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TABLE OF AUTHORITIES

All cases and authorities cited herein were referred to in the tables of the Initial Response or the Further Response, with the following exceptions:

Escobedo v. Illinois, 378 U.S. 478 (1964) 3

Johnson v. New Jersey, 384 U.S. 719 (1966) 1, 3

Miranda v. Arizona, 384 U.S. 436 (1966) 3

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 37

CURTIS PUBLISHING COMPANY,
Petitioner,

versus

WALLACE BUTTS,
Respondent.

RESPONSE TO PETITIONER'S SUPPLEMENTAL STATEMENT AND ADDITIONAL REASON WHY CERTIORARI SHOULD BE DENIED

At the time the Court requested petitioner to file a supplemental statement discussing its contentions in light of *Rosenblatt v. Baer,* 383 U.S. 75 (1966), respondent was preparing to file a supplemental response in light of *Johnson v. New Jersey,* 384 U.S. 719, decided June 20, 1966. Respondent decided to await the filing of petitioner's supplemental statement. This has now been filed.

I.

Response To Petitioner's Supplemental Statement

In its Supplemental Statement, petitioner contends that actual malice "is both legally immaterial and wholly unsupported by the record" and attaches thereto an appendix purporting to be a "summary of evidence." First, respondent does not agree that it is legally immaterial that actual malice was conclusively proven and, second, respondent points out that peti-

tioner's so-called summary of evidence is replete with inaccuracies and argument and omits undisputed evidence showing conclusively that actual malice was proved as found by the trial judge and concurred in by the Court of Appeals. We respectfully call the Court's attention to the fourteen undisputed instances of malice as set out at pages 26 through 31 of respondent's initial Response, the statement of the trial court showing actual malice as quoted on page 31 of the Response, and the Court of Appeals' affirmance thereof as quoted at the top of page 32 of the Response. Most of these fourteen points were conspicuously omitted from petitioner's purported summary of evidence.

Respondent cannot agree that the overwhelming proof of actual malice is legally immaterial as claimed by petitioner. It is strange indeed that, having applied for the writ on the basis of the constitutional requisites of factual proof enunciated in *New York Times v. Sullivan,* 376 U.S. 254 (1964), petitioner now seeks to exclude from consideration the answer to the question its contention raises. Whether or not actual malice was proven is, indeed, the primary relevant question if and when the Court gets to the stage of applying the *Times* decision. Certainly the petitioner would not have this Court require the parties and the lower courts to perform again a long and expensive trial for no reason.

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[1]The Georgia Court of Appeals has stated it well: "It is of the utmost importance that the weary river of litigation should 'wind somewhere to the sea', and it is with extreme reluctance that the appellate courts will retrace its course to find for it another channel than the one over which it has already flowed We hope its perturbed spirit will now enter into unbroken rest " *Young Men's Christian Ass'n v. Bailey,* 112 Ga. App. 684 711, 146 S.E.2d 324, 343 (1965).

Furthermore, as stated in respondent's Further Response on page 9: "The Court will recall that the sole defense made in this case was the truth of the article. When the trial court's charge was given petitioner made no objection to the charge as to actual malice, as required by the Federal Rule of Civil Procedure 51. This rule is based on sound practice and it should not be here disregarded."

II.

Johnson v. New Jersey

In the *Johnson* case, the Court decided that two landmark decisions announcing constitutional rights of persons accused of crime should not be applied retroactively to cases tried before the decision dates, even where appeals were pending on such dates and the judgments had not become final. The decisions in question are *Escobedo v. Illinois,* 378 U.S. 478 (1964), and *Miranda v. Arizona*, 384 U.S. 436 (1966).

[2]In *Escobedo,* it was held that defendant's rights to counsel under the Sixth Amendment had been denied by the police in refusing his request for counsel during interrogation by the police, thereby making inadmissible in the subsequent state criminal trial any incriminating statements elicited during the interrogation. In *Miranda,* the Court in each of four criminal cases held that the defendants' constitutional right against self-incrimination guaranteed by the Fifth Amendment had been violated in that statements had been obtained from the defendants under circumstances that did not meet constitutional standards for protection of the privilege against self-incrimination. The Court held that such statements had been wrongfully received in evidence. The majority opinion goes to great lengths in spelling out the procedures which should be employed to safeguard the right of the accused against self-incrimination.

In reaching its decision against retroactive application, the Court noted that it had the right to confine rules promulgated concerning constitutional claims to subsequently tried cases " 'where the exigencies of the situation require such an application.' " 384 U.S. at 726-27. Mr. Chief Justice Warren commented, "to reiterate what was said in *Linkletter*, we do not disparage a constitutional guarantee in any manner by declining to apply it retroactively." 384 U.S. at 728. The Court noted that retroactive application would seriously disrupt the administration of the criminal laws and found no persuasive reason to do so.

In the instant case, a comparable situation is presented, for the case was tried before the Court's decision in *Times*. The Court noted in both *Escobedo* and *Miranda* that its decisions had been foreshadowed by earlier cases. This was equally true of its decision in *Times* (see Response, pp. 21-24).

There are no special considerations requiring that *Times* be made retroactive so that a retrial can be ordered for the purpose of determining if this case can be brought within the scope of *Times*. On the contrary, there are special and compelling reasons why certiorari should be denied.

In *Rosenblatt*, the Court did give retroactive application to *Times*, but the facts and circumstances of that case are substantially different from those in this case as pointed out in the Further Response. The cir-

cumstances of each case must determine what application is to be made of *Times*.[3]

Rosenblatt (and *Times*) were concerned with "debate on a public issue" of long standing. No public issue as to the "rigging and fixing" of the game by Butts and Bryant existed at the time of publication of the magazine article here found to be libelous. Thus, there is no justification for remanding this case for a retrial on the question of whether Butts was a public official within the meaning of *Times* (as was done in *Rosenblatt)*. Furthermore, it is quite obvious that Butts was not a "public official" under the law as it existed at the time of the trial and, as has been shown, it would require a substantial stretching of *Times* and *Rosenblatt* to regard him as such. Indeed, the question was raised after the *Times* decision and it was decided by the trial judge that Butts was not a public official.

Even had Butts been held by the trial judge to have been a public official under *Times*, there is no need for a retrial on the question of whether actual malice existed. The evidence clearly supports a finding of actual

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[3]As stated by Justice Fortas in urging that the writ in *Rosenblatt* be vacated as improvidently granted: "The trial below occurred before this Court's decision in *New York Times v. Sullivan*, 376 U.S. 254. As a result, the factual record in this case was not shaped in light of the principles announced in *New York Times*. Particularly in this type of case it is important to observe the practice of relating our decisions to factual records. They serve to guide our judgment and to help us measure theory against the sharp outlines of reality. Especially where our decision furnishes a necessarily Procrustean bed for state law, I think, with all respect, that we should insist upon a relevant factual record. A subsequent trial may conceivably help respondent, but it will be too late to be of assistance to us." 383 U.S. at 100-01.

malice and it was so found by the trial court whose findings were approved by the Court of Appeals.

Finally, it is submitted that if a person convicted of "felony murder" prior to *Escobedo* and *Miranda* may not obtain the benefit of the constitutional rights as interpreted in those decisions, certainly petitioner is not entitled to a new trial because of the subsequent decision in *Times*.

CONCLUSION

Some three years have elapsed since the case was tried, during which time Curtis has settled with Bryant for $300,000.00.[4] (R. 1456-57). In fairness to Butts, no further delay should be countenanced.

For the reasons herein set forth, in addition to those previously stated and upon which respondent still insists, the application for writ of certiorari should be denied.

Respectfully submitted,

William H. Schroder

Allen E. Lockerman

[4]Petitioner has cited a number of periodicals in which college football is discussed, including an old issue of *The Saturday Evening Post*. If the Court is interested in reviewing this application for certiorari on such a basis, respondent suggests it examine Bear Bryant's article giving his version of the facts out of which respondent's suit arose, appearing in the September 5, 1966 issue of *Sports Illustrated*, copies of which have been sent to the Clerk of this Court.

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CERTIFICATE OF SERVICE

It is hereby certified that a copy of this Response To Petitioner's Supplemental Statement And Additional Reason Why Certiorari Should Be Denied has been served upon counsel for the opposing party in the foregoing matter by depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon.

This ______ day of September, 1966.

Attorney for
Wallace Butts, Respondent