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

Petitioner CBS' Reply Brief

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Preliminary Statement

After Petitioner CBS Inc. ("CBS") filed its initial brief, this Court issued a decision in Miami Herald Publishing Co. v. Morejon, 15 Fla. L.W. S302 (Fla. May 18, 1990), holding that a journalist must "'divulge information learned as a result of being an eyewitness to a relevant event in a criminal case -- i.e., the police arrest and search of the defendant.'" Id. at S302. In addition to replying to Respondent Kareem Jackson's Answer Brief (hereinafter "Resp. Br."), this memorandum will discuss why the Morejon ruling and reasoning do not control the outcome in this case.

Morejon involved the compelled testimony of a reporter who had personally observed a police search and arrest. In the present case, by contrast, respondent seeks to compel the production of a CBS News crew's nonbroadcast tapes despite the sworn and uncontroverted evidence that the crew did not witness or record either the search or the arrest of the respondent. The crew arrived on the scene only after Kareem Jackson had been apprehended and was already being handcuffed. Moreover, unlike Morejon, and other cases cited therein, Jackson has not filed a motion to suppress or even alleged that his arrest was improper or claimed that there were any improprieties after he was arrested (e.g., he has not claimed that he was beaten or otherwise mistreated by the police). Nor has Jackson stated that the broadcast news report indicates that there may be a

contradiction between the unpublished CBS materials and the evidence adduced thus far.

Unlike Morejon, Jackson's only stated basis for seeking CBS' outtakes is that it may in some way assist him in preparing his defense. This is nothing more than a fishing expedition through press files -- a course that neither this Court nor any other has sanctioned and which is not sufficient to override the journalist's privilege.

Statement of Facts

The facts relevant to this case are set forth in CBS' Appendix to its moving brief. The Appendix includes, inter alia, two affidavits which CBS submitted in support of its motion to quash the subpoena. Those affidavits established that CBS News did not arrive on the scene until after respondent had been apprehended. The crew did not witness or tape, and no materials in CBS' possession show, respondent's activity before the arrest, the seizure of drugs from the respondent, or the manner in which he was apprehended and placed under arrest. (R. 26, 57). Defendant has offered no affidavits or testimony to contradict these affidavits. Thus, 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. As respondent conceded in his brief, the only other sworn statement in this case -- the deposition of the arresting police officer, Officer Rudolph --

confirms the facts as stated in CBS' affidavits. As respondent admits: "When asked about video cameras being present, Officer Rudolph responded 'No, there wasn't.'" (R. 44).

In this case, the respondent has not made a motion to suppress or any other motion alleging that his arrest was unlawful, that he was mistreated by the police once in police custody, that he was not read his Miranda warnings, that his Fourth Amendment rights were violated in any way, or that any specific event occurred subsequent to his apprehension which is critical to his defense.

ARGUMENT

MOREJON DOES NOT GOVERN THIS CASE

Last month, this Court issued its decision in Miami Herald Publishing Co. v. Morejon, 15 Fla. L.W. S302 (Fla. May 18, 1990), denying the newspaper's request to quash a subpoena based upon the assertion of the journalist's privilege. This Court's reasoning in Morejon is simply inapposite to the present case.

In Morejon, it was uncontested that the reporter was an eyewitness to the "entire" arrest and search of a criminal defendant, and published "[c]ertain details of the search and arrest, some of which allegedly were inconsistent with the officers' account of the arrest." 15 Fla. L.W. at S303. The subpoena issued after the defendant had filed motions

challenging the legality of his search and arrest on grounds that would, if successful, lead to dismissal of the criminal charges against him. Id. Based on these facts, this Court held that in such circumstances, the journalist's eyewitness observations of Morejon's alleged criminal activity, arrest and search were not protected by a journalist's privilege. This Court did not adopt the broad position, advanced by respondent here, that the reporter's privilege is available solely for the purpose of protecting the identities of confidential sources. Id. at S304.

This Court acknowledged that a limited and qualified privilege had been set forth in Morgan v. State, 337 So.2d 951 (Fla. 1976) and Tribune Co. v. Huffstetler, 489 So.2d 722 (Fla. 1986), but did not find that it had any application to the facts in Morejon. Indeed, all of the cases relied upon by this Court in Morejon involved journalists who witnessed and reported on alleged criminal activity and events which were central to a subsequent court proceeding:

> See, e.g., In re Zeigler, 550 F. Supp. 530 (S.D.N.Y. 1982) (journalist who witnessed and reported on assault not excused from testifying before grand jury as to what he observed); Rosato v. Superior Court, 51 Cal.App.3d 190, 124 Cal.Rptr. 427 (Ct. App. 1975) (Supreme Court has denied that first amendment shields newsmen from testifying about criminal activity they observed), cert. denied, 427 U.S. 912 (1976); Lightman v. State, 15 Md.App. 713, 294 A.2d 149 (Ct.Spec.App.) (required testimony of reporter who saw drugs being sold), aff'd, 266 Md. 550, 295 A.2d 212 (1972), cert. denied, 411 U.S. 951 (1973); People ex rel. Fischer v. Dan, 41 A.D.2d 687, 342 N.Y.S.2d 731 (App. Div.) (newsmen may refuse to divulge to grand jury identity

> of informant, but they must testify about events they observed personally), appeal dismissed, 32 N.Y.2d 764, 298 N.E.2d 118, 344 N.Y.S. 2d 955 (1973); Ex parte Grothe, 687 S.W.2d 736 (Tx.Cr.App. 1984) (reporter stands on same footing as a layperson with regard to personal observations of alleged criminal activity and therefore must testify), cert. denied, 474 U.S. 944 (1985).[1/]

Morejon, 15 Fla. L. W. at S304.

Morejon thus does not govern the present case. As the sworn, uncontroverted record reveals, CBS arrived on the scene after the respondent had been arrested and searched and thus CBS was not and could not have been an eyewitness to these events. Nor does Jackson allege that his defense is dependent on any events which occurred subsequent to his arrest. For example, he has never alleged that he was mistreated by the police. Moreover, unlike Morejon in which the reporter's published newspaper article revealed inconsistencies with the arresting officers' testimony, no such discrepancies have been alleged here.

In sum, Morejon is not applicable to the present case and, as discussed in detail in CBS' initial brief, the CBS

1/ Liggett v. Kern County Superior Court, 16 Media L. Rep. (BNA) 2006 (Cal. App. 1989), a case upon which respondent relied (Resp. Br. at 12), is totally inapposite to this case. In Liggett, a cameraman had, by happenstance, observed an automobile accident. He then reported his observations to plaintiff's investigator but refused to testify at a deposition, asserting the qualified journalist's privilege and protection under the California Shield Law. The court held that the cameraman's observations, which were not from gathering news, were beyond the scope of the privilege and Shield Law.

outtakes are protected by a qualified privilege which can only be overcome if the respondent 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; (3) there is a compelling need for the information sufficient to override the journalist's privilege.

The respondent cannot demonstrate that this test has been met. Indeed, he cannot prove that the outtakes are "relevant and material to the defendant's proof of his defense" because the CBS crew did not arrive until after the respondent had been apprehended and searched and he has not alleged that anything occurred after his apprehension which is important to his defense. He has merely alleged: "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." (Resp. Br. at 20). However, the respondent has never made the legality of searches or questioning which "may have taken place" relevant in this case. Indeed, the complete irrelevance of these events is shown by the fact that the defendant's counsel did not even question the arresting officer about the events subsequent to the arrest. (R. 42-46).

The only specific reason respondent states as to why CBS' outtakes are "highly relevant" is that "they will provide information as to other sources of information; i.e., other

police officers and individuals who may have witnesses [sic] events "leading up to" and subsequent to the defendant's arrest." (Resp. Br. at 21). However, the outtakes cannot reveal witnesses leading up to the arrest because CBS was not filming then. Moreover, the identities of witnesses to events subsequent to the arrest are not relevant to any issues in this case.

As to the second prong of the test, in its initial brief, CBS listed numerous possible alternative nonjournalistic sources (e.g., police records; the photograph of the arrest taken by one of the police officers present; the witnesses, documents, statements, and police reports listed on the State's Answer to Demand for Discovery; and the respondent himself). See Pet. Br. at 30-31. In his answer brief, the respondent either ignored these or attempted to refute them with facts not in the record. Id.

And, as to the "compelling need" prong of the test, the respondent alleges only:

> 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.

Resp. Br. at 22-23. This vague blind hope is not sufficient to override the privilege.[2/]

In sum, the district court was incorrect in not quashing the respondent's subpoena for CBS' outtakes and its decision should be reversed.

2/ Contrary to respondent's assertion, this case is not analogous to CBS Inc. v. Cobb, 536 So.2d 1067 (Fla. 2d DCA 1988). In that case, the Second District Court of Appeal rejected CBS' contention that the lower court's decision that the test had been met was deficient because it did not contain specific findings of fact. However, as respondent states in his brief, the appellate court in Cobb upheld the lower court's decision because it was "clear from the record before us" that the three-part test had been met. 536 So. 2d at 1070. Resp. Br. at 16. In this case, the record clearly reveals the contrary -- the three-part test was not satisfied.

CONCLUSION

For the foregoing reasons, as well as those stated in CBS' initial brief and 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,

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Certificate of Service

I hereby certify that a true and correct copy of this brief was mailed June 11, 1990, to:

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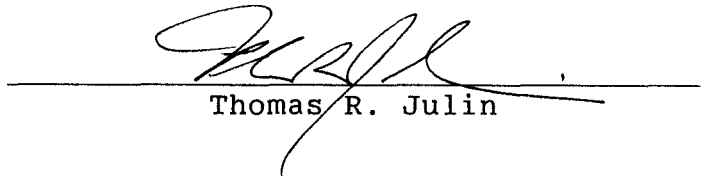

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