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

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

STEGER KRANE LLP
Michael D. Steger
1601 Broadway, 12th Floor
New York, N.Y. 10019
212.736.6800
Counsel of Record for Non-Party William Hughes

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
Katie Townsend
Kimberly Chow
1156 15th St. NW, Suite 1250
Washington, D.C. 20005
202.895.9300
Of Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Non-party William Hughes ("Hughes"), by and through his undersigned counsel, hereby submits this Reply in Support of his Motion to Quash Subpoena Duces Tecum (the "Motion").

INTRODUCTION

The Opposition filed by the New York County District Attorney's Office (the "D.A.") only underscores why the subpoena duces tecum it issued to Hughes on December 16, 2014 (the "Subpoena") should be quashed in its entirety pursuant to the New York Shield Law, N.Y. Civ. Rights Law § 79-h (the "Shield Law"). First, the D.A.'s unfounded attacks on Hughes' journalistic independence are immaterial and unavailing. The Second Circuit "independence" standard that the D.A. urges this Court to adopt is wholly inapplicable here and, even if it did apply, it would clearly be met. The record makes clear that Hughes is an independent, professional journalist, and that he is entitled to the Shield Law's protection.[1] The D.A.'s arguments and baseless aspersions to the contrary should be disregarded.

Second, nothing in the Opposition refutes the showing made by Hughes that the broad Subpoena issued by the D.A. seeks both confidential and nonconfidential newsgathering material protected by the Shield Law. As detailed in both the Motion and Hughes' supporting testimony, the Subpoena seeks, among other things, notes and recordings of off-the-record, confidential discussions with sources that are absolutely privileged. Moreover, with respect to the nonconfidential newsgathering material sought by the Subpoena, the Opposition makes clear that the Subpoena was issued because the D.A. thought it would be the most convenient way to

[1] In addition to the January 12, 2015 affidavit of William Hughes filed with the Motion (the "Hughes Aff."), Hughes submits, concurrently herewith, a supplemental affidavit ("Hughes Supp. Aff."), sworn to the 2nd of February, 2015, to correct specific misstatements asserted in the D.A.'s Opposition. Should the Court determine that additional evidentiary support is needed to demonstrate, for example, that Hughes was compensated for the freelance news article he wrote about the Hincapie case that was published in CityLimits Magazine, or had entered into a contract with a literary agent in connection with the book he is currently working on about the Hincapie case, Hughes is willing to submit such additional evidence to the Court.

conduct a fishing expedition for potential impeachment evidence that the D.A. speculates – without corroboration -- might exist. This falls woefully short of the stringent standard that the D.A. must meet to overcome the qualified privilege afforded by the Shield Law. Because, as the Opposition highlights, the D.A. is unable to make a "clear and specific" showing that the broad-ranging Subpoena seeks documents and information that are "highly material and relevant," "critical or necessary" to the D.A.'s case, and "not obtainable from any alternative source," the qualified privilege applies. N.Y. Civ. Rights Law § 79-h(c).

For the reasons set forth in the Motion, and herein, the Subpoena should be quashed.

ARGUMENT

A. Hughes is an independent, professional journalist and he is entitled to the protections of the Shield Law.

According to the D.A., the protections afforded journalists by the Shield Law are unavailable to Hughes because he has purportedly "injected himself into the case" in a "partisan" manner, is "working on behalf of" Hincapie, and is "neither independent nor principally interested in news dissemination." Opp. at 2. In support of that argument, the D.A. invokes *Chevron Corp. v. Berlinger*, 629 F.3d 297 (2d Cir. 2011) ("*Berlinger*"). *Id*. The D.A's reliance on that Second Circuit decision, however, is wholly misplaced. Even if the standard applied in *Berlinger* applied to a motion to quash a subpoena pursuant to the Shield Law, which it does not, that standard is satisfied here. The D.A.'s attack on Hughes' journalistic independence is groundless, and contrary to the record before this Court.

Berlinger involved efforts by Chevron to obtain film footage and other material from a filmmaker relating to a documentary-style film he made concerning a pending lawsuit against the oil company for alleged environmental damage in Ecuador. Berlinger, the filmmaker, resisted those efforts, asserting a qualified privilege under the First Amendment. The Second Circuit

found that the qualified privilege afforded by the Constitution was overcome in that case because Berlinger lacked journalistic independence. *Berlinger*, 629 F.3d at 308. Among other things, counsel representing the plaintiffs in the environmental lawsuit against Chevron had solicited Berlinger to produce and craft the film to serve, in essence, as public relations propaganda for the lawsuit. Berlinger was instructed by the plaintiffs' counsel to make the film sympathetic to the plaintiffs' cause, and he removed at least one scene from the film at the request of the plaintiffs' counsel. *See id.* at 302–03. The Second Circuit in *Berlinger* did not evaluate or decide whether the filmmaker was entitled to protection under the New York Shield Law. *See id*. at 306–07.

No New York court has interpreted the Second Circuit's decision in *Berlinger* as creating a new standard for determining whether or not the Shield Law applies—with good reason. *Berlinger* was decided under Second Circuit precedent interpreting the scope of the qualified privilege afforded by the First Amendment against the compelled disclosure of newsgathering material; it did not purport to—and cannot be interpreted to—rewrite New York State's Shield Law to impose additional threshold requirements not envisioned or intended by the Legislature. Indeed, the cases cited by the D.A. for the proposition that case law interpreting the scope of the federal reporter's privilege has "precedential value" for courts interpreting the Shield Law do not hold that such case law may be used to impose new restrictions on the Shield Law's application. To the contrary, those cases cited by the D.A. indicate that the privileges afforded by the First Amendment and the Shield Law may be interpreted compatibly to the extent that to do so would further the profound commitment to a free press underlying each regime, not so that a limitation on the scope of the federal constitutional privilege may be used to interpret the scope of New York's statutory privilege more narrowly. *See In re McCray*, 928 F.Supp.2d 748 (S.D.N.Y. 2013) (stating that while the case was in federal court, the state privilege could be considered as

well because it likewise vigorously promoted First Amendment rights); *O'Neill v. Oakgrove Construction*, 71 N.Y. 2d 521, 527-30 (1988) (recognizing some federal courts' adoption of a privilege but relying on New York's robust statutory protections for the press to establish a qualified privilege for nonconfidential materials). In short, not only is *Berlinger* not binding precedent, it imposes a standard that does not exist in, and is simply inapplicable to, the Shield Law.

Moreover, even assuming, *arguendo*, that this Court should consider *Berlinger*'s "independence" standard in determining the applicability of the Shield Law's protections, Hughes unquestionably meets that standard. Under *Berlinger*, a journalist lacks independence when he is commissioned to serve the objectives of those with a stake in the reporting or when he is subservient to those objectives. *See Berlinger*, 629 F.3d at 308. In applying that standard, the district court's decision in *In re McCray*, 928 F.Supp.2d 748 (S.D.N.Y. 2013) ("*McCray*") is instructive.

McCray involved a civil lawsuit against the City of New York by the men who were wrongfully accused in the infamous Central Park Five rape case. The City issued a subpoena to Florentine Films and the filmmakers Ken Burns, Sarah Burns, and David McMahon for all documents relating to the case, which they gathered while producing a documentary film on the Central Park Five. The district court quashed the subpoena on the basis of both the New York Shield Law and the Second Circuit's interpretation of the qualified reporter's privilege afforded by the First Amendment. *McCray*, 928 F.Supp.2d. at 753–54. In determining whether the filmmakers could avail themselves of the federal constitutional privilege, the district court placed great emphasis on the journalists' editorial and financial independence, which it concluded, under *Berlinger*, demonstrated journalistic independence, even if the journalist's work presented

a certain "point of view," or even if the journalist had been recruited to the project by the subject. *Id*. at 755. The filmmakers in *McCray* had a "longstanding sympathetic relationship" with the plaintiffs, and had made public statements supporting justice for the plaintiffs. The district court concluded, however, that was insufficient to show that they were not journalistically independent. *Id*. As both the *Berlinger* and *McCray* courts recognized, the mere fact that a journalist has a particular perspective or viewpoint on a subject, or even works to help a subject achieve what, in the journalists' view, is justice, does not destroy a journalist's independence. When a journalist may have crossed the line, and lost his or her independence, is when he or she is no longer editorially or financially independent, or when the subject is able to dictate the terms of his or her reporting. None of those circumstances are present here.

The record is clear that Hughes' only objective, from the outset, has been to gather and report the facts about Hincapie's case. Hughes undertook an investigation into Hincapie's claim of innocence as an investigative reporter, first for a newspaper and then as a freelancer. Hughes 2013 Aff. ¶ 2. His reporting is not done for or at the direction of Hincapie or his counsel; he was not solicited to report on Hincapie's case by Hincapie or his counsel; he has never surrendered any aspect of editorial control over his work to Hincapie or his counsel; and he has never received monetary compensation from Hincapie or his counsel. *See id*.; Hughes Supp. Aff. ¶ 6. Nor, as the D.A. concedes, has Hughes provided Hincapie or his counsel with the material sought by the D.A.'s Subpoena.[2] Even in the 2013 affidavit he submitted in this matter, which the D.A. misleadingly attempts to recharacterize as the "Hughes Advocacy Affidavit," Hughes made expressly clear that he is *not* an advocacy journalist, and that his only aim in researching

[2] Opp. at 14. The fact that Hughes has not provided these materials to Hincapie's counsel undercuts the D.A.'s argument that Hughes lacks independence and performed his research only with the goal of supporting Hincapie's case.

Hincapie's story has been to learn and report the truth. *See* Hughes Aff. ¶ 10; Hughes 2013 Aff. ¶ 7. That Hughes, over the course of approximately seven years investigating and reporting on Hincapie's case, developed a "point of view" about Hincapie's innocence that he set forth in his 2013 affidavit, does not, as *McCray* makes clear, demonstrate that he is not independent. *See McCray*, 928 F.Supp.2d. at 755. Indeed, far from resembling the extreme circumstances that the Second Circuit confronted in *Berlinger*—where, among other things, counsel for the plaintiffs showed up at the filmmaker's door to ask him to produce a documentary film for the benefit of his clients, and dictated that at least one unfavorable scene be removed from the film, *see Berlinger*, 629 F.3d at 302–03—nothing in the record before this Court suggests that Hughes is anything but an independent journalist,[3] let alone that he is a purported "partisan, working on behalf of Mr. Hincapie." Opp. at 2.

Finally, the D.A.'s assertion that Hughes is not a professional journalist is belied by the record, and easily overcome. While conceding that Hughes was paid for the freelance article he wrote for CityLimits magazine, which *alone* is sufficient to bring Hughes within the scope of the Shield Law, the D.A. attempts to make much of the suggestion that Hughes does not currently have a contract for the book or documentary film project he is working on about Hincapie's case. Opp. at 4. The D.A. relies on *Von Bulow v. Von Bulow*, 811 F.2d 136 (2d Cir. 1987), for the argument that "[a] person who gathers information for the purpose of aiding a party's court

[3] The D.A. incorrectly claims that Hughes acknowledged in his 2013 affidavit that he sought out Luis Montero ("Montero"), interviewed him, and purportedly "delivered him" to the office of Hincapie's attorney, Ronald Kuby, and that therefore he is in the same position as the filmmaker in *Berlinger*. Opp. at 4. As an initial matter, this argument is based on a misstatement of fact. While Hughes located and interviewed Montero in connection with researching the Hincapie story, he did not "deliver" or otherwise bring Montero to Kuby's law office, and his 2013 affidavit does not state otherwise. *See* Hughes 2013, Aff. ¶ 11. In any event, as set forth herein, even if factually accurate, this would still be a far cry from the showing of a lack of independence that was made in *Berlinger*.

claims is not a professional journalist entitled to protection, even though he may later contract to write a book or make a film using the same information." Opp. at 5.

Von Bulow is inapposite. The author in *Von Bulow* was a close friend of the subject and while she was taking notes at his trial had no demonstrated intent of later getting a book contract. *Von Bulow*, 811 F.2d at 145. Hughes' intent—from his first interview with Hincapie to the present—has always been to inform the public about Hincapie's case. Both as a freelance journalist preparing to publish the 2010 article in CityLimits and, later, as a freelance journalist working on a book and a documentary film, Hughes falls squarely within the Shield Law's definition of professional journalist. N.Y. Civ. Rights Law § 79-h(a)(6) ("one otherwise professionally affiliated for gain or livelihood with such medium of communication"); *see also* Hughes Aff. ¶ 17; Hughes Supp. Aff. ¶ 2. At the time he gathered the information at issue, Hughes had the clear intent to distribute it to the public through these various forms of media. He has had numerous contacts with book publishers about his book project, and also entered into a (now-terminated) contract with a literary agent. Hughes Supp. Aff. ¶ 3. The record is clear that Hughes did not collect the information sought by the Subpoena "for the purpose of aiding [Hincapie's] court claims," as the DA suggests. Opp. at 5. He collected it as part of his regular activities as a freelance, investigative journalist. Any suggestion that Hughes' book, film, and news articles are merely incidental to a campaign on behalf of Hincapie are plainly erroneous and unsupported.

B. The Subpoena seeks confidential newsgathering material.

The D.A.'s assertion that, since Hughes has published the names of his sources, he is unable to assert that any material sought by the Subpoena is confidential, manifests a fundamental misunderstanding of what confidential newsgathering material is. As Hughes has

testified, the notes and recordings of interviews that the D.A. seeks include confidential, off-the-record material from his interviews of various sources. Hughes Aff. ¶ 18 ; Hughes Supp. Aff. ¶ 4. When Hughes spoke with these sources, they requested at times that they be able to speak "off the record," meaning that they would provide Hughes with information that they either did not want attributed to them, or that they wanted Hughes to use only to inform his understanding of the case. When a source asked to go "off the record," Hughes would continue to take notes or record, with the understanding that he would not reveal that the source had provided that information, and would not publish or disclose information told to him on background. Full disclosure of Hughes' notes and recordings of interviews with his sources, as the Subpoena demands, would breach the agreements of confidentiality that Hughes made with his sources. The Shield Law provides an absolute privilege against disclosure of confidential material, which includes "news obtained or received in confidence." N.Y. Civ. Rights Law § 79-h(b). Information that was told to Hughes in confidence, including information that was told to Hughes only on the express condition that it would not be published and/or not attributed to him or her as a source, qualifies as confidential material. Accordingly, the Subpoena clearly seeks Hughes' confidential newsgathering material, and that material is provided absolute protection from disclosure under the Shield Law.[4] As discussed in the Motion, p. 6, the Legislature codified this absolute privilege decades ago.

[4] It would be enormously burdensome for Hughes to separate this confidential newsgathering material from the nonconfidential newsgathering material and work product he has amassed concerning Hincapie's case. Hughes has been researching and reporting on Hincapie's case for the past seven years. Hughes Supp. Aff. ¶ 5. It would take a staggering amount of time for him to go through all of the notes and recordings he has compiled during that time period to redact confidential material. *Id.*

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

As set forth in the Motion, in order to overcome the qualified privilege for nonconfidential material afforded by the Shield Law, the D.A. must make a "clear and specific showing" that the material sought by the Subpoena "(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.'s Opposition makes clear that it is unable to satisfy any of these three requirements.

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

The D.A. contends that Hughes' work product, including interview notes, is "highly material and relevant" and "critical and necessary" to the maintenance of its case because it speculates that Hughes may have material that the D.A. can use for impeachment purposes during the cross-examination of Hincapie and other witnesses. First, such wholesale conjecture on the part of the D.A. is a far cry from a "clear and specific" showing that the Subpoena seeks "highly material and relevant" evidence in Hughes' possession. To the contrary, it underscores the impropriety of the Subpoena at issue. A broad subpoena for the entirety of a journalist's work product issued on the mere speculative hope that it may turn up a relevant piece of evidence for the D.A. is exactly the type of subpoena that the Shield Law was intended to guard against.

Moreover, under the Shield Law, the D.A.'s intent to use Hughes' unpublished newsgathering material for impeachment purposes is insufficient to show that the material is "critical or necessary" to its case. "Ordinarily, impeachment material is *not* critical or necessary to the maintenance or defense of a claim." *In re Nat'l Broad. Co.*, 79 F.3d 346, 352 (2d Cir.

1996) (emphasis added). As one court explained in interpreting the Shield Law, "when the Legislature speaks of unpublished news being critical or necessary to the proof of a claim or defense, *it does not have in mind general and ordinary impeachment material or matters which might arguably bear on the assessment of credibility of witnesses*. To permit that might well result in the piercing of the privilege far more often and with far less basis than the legislative history suggests is appropriate." *In re Subpoena Duces Tecum to Am. Broad. Co.*, 189 Misc. 2d 805, 808 (Sup. Ct. N.Y. Cnty. 2001) (emphasis added).

Further, the Opposition makes clear that much of the material that the D.A. requests would be cumulative evidence, which does not rise to the level of being "critical or necessary." The D.A. cites examples of how assertions made in Hughes' 2010 article purportedly contradict other statements made by Hincapie and other witnesses. Opp. at 11–13. In these instances, the D.A. may question Hincapie and those other witnesses about the statements set forth in the article to impeach them; it does not also need Hughes' notes and other work product. The law is clear that the qualified privilege cannot be overcome by the mere desire to obtain cumulative evidence. *See, e.g.*, *United States v. Burke*, 700 F.2d 70, 78 (2d Cir. 1983), *abrogated by Matter of Subpoena Ad Testificandum to Daily News, L.P.*, 31 Misc. 3d 319 (N.Y. Sup. Ct. Kings Cnty. Jan. 11, 2011).

In sum, at the heart of the "critical or necessary" prong is the requirement that the requesting party clearly and specifically show 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 at 351. The D.A.'s broad ranging Subpoena, served on Hughes practically on the eve of this Court's hearing on Hincapie's claims, cannot satisfy that high standard.

b. The D.A. cannot demonstrate that the information sought is unavailable from an alternative source.

The D.A. argues that the material sought by the Subpoena is unavailable from any alternative source because Hincapie and the other witnesses at issue have either refused to give interviews or, in the D.A.'s estimation, would be unlikely to willingly consent to interviews. Specifically, conceding that it has not even attempted to obtain the information it demands from Hughes from other sources, the D.A. claims that "the co-defendant witnesses are lined-up in support of Mr. Hincapie, and interviewing them is of no avail." Opp. at 15, n.4. The D.A. has numerous tools at its disposal—including, but not limited to, the power to subpoena witnesses—that makes its purported inability to obtain documents and testimony, under oath, from any witness or potential witness, dubious at best. The D.A.'s assumption that it is easier and more convenient to attempt to obtain impeachment material—that may not even exist—from Hughes rather than from other sources does not demonstrate that the information sought by the Subpoena is unavailable from alternative sources.

Moreover, the D.A.'s argument highlights the speculative nature of the D.A's belief that Hughes or anyone else has the impeachment material it is fishing for. The D.A. does not argue that individuals interviewed by Hughes in connection with his reporting are unavailable to the D.A., just that they are, according to the D.A. unlikely to impeach their own testimony, or that of Hincapie. In any case, as set forth above, a mere desire to obtain possible impeachment material is not sufficient to overcome the Shield Law's qualified privilege. The Court should reject the D.A.'s effort to use a journalist's work product as the most convenient means for obtaining material for use in Hincapie's hearing, rather than the option of last resort it is meant to be under the Shield Law.

CONCLUSION

For the foregoing reasons, and those set forth in the Motion, Hughes respectfully requests that the Subpoena be quashed in its entirety.

Dated: February 5, 2015

Respectfully submitted,

STEGER KRANE LLP

By: _____
Michael D. Steger, #4488185
1601 Broadway, 12th Floor
New York, N.Y. 10019
212.736.6800
msteger@skattorney.com
Counsel of Record for Non-Party William Hughes

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
Katie Townsend
Kimberly Chow
1156 15th St. NW, Suite 1250
Washington, D.C. 20005
202.895.9300
Of Counsel

Copies to: Eugene R. Hurley, III, Assistant District Attorney, New York County
Ronald L. Kuby, Attorney for Johnny Hincapie