STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

IN MATTER OF SUBPOENA TO:

LAURA RICCIARDI, and
SYNTHESIS FILMS,

Calumet County Sheriff's Dept.
Incident No. 05-157-995

BRIEF OF *AMICUS CURIAE* SILHA CENTER FOR THE STUDY OF MEDIA ETHICS AND LAW IN SUPPORT OF LAURA RICCIARDI AND SYNTHESIS FILMS

I. The State of Wisconsin has recognized a journalist's privilege which should apply to individuals subpoenaed in criminal cases.

The Wisconsin Supreme Court recognized that a journalist's privilege exists under both state and federal constitutional law in *Zelinka v. State*, 266 N.W. 2d 279, 286-87 (Wis. 1978). In doing so, the Court twice referred to the Supreme Court's ruling in *Branzburg v. Hayes*, 408 U.S. 665 (1972), that no privilege exists to shield a reporter from having to testify before a grand jury about criminal activity the journalist had actually witnessed, as "limited." It noted that even after *Branzburg*, the privilege recognized by the state in *State v. Knops*, 183 N.W.2d 93 (Wis. 1970) retains validity, as does the balancing test set forth in that opinion which requires courts to weigh a privilege of nondisclosure against the societal values favoring disclosure. In *Zelinka*, the Court determined that the defendant's asserted need for disclosure did not outweigh the journalist's privilege:

> Other than the mere suggestion that the information might lead to an entrapment defense, the defendant presents no basis for concluding that he was denied a fair trial or that Fellner's information could have created a reasonable doubt of any sort. Nor does the public's right to know outweigh the privilege; the information held by Fellner was at best tangential to the case. The issue at trial was whether Zelenka had committed first degree murder. Any information which Fellner might have disclosed would have been, at best, only remotely relevant to the issues at hand. 266 N.W.2d at 619-20.

183
(1)

In the instant case, the state presents no compelling reason why it needs Ricciardi's tapes beyond speculation that they **may** be helpful. Ricciardi has already testified in her affidavit that she has avoided discussing the facts of Avery's and Dassey's cases with her interviewees, making any information she might have almost certainly "only remotely relevant" to the state's case.

The journalist's privilege has also been specifically recognized in civil cases whether or not the journalist received the information in return for a promise of confidentiality. *Kurzynski v. Smith*, 538 N.W.2d 554, 559 (Wis. Ct. App. 1995). However, no Wisconsin appellate court has addressed the question presented in the instant case: whether a privilege exists protecting nonconfidential information from a prosecution subpoena.

The Seventh Circuit has considered the journalist's privilege in this context only once, in *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003). The state relies heavily on this case in its opposition to the motion to quash, citing the *McKevitt* court's characterization of cases that extend a journalist's privilege to nonconfidential materials as "skating on thin ice." *Id.* at 533. After reviewing different federal circuits' formulations of a journalist's privilege, the *McKevitt* court concluded that any subpoena duces tecum issued to the media should simply be judged by a reasonableness standard, making the subpoenaed party's status as a journalist irrelevant. *Id.* Although the decision emanates from the federal circuit in which this Court resides, its rejection of a privilege explicitly recognized by this state's Supreme Court for over 30 years is not binding on this Court.

The state contends that this state-recognized privilege does not apply in this case, citing decisions from various federal and state appellate courts declining to recognize a privilege for nonconfidential sources in criminal cases. However, other decisions from the Second and Third

federal circuits, as well as the West Virginia Supreme Court, have recognized a journalist's privilege in situations analogous to the instant case. *See United States v. Cuthbertson*, 630 F.2d 139 (3rd Cir. 1980) (finding the rationale for a journalist's privilege in civil cases to be applicable to criminal cases as well, and holding that privilege extends beyond confidential sources); *United States v. Marcos*, 17 Media L. Rep. 2005 (S.D.N.Y. 1990) (stating a journalist's privilege applies in equal force in both civil and criminal litigation regardless of the confidentiality of the information); *State ex rel. Charleston Mail Ass'n v. Ranson*, 488 S.E.2d 5 (W. Va. 1997) (providing a qualified privilege for journalists in criminal cases where the defendant seeks nonconfidential information). Although no appellate court has addressed this issue in Wisconsin, the Circuit Court for Milwaukee County ruled that a journalist's privilege applies in a criminal matter, regardless of whether confidential sources are involved. *State v. Sievertsen*, 18 Med. L. Reptr. (BNA) 2175 (Wis. Cir. Ct. Milwaukee County 1991). Consequently, it is up to this Court to decide this issue of first impression.

II. The rationale for a journalist's privilege applies in criminal cases as well as to civil cases, even where no confidential sources are involved.

The state's response to Ricciardi's motion to quash contends that any journalist's privilege should not extend to nonconfidential materials in criminal cases. However, harms that arise from subpoenaing journalists such as hindering journalists' newsgathering ability or self-censorship of the press are not limited to civil cases involving confidential sources.

As recognized by the Third Circuit in *Cuthbertson*, 630 F.2d at 147, "the interests of the press that form the foundation for the [journalist's] privilege are not diminished because the nature of the underlying proceeding out of which the request for the information arises is a criminal trial." Protecting sources, preventing intrusion into the editorial process, and avoiding

self-censorship are all reasons for recognizing a journalist's privilege, and these interests are implicated in both criminal and civil cases. *Id.* Although it may be necessary to weigh the journalist's interest in nondisclosure differently when a defendant's rights to a fair trial and confronting witnesses are at stake (*see Id; United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1d 1988)), no such issues exist in this case because it is the state that has issued the subpoena.

Whether the information being sought is confidential is also not determinative. A primary reason for a journalist's privilege is to prevent a "chilling effect" on the free flow of information from the press to the public. The Second Circuit in *von Bulow by Auersberg v. von Bulow* recognized this potential chilling effect. 811 F.2d 136, 143 (2d 1987). The *von Bulow* court cited the public policy favoring "free flow of information to the public" as a foundation of the journalist's privilege, and recognized that protecting nonconfidential information is necessary to avoid undercutting that interest. *Id.*

Another reason for a journalist's privilege is to prevent the media from acting or appearing to act as an investigative arm of the government. Compelled disclosure of journalists' unpublished materials by the government, regardless of whether or not the materials are confidential, may create the perception that the media are no more than investigative arms of the government, and curtail them access to potential sources of information. (*Shoen v. Shoen*, 5 F.3d 1289, 1295 (9th Cir. 1993).

Finally, compelling journalists to turn over nonconfidential material may encourage them to discard valuable information from their files rather than risk it being subpoenaed at a later date, preventing the press from using those files to further the interest of ensuring free flow of information to the public. *Gonzales v. NBC*, 194 F.3d 29, 35 (2nd Cir. 1998).

The *Gonzalez* court summarized the reasons for the journalist's privilege to apply to nonconfidential materials when it stated:

> These broader concerns, we believe, are relevant regardless whether the information sought from the press is confidential. If the parties to any lawsuit were free to subpoena the press at will, it would likely become standard operating procedure for those litigating against an entity that had been the subject of press attention to sift through press files in search of information supporting their claims. The resulting wholesale exposure of press files to litigant scrutiny would burden the press with heavy costs of subpoena compliance, and could otherwise impair its ability to perform its duties -- particularly if potential sources were deterred from speaking to the press, or insisted on remaining anonymous, because of the likelihood that they would be sucked into litigation. *Id.*

In short, there are compelling reasons to recognize a journalist's privilege in both civil and criminal matters, regardless of the confidentiality of the subpoenaed materials. Despite the state's urging, this Court should not limit the privilege in criminal cases only to situations involving confidential material. Doing so would be contrary to this state's recognition of a vibrant journalist's privilege, and would hinder journalists' newsgathering and news reporting efforts in the future.

III. The subpoena is burdensome, overbroad, and unduly intrusive.

As enumerated in Ricciardi's motion to quash, potentially requiring her to disclose all 255 hours of footage is burdensome, overbroad, and intrusive. The state is seeking every piece of material Ricciardi has acquired during her current project that has any connection with Steven Avery. A case recently decided by the Pennsylvania Supreme Court, *In re The Twenty-Fourth Statewide Investigating Grand Jury Petition of Commonwealth of Pennsylvania*, 907 A.2d 505 (Pa. 2006), is instructive on this matter. In that case, the Court ruled that a subpoena issued to Lancaster Newspapers, Inc. seeking the production of all the newspapers' hard drives was unduly intrusive on the editorial independence of the newspapers and tantamount to demanding

access to entire file cabinets of the newspapers. The Pennsylvania Court recognized the heightened potential for violations of First Amendment interests because the media were involved, and then agreed that surrendering the newspapers' hard drives would lead to a "chilling effect" on their ability to acquire sources and gather news.

Here, as in the Pennsylvania case, the state seeks every tape in the possession of a journalist. This not only compromises Ricciardi's ability to gather and report valuable information to the public in the future, but also imposes an unreasonable burden on her.

An additional case – significantly, decided after the Seventh Circuit's ruling in *McKevitt* by the federal district court for the Northern District of Illinois – is instructive, as well. In *Bond v. Utreras*, 2006 U.S. Dist. LEXIS 46279 (N.D. Ill. 2006), in the context of a federal civil rights action arising from allegations of police misconduct at a housing project known as Stateway Gardens, the City of Chicago demanded that community activist and freelance writer Jamie Kalven surrender any notes or documents relating to the allegations or to 24 individuals who may have provided him with information for his stories about the underlying incidents. The magistrate judge found that the City had failed to establish that enforcing the broad subpoena would serve any real benefit sufficient to justify imposing a burden on Kalven. Noting that Kalven's work on the topic of Stateway Gardens was ongoing, the judge observed that complying with the subpoena would damage Kalven's "street cred" and undermine his journalistic endeavors. "If he is seen as being one who hands over people's stories to the Police – especially when those stories sometimes involve allegations that the Police have been abusive – people might be less willing to come to him, and his journalistic endeavors . . . would be undermined." *Id.* Because the City had failed to establish that the materials sought were highly probative of issues relevant to the case, the court declined to compel Kalven to disclose his

materials or to answer deposition questions about his conversations with anyone other than the plaintiff in the case.

Although the ruling in *Bond* was predicated not on an assertion of journalist's privilege, but rather on a claim that the subpoena was unreasonable in the circumstances based upon the Federal Rules of Civil Procedure 45 (c) and 26, the core of the magistrate judge's reasoning is clearly applicable to the instant case. As in Kalven's case, Riccardi's journalistic efforts should not be undermined by being forced to comply with an overbroad subpoena based on the mere speculation that her unpublished materials might be useful to the government.

IV. Laura Ricciardi and Synthesis Films, LLC meet the definition of a journalist and qualify for Wisconsin's constitutional privilege and the First Amendment privilege.

The only argument the state submits in opposition to Ricciardi being considered a journalist is that she "begins to appear as an 'investigative arm' of Steven Avery's defense team," pointing to Ricciardi and her crew filming the Avery defense team reviewing a blood sample in the Manitowoc Clerk of Circuit Court office as proof. The record, however, proves the contrary and demonstrates that Ricciardi was and is acting as a journalist. Ricciardi's affidavit includes a letter she emailed to Special Prosecutor Kenneth R. Kratz in the case explaining her mission as "provid[ing] viewers with an inside look at the evolution of the Wisconsin criminal justice system over the past two plus decades" and inviting him to participate in the film. The letter demonstrates both Ricciardi's intent to create a documentary film for public dissemination from the inception of her newsgathering activities, as well as her desire to include the perspectives of all parties to the case in the film.

Ricciardi's intent from the start to create a documentary film is important. Courts have refused to apply the privilege in the past when they have determined a journalist has not had this

requisite intent from the inception, most notably in *von Bulow by Auersberg v. von Bulow*, 811 F.2d 136 (2d 1987). In that case, which is easily distinguishable from Ricciardi's, a friend of the defendant took notes throughout the trial and later wrote a manuscript about it that was not published. The Second Circuit determined that because the writer had not had the requisite intent to write a book at the time she took the notes, she did not qualify for the journalist's privilege.[1]

The Second Circuit was careful to note, however, that the medium used for dissemination was not determinative, nor was prior experience as a journalist necessary to qualify for the privilege. *Id.* at 144. The Tenth Circuit extended the journalist's privilege to a documentary filmmaker in *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977), and a New Jersey court recently held a student documentary filmmaker was entitled to the privilege as well. *Marshall v. Hendricks*, No. 97-CV-5618 (D.N.J. Sept. 4, 2003). A district court in Illinois has even extended the privilege to a builders association group that engaged in information gathering. *Builders Ass'n of Greater Chicago v. Cook County*, 1998 U.S. Dist. LEXIS 2991 (E.D. Ill. Mar. 10, 1998).

In short, the privilege recognized in Wisconsin shields Ricciardi from being required to disclose her tapes. She qualifies for the privilege because she set out from the start to create a documentary film about Wisconsin's justice system and intends for it to be publicly viewed and disseminated. The evidence shows that she is not an investigative arm of the defense team, but instead would be converted into an investigative arm of the state should the subpoena be upheld.

---

[1] The Ninth Circuit adopted the *von Bulow* test in *Shoen v. Shoen*, 5 F.3d 1289 (9th 1993), as did the First Circuit in *Cusumano v. Microsoft Corp.*, 162 F.3d 708 (1st Cir. 1998), and the D.C. Circuit in *Alexander v. FBI*, 186 F.R.D. 21, 50 (D.D.C. 1998). The Third Circuit has also adopted a modified version of the *von Bulow* intent test, with the added requirement that the journalist be engaged in investigative reporting. *In re Madden*, 151 F.3d 125 (3d 1998). Under both tests, Ricciardi qualifies as a journalist.

V. Journalists need protection from compelled disclosure of unpublished information in order to fulfill their vital role in American society.

One of the most essential functions of a free press is to act as a watchdog of government activities. Press scrutiny of the criminal justice system operates as a check on misconduct and incompetence, and helps to keep both law enforcement and the judiciary accountable to the public. In *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980), the Supreme Court recognized that the press and the public have a First Amendment right to attend criminal trials. The opinion by Chief Justice Burger expressly acknowledged the important role the independent media play as surrogate for the public, helping to facilitate oversight of, and to increase public confidence in, the administration of justice.

As the Court also recognized in *Branzburg*, "without some protection for seeking out the news, freedom of the press could be eviscerated." 408 U.S. at 681. It is self-evident that if the media are not protected from demands that they disclose their unpublished materials to the state, their ability to act as the independent eyes and ears of the public will be compromised.

The media's newsgathering and reporting functions already face multiple challenges from an increasingly secretive government. When combined with the additional threat of subpoenas, the ability of the press to perform its constitutionally-mandated role will be seriously undermined. It is unfortunately true that the federal government's recent argument that no First Amendment privilege should protect the press from compelled production of confidential sources and unpublished information in grand jury investigations has been embraced by several federal courts in recent years. *See, e.g., In re Grand Jury Subpoena, Joshua Wolf*, 2006 U.S. App. LEXIS 23315 (9th Cir. Sept. 8, 2006); *In re Grand Jury Subpoenas to Mark Fainaru-Wada and Lance Williams*, 438 F. Supp. 23 111 (N.D. Cal. 2006); *In re: Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005). But whatever merit these rulings may have on grounds of

expediency is undercut by the profound threat they pose to the independence of the media and to the public's right to know. Threatening the media with contempt for failing to comply with subpoenas such as the one in the instant case will create yet another barrier to the free flow of information that the public need to govern themselves.

In a very real sense, the state courts are the last bulwark against this assault on a free press. For all of these enumerated reasons, *amicus* urges this Court to follow established precedent in this state by recognizing a journalist's privilege protecting unpublished materials in a criminal case, apply it to Ricciardi and to Synthesis Films, and to quash the prosecution subpoena issued in the instant case.

Dated: January 11, 2006.

Attorney Jane E. Kirtley
Silha Professor of Media Ethics and Law
University of Minnesota

Dated: January 11, 2006.

Attorney Waring R. Fincke
State Bar No. 01013875
Local Counsel for Amicus

P.O. ADDRESSES:

Attorney Jane E. Kirtley
Director, Silha Center for the Study of
Media Ethics and Law
School of Journalism and Mass Communication
University of Minnesota
111 Murphy Hall
206 Church Street SE
Minneapolis, Minnesota 55455

612 625 9038
612 626 8012 (fax)
kirtl001@umn.edu

Waring R. Fincke
Attorney at Law
1784 Barton Avenue
Suite 17
West Bend, Wisconsin 53090

262 334 1030
262 334 1035 (Fax)
wrfincke@execpc.com