SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

JOHNNY HINCAPIE,

Defendant.

Affidavit No. 10641/90

MEMORANDUM OF LAW IN SUPPORT OF NON-PARTY WILLIAM HUGHES' MOTION TO QUASH SUBPOENA DUCES TECUM

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Non-party William Hughes ("Hughes"), by and through his undersigned counsel, respectfully submits this Memorandum of Law in support of his motion to quash the December 16, 2014 subpoena duces tecum served on him by the New York County District Attorney's Office (the "Subpoena"), pursuant to Section 2304 of the New York Civil Practice Law and Rules ("CPLR"). The facts necessary for the determination of this motion are set forth in the accompanying affidavit of William Hughes (the "Hughes Aff."), sworn to the 12th of January, 2015, and the exhibits thereto, and the attorney affirmation of Michael D. Steger (the "Steger Aff."), sworn to the 13th of January, 2015, and the exhibit thereto.

INTRODUCTION

The stunningly broad Subpoena issued to Hughes by the New York County District Attorney's Office (the "D.A.") demands the production of virtually *all* of Hughes' journalistic work product relating to his ongoing reporting on the conviction of Johnny Hincapie ("Hincapie"). Because the D.A. cannot overcome the robust protections afforded to journalists like Hughes by the New York Shield Law, N.Y. Civil Rights Law Section 79-h (the "Shield Law"), the Subpoena must be quashed.

The Subpoena calls on Hughes to produce both confidential and nonconfidential material he gathered in connection with his investigative reporting on Hincapie's case. Such material falls squarely within the scope of the Shield Law, which provides absolute protection for confidential newsgathering materials, including the identities of sources of confidential information, and qualified protection for nonconfidential newsgathering materials. Certain documents sought by the Subpoena, including Hughes' notes of interviews with sources that provided information to him on a confidential basis, are entitled to absolute protection under the statute, and the D.A. cannot compel their production. N.Y. Civ. Rights Law § 79-h(b).

The remainder of the documents sought by the Subpoena are entitled to qualified protection under the statute that, as set forth in more detail herein, can be overcome only in extraordinary circumstances clearly not present here. N.Y. Civ. Rights Law § 79-h(c). Under the Shield Law, a court is required to quash a subpoena seeking nonconfidential, unpublished newsgathering material unless the party seeking disclosure can make a "clear and specific" showing that the information sought is (1) highly material and relevant; (2) critical or necessary to the maintenance of a party's claim, defense, or proof of an issue material thereto; and (3) not obtainable from any alternative source. N.Y. Civ. Rights Law § 79-h(c). If any one of these prongs is not satisfied, the subpoena must be quashed. Here, the D.A. cannot satisfy one—let alone all three—of these requirements.

The D.A. has not made, and could not make, the requisite showing that the broad swath of documents it seeks are highly material and relevant, and it is not enough for it to merely speculate that they may turn out to be so. And the documents sought are clearly not critical or necessary to the D.A.'s case. Indeed, the Subpoena was only issued in December of 2014, mere weeks before the hearing on Hincapie's motion to vacate his conviction was scheduled to begin, a clear indication that not even the D.A. believes its opposition to that motion will rise or fall on the basis of newsgathering material in Hughes' possession. Finally, there is no question that the information sought by the Subpoena can be obtained from alternative sources. The Subpoena requests Hughes' work product relating to interviews he conducted with a number of different individuals, including Hincapie, his attorneys, and others. The D.A. can seek whatever non-privileged information it wishes from those whom Hughes has interviewed instead of Hughes himself, and should be required to do so; New York law is clear that the work product of a journalist should be the source of last resort.

For the reasons set forth herein, Hughes respectfully requests that the Court quash the Subpoena issued to him, and grant any further relief the Court deems just and proper.

FACTUAL BACKGROUND

As set forth in additional detail in his affidavit filed in support of this motion, William Hughes has been a professional journalist for more than fifteen years. Hughes Aff., ¶ 1. Hughes first met Hincapie in 2006 while a crime reporter for *The Journal News*. *Id.* at ¶ 7. In the summer of 2007, Hughes began an extensive investigation into Hincapie's claim that he had been wrongfully convicted, conducting interviews with Hincapie and a number of other individuals. *Id.* at ¶¶ 7–8. Hughes wrote an article on Hincapie's case that was published in November 2010 in CityLimits Magazine, a digital investigative news magazine. *Id.* at ¶ 12. He is currently working on a book and a documentary project about Hincapie's case and the larger systemwide issue of criminal convictions of innocent defendants. *Id.* at ¶ 15. As Hughes' Affidavit makes clear, he is not an advocacy journalist; his research into Hincapie's case has, from the outset been, and continues to be, centered on getting at the truth, and reporting it to the public. *Id.* at ¶ 10.

ARGUMENT

A. The Shield Law provides an absolute privilege against the disclosure of confidential newsgathering materials and a qualified privilege against the disclosure of non-confidential information that is overcome only in narrow circumstances.

New York has long recognized the necessity of broad protection for free speech and an unfettered press, and those priorities are reflected in the Shield Law, which was originally enacted in 1970, the State's constitution, and myriad court decisions. New York courts play a critical role in upholding these values:

> The expansive language of our State constitutional guarantee, its formulation and adoption prior to the Supreme Court's application of the First Amendment to the States,

> the recognition in very early New York history of a constitutionally guaranteed liberty of the press, and the consistent tradition in this State of providing the broadest possible protection to the sensitive role of gathering and disseminating news of public events all call for particular vigilance by the courts of this State in safeguarding the free press against undue influence.

O'Neill v. Oakgrove Const., Inc., 71 N.Y.2d 521, 528-9, 528 N.Y.S.2d 1, 4–5 (1988) (internal citations omitted).

The absolute privilege against forced disclosure of confidential newsgathering material, first recognized in *In re Beach v. Shanley*, 62 N.Y.2d 241, 476 N.Y.S.2d 765 (1984), was later codified in the Shield Law at § 79-h(b). The provision shields professional journalists from being held in contempt for refusing to disclose "news obtained or received in confidence or the identity of the source of such news coming into such person's possession in the course of gathering or obtaining news for publication...." N.Y. Civ. Rights Law § 79-h(b). The absolute privilege is just that—absolute; it cannot be overcome in any circumstances.

The qualified privilege against forced disclosure of nonconfidential unpublished newsgathering materials was first recognized in *O'Neill* and was subsequently codified in the Shield Law at § 79-h(c). *See O'Neill*, 71 N.Y.2d at 527. Pursuant to that provision, professional journalists cannot be held in contempt for refusing to disclose such information "unless the party seeking such news has made a clear and specific showing that the news: (i) is highly material and relevant; (ii) is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto; and (iii) is not obtainable from any alternative source." N.Y. Civ. Rights Law § 79-h(c). By requiring subpoenaing parties to satisfy this stringent test, the legislature ensured that forced disclosure may only be turned to as a last resort, and only in extraordinary circumstances. *See, e.g., In re Grand Jury Subpoenas Serve on Nat'l Broad. Co.*, 178 Misc. 2d 1052, 1055 (Sup. Ct. N.Y. Cnty. 1998). Both the absolute and qualified privileges are available

to professional journalists in both civil and criminal proceedings. N.Y. Civ. Rights Law § 79-h(b)–(c).

The importance of protecting journalists from such compelled disclosures is clear. As the court stated in *O'Neill*, the "autonomy of the press would be jeopardized if resort to its resource materials, by litigants seeking to utilize the newsgathering efforts of journalists for their private purposes, were routinely permitted." *O'Neill*, 71 N.Y.2d at 526, 528 N.Y.S.2d at 3 (citation omitted). And, as the drafters of the Shield Law recognized, that threat to press freedom looms particularly large in criminal cases. Thus, the Shield Law was enacted to remove the "problematic incursions into the integrity of the editorial process" that occur "when [journalists] are drawn into the criminal justice system merely because they have reported on a crime." *In re Grand Jury Subpoenas*, 178 Misc. 2d at 1055 (internal citations omitted). It was designed specifically to eliminate "the risk of [journalists] being used as investigative agents of the government or the defense" in criminal cases. *Id.*

Other threats posed by the use of subpoenas to compel journalists to reveal source information or to produce their work product include the chilling effect on reporters' communications with their sources, the heavy cost of subpoena compliance, and deterring journalists from investigating important matters of public concern. *See, e.g.*, *Gonzales v. National Broadcasting Co., Inc.*, 194 F.3d 29, 35 (2d Cir. 1999), *aff'd*, 175 F.R.D. 57 (2d Cir. 1999) (recognizing that exposing newsroom files to litigant scrutiny increases the risk that "potential sources [will be] deterred from speaking to the press, or insist[] on remaining anonymous"); *O'Neill*, 71 N.Y.2d at 526-27, 528 N.Y.S.2d at 3 (noting that "because journalists typically gather information about accidents, crimes, and other matters of special interest that often give rise to litigation, attempts to obtain evidence [from the press] would be widespread if

not restricted on a routine basis"); *In re Consumer Union of U.S., Inc.*, 495 F. Supp. 582, 586 (S.D.N.Y.1980) (finding that compelled disclosure of a magazine's unpublished information would inhibit its "coverage of provocative issues important to the public"). The strong protections afforded journalists by the Shield Law are vital to safeguarding against these threats, and to ensuring that journalists will remain free to gather and report news to the public.

B. The Shield Law is applicable here.

The Shield Law affords protection to both professional journalists and newscasters. For purposes of the Shield Law, a "professional journalist" is defined as

> one who, for gain or livelihood, is engaged in gathering, preparing, collecting, writing, editing, filming, taping or photographing of news intended for a newspaper, magazine, news agency, press association or wire service or other professional medium which has as one of its regular functions the processing and researching of news intended for dissemination to the public; such person shall be someone performing said function either as a regular employee or as one otherwise professionally affiliated for gain or livelihood with such medium of communication.

N.Y. Civ. Rights Law § 79-h(a)(6).

Hughes unquestionably meets this definition. He is an award-winning investigative reporter who has worked as a journalist for the past more than fifteen years. Hughes Aff., ¶¶ 1, 6. He worked full-time as an investigative reporter from 1998 to 2007, and since then has continued to work as a freelance investigative reporter while also teaching journalism courses as an Associate Professor at York College. *Id.* at ¶¶ 3, 4. Hughes began researching Hincapie's story while a full-time crime reporter for, and employee of, *The Journal News*, and has continued to work on it as a freelance journalist since then. *Id.* at ¶ 7. Hughes' article on the Hincapie case—"The Murder that Changed New York City: Johnny Hincapie has done 20 years for his role in an infamous killing. Was he even there?"—was published in CityLimits Magazine in

November, 2010.[1] *Id.* at ¶ 12. Hughes is currently working on a book and a documentary film project concerning the Hincapie case, and the broader issue of wrongful convictions in the criminal justice system. *Id.* at ¶ 17. Courts have consistently held that journalists with similar— and far lesser— qualifications than Hughes are professional journalists for purposes of the Shield Law. *See, e.g., Torah Soft Ltd. v. Drosnin*, 2001 U.S. Dist. LEXIS 18614 (S.D.N.Y. Nov. 14, 2001) (holding that a former newspaper reporter who was sued over the content of a book he published was well within the parameters of a "professional journalist" under the Shield Law).

Whether Hughes' reporting on the Hincapie case was done as a freelancer or an employee of a newspaper or magazine is of no moment. A freelance journalist qualifies for the protection of the Shield Law as "one otherwise professionally affiliated for gain or livelihood with such medium of communication." N.Y. Civ. Rights Law § 79-h(a)(6). Because CityLimits compensated Hughes for his article, just as he is compensated for his other work as a professional, freelance journalist, there is no question that he reported on Hincapie's case for his "gain or livelihood." The Shield Law also protects Hughes as a book author. A book publishing company is a "professional medium which has as one of its regular functions the processing and researching of news intended for dissemination to the public." N.Y. Civ. Rights Law § 79-h(a)(6).[2] Finally, the Shield Law protects Hughes as a documentary filmmaker. The definition of "professional journalist" is one who gathers, prepares, collects, films, and tapes news for dissemination, and a documentary film production company, like a book publishing company,

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[1] *Id.*, Ex. A. CityLimits Magazine is an online investigative news magazine that provides in-depth reporting and analysis of stories and issues impacting communities within New York City. *Id.* at ¶ 13; *see also* www.citylimits.org.

[2] Indeed, this catchall provision at the end of the definition of "professional journalist" was added to the Shield Law in 1981 specifically to respond to the case *People v. LeGrand*, 67 A.D.2d 446, 415 N.Y.S.2d 252 (1979), which held that an author working on a nonfiction book on an organized crime family did not qualify for the law's protection because he was not a newscaster or a newspaper or magazine writer. *See Trump v. O'Brien*, 403 N.J. Super. 281, 958 A.2d 85 (Super. Ct. App. Div. 2008) (holding that the author of a nonfiction book focused on matters of public interest was entitled to the protection under the Shield Law).

qualifies as a "professional medium which has as one of its regular functions the processing and researching of news intended for dissemination to the public." Indeed, courts have had no trouble concluding that documentary filmmakers are professional journalists. *See, e.g., In re McCray*, 928 F. Supp. 2d 748 (S.D.N.Y. 2013) (holding that Ken Burns and other filmmakers of the "Central Park Five" documentary were professional journalists and entitled to protection under the Shield Law).

C. The Shield Law's absolute privilege covers Hughes' confidential newsgathering information

As set forth in his Affidavit, while researching Hincapie's story for the CityLimits article and his current book and documentary project, Hughes received some information from individuals with whom he spoke on a confidential or "off the record" basis, with the understanding that the information would not be attributed to them and that Hughes would not reveal them to be the source of that information. Hughes Aff. ¶ 18. Certain of those confidential communications are reflected in Hughes' notes and audio recordings of interviews and thus fall within the scope of the material sought by the Subpoena. *Id.*

Under the Shield Law, a journalist cannot be held in contempt for refusing to disclose "any news obtained or received in confidence or the identity of the source of any such news." N.Y. Civ. Rights Law 79-h(b). New York courts have consistently upheld this absolute privilege against the disclosure of confidential information. *See, e.g., Flynn v. NYP Holdings, Inc.*, 235 A.D.2d 907, 652 N.Y.S.2d 833 (3d Dep't 1997) (reporters have unqualified protection from having to divulge confidential information). Those newsgathering materials that reflect information obtained by Hughes on a confidential or "off the record" basis—including notes and/or audio recordings of certain interviews—are, accordingly, absolutely privileged from disclosure.

D. The D.A. cannot satisfy any of the requirements necessary to overcome the Shield Law's qualified privilege.

The protection afforded professional journalists by the Shield Law also prohibits them from being held in contempt for refusing to disclose nonconfidential, unpublished information unless the party seeking it has made a "clear and specific showing" that it: "(i) is highly material and relevant; (ii) is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto; and (iii) is not obtainable from any alternative source." N.Y. Civ. Rights Law § 79-h(c). The D.A. cannot satisfy any, much less all, of these three requirements.

a. The D.A. cannot demonstrate that the information sought is "highly material and relevant."

Far from being targeted toward obtaining "highly material and relevant" information, the Subpoena at issue is excessively broad and, at best, represents nothing more than an eleventh hour fishing expedition by the D.A. The Subpoena seeks five pages of categories of documents and materials, including all of Hughes' notes and other documents reflecting any conversations he had with nine different people that relate in virtually any way to Hincapie's case or his conviction, as well as other material Hughes obtained through the newsgathering process. *See* Steger Aff., Exh. A. The sheer breadth of the Subpoena alone belies any claim that the newsgathering material it seeks is "highly material and relevant" to the D.A.'s case. And the D.A. cannot satisfy its burden by speculating about what might be in Hughes' possession. *See In re Subpoena Duces Tecum to Ayala*, 162 Misc. 2d 108, 114 (Sup. Ct. Queens Cnty. 1994) ("Mere speculation without demonstrative factual corroboration is legally insufficient to impinge upon the First Amendment safeguards embodied within Civil Rights Law § 79-h."). Because the D.A. cannot show—clearly and specifically—that the materials it seeks are both "highly material and relevant," the Subpoena must be quashed.

b. The Subpoena seeks information that is not "critical or necessary."

Nor can the D.A. make the requisite clear and specific showing that the information it seeks is "critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto." To be clear, "critical or necessary" does not merely mean "helpful"; the D.A. must demonstrate, with specificity, that its case "virtually rises or falls with the admission or exclusion of the proffered evidence." *In re Nat'l Broad. Co.*, 79 F.3d 346, 351 (2d Cir. 1996). And it is plain that requirement cannot be met here.

The timing of the Subpoena *alone* demonstrates how little importance the D.A. itself ascribes to the newsgathering material it now seeks from Hughes. Hughes was served with the subpoena on December 16, 2014 – more than four years after he wrote the article but mere weeks before the hearing on Hincapie's motion to vacate his conviction was originally scheduled to commence. Were his newsgathering materials truly essential to the D.A.'s opposition of Hincapie's motion, which was been pending for more than a year, the D.A. would have issued a subpoena to Hughes much earlier. Any superficial help Hughes' work product may conceivably be able to provide the D.A.'s case at this late stage falls far short of the "critical or necessary" showing that must be made in order to overcome the protection afforded by the Shield Law.

Again, mere speculation is not enough to satisfy this requirement, nor is a vague desire for materials that might conceivably enhance or bolster the D.A.'s case. *See, e.g.*, *Brown & Williamson Tobacco Corp. v. Wigand*, 228 A.D.2d 187, 643 N.Y.S.2d 92 (App. Div. 1996) (requesting party's contention that it needed further documents to establish the full measure of damages was too vague to meet the "critical or necessary" standard). Whatever the D.A.'s rationale for issuing an exceedingly broad, eleventh hour Subpoena to Hughes, it cannot

demonstrate clearly and specifically that its case would rise or fall based on Hughes' newsgathering materials. For that reason too, the Subpoena must be quashed.

c. The District Attorney cannot demonstrate that the information sought is unavailable from an alternative source.

Finally, the Subpoena must also be quashed because the D.A. cannot show that the information it seeks from Hughes is unavailable from an alternative source. Indeed, it does not appear that the D.A. has made any effort, whatsoever, to even attempt to obtain that information from an alternative source. Just because Hughes' interview notes and other work product may be a convenient way for the D.A. to obtain information about statements made by the nine individuals identified in the Subpoena, does not justify its attempt to use Hughes as an "investigative agent[] of the government." *In re Grand Jury Subpoenas*, 178 Misc. 2d at 1055 (internal citations omitted). The D.A. is required to exhaust alternative methods of obtaining the information it seeks, which it has failed to do. *See, e.g.*, *In re Application of CBS*, 232 A.D.2d 291 (1st Dept. 1996); *Matter of Gibson v. Coburn*, 106 A.D.3d 424 (App. Div. 2013).

The option of first resort should be for the D.A. to obtain the information it seeks from the nine individuals identified in the Subpoena, whether through depositions, or by calling them as witnesses at the upcoming hearing on Hincapie's motion to vacate his conviction. Indeed, New York courts have repeatedly held that the failure to depose alternate sources of the requested information must result in the quashing of the subpoena. *See, e.g.*, *In re Forbes Magazine*, 494 F. Supp. 780, 781 (S.D.N.Y. 1980) (only deposing one executive with knowledge of the information and no others was an insufficient showing of the exhaustion of alternate sources). Because the D.A. cannot show clearly and specifically that the information it seeks from Hughes is not available from another source, the Court must quash the Subpoena.

CONCLUSION

The Shield Law provides Hughes, a professional journalist, with an absolute privilege against the disclosure of his confidential source material, and the D.A. simply cannot overcome the qualified protection afforded by the Shield Law with respect to his nonconfidential, unpublished newsgathering material. Accordingly, and for all the foregoing reasons, Hughes respectfully requests that the Subpoena issued to him by the D.A. be quashed.

Dated: January 13, 2015

Respectfully submitted,

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