotapes may depict, they simply cannot establish or even provide relevant information concerning whether the alleged crime (possession) took place, whether the search was lawful, or whether the respondent was properly advised of his rights. In these circumstances, respondent has clearly failed to provide any reason for believing that the CBS materials may be relevant to his defense, and has certainly failed to demonstrate any compelling need for them.

In his appellate brief, the respondent also asserted that Howard Rudolph, the arresting police officer, testified in his deposition "that he did not recall who else was in the car with him at the time he encountered Kareem," that he failed to remember that CBS cameras were present during the arrest or afterwards,20/ and that Officer Rudolph failed to remember that

---

20/ The respondent may be implying that he wishes to impeach the officer's credibility with evidence of the presence of CBS cameras. Even if this discrepancy is relevant for impeachment purposes, respondent now has available to him the affidavit of Barbara Baylor attesting to the presence of the CBS camera following respondent's handcuffing; such affidavit should be sufficient for respondent's purposes, at least in the absence of testimony from the officer expressly denying CBS' presence. In any event, the compelled disclosure of journalists' resource materials for impeachment purposes may be ordered only after the witness

(Continued on Page 28)

Sgt. Burnell was present during the arrest. (Resp. Br. at 2). The respondent concluded from these assertions that Officer's Rudolph's "poor memory" established his need for CBS' outtakes. (Id).

Officer Rudolph's deposition reveals, however, that CBS has no information concerning the events which Officer Rudolph could not provide and that defense counsel chose not to ask Officer Rudolph any direct questions about the events which he now claims may be shown on CBS outtakes. (R. 42-46).

Although the respondent asserts that he needs the CBS outtakes to provide him with the information which Officer Rudolph could not remember -- who else was with him in the police car prior to the arrest -- the record is unrefuted that CBS did not appear on the scene until after the arrest. (R. 26, 57). The CBS outtakes simply cannot help the respondent identify who was in the car with Officer Rudolph prior to the arrest.

Officer Rudolph's testimony does not establish, as is suggested by the respondent, that Officer Rudolph did not remember that a CBS crew ultimately came to the crime scene after the arrest. Rather, it establishes, at best, and

---

20/ (Continued from Page 27)

whose impeachment is sought has testified and the need for impeachment material has then been demonstrated. See, e.g., United States v. Cuthbertson, 651 F.2d 189 (3d Cir.), cert. denied, 454 U.S. 1056 (1981).

consistent with the affidavits submitted by CBS, that there were no video cameras present at the time of the arrest. (R. 43). Officer Rudolph was never asked whether a CBS camera crew arrived subsequent to the arrest or whether the crew videotaped any relevant events.

The respondent also argues that he needs the CBS outtakes because they may provide the information which Officer Rudolph could not recall regarding who "else" was around at the time of arrest. Yet, as indicated, the record is plain that CBS was not present at the arrest and has no videotape of the arrest. Therefore, the outtakes cannot show who "else" was around when the respondent was arrested and cannot assist the respondent in mounting any yet to be offered defense based on the legality of the arrest.

In short, Officer Rudolph's testimony does not contradict CBS' affidavits. And, if it appears deficient, it is due to the insufficiency of the questions. Although Officer Rudolph was asked questions regarding his specific observations of the crime and the arrest, he was not asked any questions which sought information upon which a motion to suppress evidence or the confession might be based. Officer Rudolph was not asked any questions about what happened subsequent to the arrest when the CBS crew arrived and began videotaping. This is no reason to override the privilege.

Thus, the respondent has not proved that the CBS

outtakes are material and relevant to his defense and he has failed to satisfy the first prong of the test.

B. The Respondent Did Not Demonstrate That He Exhausted Alternative, Nonjournalistic Sources

As to the second prong of the test, alternative nonjournalistic sources, 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." (R. 96). So, defense counsel has admitted that the respondent is one alternative available source. In addition, the public defender went on to suggest other alternative sources -- the police officers who were present: "If those police officers are doing something wrong, I'm going to have that person in there testifying also." (R. 97).

The only effort defense counsel said he made to solicit information from possible witnesses was to depose Officer Howard Rudolph.[21] He did not say that he deposed the other three witnesses listed on the State's Answer to Demand for Discovery or that he examined the documents, statement, photograph or police reports listed on this discovery response. Defense counsel did not even state that he examined the photograph which

---

[21] See discussion at 27-29 supra regarding deposition of Officer Rudolph and respondent's failure to ask the officer about what happened subsequent to the arrest.

Officer Rudolph testified he took at the time of the arrest. He did not state that he subpoenaed police records regarding the arrest -- which might list who was present at the arrest. Also, the record does not reveal that defense counsel spoke with any other arrestees or any officers other than Rudolph.

Respondent also contends that a Sgt. John Burnell was present at his arrest, that Sgt. Burnell was issued a subpoena, that the subpoena could not be served because Sgt. Burnell is not a member of the Broward County Sheriff's Office, and that respondent's counsel's attempts to locate Sgt. Burnell have failed. (Resp. Br. at 2-3). The record does show that the respondent issued a subpoena to Sgt. Burnell. (R. 48.) But the record is silent with respect to whether any attempt was made to serve the subpoena on Sgt. Burnell, or whether any efforts were made to contact Sgt. Burnell, or even to determine where he can be located. In fact, no return of service of the subpoena has been filed[22/] and defense counsel has not filed an affidavit establishing that any attempts have in fact been made to contact

---

22/ The copy of the subpoena placed in the record by the defendant carries the hand-written inscription "Not. BSO" over Sgt. Burnell's name at the top of the subpoena. (R. 48.) The affidavit of the process server, however, is blank, suggesting that there was never an effort to serve the subpoena. (Id.) The handwritten inscription may well have been an instruction to notify the Broward County Sheriff's Office rather than an indication that Sgt. Burnell is not employed by the Broward County Sheriff's Office. In any event, there is no sworn testimony in the record to establish the true meaning of this cryptic notation.

Sgt. Burnell. Therefore, there is nothing in this record to establish the unavailability of a witness who the defendant contends witnessed the arrest.

Thus, defense counsel's repeated declaration: "I have no other source" is not supported by the record. He simply has not adequately explored, much less exhausted, sources of information regarding his arrest, questioning, search and seizure, and crime. In addition, before an order compelling production may be issued, at a minimum, it must be shown that the versions of events provided by these parties raise a compelling disputed issue -- which goes to the respondent's guilt or innocence -- which the CBS materials are highly likely to resolve. See State v. Abreu, 16 Media L. Rptr. 2493 (police officers present at arrest provide alternative sources of information which must first be exhausted; defendant's argument that testimony of officers as to the appropriateness of their conduct during arrest is "inherently untrustworthy" is of no import -- they are still alternative sources which must be exhausted).23/

23/ The circuit court's decision may have been premature. On a different record, had defense counsel demonstrated that he had attempted to exhaust alternative sources (not just one witness), a different result may have been warranted.

C. The Respondent Made No Showing That He Had A Compelling Need For The Outtakes Sufficient To Override The Privilege

The respondent has not demonstrated that he has a compelling need sufficient to overcome the journalist's privilege. Respondent's right to a fair trial is not implicated here since CBS' undisputed affidavits attest that the outtakes do not contain evidence of the crime, the search and seizure, or the legality of the arrest. As CBS' sworn uncontested affidavits attest, the CBS News crew began filming after the respondent was apprehended. (R. 26, 57). Moreover, this is not a case in which the respondent has alleged that his arrest was illegal, or that he was beaten, or that the evidence seized should be suppressed.

Similarly, in State v. Abreu, 16 Media L. Rep. (BNA) 2493, the court quashed a subpoena for a television station's information regarding the respondent's arrest even when the respondent had filed a motion that the statements and confessions obtained should be suppressed because they were taken in violation of his right to counsel, that statements were not freely given, and they were the poisonous fruits of an illegal search. Indeed, as the court said in Abreu, the compelling need is to the contrary:

> It serves the public interest when journalists are able to accompany law enforcement units and to observe what they do. Unwarranted subpoenas for testimony by journalists will diminish the occasions when such scrutiny of law enforcement can take place.

16 Media L. Rep. at 2495.

In short, the record simply does not support the court's finding that the respondent satisfied the three-prong test.

CONCLUSION

For the foregoing reasons, as well as those stated in the accompanying Appendix, CBS respectfully requests that this Court quash the subpoena and vacate the order directing CBS to produce outtakes to the defendant.

Respectfully submitted,

Douglas P. Jacobs
Susanna M. Lowy
John W. Zucker
CBS Inc.
51 West 52nd Street
New York, NY 10019
(212) 975-8758

Steel Hector & Davis
Attorneys for CBS Inc.

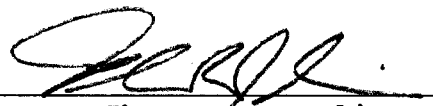
By _____
Thomas R. Julin
4000 Southeast Financial Center
Miami, Florida 33131-2398
(305) 577-2810

Certificate of Service

I hereby certify that a true and correct copy of this brief was mailed April 30, 1990, to:

Alan Levine
Room 730 & 740 - 201 S.E. 6th Street
Broward County Courthouse
Fort Lauderdale, Florida 33301

Charles Ira Kaplan
State Attorney's Office
Broward County Courthouse
Fort Lauderdale, Florida 33301



Thomas R. Julin