ORIGINAL

STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

IN THE MATTER OF
THE SUBPOENA TO:

LAURA RICCIARDI AND
SYNTHESIS FILMS, LLC

STATE'S RESPONSE TO ATTORNEY DVORAK'S MEMORANDUM IN SUPPORT OF MOTION TO QUASH SUBPOENA

Calumet County Sheriff's Department
Incident No. 05-0157-955

I. Laura Ricciardi and Synthesis Films, LLC does not meet the definition of journalist.

As one views the events and witnesses made available to Ms. Ricciardi and Synthesis Films, LLC, Ms. Ricciardi begins to appear as an "investigative arm" of Steven Avery's defense team and less a journalist. This transformation was no more evident than on August 10, 2006, when Ms. Ricciardi appeared at the Manitowoc Clerk of Circuit Court office to film the blood sample located by the Avery defense team in the Manitowoc Clerk of Circuit Court office. Documentation from the Manitowoc Clerk of Circuit Court office as well as statements collected from Manitowoc County Clerk of Court Janet Bonin confirm that Ms. Ricciardi appeared with camera equipment on August 10, 2006, when some initial observations were made of items in Manitowoc County case number 85FE118. There is no other footage that has been made available to the prosecution of the Avery defense team's initial contact with this material. The State has no other way to confirm that the evidence tape on the boxes had been broken at an earlier date and not subsequent to August 10, 2006.

This is but one example of information that has been made available to Ms. Ricciardi and Synthesis Films, LLC by the Avery defense team. Additional examples are contained in Investigator Wiegert's supporting affidavit. While the State would have expected counsel for Steven Avery to honor the State's Discovery Demand filed in February of 2006 and pursuant to

Wis. Stat. § 971.23, such material has to date not been provided to the State. If Ms. Ricciardi was working with or on behalf of the Steven Avery defense team, it would appear that her recordings would be controlled by Wis. Stat. § 971.23(2m)(am) as ". . . relevant written or recorded statements of a witness . . .."

II. Journalist Privilege for Non-Confidential Sources in Criminal Cases Under the U.S. or Wisconsin Constitution or Wisconsin Statutes.

A. There Is No Wisconsin Journalist Shield Law.

The Wisconsin Statutes do not provide for a journalist privilege. Therefore, any applicable journalist privilege must be found in either the federal or state constitution. *See* Wis. Stat. § 905.01.

B. Journalist Privilege for Non-Confidential Sources in Criminal Cases Under the U.S. Constitution.

The case law interpreting the federal constitution as it relates to the existence of a journalist's privilege, is nebulous at best. Claims of journalist privilege are of relatively recent vintage, as "[i]t appears that not until 1958 did any reporter attempt to base his purported privilege on the First Amendment guarantee of freedom of the press." *State v. Knops*, 49 Wis. 2d 647, 652, 183 N.W.2d 93 (1971). The seminal case interpreting journalist privilege under the First Amendment is *Branzburg v. Hayes*, 408 U.S. 665, 667-79 (1972), in which news reporters refused to appear and give grand jury testimony with respect to confidential sources. The U.S. Supreme Court declined to create a testimonial privilege for reporters under the First Amendment. *Id.* at 690. The Court stated that the "public . . . has a right to every man's evidence," and that "creation of new testimonial privileges has been met with disfavor by commentators since such privileges obstruct the search for the truth." *Id.* at 688, 690 n. 29 (citations omitted).

The only Seventh Circuit case regarding journalist privilege is *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003). In *McKevitt*, a journalist who had non-confidential tape recordings for a biography of a witness in a criminal prosecution in Ireland, refused to produce the tapes pursuant to a federal court order. *Id.* at 531. Judge Posner, writing for the Seventh Circuit, noted that "[a] large number of cases conclude, rather surprisingly in light of *Branzburg*, that there is a reporter's privilege." *Id.* Regarding non-confidential sources, the Court stated that "[t]he cases that extend the privilege to nonconfidential sources express concern with harassment, burden, using the press as an investigative arm of the government . . . Since these considerations were rejected by *Branzburg*, even in the context of a confidential source, these courts may be skating on thin ice." *Id.* at 533. The Court went on to explain:

> When the information in the reporter's possession does not come from a confidential source, it is difficult to see what possible bearing the First Amendment could have on the question of compelled disclosure. If anything, the parties to this case are reversed from the perspective of freedom of the press, which seeks to encourage publication rather than secrecy. Rupert [the interviewee] wants the information disclosed; it is the reporters, paradoxically, who want it secreted.

Id. The Court held that:

> [R]ather than speaking of privilege, courts should simply make sure that a subpoena duces tecum directed to the media, like any other subpoena duces tecum, is reasonable in the circumstances, which is the general criterion for judicial review of subpoenas. We do not see why there need to be special criteria merely because the possessor of the documents or other evidence sought is a journalist. The approach we are suggesting has support in *Branzburg* itself.

Id. (internal citations omitted). Thus, the only relevant Seventh Circuit Court's case rejects a First Amendment journalist privilege altogether, especially in cases where confidentiality is not at issue. *Id.* at 532.

There is no Wisconsin Supreme Court or Court of Appeals case interpreting journalist privilege under the First Amendment which is both a criminal case and involves nonconfidential

sources. In *Knops*, a newspaper editor was held in contempt for refusing to answer questions regarding the identity of the Sterling Hall bombers. *State v. Knops*, 49 Wis. 2d 647, 649-50, 183 N.W.2d 93 (1971). In this pre-*Branzburg* case, the Wisconsin Supreme Court found a qualified First Amendment privilege for confidential sources in criminal cases "which must yield to the interest of justice" when "in conflict with the public's overriding right to know." *Id.* at 659.

The Wisconsin Supreme Court reaffirmed a First Amendment privilege for a confidential source in criminal cases after *Branzburg* in *Zelenka v. State*, 83 Wis. 2d 601, 619, 266 N.W.2d 279 (1978). In *Zelenka*, a reporter who wrote a story regarding a murder refused to testify when called by the defendant in the murder trial. *Id.* at 616. The Court held that journalists have a qualified privilege based on both the U.S. and Wisconsin Constitutions, concluding that this requires "balancing a privilege of nondisclosure against the societal values favoring disclosure." *Id.* at 619.

In *United States v. Smith*, 135 F.3d 963, 966-967 (5th Cir. 1998), a television station refused to turn over to the prosecution unaired video segments of an interview with a suspect indicted on an arson charge. The Court held under *Branzburg* there is no First Amendment journalist privilege. *Id.* at 969. The Court stated that other circuits have misinterpreted Justice Powell's concurrence in *Branzburg*, which was directed at "harassment of newsmen." *Id.* The Court stated that "[a] single subpoena issued only after considered decision by the Attorney General of the United States to compel production of evidence at a federal trial of a multicount felony indictment is no harassment." *Id.* Regarding subpoenas duces tecum to produce nonconfidential sources, the Court stated that

> [T]he danger that sources will dry up is less substantial [than for confidential sources.] Presumably, on-the-record sources expect beforehand that the

> government, along with the rest of the public, will view their nonconfidential statements when they are aired by the media. WDSU-TV's fear that nonconfidential sources will shy away from the media because of its unholy alliance with the government are speculative at best.

Id. at 970. The Court then concluded that, "We are pointed to no empirical basis for assertions that the media will avoid important stories or destroy its archives in response to rare requests for criminal discovery." *Id.* at 971.

Other U.S. Court of Appeals have taken the view that there is no journalist privilege for nonconfidential sources in criminal cases. *In re Shain*, 978 F.2d 850, 851-52 (4th Cir. 1992) involved the prosecution seeking journalists to testify regarding nonconfidential statements made by the defendant in an interview that lead to published newspaper articles. The Court held that "absent evidence of governmental harassment or bad faith, the reporters have no privilege different from that of any other citizen not to testify about knowledge relevant to a criminal prosecution. *Id.* at 852. The Court also held that "the absence of confidentiality or vindictiveness in the facts of this case fatally undermines the reporters' claim to a First Amendment privilege." *Id.* at 853. *In re Grand Jury Proceedings*, 810 F.2d 580, 581-82 (6th Cir. 1987), involved a subpoena by a grand jury for unedited video tapes by a reporter of gang members who were suspected of involvement in a homicide. It is unclear whether the taping was done in confidence. *Id.* at 582. The Court declined to create a First Amendment privilege for journalists in that case. *Id.* at 583.

Several state appellate courts have also refused to create a journalist privilege based on the First Amendment for nonconfidential sources in criminal cases. *See In re Owens*, 496 S.E.2d 592, 596 (N.C. App. 1998) ("the trial court . . . properly declined to recognize a news reporter's qualified privilege to refuse to testify in a criminal proceeding where non-confidential information obtained from a non-confidential source."); *WTHR-TV v. Cline*, 693 N.E.2d 1, 4

(Ind. 1998) (The First Amendment does not proscribe disclosure of unaired portions of a television interview on grounds of privilege.); *State v. Salsbury*, 924 P.2d 208, 214 (Idaho 1996) ("the qualified privilege which has been recognized by this Court in some instances is not applicable" where the prosecution sought the videotape, including the outtakes not broadcast by the station, of an altercation between an officer and the defendant.); *State ex rel. National Broadcasting Co. v. Court of Common Pleas*, 556 N.E.2d 1120, 1127 (Ohio 1990) (In the context of a murder trial, "a court may enforce a subpoena [to preserve all news commentary tapes, including outtakes,] over a reporter's claim of privilege, so long as it is persuaded that the subpoena has been requested or issued for a legitimate purpose, rather than for harassment."); *CBS Inc. v. Campbell*, 645 S.W.2d 30, 33 (Mo. App. 1982) (No First Amendment journalist privilege to protect against compelled disclosure of videotaped outtakes to a grand jury investigating in good faith.).

The State concedes that there are many other appellate cases in which a qualified journalist privilege has been found in criminal cases but only regarding **confidential** sources. Likewise, there have been several decisions supporting a qualified journalist privilege for nonconfidential sources, but only in **civil** cases, and often in these cases the amount of protection is lower for nonconfidential sources than for confidential sources.

Article I, Section 3 of the Wisconsin Constitution states, "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."

The First Amendment to the U.S. Constitution in Article I, Section 3 of the Wisconsin Constitution have identical meaning regarding journalist privilege. *Zelenka* states that the two have the same meaning when rendering its interpretation of *Knops*: "it is apparent that the

findings of privilege in *Knops* was based on the First Amendment, not on Art. I, sec. 3. It is just as apparent, however, that *Knops* could have relied on the Wisconsin Constitution, and that this court can reaffirm *Knops* on that basis." *Zelenka*, 83 Wis. 2d at 617. Furthermore, the Court in *Kurzynski v. Spaeth,* 196 Wis. 2d 182, 538 N.W.2d 554 (Ct. App. 1995) held the following:

> The striking similarity between the analysis in *Branzburg* and *Knops*, which were both decided under the First Amendment, and the analysis in *Green Bay Newspaper Co.*, which was decided under Article I, section 3, leads us to conclude that the scope of the qualified journalist's privilege is the same whether measured under the First Amendment or under Article I, section 3.

Kurzynski, 196 Wis. 2d at 194-95. Finally, in *State ex rel. Green Bay Newspaper Co. v. Circuit Court*, 113 Wis. 2d 411, 419, 335 N.W.2d 367 (1983), the Court found a qualified journalist privilege under only the Wisconsin Constitution in a case where reporters refused to reveal confidential sources from articles they had written regarding a John Doe homicide investigation. However, the Court acknowledged the strong similarities between the First Amendment and Article I, Section 3:

> We agree with the Supreme Court of Virginia in *Brown v. Commonwealth*, 204 S.E.2d 429, 431 (1974), that the journalist's privilege "is a privilege related to the First Amendment and not a First Amendment right, absolute, universal, and paramount to all other rights." (Emphasis in original.) We believe this conclusion is equally applicable to the journalist's privilege under the Wisconsin Constitution.

Id. at 422 – 23. Under these cases, the journalist's privilege under the Wisconsin Constitution has the same meaning as under the U.S. Constitution. Thus, *McKevitt* should be controlling regarding any claim of journalist privilege in Wisconsin.

When Wisconsin courts have rendered an interpretation of journalist privilege under the Wisconsin Constitution, all of the pre-*McKevitt* cases reached the conclusion that some sort of journalist privilege applies. In *Zelenka* and *Green Bay Newspaper Co.*, the courts found a qualified journalist privilege for **confidential** source in criminal cases. *Zelenka*, 83 Wis. 2d at

619; *Green Bay Newspaper Co.*, 113 Wis. 2d at 419. In *Kurzynski*, the Court finds a qualified journalist privilege for nonconfidential sources in a **civil** case. 196 Wis. 2d at 196. However, there are no Wisconsin cases which explicitly state that there is any type of journalist privilege under the Wisconsin Constitution regarding **nonconfidential** sources in **criminal** cases.

III. Even if a Qualified Journalist Privilege Exists Under the U.S. or Wisconsin Constitution, the Privilege is Overcome When Analyzed Under the Applicable Balancing Tests

McKevitt is a criminal case involving nonconfidential sources, and it is a Seventh Circuit decision interpreting the First Amendment (which Wisconsin cases have repeatedly said is identical to Article I, Section 3 for purposes of journalist privilege). The Seventh Circuit stated the applicable test is as follows: "courts should simply make sure that a subpoena duces tecum directed to the media, like another other subpoena duces tecum, is reasonable in the circumstances." 339 F.3d at 533.

In the present case, it is reasonable for the State to require production of Laura Ricciardi and Synthesis Films, LLC recordings of members of the Avery family or extended family or any other witnesses who claim to have knowledge of the involvement of Steven Avery, Brendan Dassey or any other individual with the homicide of Teresa Halbach. The Avery family has long ago stopped speaking with law enforcement. Other witnesses, who have been made available to Laura Ricciardi by the Avery defense team and claim to have knowledge of the involvement of Steven Avery, Brendan Dassey or another individual in the homicide of Teresa Halbach, have not been identified to the State by the Avery defense team, and the only other source of the identity of witnesses and content of their recorded statements is Laura Ricciardi and Synthesis Films, LLC.

Even if one argues that in *McKevitt* the Seventh Circuit misinterpreted the First Amendment and *Branzburg*, a reliance on Justice Powell's concurrence in *Branzburg* compels disclosure in this case as well. Powell's "test" for journalist privilege is as follows:

> [N]o harassment of newsmen will be tolerated. If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. The asserted claim to 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. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.

Branzburg, 408 U.S. at 709-710 (Powell, J., concurring).

In the present case, there is no evidence of bad faith; no evidence of State harassment of a journalist in an attempt to unduly silence her or impede her editorializing or reporting. As in *Smith*, the State here seeks a subpoena issued only after a considered decision to compel production of evidence at a trial of a multi-count felony prosecution. The State only asks for the recordings of family members of Steven Avery and Brendan Dassey, who will no longer cooperate with law enforcement, and other witnesses who claim to have knowledge of the involvement of Steven Avery, Brendan Dassey or any other individual with the brutal kidnapping, sexual assault and homicide of Teresa Halbach. This is a good faith attempt by the State to obtain relevant evidence in preparation for trial. No confidential sources will be jeopardized. Thus, the State meets the provisions of Justice Powell's *Branzburg* concurrence.

Finally, even if one argues that a qualified journalist privilege applies under the U.S. or Wisconsin Constitutions, that privilege is overridden using the multi-part balancing test for confidential sources in criminal cases adopted in *Green Bay Newspaper Co.*:

> For a person to seek to invoke the privilege, there must be an initial showing, by affidavit or otherwise, that the person is one to whom the privilege should extend. In *Zelenka*, this court noted that *Knops* held that a journalist has a qualified privilege to refuse to disclose sources of information received in confidence.

113 Wis. 2d at 420. Thus, according to this test, the privilege does not apply in the present case, as Steven Avery and Brendan Dassey's family members did not give the interview to Laura Ricciardi in confidence. Other individuals who may have knowledge of the involvement of Steven Avery, Brendan Dassey or another individual with the homicide of Teresa Halbach also did not give an interview to Laura Ricciardi in confidence. Giving an interview in front of a video camera, with the knowledge that it may be broadcast on television or made into a movie at a later date, is certainly not giving information "in confidence."

Green Bay Newspaper Co. next requires the parties seeking the subpoena to "offer some proof, beyond mere speculation, that there is reasonable probability that the subpoenaed witnesses' testimony will be competent, relevant, material and favorable" to its case. *Id.* at 421. "This does not mean that the subpoenaed witness' testimony must be directly relevant, material and favorable." *Id.* Rather, one only needs to show "a reasonable probability that the subpoenaed witnesses' testimony will lead to competent, relevant, material and exculpatory evidence." *Id.* This showing must be by a preponderance of the evidence. *Id.* at 422. Investigator Wiegert's supporting affidavit identified specific instances where Steven Avery himself indicates Laura Ricciardi possesses information which is material and relevant to the case. Who, other than the criminal defendant, would be in a better position to make this assessment.

The language in this step of the *Green Bay Newspaper Co.* test requires balancing the journalist privilege against the needs of the State to effectively enforce criminal laws and protect public safety. The ultimate goal of the test is to balance the need for the free flow of information

against "societal values favoring disclosure" and "the interest of fair and effective administration of the judicial system." *Id.* at 419; *Knops*, 49 Wis. 2d at 658. Also, this step in the *Green Bay Newspaper Co.* test addresses compelled testimony from journalists. The State, in its subpoena for documents, has requested something much less intrusive, simply video recorded statements of witnesses.

The next step in the *Green Bay Newspaper Co.* test requires "a showing to the trial court by a preponderance of the evidence" that there has been an investigation of "other sources for the kind of information [sought] and there are no reasonable and adequate less intrusive alternative sources" where the information can be obtained. 113 Wis. 2d at 422.

The State has no other means of obtaining the information on the video recorded statements of Steven Avery and Brendan Dassey's family members who have refused to speak with law enforcement. Furthermore, other persons to whom Laura Ricciardi may have been lead by the Steven Avery defense team have not been identified to the State. The Steven Avery defense team has, by its own admission, negligently failed to comply with Wis. Stat. § 971.23 and the order of the circuit court. To expect the State to further rely on the Avery defense team to provide the recorded statements of witnesses would hamper the State from effectively enforcing the criminal laws and protecting the public safety.

The State believes that all of the pertinent criteria have been met and believes "an *in camera* inspection should be ordered." *Id.* at 423. At the *in camera* hearing, the journalist will be required to disclose his sources to the court." "[T]he court must make a new determination as to whether the sources can provide competent, material, relevant and exculpatory evidence." *Id.* The trial court should also make a determination as to whether the evidence is necessary to the party seeking it, meaning that it supports a theory that the party intends to assert at trial. *Id.*

"Once the trial judge is satisfied that the information meets the above criteria, he should require its disclosure to the defendant and to the state." *Id.*

CONCLUSION

There is substantial evidence that no journalist privilege exists for nonconfidential sources in criminal cases under the U.S. Constitution according to *Branzburg* and *McKevitt*. This applies with strong force in Wisconsin, given Wisconsin courts' holdings that the consideration of journalist privilege are identified under the First Amendment and Article I, Section 3, and given that no Wisconsin case had held that there is a journalist privilege for nonconfidential sources in criminal cases. Even if a qualified journalist privilege applies under the U.S. or Wisconsin Constitution, the privilege is easily overcome using the test articulated in *McKevitt*, Powell's *Branzburg* concurrence and *Green Bay Newspaper Co.*

Respectfully submitted this 22nd day of December, 2006.

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