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TED ROWLANDS

FILED
SAN MATEO COUNTY
FEB 11 2004
Clerk of the Superior Court
By _____ DEPUTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN MATEO

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff.

vs.

SCOTT LEE PETERSON,

Defendant.

Case No. 1056770

BY FAX

NOTICE OF MOTION AND MOTION OF NON-PARTY REPORTER TED ROWLANDS TO QUASH TRIAL SUBPOENA; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: TBA
Time: TBA
Dept: 42
Judge: Hon. Alfred Delucchi

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that as soon as the matter may be heard, in Department 42 of the above-entitled court, non-party reporter Ted Rowlands will and hereby does move the Court for a protective order quashing the trial subpoena issued to him by the People of the State of California (the "State").

This Motion is made on the grounds that the California shield law (Article I, Section 2(b) of the California Constitution together with California Evidence Code § 1070), and the First Amendment of the United States Constitution provide Mr. Rowlands with protection from being compelled to provide testimony. This Motion is based on the attached Memorandum of Points and Authorities and the attached Declaration of Grace K. Won, and on such additional argument as shall be presented at the hearing on this Motion.

DATED: February 11, 2004

FARELLA BRAUN & MARTEL LLP

By: _____
Grace K. Won

Attorneys for Non-Party Reporter
TED ROWLANDS

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On January 26, 2004, the District Attorney for Stanislaus County served a trial subpoena ordering the appearance of non-party reporter Ted Rowlands, a news reporter for KTVU Channel 2 News, in the matter of People v. Scott Lee Peterson, Case No. 1056770. On its face, the subpoena is silent as to the purpose of Mr. Rowlands' testimony. In a meet and confer conversation, the District Attorney stated it is seeking to compel Mr. Rowlands' testimony to testify about conversations he had with the defendant Peterson, regarding Mr. Peterson's alleged affair with Amber Frey. Despite repeated requests by Mr. Rowlands' counsel, however, the District Attorney has declined to further specify the scope of the testimony sought or when such conversations may have been broadcast.

The District Attorney's subpoena runs afoul of the California Constitution and Evidence Code which grant journalists a broadly-defined immunity from the compelled disclosure of any "unpublished information" obtained during the course of gathering and disseminating information to the public. Where, as here, the reporter is not a party to the underlying litigation, the shield law erects an absolute bar against compelling the reporter to reveal any unpublished information, including his unpublished eyewitness observations and conversations. The District Attorney's request also contravenes the qualified reporter's privilege enshrined in the First Amendment, which provides an independent source of rights for journalists, separate and apart from those protections accorded by state law.

As set forth below, the District Attorney cannot elicit any relevant and admissible testimony from Mr. Rowlands about his news reports without forcing him to disclose protected information in violation of California's shield law and the First Amendment. Therefore, Mr. Rowlands respectfully requests that the Court enter an order quashing the subpoena.

II. STATEMENT OF FACTS

Ted Rowlands is a reporter for Channel 2 KTVU, Inc. ("KTVU"). See Declaration of Grace K. Won ("Won Decl.") at ¶ 4. On January 26, 2004, the District Attorney for Stanislaus County served a subpoena (the "Subpoena") on KTVU, ordering Mr. Rowlands to appear to

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> As used in this subdivision, "unpublished information" includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and includes, but is not limited to, all notes, outtakes, photographs, tapes, or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated.

Cal. Const., art. I, § 2(b).[1]

Enacted in 1980 by an overwhelming majority of California voters, this constitutional provision provides protection beyond the qualified immunity offered to reporters under the First Amendment. See Miller v. Superior Court, 21 Cal.4th 883, 899 (1999) (noting that current version of shield law expanded scope of reporters' protection beyond what the First Amendment provides). By elevating the testimonial immunity from a statute – Evidence Code § 1070 – to the state constitution, the California electorate demonstrated its belief that reporters must be given the maximum possible protection for information obtained in the course of their newsgathering activities. As noted in Playboy Enterprises, Inc. v. Superior Court, 154 Cal. App. 3d. 14 (1984):

> The elevation to constitutional status must be viewed as an intention to favor the interests of the press in confidentiality over [competing interests]. . . .
>
> It has long been acknowledged that our state Constitution is the highest expression of the will of the people acting in their sovereign capacity as to matters of state law. When the Constitution speaks plainly on a particular matter, it must be given effect as the pararnount law of the state.

Id. at 27-28 (citations omitted).

A. The California Shield Law Broadly Protects Against The Compelled Disclosure Of Sources And Of Unpublished Information.

The State's broadly drawn Subpoena runs afoul of the shield law. In compelling Mr. Rowlands to testify about his communications with defendant Peterson, as the District Attorney indicated it intends to do in the one meet and confer conversation with counsel, the State seeks unpublished information about Mr. Rowlands' investigation. Yet "unpublished" material enjoys absolute protection under the reporters' shield law. As the California Supreme Court explained in

[1] California Evidence Code § 1070 contains virtually identical language.

testify at trial in the above-captioned criminal case. See Won Decl. at ¶ 3 & Exh. A. The Subpoena gives no explanation of why Mr. Rowlands has been subpoenaed, and no description of the testimony sought. See id. at ¶ 3 & Exh. A. In response to an earlier subpoena served by the Dsitrict Attorney on the KTVU Custodian of Records, KTVU has already provided a sworn declaration authenticating videotape of news footage broadcast on KTVU related to the matter of People v. Scott Lee Peterson. See id. at ¶ 8 & Exhs. D & E.

Counsel for Mr. Rowlands and KTVU made repeated efforts to contact the District Attorney to meet and confer regarding the Subpoena. Counsel received no response to several initial voicemails and therefore sent a follow-up letter on January 30, 2004. See id. at ¶ 5 & Exh. B. When counsel was finally able to reach the District Attorney by telephone, the District Attorney took the position that Mr. Rowlands should be compelled to testify about conversations he had with defendant Peterson, regarding Mr. Peterson's alleged affair with Amber Frey. See id. at ¶ 6. The District Attorney stated that it believed these conversations were referenced in a report by Mr. Rowlands which was broadcast by KTVU, but despite requests from counsel, the District Attorney has failed to identify any specific broadcast and failed to provide any further clarification regarding the subject and scope of the testimony sought. See id. at ¶¶ 6-7. The District Attorney has refused to withdraw the subpoena to Mr. Rowlands and has not responded to counsel's most recent letter of February 3, 2004 and voicemail on February 5, 2004 seeking additional information about the testimony sought from Mr. Rowlands. See id. at ¶¶ 6-7.

III. THE SUBPOENA SHOULD BE QUASHED PURSUANT TO THE CALIFORNIA SHIELD LAW.

The California shield law embodied in article I, section 2(b) of the California Constitution and in section 1070 of the California Evidence Code provides reporters like Mr. Rowlands with absolute immunity from being compelled by the State to testify. Article I, section 2(b) states, in pertinent part, that a news reporter:

> shall not be adjudged in contempt . . . for refusing to disclose the source of any information procured while so connected or employed [as a news reporter], . . . or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public....

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Delaney v. Superior Court, 50 Cal. 3d 785 (1990), the shield law applies to *any* unpublished information, even if not obtained in confidence:

> The language of article I, section 2(b) is clear and unambiguous . . . . The section states plainly that a newsperson shall not be adjudged in contempt for "refusing to disclose any unpublished information.". . . . The use of the word "any" makes clear that article I, section 2(b) applies to all information, regardless of whether it was obtained in confidence. Words used in a constitutional provision "should be given the meaning they bear in ordinary use." . . . In the context of article I, section 2(b), the word "any" means ***without limit*** and ***no matter what kind.***

Id. at 798 (emphasis added) (citations omitted); accord New York Times Co. v. Superior Court, 51 Cal. 3d 453, 461-62 (1990) (unpublished photographs of a public event are protected by the shield law). The shield law thus immunizes from compelled disclosure any information received, or materials generated or compiled, during the newsgathering process that have not actually been published.

Such "unpublished information" is protected from disclosure even when closely related information has been published. For example, in Playboy, a civil litigant sought audio and videotapes, notes, and other documents relating to an interview conducted by a reporter for Playboy magazine, portions of which had been republished verbatim in an article. 154 Cal. App. 3d at 21. The court rejected the litigant's argument that the protections of California's shield law were inapplicable because portions of the interview were published, noting that the language in Article I, Section 2(b) defines "unpublished information" as including any information "not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated. . . ." Id. The court further held:

> Against the construction we have adopted, defendants contend that petitioner [Playboy] has waived whatever protection it might have under article 1, section 2, by having published information that is either an exact transcription of the . . . source materials or so closely derived therefrom that disclosure of the source materials would essentially be a repeat disclosure of already published statements[.]
>
> It is evident that the published information . . . in the article is either based upon or related to the underlying records of the interview. Accordingly, this material falls squarely within the ambit of article I, section 2 protection whether the published information is an exact transcription of the source material or paraphrases or summarizes it.

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Id. at 23-24.

Thus, California's statutory and constitutional provisions protect Mr. Rowlands from being compelled to disclose any unpublished information about his communications with defendant Peterson, regardless of whether that information was gained in confidence, and regardless of whether related information has been published. Under the shield law, the State cannot require Mr. Rowlands to discuss his newsgathering activities, his underlying communications with defendant Peterson, or any other source material or records in his possession. To the extent the Subpoena is designed to elicit such testimony, it is improper and must be quashed.

B. California Courts Strictly Construe What Information Is Deemed To Be "Published" For Purposes Of The Shield Law.

To the extent that the State suggests that the Subpoena seeks only Mr. Rowlands' testimony about *published* information, its demand is still problematic. Even where information is published, a reporter is shielded from divulging how the news was obtained, from whom it was received, and by whom it was collected, in addition to further unpublished details about the underlying stories. The broadly drafted Subpoena issued to Mr. Rowlands exposes him to inquiry that could only serve to elicit this kind of protected information.

As a preliminary matter, Mr. Rowlands' testimony is not needed to "authenticate" the videotapes of any actual KTVU broadcasts – such testimony would be unnecessary and superfluous. Videotapes are self-authenticating under California Evidence Code Section 1553. See Cal. Evid. Code. § 1553 ("A printed representation of images stored on a video or digital medium is presumed to be an accurate representation of the images it purports to represent."). Furthermore, KTVU has already provided a sworn declaration from its Custodian of Records authenticating videotape of the actual KTVU broadcasts relating to this matter. See Won. Decl. at ¶ 8 & Exhs. D & E.

More fundamentally, any testimony by Mr. Rowlands on even this limited issue would necessarily force Mr. Rowlands to reveal how he obtained the information, from whom he obtained it, and what was said. Even assuming *arguendo* that Mr. Rowlands quoted from Mr.

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Peterson in a broadcast news report, the fact that Mr. Rowlands quotes from any source does not vitiate the shield law protection. California courts have long recognized that a journalist does not lose his or her shield law immunity against being compelled to disclose how information came into the journalist's possession merely by quoting or reporting statements attributed to others.

For example, in In re Jack Howard, 136 Cal. App. 2d 816, 818-19 (1955), the Court of Appeal held that the publication of a news article containing attributed quotations did not deprive the author of his right to decline to answer whether he ever had a conversation with the purported source. "[I]n the absence of any showing other than the published news story," the court reasoned, the reporter had not disclosed the source of the published information. Id. at 819. As the court explained:

> It cannot be assumed from the use of quotation marks that the statement attributed to [the source] was made directly to the petitioner. As [petitioner] notes, his information could have been secured in many ways; that is, . . . he might have learned of [the source's statements] from another person; he might have received his information from a printed press release; he might have listened to a recording of the speech; or a story might have been telephoned to his newspaper and rewritten by someone else under his byline.

Id.

In short, the article in Howard did not disclose anything other than the mere fact that the quoted statements appeared within the four corners of the article. Accordingly, the reporter could not be compelled to answer questions about the context of those statements, including how the statements came to be reported in the reporter's newspaper. See also Delaney, 50 Cal. 3d at 797 ("the shield law's definition of 'unpublished information' includes a newsperson's unpublished, nonconfidential eyewitness observations of an occurrence in a public place"); Miller, 21 Cal. 4th at 897 ("the shield law applies to unpublished information whether confidential or not").

Similarly, even requiring Mr. Rowlands to testify about reports broadcast on KTVU would only serve to subject him to improper questions about the context of his reports. As Howard and Delaney teach, even if portions of a conversation between Mr. Rowlands and Mr. Peterson were broadcast, the rest of that conversation and the context surrounding it cannot be subject to any probing from the State without running afoul of the shield law. Indeed, other than

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identifying his own name, occupation and address, it is hard to imagine what information Mr. Rowlands could provide that would fall outside the ambit of the shield law. Because the practical result of compelling the testimony of Mr. Rowlands would be to extract protected information, the subpoena must be quashed.

C. The Shield Law Provides Absolute Immunity That Cannot Be Abrogated By The State's Desire To Collect Evidence.

In subpoenaing Mr. Rowlands, the State appears to believ his testimony is necessary for its criminal prosecution of Mr. Peterson. However, the California Supreme Court has held that the State's interest in obtaining evidence for a criminal prosecution is trumped by the constitutional protections afforded to members of the press. "[T]he absoluteness of the immunity embodied in the shield law only yields to a conflicting federal or, perhaps, state constitutional right." Miller, 21 Cal. 4th at 901. No such conflicting rights are implicated, much less outweighed, by a prosecutor's need for evidence. See id. Thus, without any grounds for overcoming the shield law, the State is prevented from compelling Mr. Rowlands to testify at the criminal trial.

Moreover, to the extent the State is contending it is entitled to this information pursuant to a constitutional right to due process, that argument has been disposed of in Miller v. Superior Court, 21 Cal. 4th at 901. There, a state district attorney sought to enforce a subpoena duces tecum against a television station demanding production of a tape recording of an entire interview conducted by the station with a criminal defendant, including portions of the interview which had not been aired or otherwise published. See id. at 888. The appellate court had upheld the trial court's contempt order by balancing the people's state constitutional right to due process of law against the shield law. See id. The Miller Court found that this balancing of interests was inappropriate, because due process was in no way denied by the shield law:

> [T]here is no need to balance the two rights if they are not in conflict. In Menendez we concluded that whatever the people's right to due process of law in article I, section 29 might mean...it specifically does not mean a right of access to evidence in contravention of previously existing evidentiary privileges and immunities, which include those given to the press. Therefore, there is no conflict between the shield law and the subsequently

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enacted people's right to due process of law, and accordingly, no need to engage in the balancing of interests prescribed by Delaney.

Id. at 895 (citations omitted). Simply put, "[t]he fact that the assertion of this immunity might lead to the inability of the prosecution to gain access to all the evidence it desires does not mean that a prosecutor's right to due process is violated, any more than the assertion of established evidentiary privileges against the prosecution would be a violation." Id. at 898.

Thus, the rule stated in Miller demands that the State's desire to investigate and prosecute crimes yield to Mr. Rowlands' immunity as a news reporter from compulsion to testify before a criminal jury. Because there are no countervailing federal or state constitutional rights at stake, the California shield law operates to protect Mr. Rowlands absolutely from testifying. This is particularly the case where, as here, the State has issued a broadly drafted Subpoena, has refused to narrow the scope of the Subpoena in any way, and has already indicated that it plans to seek testimony from Mr. Rowlands regarding his newsgathering activities. Such activities – including any conversations with defendant Peterson – are protected by the shield law. The State's desire to compel Mr. Rowlands' testimony is an impermissible encroachment on the freedom of the press.[2] The Subpoena must be quashed.

D. The Subpoena Also Must Be Quashed Under The Federal Reporter's Privilege Embodied In The First Amendment.

The First Amendment provides an additional and independent ground for quashing the Subpoena. The qualified First Amendment reporters' privilege, recognized by both federal and

[2] In fact, it is just such intolerable encroachments on the freedom of the press that article I, section 2(b) of the California state constitution was intended to prevent. As the California Supreme Court explained in Miller, "the current version of the shield law was adopted 'apparently in response to [the United States Supreme Court case of] Branzburg,' and, following Branzburg's dictum, expanded the scope of the newsperson's protection from [compelled] disclosure beyond what the First Amendment provides." Id. at 899. In Branzburg v. Hayes, 408 U.S. 665 (1972), the United States Supreme Court had placed limits on the qualified First Amendment protection for reporters, but invited individual states to enact greater protections under their own constitutions than are recognized at the federal level. In acknowledging that the purpose of article I, section 2(b) of the California constitution and California Evidence Code section 1070 was to create the protections for the media that Branzburg rejected, California's highest court recognized that the manifest intent of the citizens of California in enacting the shield law was to preserve the freedom of the press from the infringements the State seeks to impose here.

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California courts, provides journalists with protection independent of California's shield law. Over the last 30 years, federal courts and California state courts consistently have recognized that the First Amendment creates a privilege for information that journalists acquire or generate in the course of newsgathering. See, e.g., Shoen v. Shoen, 5 F.3d 1289, 1292 (9th Cir. 1993); Mitchell v. Superior Court, 37 Cal. 3d 268, 274 (1984). The privilege applies in state courts, see Mitchell, 37 Cal. 3d at 274, and it applies to journalists' communications with sources, such as Mr. Rowlands' communications with defendant Peterson. Shoen, 5 F.3d at 1291.

The United States Supreme Court laid the foundation for the federal qualified reporter's privilege in Branzburg v. Hayes, 408 U.S. at 681, when it noted that "without some protection for seeking out the news, freedom of the press could be eviscerated." Since Branzburg, federal circuit courts, including the Ninth Circuit, have found that a qualified First Amendment privilege protects unpublished information that journalists acquire in the course of newsgathering. See, e.g., Farr v. Pitchess, 522 F.2d 464, 467-68 (9th Cir. 1975); Shoen, 5 F.3d at 1293; United States v. La Rouche Campaign, 841 F.2d 1176, 1182 (1st Cir. 1988); von Bulow v. von Bulow, 811 F.2d 136, 144 (2d Cir. 1987); United States v. Cuthbertson, 630 F.2d 139, 147 (3d Cir. 1980). The Ninth Circuit explained the significant public interest furthered by this privilege:

> Rooted in the First Amendment, the privilege is a recognition that society's interest in protecting the integrity of the newsgathering process, and in ensuring the free flow of information to the public, is an interest "of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice."

Shoen, 5 F.3d at 1292 (citation omitted).

The California Supreme Court has also expressly recognized the qualified journalists' privilege arising from the First Amendment. In Mitchell, 37 Cal. 3d at 274, the Court held that the First Amendment provides journalists with protection independent of California's shield law. The Court explained that important policies support the existence of the reporter's privilege:

> The First Amendment . . . guarantees a free press primarily because of the important role it can play as a vital source of public information. . . . Without an unfettered press, citizens would be far less able to make informed political, social and economic choices. But the press' function as a vital source of information is weakened whenever the ability of journalists to gather news is impaired.

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Id. at 274-75 (citations, internal quotes omitted). The Court held that under the First Amendment, the competing interests in disclosure and non-disclosure must be balanced. See id. at 276. "Thus, the courts conclude, there is neither an absolute duty to disclose nor an absolute privilege to withhold, but instead a qualified privilege against compelled disclosure which depends on the facts of each particular case." Id. (citations omitted) (emphasis added). The Court emphasized that the federal reporter's privilege must be given effect as an independent source of rights for journalists, separate and apart from those protections accorded by state law. See id. at 279.

Here, the State cannot make a sufficient showing to overcome Mr. Rowlands' First Amendment interest in not disclosing the unpublished information that he acquired or generated in the course of newsgathering. This is particularly the case where the District Attorney has provided no explanation for subpoenaing Mr. Rowlands beyond vaguely stating that it relates to a news report concerning defendant Peterson's alleged affair with Amber Frey. As noted above, Mr. Rowlands' testimony is not needed for authentication of any tape of an actual KTVU broadcast. Furthermore, to the extent that the State is seeking testimony from Mr. Rowlands for the purpose of proving that defendant Peterson denied having an affair, such testimony is impeachment material at best, and could easily be obtained instead from non-media witnesses such as Amber Frey or Laci Peterson's family or friends, thereby ensuring that important First Amendment protections for reporters are not disturbed.

IV. CONCLUSION

As set forth above, the California shield law provides absolute protection for news reporters. Non-party reporter Ted Rowlands, therefore, respectfully requests that this Court quash the subpoena ordering him to appear as a witness in the above-captioned criminal trial.

DATED: February 11, 2004

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