

STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

IN MATTER OF SUBPOENA TO:

LAURA RICCIARDI, and
SYNTHESIS FILMS, LLC

Calumet County Sheriff's Dept.
Incident No. 05-157-955

MEMORANDUM IN SUPPORT OF MOTION TO QUASH SUBPOENA

MANITOWOC COUNTY
STATE OF WISCONSIN
FILED

DEC 7 2006

CLERK OF CIRCUIT COURT

I. The journalist privilege.

A. Wisconsin recognizes a journalist privilege.

Wisconsin recognizes a journalist privilege grounded in both the 1st Amendment to the United States Constitution¹ and Art. I, § 3 of the Wisconsin Constitution.² *Zelenka v. State*, 83 Wis.2d 601, 617-20, 266 N.W.2d 279, 286-87 (1978); *Green Bay Newspapers v. Circuit Court*, 113 Wis.2d 411, 422-23, 335 N.W.2d 367, 373-74 (1983). The privilege is recognized in order to protect the societal interest in the free flow of information, and to prevent "fishing expeditions" seeking to use the journalist as an investigative tool. *Id.*

B. The protection of the free press served by the privilege requires a heightened scrutiny of state subpoenas.

Section 968.135, Stats., empowers courts to issue subpoenas requiring the production of documents, etc. upon the showing of probable cause by the district attorney or attorney general. The statute requires courts considering such

¹ "Congress shall make no law...abridging the freedom of speech or the press...."

² "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press."

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requests to evaluate probable cause by the standards applicable to search warrants. Sections 968.135 and 968.12, Stats. Under these standards, courts must be apprized of sufficient facts to excite an honest belief in a reasonable mind that the object sought is linked to the commission of a crime and will be found in the place to be searched. *State v. Swift*, 173 Wis.2d 870, 883-84, 496 N.W.2d 713, 718-19 (Ct. App. 1993), *review denied*.

However, where the target of the subpoena establishes that the information sought was gathered in the exercise of a journalistic endeavor, the court must also weigh the interests of the freedom of the press against the needs of the judicial system. *State v. Knops*, 49 Wis. 2d 647, 658, 183 N.W.2d 93, 99 (1971). A heightened standard of probable cause applies. *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1970) ("Where the material to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with 'scrupulous exactitude.'") The party issuing the subpoena must show by a preponderance of the evidence that they have investigated other sources for the kind of information sought and there is no reasonable and adequate less intrusive alternative source where they can obtain the information. *State ex rel. Green Bay Newspapers v. Circuit Court*, 113 Wis.2d 411, 422, 335 N.W.2d 367, 373 (1983). And, the information sought must be germane and not tangential or cumulative. *Zelenka*, 83 Wis.2d at 620, 266 N.W.2d at 287; *State ex rel. Green Bay Newspapers*, 113 Wis.2d at 425, 335 N.W.2d at 375 (Even though relevant, no right to production if the impact of the evidence sought "will be too insignificant to

have any bearing upon the question to which the evidence goes.”); *Kurzynski v. Spaeth*, 196 Wis. 2d 182, 197, 538 N.W.2d 554, 560 (Ct. App. 1995).

C. Laura Ricciardi and Synthesis Films, LLC have standing to assert the privilege.

The person invoking the privilege must make a showing that she is one to whom the privilege should extend. *State ex rel. Green Bay Newspapers*, 113 Wis.2d at 420, 335 N.W.2d at 372. Wisconsin courts have not had occasion to discuss the test for who can assert the privilege. *Id.*

Other courts have given an expansive definition of those who can assert the privilege. It includes anyone who “at the inception of the investigatory process, had the intent to disseminate to the public the information obtained through the investigation.” *In re Charges of Unprofessional Conduct Involving File No. 17139*, 720 N.W.2d 807, 816 (Minn. 2006) (Citing *von Bulow ex rel. Auersperg v. von Bulow*, 811 F.2d 136, 143 (2nd Cir. 1987)). Independent production companies that produce documentaries are included. *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436-37 (10th Cir. 1977); *People v. Hendrix*, 12 Misc.3d 447820 N.Y.S.2d 411, 415 (2006) (Interpreting New York’s “Shield Law,” Civil Rights Law § 79-h(a)(3) and (a)(6)). A novice in the field can assert the privilege. *von Bulow ex rel. Auersperg*, 811 F.2d at 144.

Laura Ricciardi’s Affidavit establishes the intent to prepare a film for viewing by the public on a matter of public interest and importance – an examination of the criminal justice system over the past quarter century.

The nature of her work also demonstrates that she is one to whom the privilege should apply. She has consciously avoided discussions concerning the facts in the cases pending against Avery and Dassey. She has worked to obtain the confidence and trust of the persons interviewed. A perception that she is or has become an investigative arm of the state would betray that trust and affect her ability to obtain open and honest information. She has also established that she has not shared the content of any of the interviews with any party in the Avery or Dassey cases.

Ricciardi has standing to assert the privilege.

- II. The court should quash the subpoena.
 - A. Request for statements made by Steven Avery.

Paragraph 1 of the subpoena requests written or electronically recorded statements made by Steven Avery to Laura Ricciardi and/or her associates or employees at Synthesis Films, LLC (Ricciardi). The court should quash this paragraph because the state already has whatever statements are available.

The affiant, Investigator Mark Wiegert, is the lead investigator in the Halbach slaying. Affidavit, ¶ 1. In ¶5 of the Affidavit, he alleges that Avery has been in custody at the Manitowoc County Jail where all of Avery's telephone calls are monitored and recorded. The affiant acknowledges that he reviewed the phone calls from Avery from November 9, 2005 (prior to Ricciardi's involvement) to October 17, 2006. Affidavit, ¶ 5. Ricciardi has not communicated

with Avery by telephone on or after October 17, 2006. Therefore, the state already has recordings of any calls between Ricciardi and Avery.

Ricciardi also visited Avery. However, jail rules prohibited her from bringing recording equipment. Also, according to Jail Administrator John Byrnes, all jail visits in the general visiting area are recorded. All of Ricciardi's visits with Avery were in that area. Therefore, Ricciardi has no statements from those visits, and the state has access to those recordings.

Since Ricciardi received no written statements or correspondence from Avery, Ricciardi possesses no information that the state does not already have.

B. Request for statements by any other person.

Paragraph 2 of the subpoena requests "[a]ny written or electronically recorded statement made by any other person interviewed ... who claim to have any knowledge of the involvement of Steven Avery, Brendan Dassey, or any other individual with the homicide of Teresa Halbach."

1. The Affidavit fails to state probable cause.

The Affidavit is 11 paragraphs. The first 2 paragraphs establish the identity of the affiant and incorporate the criminal complaints against Avery and Dassey. The 3rd paragraph establishes the identity of Ricciardi and the fact she has interviewed a number of people with varying perspectives concerning Avery's contact with the criminal justice system over the past 26 years.

Paragraphs 5 and 6 establish that law enforcement has monitored all phone calls

made from the jail by Avery and Jodi Stachowski (Stachowski). Paragraphs 9 and 10 establish Ricciardi's intent to exercise her journalist privilege in order to protect her film.

The only facts offered to establish probable cause that Ricciardi may have statements "by any other person ... who claim to have any knowledge ..." are found in paragraphs 4, 7, and 8.

In ¶ 4, the affiant states he spoke with Dassey's mother (Barbara Janda) and Avery's girlfriend (Jodi Stachowski). Stachowski told the affiant that she "provided information to Laura Ricciardi regarding Steven Avery."

The affiant provides no context for the statement or description of the nature of information provided to Ricciardi. Surely the affiant would have asked if he thought it important. Assuming that he did ask follow-up questions, he provides no information about the answers. We are left to speculate whether we are talking about historical information about Avery, Avery's conversations about being wrongfully convicted, Avery's dog (if he had one), etc. The affiant supplies the court with innuendo and leaves it to speculate about the importance of this statement. The court is not allowed to speculate. *State ex rel. Green Bay Newspapers*, 113 Wis.2d at 421, 335 N.W.2d at 372-73.

Because the state fails to allege that it sought the answer from Stachowski and that she refused to give any further information, the state has not proven by a preponderance of the evidence that the could not get they answer from another source.

Paragraph 7 recounts an intercepted telephone conversation from the jail between Chuck Avery (Steven Avery's brother) and Stachowski. Chuck Avery reportedly tells Stachowski that he told Ricciardi "about evidence that could be useful to Steven Avery." The affiant fails to state whether there was any other discussion about that comment that would shed some light on its meaning. The affiant does not say that this is all that was said about the subject during the phone call, does not give any context for the comment, and does not relate if there was any reply. One might expect Stachowski (Avery's girlfriend) to be interested enough to ask about the nature of that evidence. The failure to affirmatively state that there was no further discussion about the nature of the "useful evidence" causes one to pause in assessing its usefulness in establishing probable cause. The court is again left with innuendo not probable cause.

And again, there is no allegation that the police made an effort to get this information from Stachowski or Chuck Avery. One is left to speculate whether Chuck Avery is one of the "uncooperative" witnesses referred to generally in ¶ 11. On the other hand, we know that Stachowski has cooperated (Affidavit ¶ 4).

Finally, missing from a fair evaluation of the meaning of the statement in ¶ 7 is any basis for the court to conclude that Chuck Avery had any information to give Ricciardi or what he might have meant by "useful," assuming that useful is the word that Chuck Avery used. Though the affiant had a recording of the conversation, he quoted none of it.

In ¶ 8, the affiant recounts another intercepted telephone conversation between Avery and his friend, Debbie Klemp. Avery tells Klemp that Ricciardi "might have more information regarding his case, including proof that might result in having Avery's case thrown out." Given the evidence amassed against Avery that would be remarkable. The court should consider the source of this information. There are no indicia of reliability here.

As with the other paragraphs, there is no other information giving context or further meaning to the statement. Also, the affiant does not quote the comment, though he was working from a recorded statement.

As with Stachowski, one would expect Klemp to make further inquiry into the nature of that evidence. Also, there is nothing to suggest that the police made any effort to flush out this statement by any other source. We do not know whether the police talked to Klemp, as they did with Avery's girlfriend and Dassey's mother, or whether they talked with any of Klemp's friends.

Finally, the comment from Avery that Ricciardi "might" have information is too vague a comment to overcome the journalist privilege against disclosure.

Paragraph 11 asserts that the affiant is aware that Ricciardi "has interviewed and/or recorded statements" from people who are either uncooperative with or unknown to law enforcement. The affiant then makes the bald, unsupported assertion that "Your affiant believes that these statements and records are relevant to the investigation into the homicide of Teresa Halbach."

The affidavit fails to state any facts supporting his believe that any information collected by Ricciardi is relevant to the affiant's investigation. Considering that affidavit as a whole, the only factually assertions supporting the "belief" that Ricciardi has relevant information are contained in paragraphs 4, 7, and 8, discussed above. Bald assertions without sufficient factual support are not sufficient to establish probable cause.

Paragraph 11 also makes the unsupported assertion that Ricciardi's tapes might contain information helpful for cross-examination or impeachment. Such assertions are not sufficient to obtain an *in camera* review of medical records and should not be sufficient when the interest involved is one protected by the Constitution. See, *State v. Green*, 2002 WI 68, ¶ 37, 253 Wis. 2d 356, 646 N.W.2d 298.

Considering the Affidavit as a whole, it fails to establish probable cause for the issuance of a subpoena, and fails to demonstrate by a preponderance of the evidence that the state has investigated other sources for the kind of information sought and there is no reasonable and adequate less intrusive alternative source where they can obtain the information. *State ex rel. Green Bay Newspapers*, 113 Wis.2d at 422, 335 N.W.2d at 373 (1983).

2. Ricciardi's supporting documents vitiates probable cause for the subpoena.

If the court decides that the Affidavit supports a finding of probable cause, Ricciardi's affidavits in support of her motion to quash vitiate that finding.

Ricciardi's affidavit establishes that she has diligently sought to avoid discussions concerning the facts of the pending cases against Avery and Dassey. The Wiegert and Ricciardi affidavits establish that Ricciardi's film is not an investigative piece about the death of Teresa Halbach, but a look at the criminal justice system in Wisconsin over the past quarter century and the man whose wrongful conviction prompted it to make significant changes. Her interviews are with people involved in the criminal justice system over that period of time, including legislators, judges, death penalty advocates and detractors, Innocence Project personnel, civil attorneys from Avery's wrongful conviction law suit, etc. Ricciardi's affidavit also establishes that she did not come to Wisconsin to begin filming until December 6, 2005. Her affidavit also confirms that she has not shared any information from interviews with the defense.

Ricciardi's affidavit vitiates any inference that the information Stachowski provided to Ricciardi regarding Steven Avery in ¶ 4 has any relevance to the state's case.

The same is true about Chuck Avery's statement to Stachowski in ¶ 7. "Useful" in the context of Avery's contacts with the criminal justice system over 26 years covers a lot of possibilities. Given Ricciardi's conscious commitment to staying out of the pending criminal case, it is not reasonable to adopt an inference suggesting that the information, if there was any, was germane to the state's case against Avery. The same can be said about ¶ 8.

Also regarding ¶ 8, Ricciardi did not begin filming or recording in Wisconsin until December 6, 200~~6~~⁵. It would be truly remarkable for Ricciardi to develop information that might result in having Avery's case thrown out when she had only been here for less than 2 months before the recording of this call.

Because free press issues are implicated, the court should examine the state's petition for a subpoena with "scrupulous exactitude." *Zurcher*, 436 U.S. at 564. The state has presented vague factual assertions. They have not presented quotes, when they have recordings. They have presented an affidavit lacking readily available information, leaving only innuendo. They have failed to demonstrate that they have sought the information elsewhere when the Affidavit suggests that they could have. The court should quash the subpoena.

C. The subpoena is overbroad.

Search warrants are required to state with particularity the items to be seized, and a deficient warrant is not saved by a sufficient affidavit. *Groh v. Ramirez*, 540 U.S. 551 (2004). The particularity requirement fulfills 3 objectives: 1. prevents general searches, 2. prevents the issuance of warrants on less than probable cause, and 3. prevents the seizure of objects when the warrant describes different objects. *State v. Petrone*, 161 Wis.2d 530,540-41, 468 N.W.2d 676,680, *cert. denied*, 502 U.S. 925 (1991). The warrant must be specific enough to allow the searcher reasonably to ascertain and identify the thing to be seized. *Id.*, 161 Wis.2d at 542, 468 N.W.2d at 680.

Overly broad subpoenas violate the 4th Amendment's reasonableness clause. They are unreasonable in that their lack of specificity allows the government to go on a fishing expedition, similar to that of a general warrant. *Custodian of Records v. State*, 2004 WI 65, ¶ 50, 272 Wis.2d 208, 239, 680 N.W.2d 792, 807. The purpose of the journalist privilege is to prevent such expeditions. *State ex rel. Green Bay Newspapers*, 113 Wis.2d at 422, 335 N.W.2d at 373.

To avoid an over breadth problem the subpoena must: 1. be limited to the subject matter of the pending proceeding, 2. show that the data is relevant to the subject matter of the proceeding, 3. specify the data with reasonable particularity, and 4. cover a reasonable period of time. *Custodian of Records v. State*, 2004 WI 149, ¶ 55, 277 Wis.2d 75, 78, 689 N.W.2d 908, 909-10. (The case discusses a John Doe subpoena but incorporates § 968.135 subpoenas).

The subpoena here demands production of statements of "any" person interviewed who "claim" to have "any knowledge" of the involvement of Avery, Dassey or anyone else in the homicide of Teresa M. Halbach. The subpoena is so broadly worded that it could be interpreted to include virtually anything. How is Ricciardi to know what is relevant to the state's case? To respond to the subpoena, Ricciardi must have a working knowledge of the prosecution and defense cases.

Even with the benefit of reference to the Affidavit - which the state refused to produce without a court order - the subpoena is overbroad. The Affidavit refers to information that "may be" admissible as direct evidence,

useful in cross-examination, or to impeach a witness. Without a working knowledge of the state and defense cases, Ricciardi has no way of knowing what might be useful in cross-examination or for impeachment.

A statement that information "might" be useful for some purpose is too vague and does not constitute a sufficient showing in a free press case. *Zelenka*, 83 Wis.2d at 621, 266 N.W.2d at 287.

Ricciardi's work to date has yielded over 255 hours of tapes. Review of these tapes to comply with the court's order would shut down her project, cause the loss of a years worth of labor, and impose an unreasonable financial burden.

D. The balance of competing interests favors quashing the subpoena.

The interest of the administration of justice does not outweigh the impact that enforcement of this subpoena will have on the free flow of ideas necessary to insure freedom of the press. This case stands in stark contrast to the only case in Wisconsin where the court found that the privilege must yield to the needs of the judicial system.

Knops came to the Court in the throws of the antiwar movement of the 60s and 70s. An arsonist had set fire to the "Old Main" hall on the campus of UW-Whitewater on July 1, 1970, and a bomb shattered Sterling Hall at UW-Madison on August 24, 1970 causing one death and several injuries. On August 26, 1970, the Madison Kaleidoscope printed a front-page story entitled "The Bombers Tell Why and What Next-Exclusive to Kaleidoscope." Knops, the editor, refused to

testify following an immunity grant and raised a claim of privilege not to divulge his source under the 1st Amendment. The Court recognized Knops's right to claim the journalist privilege but concluded that, under these circumstances, the needs of the criminal justice system outweighed the privilege.

Here the appellant's information could lead to the apprehension and conviction of the person or persons who committed a major criminal offense resulting in the death of an innocent person. The information sought may remove threats of repetition of the offenses.

Knops, 49 Wis.2d at 658, 183 N.W.2d at 99. *See also, Zurcher, supra.* (Demonstrators wielding sticks and clubs wounded 9 police officers. The police could identify 2 of the perpetrators. The Stanford Daily newspaper published a story with photos and included a by-line that one of the staff members was present in the area and could have taken photos. The execution of a search warrant was challenged in an injunction action under 42 U.S.C. § 1983, which was denied.)

Here, the state has identified, captured, and charged its suspects. It also appears to have amassed a mountain of evidence against them. Ricciardi did not witness the crime. Though she spoke with Avery, the state has tape-recorded all of their conversations. She never communicated with Dassey. She has no direct evidence.

The state is engaged in a fishing expedition. It asks Ricciardi to rummage through 255 hours of tapes to see if there is anything that might be helpful to the state in cross-examination or to impeach a witness. Ricciardi does not have the

understanding of the state and defense cases to know who will be called as a witness and what that witness will be called to testify about. The only safe way to respond is to turn over everything and let the state seine for minnows.

The search for evidence that might be useful for impeachment or cross-examination is speculative and tangential. *Zelenka*, 83 Wis.2d at 620, 266 N.W.2d at 287; *State ex rel. Green Bay Newspapers*, 113 Wis.2d at 425-27, 335 N.W.2d at 375. Even if the state reviews all of the materials, they cannot say at this time what will be useful. It depends on who testifies and what they say on the stand. Given the strength of the state's case, any impeaching information is likely to be of little impact.

The state has failed to identify those witnesses whom the state knows have talked to Ricciardi and who are not cooperative with the state. Their affidavit is vague and fails to give information when information is clearly available. The state has failed to seek available alternate sources for the information.

The state has not demonstrated a substantial or compelling need for any other information. They have not thought it important enough to seek it on their own, or if they have, they have not demonstrated that in their petition. 113 Wis.2d at 425, 335 N.W.2d at 375.

Ricciardi's film is not an investigative piece exploring the homicide of Teresa M. Halbach. Ricciardi has not shared any information about statements

with any party and does not intend to. She has scrupulously avoided talking about the facts of the pending cases during her interviews.

The impact on the free flow of ideas is substantial. Requiring Ricciardi to cull through 255 hours of tapes for information that is ill-defined will shut down the project.

Ricciardi has worked an entire year without pay on this film. Her helpers have also worked without pay to date. To enforce a subpoena that will shut down this film on the showing made here will have a chilling effect on Ricciardi and other aspiring, independent documentarians. The court will eviscerate the journalist privilege if it allows prosecutors access to the journalists' files, tapes, etc. in order to search for evidence that "might" be useful on cross-examination or impeachment. It will discourage unfunded independent journalists and documentarians from making the substantial commitment of time and resources if their projects can be so easily shut down. Knowing that prosecutors have this power will also affect their independence.

Society's interest in having a quarter-century wide perspective on the bizarre twists in Avery's encounters with the criminal justice system is compelling. There is interest in knowing how Avery came to be the victim of a wrongful conviction and how the criminal justice system responded to that conviction. The fallout of Avery's wrongful conviction is a watershed moment in the development of criminal justice in this state.

There is also interest in gaining some insight into the person and family of the man who, shortly after release, came to be charged with a gruesome homicide. It is an important story for many reasons.

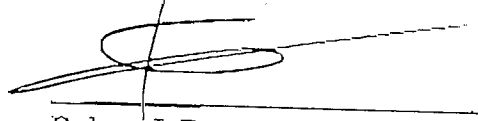
Ricciardi's effort to tell that story will at best be compromised, and at worst terminated if required to respond to this subpoena. The trust and rapport with witnesses will be damaged. There is a very real risk that she will be viewed as an investigative arm of the state, even if an unwilling one. Those closest to the story will be unwilling to remain open with her. The public will lose this unguarded perspective; Ricciardi's film will be compromised.

III. If the court denies the motion to quash at this time, it must view the materials *in camera* before ordering disclosure to the state.

If the court determines that the state has established probable cause, presented a proper petition and subpoena, and has shown by a preponderance of the evidence that it has investigated all reasonable and available alternative sources for the information it seeks or that no such source exists, the court should then order an *in camera* inspection. *State ex rel. Green Bay Newspapers*, 113 Wis.2d at 423, 335 N.W.2d at 373. Upon review of the information, the court must make a new determination as to whether the information is competent, relevant, and material to the state. *Id.* The court should then make a determination that the information is necessary to the party making the request. *Id.*, 113 Wis.2d at 423, 335 N.W.2d at 373-74.

Dated: December 1, 2006.

Respectfully submitted,



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