

FILED
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BY SUSAN L. CARLSON
CLERK

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

No. 98879-0

(On appeal from King County Superior Court SW No. 20-0-616926)

IN RE SUBPOENA DUCES TECUM TO SEATTLE NEWS MEDIA

NEWS MEDIA APPELLANTS' EMERGENCY MOTION FOR STAY

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I. IDENTITY OF MOVANTS

The moving parties are Appellants Seattle Times Co. (“Times”), Sinclair Media of Seattle, LLC (“KOMO-4”), KING Broadcasting Company (“KING-5”), KIRO TV, Inc. (“KIRO-7”), and Fox Television Stations, LLC (“KCPQ-13”) (collectively, “News Media”). The News Media, five of the state’s largest news organizations, are the targets of an extraordinary third-party subpoena *duces tecum*, through which the Seattle Police Department (“SPD”) is demanding production of unpublished and unaired news images to potentially assist in a criminal investigation. This journalistic work product, however, is protected from compelled disclosure by Washington’s reporter shield statute, RCW 5.68.010. The News Media have filed a Notice of Appeal and are seeking direct review of a July 31 order entered by the King County Superior Court, enforcing the subpoena (“Order”).¹

II. RELIEF SOUGHT

Pursuant to RAP 8.1(b)(3) and RAP 8.3, the News Media move for a stay of enforcement of both the Order and the underlying subpoenas, pending resolution of appellate review, to be entered **no later than August 21, 2020**. The trial court temporarily stayed its Order through that

¹ The Notice of Appeal, with the Order attached, is tab A to the paginated Appendix (“App.”) hereto.

date, and directed the News Media to request any further stay from the appellate court. App. 40. Accordingly, the News Media ask that this Court expedite its consideration of this Motion, and enter a stay prior to August 21, 2020, in order “to insure effective and equitable review.” RAP 8.3.²

III. STATEMENT OF THE CASE

A. Decision Below.

The News Media are appealing (and seeking this Court’s direct review of) the Order, which requires them to comply with an unusual subpoenas *duces tecum* (“Subpoena”) pursued by SPD. The Order directs that each of the five News Media entities comply with the Subpoena by producing, with 21 days (*i.e.*, by August 21, 2020):

Unedited or raw video footage/photographs ... for Saturday, 05-30-20, taken from 1530 hrs. to 1700 hrs.: in the area from Olive Street to Pike Street and from 6th Avenue to 4th Avenue as taken by assigned videographers or photojournalists under the News Media Parties employment, agency or control; however, no such video or photographs shot on cell phones need be produced.

App. 38. The Order notes that “[t]he parties have stipulated that this

² Pursuant to RAP 17.4(b), undersigned counsel certifies that SPD’s counsel has been served with this motion, and was aware that the News Media would be seeking a stay by no later than August 21, 2020. As noted above, the need for an appellate stay is addressed in the trial court’s Order. The News Media’s counsel also advised SPD’s counsel of this Motion by email and telephone on August 5, 2020.

Order and enforcement of the Subpoena may be stayed for the longer of (a) 21 days after entry of the Order and the Findings of Fact/Conclusions of Law, or (b) exhaustion of any appellate review.” *Id.* The trial court declined to enter the stipulated stay pending appeal, however. Instead, it directed the News Media “to file the necessary appeal documents, including a request for an order staying this Court’s Order, as expeditiously as possible,” and prior to the August 21 deadline for compliance with the Subpoena. App. 39-40.

Concurrently with this Motion seeking a stay pending final appellate resolution, the News Media have filed a Notice of Appeal with this Court, along with a Statement of Grounds for Direct Review.

B. Matter Background.

This matter arises from an unusual, possibly unprecedented, attempt to compel Washington news publishers and broadcasters to assist a law enforcement agency in its attempt to identify unknown criminal suspects. SPD is seeking individuals suspected of setting fire to and stealing firearms from police vehicles in downtown Seattle on May 30, 2020, during civil unrest that followed a march and demonstrations protesting the death of George Floyd. App. Tab B (Subpoena and Affidavit) at App. 47. Authorities have arrested one theft suspect and one arson suspect. App. 60; App. 14 ¶ 18. SPD has photographs and

descriptions of five other suspects allegedly involved in the theft and arson – all from news publications or other sources available to SPD – but has not publicized those images, or made any public appeal seeking help in identifying the suspects. App. 11-14 ¶¶ 8-18; App. 18 ¶ 33; App. 49-60. Nor has SPD reviewed all available images of the events in question that have been published in news sources and on social media. App. 12 ¶ 12; App. 17 ¶ 30.

In the course of SPD’s partial investigation into these crimes, SPD sought to obtain **unpublished** outtakes and images from the News Media outlets. SPD targeted these five newsrooms simply because they had journalists on the scene, reporting on the events in downtown Seattle as part of their news coverage. In an affidavit seeking to obtain this unpublished news material, an SPD detective asserted there was “probable cause” to believe unpublished news material depicting the five suspects existed because he “watched the civil unrest unfold via local television (in real time while off duty) and noted that the vast majority of coverage by the four affiliates KIRO TV, KING TV, KOMO TV, KCPQ and the Seattle Times (based upon published photographs) were all within” the four-block area noted above. App. 58.

Washington law prohibits search warrants directed to news broadcasters and publishers, with limited exceptions that are not

applicable here. Instead, by statute, evidence sought from a news outlet “shall be secured only through a subpoena duces tecum[.]” RCW 10.79.015(3). That statute was enacted in 1980, as part of a wave of similar laws passed around the country to protect newsrooms from overreaching law enforcement demands. *See* Laws of 1980, ch. 52 § 1; *J.O. v. Bedminster*, 77 A.3d 1242, 1245 (N.J. App. 2013) (discussing background of RCW 10.79.015(3) and other “subpoena-first” statutes). The statute has achieved its intended effect: it has not been cited in any published (or, for that matter, unpublished) Washington appellate decision in its 40 years of existence. Washington’s Criminal Rules likewise specify that – except in narrow circumstances, again not applicable here – a court has no authority to issue a search warrant for evidence from news media, but instead may only “issue a subpoena duces tecum in accordance with CR 45(b).” CrR 2.3(f)(2).

Notwithstanding these prohibitions against newsroom search warrants, and the clear reference to Civil Rule 45 as the required procedure for seeking discovery of news material, SPD pursued this matter as if it were a search warrant proceeding. It presented an affidavit of probable cause, *ex parte*, to a Superior Court judge, who signed it and authorized SPD to serve the Subpoena on the five News Media outlets. App. Tab B. The Superior Court also set a hearing “to consider and rule

upon any objections to permitting” production of the unpublished news footage identified in the Subpoena. App. 43.

SPD served the Subpoenas on June 19 and June 22. App. 7. The News Media submitted objections (App. Tab C) and a supporting declaration (App. Tab D) on June 29, 2020.³ That same day, the Reporters Committee for the Freedom of the Press (“RCFP”) submitted an amicus curiae brief supporting the News Media’s objections, which the court accepted. App. Tab E; App. 7.⁴

The News Media objected to the Subpoena primarily on the ground that it violated their rights under RCW 5.68.010 (“Shield Law”), because SPD had failed to show by “clear and convincing evidence” that the qualified privileged against compelled disclosure of journalistic work product had been overcome in this case. *See* RCW 5.68.010(2). The News Media also objected that the Subpoena was overbroad in scope.

Following a series of hearings between July 16 and July 31, 2020, the trial court generally overruled the News Media’s objections and found

³ Because SPD pursued this matter under a search warrant cause number, the News Media initially were unable to access the docket or to file papers with the Superior Court, and instead emailed their papers directly to Superior Court Judge Nelson Lee per his instructions. The papers subsequently were filed manually with the Superior Court.

⁴ SPD’s responsive brief and the News Media’s reply are appended to this Motion as App. Tabs F and G, respectively.

that SPD had overcome the Shield Law privilege. The court modified the scope of the Subpoena slightly, to exclude images that had already been published and images recorded on reporters' cell phones. It ordered the News Media to produce, within 21 days, the unpublished news material for in camera review and potential production to SPD. App. 7, 38-39.

No further proceedings are set before the Superior Court. The News Media are seeking direct review of Judge Lee's final Order, and a stay of enforcement prior to August 21, 2020.

IV. GROUNDS FOR RELIEF

Under both RAP 8.1(b)(3) and RAP 8.3, this Court has authority to stay the trial court's Order pending final review and resolution of this appeal on the merits. RAP 8.3 authorizes appellate courts to grant orders, "before or after acceptance of review" as needed "to insure effective and equitable review." Under RAP 8.1(b)(3), "the appellate court has authority, before or after acceptance of review to stay enforcement of the trial court decision upon such terms as are just."⁵ Under both rules, the standard is the same: a stay or order preserving review is appropriate

⁵ RAP 8.1(b)(3) applies to "civil cases," other than money judgments or those affecting property. Although this matter did not arise on a civil docket, it arises at least in part under Civil Rule 45, and is the equivalent of an order in a civil case seeking to enforce or quash a third-party subpoena. Accordingly, RAP 8.1(b)(3) authorizes a stay here.

when the movant presents “debatable issues” on appeal, and the order is necessary to preserve the fruits of an appeal, considering the equities. *See* RAP 8.1(b)(3); *Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 759, 958 P.2d 260 (1998) (applying RAP 8.3). “The purpose of [these rules] is to permit appellate courts to grant preliminary relief in aid of their appellate jurisdiction so as to prevent the destruction of the fruits of a successful appeal.” *Cronin v. Cent. Valley Sch. Dist.*, 12 Wn. App. 123, 130, 456 P.3d 857 (2020), quoting *Wash. Fed’n of State Emps. v. State*, 99 Wn.2d 878, 883, 665 P.2d 1337 (1983).

A stay is justified where, as here, an appellant seeks to vindicate its rights under the Shield Law. *See Republic of Kazakhstan v. Does 1-100*, 192 Wn. App. 773, 781, 368 P.3d 524 (2016) (granting emergency stay of trial court order enforcing subpoena, pending appeal by non-party asserting objections under Shield Law). Both elements for a stay are met here.

A. A Stay Is Warranted Because The Issues In This Appeal Are Easily “Debatable.”

The trial court’s Order enforcing the SPD Subpoena presents issues under the Shield Law that are readily “debatable,” and that deserve effective appellate review. As an initial matter, there is no dispute that the Order below implicates interests of the utmost significance, as even the

trial court recognized:

[I]t is exceedingly rare in Washington State that police seek evidence from media companies. This is as it should be. The news media in a constitutional democracy is not and should not be an arm of the government. The preamble to the first ten amendments to our federal Constitution – our Bill of Rights – stated that those amendments were necessary to prevent misconstruction or abuse of the powers granted to the federal government by our Constitution, and the First Amendment enacted ensured freedom of the press.

App. 35 ¶ 23.

The privilege against compelled disclosure of journalists' work product serves to protect those interests. "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 v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993) (*Shoen I*). Compelling the press to produce unpublished news material poses many dangers to journalists' autonomy, including:

- the threat of judicial intrusion into the newsgathering and editorial process;
- the disincentive to compile and preserve unpublished material if that material is subject to disclosure;

- the burden on journalists' time and resources in responding to subpoenas; and
- the perception that the journalist is an investigative arm of the judicial system or a litigant.

Id. at 1294-95; *Miller v. Superior Court of San Joaquin Cnty.*, 21 Cal.4th 883, 886, 986 P.2d 170 (1999) (threat to press autonomy from subpoenas “is particularly clear in light of the press’s unique role in society.”).

Washington courts have long recognized the reporter’s privilege as a matter of common law. *See, e.g., State v. Rinaldo*, 102 Wn.2d 749, 689 P.2d 392 (1984); *Senear v. Daily Journal-American*, 97 Wn.2d 148, 641 P.2d 1180 (1982); *Clampitt v. Thurston Cnty.*, 98 Wn.2d 638, 658 P.2d 641 (1983). In 2007, the Legislature codified the shield privilege as RCW 5.68.010. This Shield Law provides an absolute privilege against disclosure of confidential news sources. RCW 5.68.010(1)(a). In all other situations, the statute provides qualified protection against subpoenas that compel the news media to “produce” or otherwise disclose **any** information obtained in the course of “gathering, receiving, or processing news or information for potential communication to the public.” RCW 5.68.010(1)(b).

To overcome the privilege, a party seeking to compel information arising from newsgathering activities must establish, by “clear and

convincing evidence” that (1) the information is “highly material and relevant;” (2) the information is “critical or necessary to the maintenance of a party’s claim, defense, or proof of an issue material thereto; (3) the party “has exhausted all reasonable and available means to obtain it from alternative sources;” and (4) “[t]here is a compelling public interest in the disclosure.” RCW 5.68.010(2)(b).

The trial court’s determination that SPD satisfied these elements by “clear and convincing evidence” is not merely debatable, but reversible error. The issues justifying a stay in aid of appeal include the following:

First, it is at least debatable that the news material sought by SPD is “highly material and relevant,” or “critical or necessary” to any particular claim or defense. RCW 5.68.010(2)(b)(i), (ii). SPD’s assertion is that the News Media’s unpublished outtakes “may” contain better images of potential suspects than the published images SPD already possesses. *See, e.g.*, App. 100 (SPD response). But as numerous courts have recognized, the journalist’s shield cannot be breached by the mere possibility that a press outlet has relevant evidence. Even at common law, the reporter’s privilege cannot be overcome by an “affidavit broadly speculat[ing], without citing specifics, that information needed for the defense was being held by the newspaper.” *State v. Rinaldo*, 102 Wn.2d 749, 760, 689 P.2d 392 (1984) (Dimmick, J., concurring). “[T]here must

be a **showing of actual relevance**; a showing of potential relevance will not suffice.” *Shoen v. Shoen*, 48 F.3d 412, 416 (9th Cir. 1995) (“*Shoen II*”) (emphasis added); *see also, e.g., Durand v. Massachusetts Dep’t of Health*, 2013 WL 2325168, at *1 (D. Mass. May 28, 2013) (granting motion to quash under journalist’s shield where alleged relevance of information was “based on speculation”); *People v. Novak*, 41 Misc. 3d 749, 755, 971 N.Y.S.2d 853, 857 (2013) (shield statute not overcome where materiality was “speculative”); *In re Subpoena Duces Tecum to Ayala*, 162 Misc. 2d 108, 114, 616 N.Y.S.2d 575, 579 (1994) (contention that news video “‘may’ be [a litigant’s] most reliable version” of events at issue fails to overcome privilege; “Mere speculation without demonstrative factual corroboration is legally insufficient to impinge upon the First Amendment safeguards embodied within” state shield laws).

Indeed, the trial court here expressly acknowledged that “**it is not clear whether** unpublished high-quality footage of these suspects or the disappearance of the firearms **exists at all beyond what had already been published and whether, if they exist, that they will be of greater evidentiary value.**” App. 28 ¶ 14 (emphasis added). The court nevertheless concluded that SPD had made the requisite showing of need because the News Media entities were present and engaged in news reporting at the time of the incidents in question. App. 29 ¶ 16 (finding

that because News Media “had film crews and photographers filming in the area at the time in question,” there is “a reasonable likelihood that News Media video and/or photographs **may** also show” additional information about the suspects) (emphasis added). This contention is not merely debatable, but directly contrary to the core purpose of the Shield Law in assuring the press is free to cover newsworthy events without interference from investigators or other litigants. A journalist doing his or her job is a trigger for **applying** the privilege, not a basis for **overcoming** it. Were it otherwise – if a reporter’s mere presence at a crime scene or civil unrest were sufficient to show heightened relevance and “critical” need under the Shield Law – these elements would be meaningless. The Order’s reasoning invites police to engage in fishing expeditions for unpublished news material even where, as here, the alleged relevance and need are entirely speculative.

Second, the Order’s conclusion that SPD “exhausted all reasonable and available means to obtain [the information] from alternative sources,” RCW 5.68.010(2)(b)(iii), is more than debatable. One obvious reasonable alternative that SPD failed to undertake before demanding unaired and unpublished news materials was to make a public appeal for assistance using the published images already in its possession. *See* App. 18 ¶ 33. For example, SPD could have held a press conference publicizing the

images, issued press releases, or circulated the available images on social media. This Court should take judicial notice of the fact that just four days after the Order was entered in this matter, SPD made precisely such a public appeal for help identifying – and circulated photographs of – several people they believe were involved in a shooting in June near the Capitol Hill protest zone.⁶

A party’s burden to exhaust alternative sources is “very substantial,” and “courts should do their utmost to avoid the need for reporter disclosure, ordering it only as a last resort” and after “the court is absolutely convinced” that the privilege has been overcome. *Clampitt v. Thurston Cnty.*, 98 Wn.2d 638, 643-44, 658 P.2d 641 (1983). The trial

⁶ See ER 201(b), (f) (permitting judicial notice “at any stage of the proceeding” of facts “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”); RCW 5.68.010(4) (permitting judicial notice of “fact of publication of news or information”). SPD published its recent appeal for help identifying suspects, with the available images, on its own website and on its Twitter page. See “SPD Detectives Seek Help Identifying Persons of Interest in CHOP-area Shooting,” *SPD Blotter* (Aug. 4, 2020), available at <https://spdblotter.seattle.gov/2020/08/04/spd-detectives-seek-help-identifying-persons-of-interest-in-chop-area-shooting/>; see also <https://twitter.com/SeattlePD/status/1290781766790180864> (SPD Twitter page). SPD’s public appeal was also reported in news stories. See, e.g., Elise Takahama, “Police ask for public’s help in identifying people possibly involved with CHOP shooting that injured 33-year-old,” *The Seattle Times* (Aug. 4, 2020), available at <https://www.seattletimes.com/seattle-news/crime/police-asking-for-publics-help-in-identifying-people-involved-with-capitol-hill-shooting-that-killed-19-year-old-man/>.

court's failure to hold SPD to its burden to exhaust alternative sources for identification raises a readily debatable issue for appeal.

Third, the trial court's finding that the public interest favors disclosure was erroneous and raises debatable issues for appeal, because it downplays the risk the Subpoena poses to journalists, including in the specific context of covering demonstrations and civil unrest. App. 35-36. Case law recognizes that compelled disclosure, even of non-confidential news material, "harms the press' ability to gather information by converting the press in the public's mind into an investigative arm of prosecutors and the courts," and that even the perception that journalists are "adjunct of the police or of the courts" puts journalists at risk of suspicion or physical harassment when covering public events. *Shoen I*, 5 F.3d at 1295 (citation, internal quotation omitted). The News Media and their amici documented that this risk has in fact been faced by local reporters covering the recent protests in Seattle. *See* App. Tab D (Gawlowksi Decl.); App. Tab E (RCFP amicus brief). For example, news photographers at the May 30 protests told by demonstrators that they did not want their photographs taken because they feared identification or police retaliation. App. 80-81 ¶ 7. Similarly, in covering the "Capitol Hill Occupied Protest," journalists had to explain repeatedly that they are independent from the police, and that journalists do not serve as an

extension of law enforcement. App. 81 ¶ 8. These assurances were instrumental in enabling journalists to gain trust with protesters so that they could safely and accurately report news from the protest zone, in order to inform the public. *Id.*

The trial court's Order acknowledged these issues, but dismissed the notion that enforcing the Subpoena would aggravate the already existing dangers that journalists face. App. 36 ¶ 26. Instead, the court found that the possibility that unpublished news material might assist in solving the crimes at issue was sufficient to justify breaching the Shield Law's protections. App. 37 ¶ 27. That interest, however, exists in **any** unsolved criminal case; under the trial court's reasoning, police would be justified in violating the reporter's privilege any time a journalist covered news regarding a serious crime. But the Legislature has made clear that the public interest supports protecting non-party news media from subpoenas in all but the most extreme circumstances.

Finally, the trial court's Order presents debatable issues regarding the proper procedure to follow when police seek to issue a subpoena *duces tecum* to the press. Notwithstanding that CrR 2.3(f)(2) expressly requires that such subpoenas must be issued "in accordance with CR 45(b)," the trial court found that the procedures and protections normally afforded to civil subpoenas under CR 45 do not apply here. App. 24 ¶ 3. For

example, the court found that a journalist receiving such a subpoena *duces tecum* is not entitled to object to the subpoena as overbroad or unduly burdensome (as provided by CR 26(c)), or on any ground outside the Shield Law. App. 37 ¶ 28. That conclusion makes no sense: it would mean the press is entitled to **less** protection than any other third party receiving a subpoena. Indeed, even in criminal matters, procedural rules allow for objections to third-party subpoenas on overbreadth and other grounds. See CrR 4.8(b)(4). The Order also is contrary to the language and purpose of RCW 10.79.015(3), which requires subpoenas, rather than search warrants, so that newsrooms have a fair opportunity to review and respond to demands for news material. The Civil Rules governing subpoenas should apply to this situation, because CR 45 provides a comprehensive procedure for review of, compliance with, and objection to a subpoena *duces tecum*, and because the Civil Rules spell out the procedures and burdens that apply to any attempt to enforce or quash a subpoena.

For all the reasons identified above, the News Media should be granted a stay pending direct appeal of these highly debatable issues.

B. A Stay Is Needed To Prevent Harm to the News Media and To Preserve The Fruits of Their Appeal

A stay also is necessary here “to preserve the fruits of an appeal, considering the equities.” *Confederated Tribes*, 135 Wn.2d at 759. This factor considers whether “equities require that the status quo ante be maintained in order to preserve the fruits of the appeal in the event it should prove successful.” *Columbian Pub. Co. v. City of Vancouver*, 36 Wn. App. 25, 28 n.1, 671 P.2d 280 (1983), citing *Kennett v. Levine*, 49 Wn.2d 605, 304 P.2d 682 (1956). The test compares not the merits of the case or the status of parties, but the comparative “injury that would be suffered” from granting or denying the stay. RAP 8.1(b)(3).

Here, the Court should exercise its authority to stay enforcement of the Order, until it can address the numerous significant issues raised by the News Media. Most obviously, absent a stay, the News Media parties will lose the fruits of the appeal because they would be compelled to turn over the very unpublished news material that they assert is privileged. The Shield Law provides that absent the requisite heightened showing,

no judicial, legislative, administrative, or other body with the power to issue a subpoena or other compulsory process may compel the news media to testify, produce, or otherwise disclose ... (b) Any news or information obtained or prepared by the news media in its capacity in gathering, receiving, or processing news or information for potential communication to the public, including, but not limited to, any notes, outtakes, photographs, video or sound tapes, film, or other data[.]

Denying a stay of the Order thus would, as a practical matter, deprive the News Media of the Shield Law's protection and the benefits of any appeal.

Further, a stay is necessary and equitable because the trial court's Order puts journalists at risk. As noted above, shield laws are meant to protect against even the perception of "converting the press in the public's mind into an investigative arm of prosecutors and the courts," which poses a serious threat to reporters. *Shoen I*, 5 F.3d at 1295. Without a stay, the Shield Law's intended protection will be irretrievably lost.

V. CONCLUSION

For all of the reasons above, the Court should enter an order staying enforcement of both the Order and the underlying subpoenas, pending resolution of all appellate review.

RESPECTFULLY SUBMITTED this 11th day of August, 2020.

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DECLARATION OF SERVICE

The undersigned, hereby declares under the laws of the State of Washington, that on this day he caused to be served, a copy of the foregoing document on the following counsel of record in the manner indicated:

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DATED this 11th day of August, 2020, at Seattle, Washington.

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APPENDIX

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APPENDIX A

APP001

The Honorable Nelson K. H. Lee

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SUPERIOR COURT OF THE STATE OF WASHINGTON
KING COUNTY

STATE OF WASHINGTON

COUNTY OF KING

SW No. 20-0-61692-6

NOTICE OF APPEAL TO
WASHINGTON SUPREME COURT

Clerk's Action Required

The Seattle Times Co. ("Times"), Sinclair Media of Seattle, LLC ("KOMO-4"), KING Broadcasting Company ("KING-5"), KIRO TV, Inc. ("KIRO-7") and Fox Television Stations, LLC ("KCPQ-13") (collectively, "News Media"), seek review by the Washington Supreme Court of the final Order Enforcing Subpoena and Denying News Media's Objections to SPD's Subpoena Duces Tecum (including the Findings of Fact and Conclusions of Law contained therein), entered on July 31, 2020.

A copy of the Order is attached to this notice.

DATED this 11th day of August, 2020.

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DECLARATION OF SERVICE

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The undersigned, hereby declares under the laws of the State of Washington, that on this day he caused to be served, a copy of the foregoing document on the following counsel of record in the manner indicated:

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DATED this 11th day of August, 2020, at Seattle, Washington.

/s/Eric M. Stahl
Eric M. Stahl, WSBA #27619

ORDER

APP005

FILED
2020 JUL 31
KING COUNTY
SUPERIOR COURT CLERK

CASE #: 20-0-61692-6 SEA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON

SW No. 20-0-616926

COUNTY OF KING

ORDER ENFORCING SUBPOENA AND
DENYING NEWS MEDIA'S
OBJECTIONS TO SPD'S SUBPOENA
DUCES TECUM

This matter arises out of an application by the City of Seattle's Police Department ("SPD") for a search warrant to obtain evidence for its investigation of certain felonies that were committed on May 30, 2020, to wit the theft of five firearms from SPD vehicles, and the arson of six SPD vehicles. Because SPD seeks this evidence from certain media organizations, CrR 2(f) required issuance of a subpoena duces tecum, rather than a typical search warrant.

On June 18, 2020, SPD presented a proposed subpoena, along with a supporting Affidavit of Detective Michael Magan (the "Affidavit.") Based on the evidence adduced in the affidavit, Judge Patrick Oishi issued a proposed Subpoena to the parties identified in the subpoena, and the following parties appeared through counsel at the hearings described below: KIRO TV, Inc. ("KIRO"), KING Broadcasting ("KING"), Sinclair Media of Seattle, LLC. ("KOMO"), Fox Television Stations, LLC ("KCPQ"), and the Seattle Times Company ("Seattle Times"), referred to collectively as the "News Media Parties." The Subpoena notified the News Media Parties that SPD was seeking "[a]ny and all video footage or photographs, including but not limited to all unedited and/or raw video footage, taken on Saturday, May 30, 2020, from 1530 hours to 1700

hours from the locations of Olive Street to Pike Street and also from 6th Avenue to 4th Avenue in Seattle, Washington.” The Subpoena further notified the News Media Parties that a hearing was set for June 29, 2020 at a time to be determined to “consider and rule upon any objections to permitting such production, inspection and copying, which shall not be required until after such hearing.” SPD then served the Subpoena, along with the Affidavit, on the various News Media Parties; according to the affidavits of service, KIRO, KING, KOMO, and KCPQ were served on June 19, 2020; the Seattle Times was served on June 22, 2020.

The Court subsequently reset the hearing to July 16 at 1:30 pm. The News Media Parties filed “Objections and Request to Quash Purported Subpoena For Protected Newsgathering Material” on June 29, 2020 (the “Objections”), along with a supporting Declaration of Danny Gawlowski (“Gawlowski Decl.”). Amicus curiae the Reporters Committee for Freedom of the Press (“Reporters Committee”) moved to submit an amicus brief, which motion was unopposed and granted, and filed a brief the same day in support of the News Media Parties. SPD filed a Response in Opposition to News Media Objections and Request to Quash (the “Opposition”) on July 13, 2020, along with a supporting Declaration of Brian Esler (“Esler Decl.”). The News Media Parties filed a Reply In Support Of Objections And Request To Quash” (the “Reply”) on July 14.

The Court held a telephonic hearing on the afternoon of July 16; all parties stipulated to conducting the hearing by telephone. At that hearing, the Court considered the arguments of counsel, and also took testimony from Detective Michael Magan. The Court declined to rule that day, and set a further telephonic hearing on July 23 starting at 9:00 am.

At the July 23 hearing, all parties again stipulated to conducting the hearing by telephone. At that July 23rd hearing, the Court took further testimony from Detective Magan, and considered the further arguments of counsel for the parties and the amicus. SPD also requested at the July 23 hearing that the Court take judicial notice of a July 3, 2020 Seattle Times online article entitled “Seattle Times, other media fight Seattle Police Department subpoena for raw footage,

photos of protest” < <https://www.seattletimes.com/seattle-news/seattle-times-other-media-fight-seattle-police-department-subpoena-for-raw-footage-photos-of-protest/>> (the “Article”), which Article included a hyperlink to Detective Magan’s Affidavit. Hearing no objection, the Court granted that request.

Having considered the above-described evidence, the submissions and arguments of all parties (including amicus), and the pleadings and filings herein, the Court enters the following findings of fact and conclusions of law (which incorporate by reference the above procedural description):

I. FINDINGS OF FACT

1. There was no dispute raised in court that on Saturday, May 30, 2020, between approximately 3:30 pm and 5 pm in the area of Olive Street to Pike Street in downtown Seattle, six SPD vehicles were lit on fire, and five firearms were stolen from SPD vehicles, as further described in the Affidavit. These thefts and arsons constitute serious felonies.

2. No party disputed the events and evidence described in the Affidavit, the Court incorporates those by reference in these findings, and describes those events and that evidence summarily below. The protests and demonstrations of May 30, 2020 lasted well into the night. The Court also takes judicial notice of this fact.

3. The stolen firearms consist of two loaded Colt AR 15 rifles, two loaded Colt M4 carbines, and a loaded Glock Model 43 semiautomatic pistol. The AR 15 rifles, as well as one of the M4 carbines, were later recovered. However, one of the M4 carbines (with suppressor) as well as the Glock pistol, remain unrecovered. The continued circulation of these unrecovered police weapons in the community threaten public safety.

4. Detective Magan watched the civil unrest of May 30, 2020 unfold via local television stations while off-duty that day. He noted that it appeared to him that the vast majority of the coverage by the News Media Parties seemed to occur with a four-block area between 4th Avenue to 6th Avenue and Olive Way to Pike Street. He testified in his Affidavit that “[b]ased on when the incidents under investigation occurred, there is probable cause to believe that those media sources captured images of the suspects in the footage/photographs taken in that area between 3:30 PM to 5 PM, which footage/photographs have not yet been published.” Magan Aff., at 13-14.

5. On Sunday, May 31, 2020, SPD assigned Detective Michael Magan to investigate those thefts and arsons. Affidavit, at 2. There was no dispute raised in court that, as described in his June 18 Affidavit, the following events occurred in and around the area circumscribed by Olive Street to Pike Street and 6th Avenue to 4th Avenue in downtown Seattle.

6. At about 2 pm, five SPD vehicles park in 1600 block of 6th Avenue on West side of street in front of Nordstrom; one vehicle parks in 500 block of Pine Street.

7. Around 3:30 pm, civil unrest began to occur in a concentrated area between 4th Avenue to 6th Avenue and Olive Way to Pike Street. A KCPQ cameraperson (or persons) captured some of the unrest in the 500 block of Pine Street on video. Affidavit, at 7.

8. Around 4:06 pm, an armed contract security agent working for KCPQ (Mr. Carughi) is in the 1600 block of 6th Avenue when he witnesses unidentified male suspect wearing red hooded sweatshirt and blue jeans (the **Shooter Wearing a Red Sweatshirt**) who smashes out passenger side window of SPD vehicle, removes a loaded Colt AR 15 rifle, and fires four rounds through the window. Mr. Carughi drew his personal firearm, confronted that suspect, and convinced the suspect to drop the rifle. That rifle was recovered but the suspect unidentified..

9. Around 4:06 pm, a KCPQ camera person (or persons) capture on video a woman (later identified as Margaret A. Channon) igniting the headliner of an SPD vehicle that is parked in the 500 block of Pine Street. Affidavit, at 7. Margaret Channon has now been arrested.

10. At around 4:10 pm, an unidentified adult male wearing a blue surgical mask and red Adidas track suit (identified in the filings as the "**Red Adidas Tracksuit Suspect**") is captured on the external surveillance video at the Nordstrom store, in the 1600 block of 6th Avenue going to the rear of SPD vehicle# 33391 to remove a black colored nylon rifle bag containing a Colt AR 15 rifle (which rifle was later recovered).

11. KCPQ later captures the Red Adidas Tracksuit Suspect on video looting the Old Navy store in the 500 block of Pine Street. Affidavit, at 11, 12. KCPQ also captured further footage of that suspect, which footage was aired nationally on FOX News New York. Affidavit, at 13. That suspect remains unidentified.

12. The Seattle Times published a photo showing Margaret Channon in 1600 block of 6th Avenue on May 30 lighting an SPD vehicle on fire. Affidavit, at 12. The Red Adidas Tracksuit Suspect can be seen in the background in that photograph. Based on the sequence of events set forth in the Affidavit, that photograph was likely taken between 4 pm and 4:30 pm that day. Seattle Times photographer Dean Rutz took that photo, which was described as being photo number 29 of 69. At the hearing, counsel for the Seattle Times represented that all 69 photos in that series remain available online at the Seattle Times website: <https://seattletimes.com/seattle-news/photos-protests-in-seattle-sparked-by-the-death-of-george-floyd-in-minneapolis/>. Detective Magan clarified (under oath) in a hearing on July 31, 2020 that on the morning of June 8, 2020, he did look at and review the gallery of 69 photographs available online at the aforementioned website. He further clarified that during previous testimony, his response during cross-examination that he had not viewed the online gallery of 69 photographs was in reference to Mr. Rutz's photograph of Red Adidas Tracksuit Suspect. His response was intended to convey that he had not reviewed a gallery of 69 photographs associated with Mr. Rutz. He explained that he mistakenly thought the question posed by Counsel for News Media meant that Mr. Rutz also had a gallery of 69 photographs.

13. Around 4:16 pm, a security video camera captures an unidentified male, with his face covered, dressed in dark colored top, shorts and a backpack (the “**Suspect Who Stole the Glock**”) walk up to SPD vehicle #33411, which is parked in the 1600 block of 6th Avenue, where he reaches in through the broken left rear windshield of the vehicle and removes a tan colored fanny pack containing a loaded Glock Model 43 semiautomatic pistol. He turns and walks southbound on 6th Avenue towards Pine Street. No additional surveillance cameras capture this suspect as he walks towards Pine Street. The pistol has not been recovered, the suspect remains unidentified.

14. Around 4:20 pm, KCPQ captures suspect Margaret Channon on video in the 1600 block of 6th Avenue setting fire to further SPD vehicles. Affidavit, at 7. KOMO also captures suspect Margaret Channon on video setting fire to SPD vehicles. Affidavit, at 8, 10.

15. She is later joined in that activity by an unidentified male wearing a tan colored stocking cap, a white colored t-shirt, blue jeans, hiking shoes with a black down wrapped around his waist, carrying a shoulder bag (the “**Arson Suspect**”), who helps her sets fire to the driver's seat of SPD Video vehicle that is parked in the 1600 block of 6th Avenue. Affidavit, at 10. That Arson Suspect remains unidentified.

16. An unidentified local television news affiliate camera person recorded SPD vehicles burning in the 1600 block of 6th Avenue. Affidavit, at 15. Another unidentified local news camera person was recording the events taking place at 6th Avenue and Pine Street. Affidavit, at 14.

17. At about 4:23 pm, KOMO captured on video an armed contract security agent working for KCPQ (Mr. Carughi) confronting an unidentified adult male (the “**Suspect Wearing a Rolling Stones Sweatshirt**”) who had just broken the glass on an SPD vehicle to remove a loaded Colt AR 15 rifle. The rifle was recovered; the suspect remains unidentified.

18. These five suspects remain unidentified. SPD has now arrested a suspect (Jacob Little) for the theft of the M4 carbine, without reliance on images published by News Media parties. However, suspect Little invoked his 5th Amendment rights and that gun has not been recovered.

19. SPD’s principal witness was Detective Magan. The Court found him to be a credible witness.

20. Since being assigned to this investigation on May 31, Detective Magan has personally spent a few hundred hours investigating the theft of firearms and the arson of SPD vehicles. Detective Magan was working 15-hour days on this investigation for most of June. He testified that he has spent approximately 200 regular hours and an additional 200 overtime hours on the investigation to date. Together with approximately 29 other colleagues, Detective Magan has spent over 1000 person-hours on these investigations. SPD has also collaborated with the FBI, ATF, and U.S. Attorney’s Office on these investigations.

21. As part of its investigation, SPD contacted businesses in the affected area to collect surveillance video, including Nordstrom, Pacific Place, Old Navy, the Gap, Banana Republic, Westlake Center, the Tower Building, and the Fifth & Pine Building. Those businesses all voluntarily supplied available surveillance video camera footage for SPD to review. SPD did review that footage to try to identify the five so-far unidentified suspects who stole firearms and set fire to SPD vehicles. However, the quality of that footage is poor, limited, or cameras set in fixed positions have not captured all of the events. Further, certain cameras from Nordstrom were damaged by fires and smoke according to Detective Magan.

22. Detective Magan also reviewed portions of the available publicly-aired video footage from the four news affiliates, KIRO, KING, KOMO, and KCPQ, as well as posted images from the Seattle Times. Those videos and photographs were generally of higher quality and detail than the footage available from security cameras. Given the professional-quality cameras and devices that the News Media Parties were observed using on May 30, 2020, Detective Magan reasonably believes that such high-quality video and photography equipment would very probably capture events that would provide more detail than other available sources.

23. SPD did make some informal attempts to obtain the News Media Parties' evidence voluntarily. On about June 2, 2020, Detective Magan spoke to Steve Miller, a KOMO cameraperson, who confirmed that he had filmed the incident when security guard Carughi disarmed one suspect. However, Mr. Miller indicated to Detective Magan that KOMO would be unlikely to release unaired video without a court order requiring such release.

24. Similarly, Detective Magan left a voicemail for Danny Galowski of the Seattle Times to inquire about obtaining further evidence from the Seattle Times. That call was never returned. The Court acknowledges that Mr. Galowski had no legal obligation to return the call. This fact was considered by the Court insofar as it showed the efforts that Detective Magan expended in conducting his investigation.

25. In seeking the public's help to provide information about these felonies, SPD on or about June 1, SPD set up an Evidence Submission Portal at <https://seattlepd.evidence.com/axon/citizen/public/demonstrations>. SPD received approximately 27,800 videos or photos through this portal; however, the vast majority were pornographic in nature or links to such pornography. Of those 27,800 videos, only about 212 videos or photographs were actually useful in capturing the events being investigated. However, none of those videos or photographs led to an identification of the suspects at issue here. The home page of this portal states: "Seattle Police Department detectives are investigating a number of assaults, vandalism, arsons, burglaries and other crimes that occurred over the last several days in Downtown Seattle. Police are seeking photos or videos that could help detectives identify suspects who have caused injuries and damaged public and private property. To submit videos and photos related to any concerns regarding officer conduct at demonstrations, please contact the Office of Police Accountability website to complete the Complaint Process."

26. SPD also had its own videographers filming downtown in the area, however, SPD's own video did not capture helpful or usable images of the suspects.

27. SPD also interviewed several witnesses in a further attempt to identify the suspects and retrieve the guns.

28. SPD also created large photographic boards with images of the suspects captured from publicly available information, which boards SPD displayed at roll calls for all police precincts to try to identify the suspects.

29. SPD also put alerts regarding the missing guns and the suspects on the National Crime Information Center (NCIC), which is an electronic clearinghouse of crime data that can be tapped into by most criminal justice agencies.

30. SPD also reviewed a number of video or photographs posted on the internet or social media by “hobbyists” and others to try to identify these suspects and retrieve the guns. Detective Magan did not personally review every video footage or photograph of the May 30, 2020 protest that was made available online; however, members of his investigative team also assisted in reviewing some of the footage/photographs available online.

31. One such video, entitled “Riot Holiday” [≤https://www.youtube.com/watch?v=CUO8secmc0g>](https://www.youtube.com/watch?v=CUO8secmc0g) did assist in the eventual arrest of suspect Little, who is accused of stealing the M4 out of the back of an SPD vehicle. That video captured images of a male taking the M4 out of the vehicle. However, it was only after the suspect posted on his social media video and images of himself damaging SPD vehicles, which a tipster reported to the Snohomish County Sheriff’s Office, that SPD could eventually establish a correlation with what was shown in the video and positively identify the suspect.

32. Detective Magan has reviewed approximately 2,700 photographs of the events in questions, as well as many hours of video, in an effort to identify the suspects.

33. The News Media Parties argued that SPD should have published images of the suspects publicly with an appeal for the public's help by circulating the already published images of these individuals via a press conference, its own media channels, "Crime Stoppers," or the digital equivalent of a "milk carton" appeal before subpoenaing the News Media Parties.

Detective Magan testified that he was instructed not to issue such a public appeal because SPD was concerned that would only cause the suspects to dispose of the firearms and try to conceal themselves. He also testified to the limited use of such public appeals and referenced the results of the online video portal that yielded 27,800 submissions consisting mostly of pornography or links to pornographic images/websites. Based on his experience, he added that in his opinion, such a public appeal in this particular case would put the public at risk with respect to the missing firearms.

34. Search warrant applications are often filed under seal to protect the secrecy and integrity of the investigation. However, SPD acknowledged that by serving a subpoena duces tecum on the News Media Parties as required by law, it was likely that the details of this investigation would become more public. SPD filed the Affidavit “publicly” (not under seal) with the Court. Counsel for News Media Parties noted that he and others experienced difficulty in accessing the docket in this matter and filing pleadings through the King County Superior Court’s Electronic Records System. The hearings conducted on this matter were open to the public (by telephone and court). The Court (King County Courthouse, 516 Third Avenue, Rm. E-209, Seattle, Washington 98104) was open to the public at all times during the hearing. Though no one attended in person during the July 16, 2020 and July 23, 2020 hearings, a number of persons beyond just the parties and their representatives attended the telephonic hearings.

35. On July 3, the Seattle Times published the Article describing the investigation, the online version of which lawfully included a link to the Affidavit. Thus, the Affidavit has been publicized, including the available images of the suspects. The Court takes judicial notice that the images as they appear online through the aforementioned link are of poor quality and contrast. The Seattle Times and other media outlets have also published reports and editorials in advance of and after the July 16, 2020 and July 23, 2020 hearings. None of the aforementioned publications resulted in SPD receiving any significant further information to help identify the suspects and recover the missing firearms.

36. According to Detective Magan, SPD's investigation of these suspects and the recovery of the firearms is at a "dead end", as SPD has reviewed all available photographs, video, and other evidence to identify these suspects and recover the stolen firearms, but has been unable to do so.

37. Detective Magan has been a police officer since 1986, and been involved in numerous investigations of thefts, arson, and other felonies. He testified that this investigation in terms of hours and resources spent, the facts and circumstances of the events, including the level of violence and degree of destruction, and the ultimate request for media footage is "one the likes of which he has never before experienced."

38. At the hearings, the News Media Parties conceded that they had journalists on the scene in the requested area and during the requested time, and that the equipment they used very likely capture higher quality images. Although not conceded by News Media, the circumstantial evidence set forth by SPD in the Affidavit and at the hearings, and the images of suspects already published by at least some members of News Media demonstrate to the Court that there is a high probability that the News Media Parties have images that might help further SPD's investigation into identifying these suspects and/or retrieval of stolen firearms.

39. During and before the proceedings, SPD offered the News Media Parties the outline of a proposed protective order to try to address the News Media Parties' objections, and limit the use of the requested evidence. News Media addressed the proposed "protective order" in its Reply brief and at the July 23, 2020 hearing noting that the proposed order did not address its overbreadth and undue burden concerns.

40. During the proceedings, SPD also clarified that it is not seeking cell phone videos or photographs from any of the News Media Parties. It is only seeking the higher-resolution videos and photographs that would have been shot by the News Media Parties' professional videographers and photojournalists. The Court finds that given the evidence presented and the professional quality of cameras used by New Media, the likelihood of photographic images or videos captured on cellular phones being of evidentiary or investigative use is slight.

41. On July 30, 2020 at 9:00 am, the Court held a hearing for the entry of its order. The hearing was held in the Presiding Judge's Courtroom, E-942, King County Courthouse, 516 Third Avenue, Seattle, Washington 98104. The Court moved this hearing to this much larger courtroom in order to accommodate an anticipated larger, COVID-19 protocols compliant audience. A notice informing of the relocation was posted outside Courtroom E-209 at 8:00 am on the day of the hearing. Counsel for both parties were also advised of this relocation on July 28, 2020 and also provided with the telephonic call-in information to distribute freely. This hearing was physically attended by a small handful of individuals including members of the press. Approximately 15 individuals attended telephonically.

42. At the July 30, 2020 hearing, the Court advised the parties that upon further reflection and balancing of the press' interests against the public's and law enforcement's compelling interests in public safety, it would order the in-camera review of the subpoenaed materials as an added layer of scrutiny. The Court reasoned that under this scenario, SPD would not have access to tens of hours of raw media footage. At most, it might, if the Court determines there is evidentiary value relating directly to the arson and theft of firearms, result in the release of a nominal amount of video footage and/or photographs to the Seattle Police Department. An in-camera review might also lead to the release of no images or footage. Neither party objected to an in-camera review.

43. The Court also incorporates its oral rulings and findings.

II. CONCLUSIONS OF LAW

1. This matter arises from a criminal investigation. The normal procedure for seeking evidence in aid of a criminal investigation is for the court to issue a search warrant, which would entitle the police to search specified premises for specified evidence. However, when the evidence is held by media organizations, law enforcement is generally prohibited from seeking such evidence via a search warrant and may proceed only via a subpoena duces tecum, which is the procedure SPD followed in this instance. The prohibition applies as a matter of both state and federal law, RCW 10.79.015(3); 42 U.S.C. sections 2000aa et. seq.

2. Superior Court Criminal Rule 2.3(f) specifically deals with “Searches of Media.” That section states that if the “application for a search warrant is governed by RCW 10.79.015(3)” and the court determines that there is probably cause for issuing a search warrant, “the court shall issue a subpoena duces tecum in accordance with CR 45(b).” CrR 2.3(f)(2). The referenced RCW specifically authorizes issuance of a search warrant to “search for and seize any evidence material to the investigation or prosecution of . . . any felony: PROVIDED, That if the evidence is sought to be secured from [any news media], the evidence shall be secured only through a subpoena duces tecum” unless there is probably cause to believe the news media is involved in the felony or would destroy or hide the evidence. RCW 10.79.015(3).

3. Notably, the only reference to the Civil Rules at all is in CrR 2.3(f)(2), which requires that the subpoena issue “in accordance with CR 45(b).” In turn, all CR 45(b) deals with is service of the subpoena, requiring that the subpoena be served by giving it to the person named, or leaving a copy at the person’s usual place of abode. CR 45(b)(1). News Media argues that since RCW 10.79.015(3) defines the mechanism for obtaining information from the news media as a “subpoena duces tecum”, the full panoply of provisions in CR 45 apply. The Court disagrees. Neither the plain language in CrR2.3 nor RCW 10.79.015 require the incorporation of the full panoply of CR 45. Had the legislature meant for such incorporation, it would have stated so. Nonetheless, the Court finds that the provisions and requirements of CR 45 have been met in the instant case in that the subpoena duces tecum: 1) states the name of the court from which it was issued; 2) states the title (number) of the action and the name of the court in which it is pending, and an identifying (case) number; 3) commands the person(s) to whom it is directed to produce and permit inspection and copying of specified video footage and/or photographs in possession or control of the person(s); 4) sets forth the text of subsections (c) and (d) of CR 45; 5) was properly served on the appropriate parties; 6) affords the served parties more than 14 days after service of the subpoena to submit written objections to the inspection or copying of any of the designated materials; and 7) grants the serving party the ability to file a motion to compel. Moreover, the procedure followed by the Court and the parties allowed for News Media to avoid permitting the inspection or copying of requested vide footage and/or photographs upon the filing of its written objections per CR 45(c)(2)(B). Therefore, the Court finds that there is nothing procedurally improper about the issuance of this subpoena duces tecum.

4. Washington's Shield Statute (RCW 5.68.010) establishes a privilege against compelled disclosure when police issue a subpoena. That statute prohibits any "judicial, legislative, administrative, or other body with the power to issue a subpoena or other compulsory process" to compel the news media to produce news and information until such certain criteria are met (qualified privilege). RCW 5.68.010(1).

5. Judge Patrick Oishi reviewed, approved, and signed the subpoena duces tecum on June 18, 2020. Judge Oishi followed the correct procedure in setting a hearing date for the News Media defendants to air their objections, and for the court to determine whether SPD has met its burden under the Shield Statute, before the News Media Parties would be compelled to produce the requested evidence. *See also* RCW 5.68.010(6) (court may "conduct all appropriate proceedings required").

6. Here, it is undisputed that SPD is investigating numerous serious felonies, and that the information sought is not confidential. Indeed, the Shield Statute specifically provides that the court may compel production of "outtakes, photographs, video or sound tapes, [or] film . . ." RCW 5.68.010(1)(b) and (2), if the requirements set out in the statute are satisfied.

7. The purpose of the hearings was to determine whether SPD has established "by clear and convincing evidence" that the information sought is (i) "highly material and relevant," (ii) "critical or necessary" to the issue sought to be proven, (iii) that SPD "has exhausted all reasonable and available means to obtain" that information from alternative sources, and (iv) that there "is a compelling public interest in the disclosure." RCW 5.68.010(2)(b)(i) – (iv).

8. Clear, cogent, and convincing evidence exists when the fact at issue has been shown by the evidence to be “highly probable.” *State v. Dobbs*, 180 Wn.2d 1, 11, 320 P.3d 705, 710 (2014). The “clear and convincing” standard is more stringent than the “preponderance of the evidence (more likely than not)” burden ordinarily required in civil suits. *Herron v. Tribune Pub. Co.*, 108 Wn.2d 162, 170 (1987). It is also less stringent than the “beyond a reasonable doubt” standard required in criminal cases.

9. There is only one reported decision under the Washington Shield Statute. *Republic of Kazakhstan v. Does 1-100*, 192 Wn. App. 773, 368 P.3d 524 (2016). That case arose out of a civil action, and involved an attempt to identify a **confidential source**. *Kazakhstan*, 192 Wn. App. at 781. The subpoena was quashed, as the Shield Statute categorically prohibits compelling such disclosure (i.e., the “absolute privilege”). *Kazakhstan*, 192 Wn. App. at 786. That case provides little guidance here.

10. The Washington Supreme Court (like some federal courts) has only recognized a qualified news media privilege for confidential sources. *State v. Rinaldo*, 102 Wn.2d 749, 752-753, 689 P.2d 392 (1984). Some federal courts have recognized that the qualified privilege applies even to non-confidential sources. *See, e.g. Shoen v. Shoen*, 48 F.3d 412, 416 (9th Cir. 1995). The Washington Shield Statute thus appears to provide greater protection than the federal and state constitutions provide to the news media for confidential sources, but continues to provide only a qualified privilege for non-confidential materials. Here, SPD is seeking footage of events that occurred in public, so there is no concern about confidentiality, and no such concern was raised at the hearing.

11. One of the cases on reporters' privilege considered by the Court involved a search warrant to search a newspaper's offices for photographs and other evidence that might allow police to identify those at a protest who assaulted police officers. *Zurcher v. Stanford Daily*, 436 U.S. 547, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978). In that case, the Supreme Court upheld the search warrant over the objections of the newspaper, finding that the use of search warrant for those purposes was reasonable. The Supreme Court noted that if evidence sought by a warrant is sufficiently connected with the crime to satisfy the probable-cause requirement, "it will very likely be sufficiently relevant to justify a subpoena and to withstand a motion to quash." *Zurcher*, 436 U.S. at 566. The Supreme Court also held that the "hazards" of warrants to search newspaper premises for criminal evidence "can be avoided by a neutral magistrate carrying out his responsibilities under the Fourth Amendment, for he has ample tools at his disposal to confine warrants to search within reasonable limits." *Id.* That said, the Supreme Court also cautioned that "where presumptively protected materials are sought to be seized, the warrant requirement should be administered to leave as little as possible to the discretion or whim of the officer in the field." *Zurcher*, 436 U.S. at 564

12. For most criminal investigations where the normal search warrant procedure is used, the party on the receiving end of the warrant has no opportunity to object or test the evidence supporting the warrant until after the police have already obtained the evidence. The Shield Statute thus provides greater protection for the News Media Parties than would usually be available -- by requiring use of a subpoena duces tecum, putting the burden on SPD to prove elements by "clear and convincing evidence" and giving the News Media Parties a hearing at which to raise their objections before they are required to produce the evidence requested.

13. “[W]here the protection of confidential sources is not involved, the nature of the press interest protected by the privilege is narrower.” *Gonzalez v. National Broadcasting Co., Inc.*, 194 F.3d 29, 36 (1999) (also noting that “when protection of confidentiality is not at stake, the privilege should be more easily overcome.”). Here, SPD is seeking footage and photographs of events that occurred in public.

14. **SPD has shown by clear and convincing evidence that the material requested is highly material and relevant to its investigation.** It is undisputed that the News Media Parties had film crews and photographers filming in the area at the time in question. Here, SPD is trying to identify the suspects in the arsons and theft of firearms – the identities of the suspects and/or their accomplices is therefore highly material and relevant to the SPD investigation into the individuals who committed these felony offenses, but also to the SPD’s attempts to recover the stolen firearms. To date, SPD has been unable to identify the remaining suspects and are also no closer to recovering the stolen firearms. High quality images and/or video of the crimes/suspects are highly likely to assist in SPD’s investigation. The Court acknowledges that it is not clear whether unpublished high-quality footage of these suspects or the disappearance of the firearms exists at all beyond what has already been published and whether, if they exist, that they will be of greater evidentiary value.

15. The News Media Parties object that SPD has not shown exactly what evidence may be in those Parties' possession. But this sets the bar too high, as "[i]t is the rare case in which a litigant, in advance of looking at items sought by subpoena, can actually establish that such items contain the very evidence the litigant needs." Courts may draw reasonable inferences from the facts because, "Obviously, there may be instances in which the content of the unpublished news is not known to the party seeking it, but can be inferred from the content of the published portion or from witnesses accounts or from the circumstances surrounding its creation." *In Re Grand Jury Subpoena to National Broadcasting Co., Inc.*, 178 Misc.2d 1052, 1058, 1059, 683 N.Y.S.2d 708, 713 (N.Y. Sup. Ct. 1998); *see also United States v. King*, 194 F.R.D. 569, 573 (2000) (relevance standard requires only a showing that the tapes are likely to contain relevant information and does not require describing precisely what is on the videotapes, as that can only be determined once the tapes are actually produced).

16. To date, SPD has not been able to ascertain the identity of these suspects (except Margaret Channon) through available eyewitness accounts or other available footage. The available evidence showed, and it is undisputed that, the News Media Parties had film crews and photographers filming in the area at the time in question. The Court finds that they did capture images of the suspects (as evidenced by the published images), and that their video and photographs would be of higher resolution than available security or cell phone videos or photographs. The Court also finds that there is a reasonable likelihood that News Media video and/or photographs may also show the suspect's actions and route of departure immediately following the arson/theft of firearms. SPD has established by clear and convincing evidence that the footage and photographs sought are highly material and relevant to its investigation.

17. **SPD has also shown by clear and convincing evidence that the material requested is “critical or necessary” to its investigation.** As explained by Detective Magan, he reviewed many other available sources, but they do not provide good enough footage for identification, which makes any better-quality footage critical or necessary. SPD is barred by law (S.M.C. 14.18) from using any sort of facial recognition software. Having high-quality photos or video of the suspects may allow SPD to identify distinguishing features. Notably, one suspect already arrested (Margaret Channon) was identified in part because the available video showed a distinguishing tattoo. The raw footage shot by these News Media parties during the critical 90 minutes appears to the Court to be the best evidence available to identify these suspects – and also to determine what became of the stolen firearms. News Media’s footage or photographs may also be helpful in determining what happened to the firearms immediately following their theft. The Court finds that there is a reasonable likelihood that News Media video and/or photographs may also show the suspect’s actions and route of departure immediately following the arson/theft of firearms. *E.g., Gonzales*, 194 F.3d at 36 (outtakes were necessary because they were likely the best evidence available).

18. SPD's request here is similar to the subpoena upheld in *In re Grand Jury Subpoenas Served on Nat. Broad. Co., Inc.*, 178 Misc. 2d 1052, 683 N.Y.S.2d 708 (N.Y. Sup. Ct. 1998). There, a prosecutor issued a grand jury subpoena to several media companies for video footage of assaults on police officers during a demonstration. Applying New York's similar shield statute, the trial court found the footage was "critical or necessary" because "other than the broadcast camera crews, there are no witnesses available to [the prosecution] now who were uniquely in a position to see the assaults and the perpetrators of the assaults in such a manner as to reliably record the details and identities." *In re Grand Jury Subpoenas (NBC)*, 178 Misc. 2d at 1058, 683 N.Y.S.2d at 712; *see also People v. Bonie*, 141 A.D.3d 401, 404, 35 N.Y.S.3d 53, 56 (N.Y. App. Div. 2016) (outtakes were "critical or necessary" because witnesses alone could not reliably repeat what was on the video). SPD also does not have the discovery tools that would be available were there an ongoing proceeding against a specific individual. Like the media's footage in *In re Grand Jury Subpoenas (NBC)*, the News Media's video and photo quality is superior to that available to SPD, and was collected under circumstances that make it highly probable that suspects' conduct was captured, which is enough to show it is "critical or necessary." The Court notes News Media's arguments that these cases are factually distinguishable from the instant case. However, given the lack of Washington case law and the unique set of facts surrounding the events of May 30, 2020 and the subsequent investigation, the cases submitted by BOTH parties can all be factually distinguished from the instant case.

19. **SPD has shown by clear and convincing evidence that it has exhausted all reasonable and available means to identify the suspects' identity from alternative sources.**

Washington decisions before the enactment of the Shield Statute held that the party should demonstrate that it attempted to use alternative sources for the requested information. *Clampitt v. Thurston Cty.*, 98 Wn.2d 638, 644, 658 P.2d 641, 645 (1983). Generally, cases discussing this issue involve a civil litigant that has not exhausted, for example, their use of discovery tools such as depositions. *See, e.g., Clampitt v. Thurston*, 98 Wn.2d 638, 644, 658 P.2d 641, 645 (1983); *Shoen v. Shoen (Shoen I)*, 5 F.3d 1289, 1295 (9th Cir. 1993). The Court acknowledges that the exhaustion requirement applies to criminal cases. *State v. Rinaldo*, 102 Wash.2d 749, 689 P.2d 392 (1984) Again, the Court notes News Media's arguments that these cases are factually distinguishable from the instant case.

20. SPD first sought evidence sufficient to identify these suspects from: (1) an incident report from a citizen that recovered two of the stolen firearms; (2) video captured by the SPD Police Department Video Unit who was located inside the Nordstrom Store during the unrest; (3) surveillance footage from many local businesses such as the Nordstrom Corporation, Pacific Place, and Westlake Mall; (4) video footage that was sent to the SPD Police Department by citizens who were in the relevant area during the civil unrest; (5) published video footage from KIRO TV, KING TV, KOMO TV, KCPQ, and published photos from Seattle Times. SPD also put the available information on national databases such as NCIC, and created boards with pictures of the suspects to show at roll calls with all police precincts. Detective Magan has personally visited the affected businesses and the area looking for further evidence; he and others at SPD have spent countless hours (estimated to be over 1000 hours) reviewing available video, photographs and other evidence to try to identify these individuals. SPD has also collaborated with the FBI, ATF, and the U.S. Attorney's Office.

21. While it is easy to criticize a police investigation by suggesting one more hypothetical approach that they could take (such as the News Media Parties' suggested "digital milk carton" appeal for information), the Legislature only requires that the police exhaust all "reasonable and available" means to obtain the information sought from alternative sources before resorting to a subpoena to obtain news media evidence. The events at issue occurred on May 30; two months later, and after over 1000 SPD hours spent on the investigation, SPD has not yet been able to identify the persons who stole guns from police vehicles (except Jacob Little) and helped to set them on fire. SPD's online portal that received 27,800 submissions, which primarily contained pornographic video/images or links to pornographic images/websites together with Detective Magan's testimony about why his department did not make a more wide-spread affirmative appeal for the public's help demonstrates why, in this particular case, such public appeal was neither a reasonable alternative nor likely to be helpful, especially in light of the fact that to date, there has been limited public assistance despite nationwide media coverage of this pending subpoena duces tecum. Here, the information sought is higher quality photos and video of the suspects and their criminal actions (arson/theft of firearms); there was no dispute that the News Media Parties uniquely possess that information. SPD did have contact with KOMO and Seattle Times personnel to try to obtain this information without a subpoena, but that outreach was unsuccessful.

Under the totality of the circumstances, the Seattle Police Department should not be denied the video footage and photographs requested until they have looked for the proverbial needle in the haystack and, to the detriment of the public and public safety, expend its time and resources in a search not reasonably likely to have positive results.

22. SPD has shown by clear and convincing evidence that it has exhausted all reasonable and available means to obtain this information from alternative sources.

23. **SPD has shown by clear and convincing evidence that there is a compelling public interest in this disclosure.** The parties agree that it is exceedingly rare in Washington State that police seek evidence from media companies. This is as it should be. The news media in a constitutional democracy is not and should not be an arm of the government. The preamble to the first ten amendments to our federal Constitution – our Bill of Rights – stated that those amendments were necessary to prevent misconstruction or abuse of the powers granted to the federal government by our Constitution, and the First Amendment enacted ensured freedom of the press. Similarly, our state Constitution, in Article 1, Section 5, states that “every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.”

24. However, neither our state nor the federal constitution has ever exempted the press from providing evidence for a government investigation. As confirmed recently by the Supreme Court, “the public has a right to every man’s evidence,” so even the President of the United States is not exempt from providing relevant information to aid in a criminal investigation. *Trump v. Vance*, 591 U.S. ___, 2020 WL 3848062, *3 (quoting 12 Parliamentary History of England 693 (1812)). Hence, under both our federal and our state constitutions, courts have only recognized at most a qualified reporters’ privilege, which privilege can be overcome in the proper circumstances. *Rinaldo*, 102 Wn.2d at ___; *Branzburg v. Hayes*, 408 U.S. 665, 691, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972) (“the Constitution does not, as it never has, exempt the newsman from performing the citizen’s normal duty of appearing and furnishing information” relevant to a criminal investigation).

25. Further, the Shield Statute instructs that a “court may consider whether or not the news or information was obtained from a confidential source in evaluating the public interest in disclosure.” RCW 5.68.010(2)(a)(iv). Here, the evidence that SPD seeks is video and photographs of acts that were committed in public; there is nothing confidential about such video or photographs. Compelling the media to produce “photographs taken in a public place carries no realistic threat of prior restraint or of any direct restraint whatsoever” on the media’s ability to publish. *Zurcher*, 436 U.S. at 567.

26. The News Media Parties and Amicus point to potential violence against journalists as an interest weighing against disclosure. It is undisputed that violence against the media is on the rise. The Court noted (and Amicus conceded) that recently, the vast majority of violence against the media in the United States appears to have been perpetrated by law enforcement. While violence against journalists is on the rise, and such violence is deplorable, there is no evidence that a Court order following strenuous objection from News Media requiring the News Media Parties to produce video that may lead to the identification of suspects who burned police cars and stole weapons has caused or will cause such violence. That said, the Court did carefully weigh News Media’s interests and concerns against the compelling public interest of public safety in reaching its final decision.

27. There is a compelling public interest in identifying the still-unidentified felony suspects who stole those weapons and aided in burning those SPD vehicles. Those vehicles contained gasoline in their fuel tanks. Some, if not all of the vehicles, also contained live ammunition. The setting of fire to those vehicles posed a grave danger to those present in and around the area, including protesters, first responders, and the media. Allowing the individuals who committed these seriously violent offenses to remain at large poses a real danger to the public. The M4 Carbine assault rifle with suppressor (silencer) and Glock pistol that are still unrecovered represent a real danger to public safety. The Court noted its grave concern that those weapons may one day be used against an individual or individuals, including during future protests.

28. **There is no “overbroad and unduly burdensome” exception to the Shield Statute, but the Court has taken those objections into account.** Here, the Court finds that SPD has met the standard for compelling the News Media Parties to turn over the requested information. While the Shield Statute has no “overbroad and unduly burdensome” exception (in part because those concerns are encompassed in the four-part test that the SPD must meet), the Court agrees with the News Media Parties that every effort must be made to keep the scope of what is obtained as narrow as is reasonably necessary for the specific investigation as outlined in the Affidavit supporting the original search warrant application.

29. SPD stipulated during the hearing that it was not seeking any cell phone video or photographs and the News Media Parties will not be required to produce such evidence.

30. Further, SPD offered to enter into a protective order to limit the use of this evidence, and the Court is adopting that suggestion...and beyond. The Court has also, as an added layer of scrutiny, ordered that the requested materials first be reviewed by the Court in-camera. The in-camera review is also intended as a less intrusive alternative to requiring the provision of subpoenaed video footage and photographs to the Seattle Police Department for review.

31. The Court incorporates its oral rulings and conclusions of law.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

1. The News Media Parties shall produce the following evidence to the Court for an **in-camera** review (which may be conducted by a Special Master or the Court – to be determined at a later date):

Unedited or raw video footage/photographs from KIRO TV, KING TV, KOMO TV and KCPQ, and the Seattle Times for Saturday, 05-30-20, taken from 1530 hrs. to 1700 hrs.: in the area from Olive Street to Pike Street and from 6th Avenue to 4th Avenue as taken by assigned videographers or photojournalists under the News Media Parties employment, agency, or control; however, no such video or photographs shot on cell phones need be produced.

The News Media Parties do not need to produce separately any footage or photographs that are otherwise publicly available on their websites. Such video and photographs shall be produced on a rolling basis as soon as reasonably available, but all such video and photographs must be produced within 21 calendar days of the date of this order.

2. The Court will review as expeditiously as possible such video and/or photographs for relevant evidence from the date of production; the Court shall maintain sole and exclusive possession of the materials during that time.

3. The Court's review of such materials is limited to:

- Obtaining imagery of the felony crimes of Theft of a Firearm and/or Attempted Theft of a Firearm (from Seattle Police Department vehicles) in violation of RCW 9A.56.300/RCW 9A.28.020, Arson and/or Attempted Arson (Seattle Police Department vicles) in violation of RCW 9A.48.020/030/RCW 9A.28.020.
- Identifying those individuals who participated in the arson/attempted arson of SPD vehicles during the hours of 3:30 pm through 5 pm in the area from Olive Street to Pike Street and from 6th Avenue to 4th Avenue in downtown Seattle on May 30, 2020.
- Identifying those individuals who were involved in stealing firearms/attempting to steal firearms from SPD vehicles during the hours of 3:30 pm through 5 pm in the area from Olive Street to Pike Street and from 6th Avenue to 4th Avenue in downtown Seattle on May 30, 2020.

Copies of those portions of the materials that meet the above criteria, if any, will be released to the Seattle Police Department and may only be used as necessary in the criminal investigations and any subsequent prosecution. Use of the materials for any purpose other than provided in this order is prohibited without further **written** order of this Court following a hearing. Any use of the materials in violation of this order will be deemed contempt of court and be excluded from use in any future proceeding, hearing, or prosecution.

4. Following the in-camera review period, the materials provided to the Seattle Police Department pursuant to this order shall be filed with the court as a sealed exhibit and remain sealed until further order of this Court. A copy of the materials provided to Seattle Police Department, if any, will also be provided to News Media Parties.

5. The Court estimates that it may take up to 10 calendar days to conduct its in-camera review of the subpoenaed video and photographic images.

6. The parties have stipulated that this Order and enforcement of the Subpoena may be stayed for the longer of (a) 21 days after entry of this Order and the Findings of

Fact/Conclusions of Law, or (b) exhaustion of any appellate review. However, in the compelling interest of public safety, the Court is directing that New Media commence immediate gathering/collection of the subpoenaed video footage and photographs. Since News Media has 21 calendar days from this Order by which it must submit the subpoenaed video footage and photographs for in-camera review, the Court is further directing Counsel for News Media to file the necessary appeal documents, including a request for an order staying this Court's Order, as expeditiously as possible. If, after diligently seeking appellate review Counsel for News Media is unable to secure a stay order from the appellate court, Counsel for News Media may move this Court for reconsideration of the stay order on short notice.

7. If the Seattle Police Department has arrested and charged all of the arson and theft of firearms suspects during the pendency of this Order, appellate review, or in-camera review, Counsel for the Seattle Police Department/City of Seattle must notify Counsel for News Media and the Court immediately.

DATED this 31st day of July, 2020.



HONORABLE NELSON K. H. LEE
JUDGE, KING COUNTY SUPERIOR COURT

APPENDIX B

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COPY RECEIVED
JUN 22 2020
DWT WASHINGTON LLC

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING**

STATE OF WASHINGTON

COUNTY OF KING

SW No. 20-0-616926

**SUBPOENA DUCES TECUM TO
KIRO TV, INC.; TEGNA, INC.; SINCLAIR
MEDIA OF SEATTLE LLC; TRIBUNE
BROADCASTING SEATTLE LLC;
SEATTLE TIMES COMPANY
PURSUANT TO CrR 2.3(f) AND RCW
10.79.015(3).**

TO: KIRO TV, INC.
R/A CORPORATION SERVICE COMPANY
300 DESCHUTES WAY SW, STE 208 MC-CSC1
TUMWATER, WA 98501

TEGNA, INC.
d/b/a KING TV & KING 5 NEWS
R/A CT CORPORATION SYSTEM
711 CAPITOL WAY S, STE 204
OLYMPIA, WA 98501

SINCLAIR BROADCASTING OF SEATTLE, LLC
d/b/a KOMO TV & KOMO 4 NEWS
R/A CT CORPORATION SYSTEM
711 CAPITOL WAY S, STE 204
OLYMPIA, WA 98501

1 **FOX TELEVISION STATIONS, LLC**
2 d/b/a KCPQ & Q13 FOX NEWS
3 R/A CORPORATION SERVICE COMPANY
4 300 DESCHUTES WAY SW, STE 208 MC-CSC1
5 TUMWATER, WA 98501

6 **SEATTLE TIMES COMPANY**
7 R/A DWT WASHINGTON, LLC
8 920 FIFTH AVENUE
9 SUITE 3300
10 SEATTLE, WA 98104-1610

11 YOU ARE COMMANDED to produce and permit inspection and copying of the following
12 documents or tangible things at the place, date, and time specified below:
13 **Any and all video footage or photographs, including but not limited to all unedited and/or**
14 **raw video footage, taken on Saturday, May 30, 2020, from 1530 hours to 1700 hours from**
15 **the locations of Olive Street to Pike Street and also from 6th Avenue to 4th Avenue in Seattle,**
16 **Washington.**

PLACE	DATE AND TIME
Seattle Police Department Attn: Michael Magan 610 5th Avenue Seattle, WA 98124 (206) 684-5540	

17 A. HEARING HAS BEEN SET ON 6/29/20 AT
18 TBD BEFORE THE ~~UNDERSIGNED~~ JUDGE TO CONSIDER AND
19 RULE UPON ANY OBJECTIONS TO ~~PERMITTING~~ SUCH PRODUCTION,
20 INSPECTION AND COPYING, WHICH SHALL NOT BE REQUIRED UNTIL AFTER
21 SUCH HEARING.

ISSUING OFFICER'S SIGNATURE AND TITLE	DATE
 Judge <u>Dishi King County</u>	6/18/20

26 Superior Court

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<p>PRESENTED BY:</p> <p><u>/s/Brian W. Esler</u> Brian W. Esler, WSBA No. 22168 MILLER NASH GRAHAM & DUNN LLP Pier 70, 2801 Alaskan Way, Suite 300 Seattle, WA 98121-1128 Tel: (206) 624-8300 Fax: (206) 340-9599 Email: brian.esler@millernash.com</p> <p>Attorneys for Seattle Police Department</p>	
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CR 45 - SUBPOENA

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to subsection (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce and all other parties, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it:

(i) fails to allow reasonable time for compliance;
(ii) fails to comply with RCW 5.56.010 or subsection (e)(2) of this rule;
(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies; or
(iv) subjects a person to undue burden, provided that the court may condition denial of the motion upon a requirement that the subpoenaing party advance the reasonable cost of producing the books, papers, documents, or tangible things.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or
(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2)(A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information in camera to the court for a determination of the claim. The person responding to the subpoena must preserve the information until the claim is resolved.

SUBPOENA DUCES TECUM - 4

MILLER NASH GRAHAM & DUNN LLP
Pier 70 ~ 2801 Alaskan Way ~ Suite 300
Seattle, Washington 98121-1128
(206) 624-8300/Fax: (206) 340-9599
559160-0005/4847-6910-5344.1

SUPERIOR COURT FOR KING COUNTY

STATE OF WASHINGTON)

SW NO. 20-0-61692-6

COUNTY OF KING)

: ss

AFFIDAVIT FOR SUBPOENA

Detective Michael MAGAN, being first duly sworn on oath, deposes and says:

On the basis of the following, I believe there is probable cause that **multiple unidentified individuals** have committed the below-identified crime(s) in King County, and that:

- Evidence of the crime(s) of **Theft of a Firearm, RCW 9A.56.300, Arson RCW 9A.48.020** and
- Contraband, the fruits of a crime, or things otherwise criminally possessed, and
- Weapons or other things by means of which a crime has been committed or reasonably appears about to be committed, and
- A person for whose arrest there is probable cause, or who is unlawfully restrained is/are located in, on, or about the following described premises, vehicle or person:

Media Outlets: Seattle Times Newspaper, KIRO TV, KING TV, KOMO TV and KCPQ for raw/unedited video footage and digital images for Saturday, 05-30-20, taken from 1530 hrs: to 1700 hrs: in the area from Olive Street to Pike Street and from 6th Avenue to 4th Avenue in the City of Seattle, County of King and State of Washington.

The Seattle Police Department (SPD) is seeking evidence in the form of raw videotape footage and photographs from media outlets that it believes will help it identify the persons that on Saturday, 05-30-20, set fire to SPD vehicles and/or stole firearms from those vehicles (some of which firearms still have not been recovered). Because this evidence is sought from media outlets, the Court is requested to issue a subpoena duces tecum according to the procedure set forth in CrR 2.3(f) and RCW

(continued next page)

Affidavit for Search Warrant
Page 1 of 17

MILLER NASH GRAHAM & DUNN LLP
ATTORNEYS AT LAW
T: 206.674.8300 | F: 206.340.9599
PIER 70
2801 ALASKAN WAY, SUITE 300
SEATTLE, WASHINGTON 98121

Affidavit for Search Warrant (continued)

10.79.015(3). Those media outlets will then have an opportunity to respond to the subpoena and have the Court rule on any objections. SPD requests that the Court set a hearing to consider any such objections, and so indicate on the face of the subpoena.

Your affiant is a graduate of the University of Washington with a Bachelor of Arts Degree in Society & Justice and Sociology. Following graduation, your affiant was hired as an Officer with the Seattle Police Department (SPD) in 1986, attended and completed the Washington State Criminal Justice Training Commissions Basic Law Enforcement Training and has served in various capacities with the SPD, patrol, the Mayor's Protection Detail and also as an Arson Investigator. Your affiant also served in the Federal Bureau of Investigation's (FBI) and the Seattle Police Public Corruption Squad that had primary responsibilities for investigating public servants who have committed serious crimes, including murder, assault and bribery.

Prior to your affiant's current assignment, he was assigned to the FBI-sponsored Puget Sound Violent Crimes Task Force (PSVCTF) for three years. In this multi-agency task force, your affiant had investigative responsibilities for all bank robberies in the greater Puget Sound area, which included short and long term investigations and assisted a variety of law enforcement agencies throughout the country.

Your affiant's current assignment is two-fold. Your affiant is and has been assigned to the SPD Robbery Unit for the last twenty-five years and has also been assigned to the Northwest Fugitive Apprehension Task Force, sponsored by the United States Marshal Service.

At the SPD Robbery Unit, your affiant has investigative responsibilities for both commercial and residential robberies, pattern robbery investigations, as well as extortion cases that occur in the City of Seattle.

In your affiant's new assignment with Northwest Fugitive Apprehension Task Force, he will have investigative responsibilities for tracking down fugitives for the crime of robbery. In this capacity, your affiant serves at the command of the U.S. Marshal for Washington, Oregon and Alaska and will assist outside law enforcement agencies when so called upon.

On Sunday, 05-31-20, your affiant was assigned investigative responsibilities for the below:

SPD # 2020-177514 & 2020-179414:

Two of the investigations your affiant currently has investigative responsibilities are the reported theft of firearms: four Colt AR-15 5.56mm rifles (# 2020-177514) and one Glock model 43 .9mm semi-auto pistol (#2020-179414) from unmarked SPD vehicles that were parked in the 1600 block of 6th Avenue.

During the course of this investigation, your affiant determined that the follow occurred.

On Saturday, 05-30-10, at approximately 1400 hrs: Officers **T. JONES # 6935, K. HOLT # 7711, D. WARD # 7603, Q. WASHINGTON # 7696, D. BEHN # 7717** and **S. SPECT # 7631**, who are assigned to the SPD South Precincts Anti-Crime Team (ACT) were to deployed to work a march/demonstration in regards to the death of George Floyd. These officers were assigned to work demonstration management/crowd control in the area of 6th Avenue and Pine Street.

(continued next page)

Affidavit for Search Warrant (continued)

Upon the officer's arrival in the area, Officers **T. JONES # 6935**, **K. HOLT # 7711**, and **D. WARD # 7603** parked SPD vehicle # 33391 in the 1600 block of 6th Avenue on the west side of the street in front of the Nordstrom Store, while **Q. WASHINGTON # 7696**, **D. BEHN # 7717** and **S. SPECT # 7631** parked SPD vehicle # 33411 directly behind the other vehicle. Three other SPD vans were also parked at the same location, to include both civilians and sworn SPD employees.

Additional SPD personnel from the SPD South Precinct and the SPD Video Unit parked their vehicles in the 1600 block of 6th Avenue and the 500 block of Pine Street:

SPD vehicles:

- # 34424, SPD Video Unit van, parked in the 1600 block of 6th Avenue
- # 63181, SPD Video Unit van, parked in the 1600 block of 6th Avenue
- # 93151, SPD South Precinct Vehicle (black van) parked in the 1600 block of 6th Avenue
- # 33391, SPD South Precinct Vehicle (blue Ford SUV) parked in the 1600 block of 6th Avenue
- # 33341, SPD South Precinct Vehicle (blue Ford SUV) parked in the 1600 block of 6th Avenue
- # 34261, SPD South Precinct vehicle, parked in the 500 block of Pine Street

Officers transported their department issued Colt AR-15, 5.56mm rifles as well medical supplies, helmets, clothing, video equipment and other items from the SPD South Precinct to the 1600 block of 6th Avenue and the 500 block of 5th Avenue. Most of it was locked inside of the vehicles as the officers responded on foot to the demonstration, also locked in an SPD vehicle was the back-up weapon, a Glock model 43 9mm semi-automatic pistol, serial # BABM909 belonging to **Q. WASHINGTON # 7696**. The above-named Officers were assigned to work an area several blocks from their secured vehicles.

At approximately 1530 hrs: civil unrest began to occur in a concentrated area, 4th Avenue to 6th Avenue and Olive Way to Pike Street. The five SPD vehicles that were parked in the 1600 block of 6th Avenue and the one additional SPD vehicle that was parked in the 500 block of Pine Street were heavily damaged by vandals, who started by ripping off the windshield wipers, side view mirrors, breaking out the vehicle windows with rocks and poles, and removing various equipment, including video recording equipment, ballistic helmets, uniforms, emergency medical equipment, fire extinguishers and eventually the following firearms:

From Police Vehicle # 33391:

Officer **K. HOLT # 7711**: One loaded Colt AR 15 rifle, Serial # FNCR012595. (Later recovered.)

From Police Vehicle # 33411:

Officer **Q. WASHINGTON # 7696**: One loaded Colt M4 carbine rifle with a suppressor, Serial # LE296517. (Still missing.)

One loaded Glock Model 43 semi-automatic pistol, Serial # BABM909. (Still missing.)

Officer **D. BEHN # 7717**: One loaded Colt AR 15 rifle, Serial # FNCR011601. (Later recovered by Q13.)

(continued next page)

Affidavit for Search Warrant (continued)

Officer S. SPECHT # 7631: One loaded Colt M4 carbine rifle, Serial # LE325779. (Later recovered.)

At approximately 1606 hrs: witness **CARUGHI** was an armed contract security agent working for Seattle's FOX affiliate KCPQ. He reported being in the 1600 block of 6th Avenue when he witnessed an unidentified adult male suspect wearing a red colored hooded sweatshirt and blue jeans, smash out a passenger side window of a SPD vehicle # 33391 parked in the 1600 block of 6th Avenue and remove a loaded Colt AR 15 Rifle, walk to the front of that SPD vehicle, aim the rifle at the front windshield and fire four rounds through the front windshield. **CARUGHI** drew his personal firearm and confronted the armed suspect and ordered him to place the rifle on the ground. **CARUGHI** recovered the rifle, removed the magazine and the round in the chamber rendering the rifle safe.

At approximately 1610 hrs: an unidentified adult male wearing a blue colored surgical mask that covers the lower portion of his face, a very distinct red colored Adidas brand sweat-suit, a red colored Adidas brand cap and red colored Adidas brand tennis shoes is captured on the external surveillance video at the Nordstrom store, in the 1600 block of 6th Avenue going to the rear of SPD vehicle # 33391, reaches into the rear of the vehicle and remove a black colored nylon rifle bag. The unidentified adult male suspect in the red colored Adidas brand sweat suit takes the bag, lays it down on the sidewalk, unzips the bag, opens the bag and sees that there is a Colt AR 15 rifle inside bag. He then quickly zips the rifle bag closed, turns and runs south bound on 6th Avenue to Pine Street. As the unidentified adult male in the red colored Adidas brand sweat suit turns westbound on to Pine Street and is observed on the Nordstrom external surveillance video being confronted by an unidentified adult male in a dark colored jacket and drops the rifle bag on the street. A physical fight ensues between the two and the rifle bag gets picked by another unidentified male, who takes the bag and walks westbound on Pine Street towards 5th Avenue. Unfortunately, no additional surveillance cameras capture this suspect as he walks away with the rifle.



(continued next page)

Affidavit for Search Warrant (continued)

The unidentified adult male suspect wearing the distinct red colored Adidas brand sweat-suit, a red colored Adidas brand cap and red colored Adidas brand tennis shoes running south bound on 6th Avenue after stealing a loaded Colt AR 15 rifle

At approximately 1616 hrs: an unidentified male, with his face covered, dressed in dark colored top, shorts and a backpack walks up to SPD vehicle # 33411, which is parked in the 1600 block of 6th Avenue, reaches in through the broken left rear windshield and removes a tan colored fanny pack belonging to Officer Q. WASHINGTON # 7696, that contained the loaded Glock Model 43 semi-automatic pistol, serial # BABM909. The unidentified male takes the fanny pack, turns and walks south bound on 6th Avenue towards Pine Street. Unfortunately, no additional surveillance cameras capture this suspect as he walks towards Pine Street.



The unidentified male removing the tan colored fanny pack that contained the loaded Glock semi-automatic pistol from the rear of the SPD vehicle



(continued next page)

Affidavit for Search Warrant (continued)

The unidentified male carrying WASHINGTON'S tan colored fanny pack in his right hand south bound on 6th Avenue

At approximately 1623 hrs: witness CARUGHI later reported that he observed another unidentified adult male suspect approach the rear of SPD vehicle # 33411, break open the glass and remove a loaded Colt AR 15 Rifle. CARUGHI who was across the street, again drew his personal firearm, ran across the street and confronted the unidentified adult male suspect and physically removed the loaded Colt AR 15 rifle from him. CARUGHI removed the magazine and the round in the chamber rendering the rifle safe.



CARUGHI on the right after disarming the second suspect on the left, who removed the loaded Colt AR 15 rifle from the SPD vehicle in the 1600 block of 6th Avenue

CARUGHI later contacted the SPD and turned the two recovered Colt AR 15 Rifles over to Lieutenant J. OSBORNE, SPD North Precinct. Officer N. APPIAH-AGYEKU # 8633, SPD West Precinct completed an incident report, SPD # 2020-177514.

At approximately 1606 hrs: SPD Vehicle # 34261, which was parked in the 500 block of Pine Street had all of its windows smashed out, the doors completely bent back away from the main frame of the vehicle, was spray painted, had its tires slashed, was physically beaten with bats, hammers and metal poles and had all of the police equipment (ballistic helmets, uniforms, emergency medical equipment and fire extinguishers) that was inside of the vehicle, removed and stolen or used to damage the vehicle.

(continued next page)

Affidavit for Search Warrant (continued)



The SPD vehicle that was parked in the 500 block of Pine Street that was damaged during the civil unrest

At approximately 1606 hrs: an unidentified¹ adult female, with blond hair, wearing a black and white colored bandanna over the lower portion of her face, a black colored short sleeved t-shirt, black colored jeans, black colored tennis shoes with white colored socks and a black colored back pack, is captured on video using an accelerant in an aerosol can and a lighter to ignite the accelerant setting fire to the headliner of SPD vehicle # 34261 that is parked in the 500 block of Pine Street.



The unidentified adult female using an accelerant in an aerosol can and a lighter to ignite the accelerant setting fire to the interior of the SPD vehicle in the 500 block of Pine Street

At approximately 1620 hrs: the same unidentified adult female, with blond hair, wearing a black and white colored bandanna over the lower portion of her face, a black colored short sleeved t-shirt, black colored jeans, with a black and white striped shirt wrapped around her waist, black colored tennis shoes with white colored socks and a black-colored backpack, is captured on video, in the 1600 block of 6th Avenue using an accelerant in an aerosol can and a lighter to ignite the accelerant, setting fire to the headliner of SPD vehicle # 93151

¹ This suspect was later identified by the F.B.I as **Margaret A. CHANNON**, and has been taken into custody.
(continued next page)



The unidentified adult female suspect using an accelerant in an aerosol can and a lighter to ignite the accelerant setting fire to the headliner of SPD vehicle # 93151

After setting fire to the headliner of SPD vehicle # 93151, she moved to the next SPD vehicle, # 33391 and using the same accelerant in the aerosol can and lighter she set fire to the headliner of that vehicle.



The adult female suspect setting fire to SPD vehicle # 33391 using an accelerant in an aerosol can and a lighter to ignite the accelerant setting fire to the headliner

At approximately 1620 hrs: Video Tech **Cesar HIDALGO**, SPD Video Unit, who was inside the Nordstrom Store in the 1600 block of 6th Avenue videoing the civil unrest, captured the unidentified
(continued next page)

Affidavit for Search Warrant (continued)

adult female using an accelerant in an aerosol can and a lighter to ignite the accelerant setting fire to the headliner and front driver's seat of the SPD Video vehicle # 34424 that was parked directly in front of where he was video-taping.



The unidentified adult female suspect using an accelerant in an aerosol can and a lighter to ignite the accelerant setting fire to the headliner of SPD Video vehicle that is parked in the 1600 block of 6th Avenue.



The unidentified adult female suspect using an accelerant in an aerosol can and a lighter to ignite the accelerant setting fire to the driver's seat of SPD Video vehicle that is parked in the 1600 block of 6th Avenue.

The unidentified adult female suspect is later joined by an unidentified male wearing a tan colored stocking cap, a white colored t-shirt, blue jeans, hiking shoes with a black down jacket wrapped around his waist, carrying a shoulder bag. This unidentified adult male takes the aerosol can and lighter from

(continued next page)

Affidavit for Search Warrant (continued)

the unidentified adult female and ignites the accelerant with the lighter and sets fire to the driver's seat of SPD Video vehicle that is parked in the 1600 block of 6th Avenue.



The unidentified adult male takes the aerosol can and lighter from the unidentified adult female and ignites the accelerant with the lighter and sets fire to the driver's seat of SPD Video vehicle that is parked in the 1600 block of 6th Avenue

Several minutes later six SPD vehicles, # 34424, # 63181, # 93151, # 33391, # 33341 and # 34261 were either fully engulfed in flame or damaged as result of the fires started by the unidentified adult female suspect and the unidentified adult male.



SPD vehicles, # 34424, # 63181, # 93151, # 33391, # 33341 engulfed in flames in the 1600 block of 6th Avenue

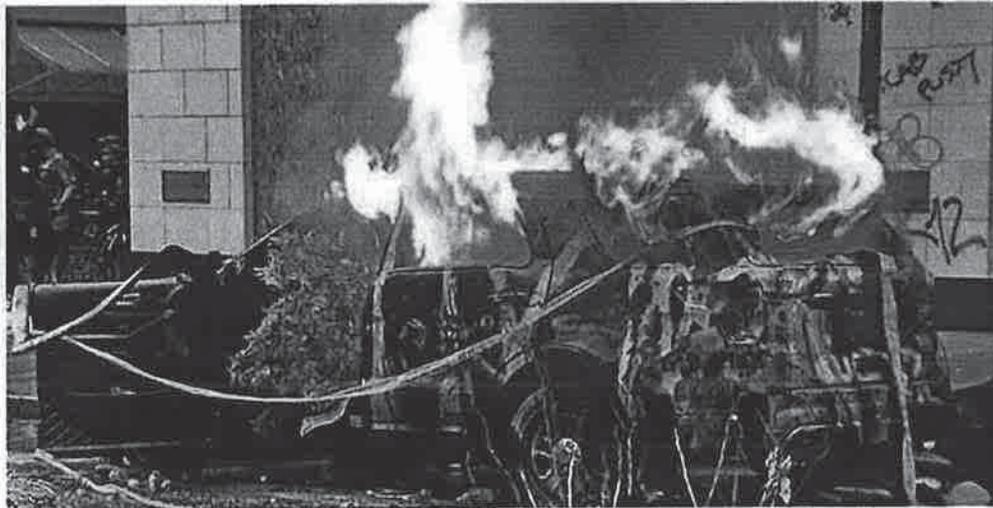
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Affidavit for Search Warrant,
Page 10 of 17

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APP055

Affidavit for Search Warrant (continued)



SPD vehicles, # 34261 engulfed in flames in the 500 block of 5th Avenue

As the vehicles burned, your affiant noted that both the adult male suspect dressed in the red colored Adidas brand sweat suit, hat and shoes (who stole the loaded Colt AR 15 rifle from the SPD vehicle) and the unidentified adult female dressed in all black with the black and white striped bandanna (who set fire to six SPD vehicles) seem to be at the forefront for all of the damage and mayhem that was occurring in the 1600 block of 6th Avenue and the 500 block of Pine Street. Your affiant, who recovered and reviewed surveillance video footage from various locations, noted that both of these suspects were very easy to track based upon their clothing and actions during the civil unrest.



The adult female wearing all black with the black and white bandanna looting the Old Navy Store in the 500 block of Pine Street at the same time the adult male wearing the red colored Adidas brand attire

(continued next page)

Affidavit for Search Warrant (continued)



Both unidentified male in the red colored Adidas brand sweat suit and the unidentified adult female wearing all black with the black and white bandanna leaving the Old Navy Store after looting the store

While your affiant has reviewed various videos and images as well as checked the four local news networks' and the Seattle Times' web sites, your affiant found that the Seattle Times, CBS affiliate KIRO TV, NBC affiliate KING TV, ABC affiliate KOMO TV and the FOX affiliate KCPQ, all had multiple photographers, reporters, camera teams on the ground doing live shots as well as recording/video-taping and photographing capturing the civil unrest as it was occurring.



A Seattle Times published image of the arson suspect and in the background, the unidentified suspect in the red colored Adidas sweat suit who stole a Colt AR 15 rifle from a Police vehicle

(continued next page)



A screen shot image taken from Seattle FOX affiliate KCPQ of the unidentified suspect in the red colored Adidas sweat suit that was aired nationally on FOX News New York.

It has been your affiant's experience through investigations and conversations with television news reporters and camera personnel, that newspapers and news stations' will record footage of events even when they are not broadcasting live from a location. This footage is referred to as unedited or raw footage. From those investigations and conversations, your affiant understands that photographers and camera personnel who are at various events will record footage/photograph events and will use a small amount of footage during their news stories and the footage/photographs that are not aired/posted will be downloaded into an internal system that will retain the footage/photographs for approximately thirty days.

The television affiliate will also provide their news teams cellular telephones, so they can do live remotes from locations during major events.

On Saturday, 05-30-20, your affiant watched the civil unrest unfold via local television (in real time while off duty) and noted that the vast majority of coverage by the four affiliates KIRO TV, KING TV, KOMO TV, KCPQ and the Seattle Times (based upon published photographs) were all within a four-block area 4th Avenue to 6th Avenue and Olive Way to Pike Street. Based on when the incidents under investigation occurred, there is probable cause to believe that those media sources captured images of

(continued next page)

Affidavit for Search Warrant (continued)

the suspect in the footage/photographs taken in that area between 3:30 PM to 5:00 PM, which footage/photographs have not yet been published.

Following the civil unrest from Saturday, 05-30-20, your affiant was assigned to joint SPD, FBI and Alcohol, Tobacco and Firearms (ATF) Task Force to investigate various crimes that occurred, specifically the theft of firearms from Police vehicles. Your affiant has recovered and reviewed numerous hours of surveillance and video footage as well as published still images from Seattle Times and while doing so, your affiant observed KIRO TV, KING TV, KOMO TV, KCPQ recording the civil unrest to include the actions of the adult male in the red colored Adidas brand attire and the unidentified adult female who set the SPD vehicles on fire.



An unidentified local news affiliate reporter and cameraman at 6th Avenue and Pine Street recording the events

(continued next page)

Affidavit for Search Warrant (continued)



An unidentified local television news affiliate cameraman recording the arsons in the 1600 block of 6th Avenue

During the course of the on-going investigation, your affiant has been reviewing surveillance footage that was provided to him from the Nordstrom corporation, Pacific Place, West Lake Mall, as well as video that was sent to the SPD from citizens who were in the area of Olive Way to Pike Street, 4th Avenue to 6th Avenue and found that the quality of video footage is poor, limited, or cameras that are in fixed positions do not capture events. Certain cameras from the Nordstrom store were damaged from the fires that were set by the unidentified adult female suspect or that the heavy smoke from the fires make the camera footage useless.

Your affiant reviewed the posted video footage from the four news affiliates, KIRO TV, KING TV, KOMO TV and KCPQ as well as posted images from the Seattle Times and found them to have excellent quality of video footage and still images and believes that obtaining and reviewing the unedited or raw video footage as well as still images that were not posted would/will lead to the identity of suspect(s) who are responsible for the theft of the firearms stolen from SPD vehicle's # 33391 and # 33411 as well as the suspect(s) who set fire to SPD vehicles # 34424, # 63181, # 93151, # 33391, # 33341 and # 34261.

The female believed to be responsible for setting the fires as described above was later identified by the F.B.I as **Margaret A. CHANNON**. **CHANNON** was taken into custody by federal agents the morning of June 11, 2020 and has been charged with the arsons in Federal Court.

The male involved in the arson and the individuals involved in the thefts of the firearms remain unidentified.

Your affiant is requesting the Court's permission to seek the unedited or raw footage/photographs that were captured by KIRO TV, KING TV, KOMO TV and KCPQ, and the Seattle Times for Saturday, 05-30-20, from 1530 hrs: to 1700 hrs: from Olive Street to Pike Street and from 6th Avenue to 4th Avenue for review to identify suspect(s) for the crime of theft of weapons and arson.

(continued next page)

Affidavit for Search Warrant (continued)

Based on all the foregoing information, your affiant believes that evidence of the above-listed crime(s) exists at the above-described property and that there is probable cause to issue a subpoena duces tecum to command the production of evidence of the above-listed crime(s) including the following items:

Unedited or raw video footage/photographs from KIRO TV, KING TV, KOMO TV and KCPQ, and the Seattle Times for Saturday, 05-30-20, taken from 1530 hrs: to 1700 hrs: in the area from Olive Street to Pike Street and from 6th Avenue to 4th Avenue.

(Check if applicable) I also ask that the court find that notice to any person, including the subscriber(s) and customer(s) to which the materials relate, of the existence of this warrant would likely jeopardize the life or physical safety of an individual and/or jeopardize an ongoing criminal investigation. The request for this finding is based on the following facts:

This affidavit was submitted to the issuing judge or magistrate using an electronic device that is owned, issued, or maintained by the below-identified criminal justice agency.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the attached reports/copies of documents and the information contained therein are true, correct and accurate (RCW 9A.72.085).

<u>6.18.20</u> Date Signed	<u>Seattle WA.</u> Place Signed
<u>Michael MAGAN</u> Printed Name of Peace Officer, Agency, and Personnel Number	 Signature of Peace Officer

OR, if submitted electronically or by phone:

Affiant full name: /s/ Michael P. MAGAN

Agency Badge/Serial or Personnel #: 5094

Agency Name: Seattle Police Department

(Check if applicable) The Judges signature, below, was placed by affiant, at the judge/magistrate's direction given by

telephone (preserve a recording of the authorization)

email (preserve and file the email) or by

(continued next page)

Affidavit for Search Warrant (continued)

_____ (other reliable method).

Signature: 
SUPERIOR COURT JUDGE

Printed Judge Name: Dishi

4833-1237-2672.1

APPENDIX C

FILED
KING COUNTY, WASHINGTON

The Honorable Nelson K. H. Lee
Hearing Date: July 2, 2020 at 1 pm

JUL 27 2020

SUPERIOR COURT CLERK
BY Heather Gordon
DEPUTY

SUPERIOR COURT OF THE STATE OF WASHINGTON
KING COUNTY

STATE OF WASHINGTON

SW No. 20-0-616926

COUNTY OF KING

**NEWS MEDIA OBJECTIONS AND
REQUEST TO QUASH
PURPORTED SUBPOENA FOR
PROTECTED NEWSGATHERING
MATERIAL**

I. INTRODUCTION AND RELIEF REQUESTED

Pursuant to CR 45(c) and Washington's journalist shield law, RCW 5.68.010, the Seattle Times Co. ("Times"), Sinclair Media of Seattle, LLC ("KOMO-4"), KING Broadcasting Company ("KING-5"), KIRO TV, Inc. ("KIRO-7") and Fox Television Stations, LLC ("KCPQ-13") (collectively, "News Media") object to the subpoena the Seattle Police Department ("SPD") purports to request in this matter ("Subpoena"). The Court should enter an order holding that the Subpoena is unenforceable.¹

The Subpoena is a procedurally irregular, overbroad and impermissible assault on the independence of the press. SPD, acting through outside counsel, has targeted Seattle's five largest news outlets with an expansive demand for vast amounts of unaired news footage and unpublished news photographs. The demand is not limited to evidence of the single unsolved crime alleged in its supporting affidavit; instead, it seeks **all** images from 90 minutes of protests across four city blocks.

¹ The Subpoena misidentifies the entities that operate KING-5 and KCPQ-13. The correct entities are as set forth above.

1 SPD's fishing expedition disregards procedural safeguards that must be followed when
2 seeking evidence from news outlets. *See* Section V.A, *infra*.

3 The Subpoena also violates the constitutional and statutory privileges against compelled
4 disclosure of journalistic work product, particularly unpublished material. Both the First
5 Amendment and RCW 5.68.010 protect the news media from such compelled disclosure, largely
6 so that journalists are not perceived as arms of governmental investigators:

7 [C]ompelled disclosure of non-confidential information harms the press'
8 ability to gather information by . . . "converting the press in the public's
9 mind into an investigative arm of prosecutors and the courts. . . . **If**
10 **perceived as an adjunct of the police** or of the courts, journalists might
11 well be shunned by persons who might otherwise give them information
without a promise of confidentiality, barred from meetings which they
would otherwise be free to attend and to describe, or **even physically**
harassed if, for example, observed taking notes or photographs at a
public rally."

12 *Shoen v. Shoen*, 5 F.3d 1289, 1295 (9th Cir. 1993) (*Shoen I*), quoting Morse & Zucker, *The*
13 *Journalist's Privilege in Testimonial Privileges* 474–75 (1983) (emphasis added). This risk of
14 distrust and physical harassment has been witnessed by local reporters covering the recent
15 protests in Seattle, and would be aggravated if SPD is allowed to enforce this Subpoena.

16 Under the shield statute, journalistic work product is privileged absent "clear and
17 convincing evidence" that the information is "highly material and relevant" and is "critical or
18 necessary" to a claim; that the party has "exhausted all reasonable and available means to obtain
19 it from alternative sources"; and that "[t]here is a compelling public interest in the disclosure."
20 RCW 5.68.010(2). SPD cannot meet this burden here. The heightened relevance burden cannot
21 be satisfied by mere speculation, which is all SPD offers in its affidavit supporting the Subpoena.
22 Nor has SPD demonstrated that it has exhausted other sources of information, such as publicly
23 available social media images depicting this heavily recorded event. The Subpoena also is
24 contrary to the public interest, because – particularly in the context of news coverage of civil
25 unrest – requiring news outlets to hand over to police images of protesters imperils journalists
26 and impedes their ability to inform the public about such events. *See* Section V.B, *infra*.

1 Finally, the Subpoena is unduly burdensome and overly broad, which is a sufficient basis
2 for the Court to decline to enforce it under CR 45. *See* Section V.C, *infra*.

3 **II. STATEMENT OF FACTS**

4 This matter is pending under a search warrant cause number, SW No. 20-0-61692-6.
5 Undersigned counsel for the News Media has been unable to access any filed document, view
6 any publicly available docket information, or file a Notice of Appearance.

7 According to documents SPD provided to each of the News Media parties, SPD
8 submitted to the Court an “Affidavit for Subpoena” (“Aff.”) in this matter on June 18, 2020. The
9 document asks the Court to “issue a subpoena duces tecum according to the procedure set forth
10 in CrR 2.3(f) and RCW 10.79.015(3),” and to set a hearing where the named “media outlets will
11 then have an opportunity to respond to the subpoena and have the Court rule on any objections.”
12 Judge Oishi apparently signed the request on June 18, 2020.²

13 The affidavit states that SPD seeks unpublished and unaired news images primarily to
14 locate two individuals – a man in a distinctive “red colored Adidas brand sweat suit” and a
15 female wearing a “black and white striped bandana,” *See* Aff at 11, 14. The affidavit refers to
16 the female as “unidentified” multiple times (*id.* at 7, 8, 9) before disclosing that she was in fact
17 taken into custody and charged a week before SPD requested the Subpoena. *Id.* at 15. The
18 affidavit states that both the male and female suspects are “very easy to track based upon their
19 clothing and actions during the civil unrest.” *Id.*

20 The requested Subpoena, however, seeks information far beyond these two individuals.
21 It demands **all** news footage for an extended period, at the epicenter of a period of both
22 demonstrations and civil unrest. The Subpoena demands:

23 Any and all video footage or photographs, including but not limited to all
24 unedited and/or raw video footage, taken on Saturday, May 30, 2020, from
25 1530 hours to 1700 hours from the locations of Olive Street to Pike Street
and also from 6th Avenue to 4th Avenue in Seattle, Washington.

26 _____
27 ² The hearing set by Judge Oishi was initially set for June 29. This Court subsequently
rescheduled the hearing for July 2.

1 SPD subsequently served the Subpoena on each of the Times, KOMO-4, KING-5, KIRO-
2 7 and KCPQ-13, captioned as a “Subpoena Duces Tecum ... Pursuant to CrR 2.3(f) and RCW
3 10.79.015(3).” The Subpoena fails to provide any place, date or time for compliance.

4 III. ISSUES PRESENTED

5 1. Whether SPD is entitled to enforce a subpoena to news outlets, seeking
6 unpublished information gathered in the course of gathering and reporting the news, where the
7 subpoena fails to comply with CR 45.

8 2. Whether SPD has met its burden to show, by clear and convincing evidence, that
9 its subpoena to every major Seattle news organization, seeking information obtained in the
10 course of protected newsgathering activity, should not be quashed pursuant to RCW 5.68.010.

11 3. Whether SPD’s subpoena is overbroad or otherwise objectionable pursuant to
12 CR 45.

13 IV. EVIDENCE RELIED ON

14 The News Media rely on the Declaration of Danny Gawlowski (“Gawlowski Decl.”) (the
15 Times’ Assistant Managing Editor for photography), and on the filings in this matter.

16 V. LEGAL AUTHORITY AND ARGUMENT

17 A. SPD’s Attempt to Enforce the Subpoena Is Procedurally Improper.

18 As a threshold matter, any attempt to enforce the Subpoena at this stage would be
19 procedurally improper. As detailed below, the News Media must be provided the opportunity to
20 review and respond or object to the Subpoena as provided under **CR 45**; and any attempt to
21 enforce it must be pursuant to a motion to compel in an **action under the Civil Rules**, not in an
22 action docketed as a search warrant.

23 The requirement to proceed with a civil subpoena arises under RCW 10.79.015(3), which
24 states that if evidence of “any homicide or any felony” is sought “from any radio or television
25 station or from any regularly published newspaper, magazine or wire service, or from any
26 employee of [same], the evidence shall be secured **only through a subpoena duces tecum,**”
27 with limited exceptions that do not apply here. RCW 10.79.015(3) (emphasis added).

1 Enacted in 1980 (*see* 1980 c 52 § 1), RCW 10.79.015(3) is one of a number of similar
2 laws passed around the country to protect newsrooms from overreaching law enforcement
3 demands in the wake of *Zurcher v. Stanford Daily*, 436 U.S. 547, 567-68 (1978). The facts of
4 *Zurcher* are instructive. A demonstration at Stanford University led to a violent clash with
5 police, in which nine officers were injured. A newspaper ran articles about the incident. Local
6 law enforcement obtained a warrant to search the newspaper’s office for photographs or other
7 evidence that might reveal “the identity of the perpetrators” of the assaults. *Id.* at 550-51.
8 Although the Court concluded that the newspaper could not pursue a civil rights action based on
9 the search, it also found that “the Fourth Amendment does not prevent or advise against
10 legislative or executive efforts to establish nonconstitutional protections against possible abuses
11 of the search warrant procedure.” *Id.* at 567. Congress and a number of states, including
12 Washington, “accepted the invitation to establish such protections.” *J.O. v. Bedminster*, 77 A.3d
13 1242, 1245 (N.J. App. 2013) (citing RCW 10.79.015(3)).³

14 Like RCW 10.79.015(3), the Criminal Rules also require that demands for news material
15 must be made via a **civil subpoena**. Criminal Rule 2.3(f), “Searches of Media,” provides:

16 (1) *Scope*. If an application for a search warrant is governed by
17 RCW 10.79.015(3) . . . this section controls the procedure for
obtaining the evidence.

18 (2) *Subpoena Duces Tecum*. Except as provided in subsection (3)
19 [governing issuance of a search warrant], if the court determines that
20 the application satisfies the requirements for issuance of a warrant,
as provided in section (c) of this rule, **the court shall issue a
subpoena duces tecum in accordance with CR 45(b)**.

21 CrR 2.3(f) (emphasis added).

22 Accordingly, any attempt by SPD to obtain evidence from newspapers or television
23 stations must be made via a subpoena issued in accordance with CR 45(b). This assures that in
24 the face of any demand for compelled disclosure of journalistic work product, the press will have
25

26 _____
27 ³ Washington’s law has had its intended effect. It is rarely invoked, and has not been cited in
any published (or, for that matter, unpublished) appellate decision in its 40 years of existence.

1 an opportunity to review the request and, if it is objectionable, will have access to full judicial
2 review. CR 45(b) allows for this opportunity; a search warrant procedure does not.

3 SPD has failed to follow the requirements of CR 45. First, the Subpoena does not specify
4 “a time and place” for compliance, as required by CR45(a)(1)(C). This is not merely a formality.
5 A subpoena’s compliance time triggers the deadline for the recipient to serve objections.
6 CR 45(c)(2)(B). Timely objections shift the burden of enforcing the subpoena to the party
7 serving it, which cannot obtain the requested documents unless it brings a properly noticed
8 motion to compel under the Civil Rules. *Id.* SPD’s failure to provide a proper subpoena, but
9 instead to request that the Court immediately decide objections in a search warrant proceeding,
10 short-circuits this process. SPD should have provided the News Media an opportunity to review
11 and object to the Subpoena; and after reviewing and conferring over any such objections, it
12 would have been SPD’s burden to justify the Subpoena in a proper **civil** discovery motion.

13 SPD’s disregard of the CR 45 process also deprives the News Media of the usual route to
14 appellate review that attaches to efforts to enforce third-party subpoenas. A third party may
15 appeal an order in a civil action granting or denying a motion to enforce a subpoena. *Republic of*
16 *Kazakhstan v. Does 1-100*, 192 Wn. App. 773, 781, 368 P.3d 524 (2016) (nonparty appeal of
17 denial of motion to quash subpoena). In a search warrant action, it is unclear how, short of
18 seeking a writ of mandamus, the News Media would obtain such review.

19 Accordingly, the Court should take no action to enforce SPD’s Subpoena. Instead, the
20 Court should hold that it is not enforceable. If SPD still wishes to pursue the subpoena that it
21 requested from Judge Oishi on June 18, it should serve a subpoena that complies with CR 45,
22 and that follows its procedural safeguards, including by providing the News Media sufficient
23 time to review and object or respond.

1 **B. The Information Sought By the Subpoena Is Protected By the Shield Law,**
2 **the First Amendment, and the Common Law.**

3 Should the Court permit SPD to pursue the Subpoena at this time, it should hold that it is
4 unenforceable under the shield statute (RCW 5.68.010) and the constitutional and common law
5 protections against compelled disclosure of journalistic work product.

6 Reporter shield laws protect non-party news media against compelled disclosure of
7 information acquired in the course of newsgathering activities. “Rooted in the First Amendment,
8 the privilege is a recognition that society’s interest in protecting the integrity of the
9 newsgathering process, and in ensuring the free flow of information to the public, is an interest
10 of sufficient social importance to justify some incidental sacrifice of sources of facts needed in
11 the administration of justice.” *Shoen I*, 5 F.3d at 1292 (internal quotation marks omitted).
12 Compelling the news media to produce unpublished news footage and images poses many
13 dangers to journalists’ autonomy, including:

- 14 • the threat of judicial intrusion into the newsgathering and editorial process;
- 15 • the disincentive to compile and preserve unpublished material if that material is
16 subject to disclosure;
- 17 • the burden on journalists’ time and resources in responding to subpoenas; and
- 18 • the perception that the journalist is an investigative arm of the judicial system or a
19 litigant.

20 *Id.* at 1294-95; *Miller v. Superior Court of San Joaquin Cty.*, 21 Cal.4th 883, 886, 986 P.2d 170
21 (1999) (threat to press autonomy from subpoenas “is particularly clear in light of the press’s
22 unique role in society. . . . Because journalists not only gather a great deal of information, but
23 publicly identify themselves as possessing it, they are especially prone to be called upon by
24 litigants seeking to minimize the costs of obtaining needed information.”) (internal quotations
25 omitted).

26 Washington courts have long recognized the reporter’s privilege as a matter of both
27 constitutional and common law. *See e.g., State v. Rinaldo*, 102 Wn.2d 749, 689 P.2d 392 (1984);

1 *Senear v. Daily Journal-American*, 97 Wn.2d 148, 641 P.2d 1180 (1982); *Clampitt v. Thurston*
2 *County*, 98 Wn.2d 638, 658 P.2d 641 (1983).

3 In 2007, the Legislature codified the shield privilege as RCW 5.68.010. The statute
4 provides an unequivocal privilege to the “news media,” defined in relevant part to include any
5 newspaper or television station in the regular business of gathering and disseminating news or
6 information to the public by broadcast, and their employees who obtain or prepare news or
7 information in the scope of employment. RCW 5.68.010(5)(a), (b). The News Media entities
8 plainly meet this definition; indeed, SPD cites their extensive news coverage of the events of
9 May 30 as the very reason it seeks the Subpoena. *See Aff.* at 14, 15.

10 The statute provides an absolute privilege against disclosure of confidential news sources.
11 RCW 5.68.010(1)(a). In all other situations, the statute provides qualified protection against
12 subpoenas that compel the news media to “produce” or otherwise disclose **any** information
13 obtained in the course of “gathering, receiving, or processing news or information for potential
14 communication to the public.” RCW 5.68.010(1)(b). Here, the Subpoena falls within this broad
15 scope of the shield law. It seeks to compel the News Media to produce all “raw/unedited” video
16 and images taken by journalists from the demonstrations and unrest downtown on May 30.

17 To compel the media to disclose any information arising from its newsgathering
18 activities, the party seeking the information must establish each of following elements by “clear
19 and convincing evidence.” RCW 5.68.010(2). First, the information must be not merely
20 relevant but both “highly material and relevant” to the matter at hand and “critical or necessary
21 to the maintenance of a party’s claim, defense, or proof of an issue material thereto.” RCW
22 5.68.010(2)(b)(i), (ii). Second, the party seeking the information must show it “has exhausted all
23 reasonable and available means to obtain it from alternative sources.” RCW 5.68.010(2)(b)(iii);
24 Finally, the party seeking the information must show that “[t]here is a compelling public interest
25 in the disclosure.” RCW 5.68.010(2)(b)(iv). SPD cannot show these elements, much less by
26 clear and convincing evidence.

1 **1. SPD Has Failed To Provide Clear and Convincing Evidence of**
2 **Heightened Relevance or Critical Need for the Requested Information**

3 SPD has not shown that the material demanded in the Subpoena is both “highly material
4 and relevant” and “critical or necessary” to any prosecution. RCW 5.68.010(2)(b). To satisfy
5 these standards, SPD must establish, by clear and convincing evidence, that its case “virtually
6 rises or falls with the admission or exclusion” of the evidence sought from the press. *In re*
7 *Application to Quash Subpoena to Nat'l Broad. Co.*, 79 F.3d 346, 351 (2d Cir. 1996)
8 (interpreting shield law similar to RCW 5.68.010) (internal quotations omitted). Moreover,
9 “there must be a **showing of actual relevance**; a showing of potential relevance will not
10 suffice.” *Shoen v. Shoen*, 48 F.3d 412, 416 (9th Cir. 1995) (“*Shoen II*”) (emphasis added).

11 This heightened relevance standard requires more than just an assertion that a fishing
12 expedition of unaired news footage **might** lead to something relevant. In *United States v.*
13 *Thompson*, 2015 WL 1608462, at *2 (S.D. Fla. Apr. 10, 2015), for example, a criminal defendant
14 sought to subpoena a news crew’s footage of his arrest, arguing it would disprove probable
15 cause. The court quashed the subpoena, finding the assertion insufficient to breach the
16 journalist’s privilege because it was “speculative – whether or not the footage actually shows this
17 information appears to be pure conjecture and merely exploratory at this point. Without more of
18 a showing, the Court cannot conclude that this footage is necessarily ‘highly relevant’.” *Id.*

19 Another court applying the heightened relevance element held an “open ended request for
20 unaired video footage that has nothing to do with [the party in question] fail[s] to make the
21 requisite showing. . . . **Speculating about possible relevance, rather than showing actual**
22 **relevance, is not enough to compel journalists to empty their newsroom files.”** *Flynn v.*
23 *Roanoke Companies Grp.*, 2007 WL 4564113, at *3 (N.D. Ga. Dec. 21, 2007) (emphasis added).

24 Like the party issuing the subpoena in *Flynn*, SPD “cannot, and does not, explain why
25 every piece of unaired footage is either relevant or [] necessary.” *Id.* Indeed, SPD’s supporting
26 affidavit shows **no** basis for it to assert that the unpublished information it seeks will provide any
27 clearer image of the one at-large suspect it seeks to identify, or any better evidence of the

1 felonies it claims to be investigating, than the numerous published images it already possesses.
2 At best, SPD **speculates** that forcing every major newsroom in town to empty its files of all
3 unpublished material **might** lead to something useful. That is insufficient as a matter of law to
4 show that its Subpoena seeks “highly material and relevant” and “critical or necessary”
5 information.



6 **SPD Has Not Presented Clear and Convincing Evidence That It Has**
7 **Exhausted Alternative Sources**

8 SPD also fails to meet its burden to show it “has exhausted all reasonable and available
9 means to obtain [the information] from alternative sources.” RCW 5.68.010(2)(b)(iii). A party’s
10 burden to exhaust alternatives sources is “very substantial.” *Clampitt*, 98 Wn.2d at 644.
11 “[C]ourts should do their utmost to avoid the need for reporter disclosure, ordering it only as a
12 last resort” and only after “the court is absolutely convinced” that the privilege has been
13 overcome. *Id.* at 643. *See also Schoen I*, 5 F.3d at 1295 (refusing to compel book author to
14 testify because plaintiffs had not deposed defendant about statements he made to author)

15 Here, SPD has not shown that it has done its utmost to avoid seeking unpublished news
16 material. It asserts that it “has been reviewing” surveillance footage from nearby businesses.
17 Aff. at 15. But there is no indication SPD has exhausted that process. Nor has SPD suggested it
18 has exhausted other sources of images, such as publicly available social media posts from the
19 heavily-recorded events of May 30. SPD’s supporting affidavit fails to state whether it has
20 publicized the images it already possesses to seek the public’s help in identifying the one at-large
21 suspect. Nor has SPD indicated whether it has completed its interviews of the many witnesses to
22 the events described in its supporting affidavit. In short, SPD has not satisfied its burden, much
23 less by clear and convincing evidence, that it exhausted every available source of the information
24 it seeks before it made its demand to the News Media.

1 **¶ The Public Interest, Particularly in Protecting Journalists Who Cover**
2 **Civil Unrest, Requires Enforcing the Privilege.**

3 SPD also fails to meet the final element of the shield statute: it has not shown clear and
4 convincing evidence of “a compelling public interest” in requiring disclosure of the requested
5 unpublished news materials. RCW 5.68.010(2)(b)(iv). To the contrary, its Subpoena
6 undermines the public interest in assuring that journalists can safely and effectively report on
7 events like those that unfolded in Seattle on and after May 30.

8 The Legislature has made clear that the public interest supports protecting non-party
9 news media from subpoenas in all but the most exceptional cases. These public interests include
10 protecting journalists from “the disadvantage of . . . appearing to be an investigative arm of the
11 judicial system or a research tool of government.” *Shoen I*, 5 F.3d at 1294-95 (citation omitted).
12 Permitting the press to be seen as an adjunct of the police interferes with its ability to report
13 accurate information to the public. It fosters distrust among potential sources and can lead to
14 journalists being “physically harassed” when covering public gatherings *Id.* at 1295.

15 These are not idle concerns. Reporters who collaborate with law enforcement have been
16 the target of vandalism and harassment.⁴ But even the **perception** that journalists operate as
17 arms of the police poses a risk to journalists – a risk that, in the specific context of covering
18 protests and civil unrests, includes a danger of physical harm. *See* Gawlowski Decl. ¶ 6. The
19 News Media encountered these risks over and over again covering the events on and after May
20 30. One news photographer was hit in the head with a rock thrown by protesters, and later
21 punched in the face by a protester. *See id.* ¶ 7. Other journalists were told by demonstrators that
22 they did not want their photographs taken because they feared identification or police retaliation
23 if they were recorded. *Id.* At least one news station hired a private security contractor to protect
24

25 ⁴ *See, e.g.*, “Olympian newspaper disciplines photographer,” *Seattle Times* (July 12, 2011)
26 (after photojournalist shared unpublished photos of violent protesters with police, both his home
27 and newspaper’s office were vandalized), available at <https://www.seattletimes.com/seattle-news/olympian-newspaper-disciplines-photographer/>.

1 its news crew. Aff. at 4. Journalists faced numerous incidents of protesters attempting to block
2 cameras or interfere with their ability to provide news coverage.⁵

3 Similarly, in covering the “Capitol Hill Occupied Protest,” journalists have had to explain
4 repeatedly that they are independent from the police, and that journalists do not serve as an
5 extension of law enforcement. Gawlowski Decl. ¶ 8. These assurances are instrumental in
6 enabling journalists to gain trust with protesters so that they can safely and accurately report
7 news from the protest zone. *Id.* The perception that the News Media is cooperating with police
8 investigations would subvert that effort, degrade trust in journalists, and undermine their ability
9 to inform the public. *Id.*

10 In sum, SPD cannot show by clear and convincing evidence that enforcing the Subpoena
11 is the public interest. The Subpoena poses a substantial risk both to the physical safety of
12 journalists, and to their ability to inform the public effectively. *Id.* ¶ 9.

13 **C. The Subpoena Is Overbroad and Unduly Burdensome**

14 In addition to being contrary to the shield law, the subpoena should be quashed for a
15 more basic reason: it is flagrantly overbroad and would subject the News Media to an undue
16 burden. CR 26(c); *Jimenez v. City of Chicago*, 733 F. Supp. 2d 1268, 1273 (W.D. Wash. 2010)
17 (quashing subpoena as unduly burdensome, as well as violating the journalist’s privilege).

18 The Subpoena’s scope is overbroad. SPD’s affidavit focuses on two individuals, readily
19 identifiable by their clothing – one of whom is already in custody. *See* Aff. at 11, 14, 15. Yet
20 the Subpoena is not limited to these individuals, or even to individuals suspected of committing a
21 felony (as required to permit a news media subpoena under RCW 10.79.015(3)). Instead, the
22 Subpoena seeks **all** of the News Media’s footage and images, depicting thousands of individuals
23 attending a mass demonstration and its aftermath. No basis exists for SPD to demand that
24 journalists turn over material identifying individuals who are not even suspected of wrongdoing.

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26
27 ⁵ One example of a news crew facing such harassment while broadcasting live can be seen at
3:00 to 3:30 in the news video at <https://twitter.com/johncolucci/status/1266918131529691137>.

1 Second, the Subpoena seeks a vast amount of footage and images from **dozens** of
2 individual journalists. *See* Gawlowski Decl. ¶ 5 (noting the Times alone had 15 journalists
3 covering the events). Responding to the Subpoena would be exceedingly disruptive and
4 burdensome to Seattle’s five major newsrooms. It would interfere with regular news reporting –
5 a particular concern in light of diminished newsroom resources, increased workloads, and the
6 burdens of covering the ongoing COVID-19 pandemic – and would require each journalist to
7 search for images spread out across multiple platforms. *Id.* Identifying responsive material also
8 would require hours of time from editors and production staff. *Id.*

9 **VI. CONCLUSION**

10 The subpoena is procedurally improper under CR 45. It seeks information privileged
11 under RCW 5.68.010, and SPD has failed to meet its burden of showing, by clear and convincing
12 evidence, that the shield law’s protections do not apply. It also is unduly burdensome. For all of
13 these reasons, the Court should enter an order holding that the Subpoena is not enforceable.

14 -----

15 I certify that this memorandum contains 4,123 words, in compliance with the Local Civil
16 Rules.

17 DATED this 29th day of June, 2020.

18 Davis Wright Tremaine LLP
19 Attorneys for Seattle Times Co., Sinclair Media of
20 Seattle, LLC, KING Broadcasting Company, KIRO
TV, Inc. and Fox Television Stations, LLC

21
22 By Eric M. Stahl
Eric M. Stahl, WSBA #27619

1 **DECLARATION OF SERVICE**

2 The undersigned, hereby declares under the laws of the State of Washington, that on this
3 day he caused to be served, a copy of the foregoing document on the following counsel of record
4 in the manner indicated:

5 Brian W. Esler
6 Miller Nash Graham & Dunn LLP
7 Pier 70, 2801 Alaskan Way, Suite 300
8 Seattle, WA 98121-1128
9 brian.esler@millernash.com

[] Via First Class Mail
[] Via Overnight Mail
[X] Via Email
[] Via Messenger

10 DATED this 29th day of June, 2020, at Seattle, Washington.

11 /s/Eric M. Stahl
12 Eric M. Stahl, WSBA #27619

APPENDIX D

The Honorable Nelson K. H. Lee
Hearing Date: July 2, 2020 at 1 pm

FILED
KING COUNTY, WASHINGTON

JUL 27 2020

SUPERIOR COURT CLERK
BY Heather Gordon
DEPUTY

SUPERIOR COURT OF THE STATE OF WASHINGTON
KING COUNTY

STATE OF WASHINGTON

SW No. 20-0-616926

COUNTY OF KING

**DECLARATION OF DANNY
GAWLOWSKI IN SUPPORT OF
OBJECTIONS TO SUBPOENA
FOR PROTECTED
NEWSGATHERING MATERIAL**

I, Danny Gawlowski, declare:

1. I make this declaration based on personal knowledge, except for matters stated on information and belief, which I believe to be true. This declaration is made in support of the news media's Objections to and Request to Quash Subpoena for Protected Newsgathering Material. If called, I could testify competently as follows.

2. I am an Assistant Managing Editor for the Seattle Times ("Times"). I oversee the Times' photography, video and digital departments, and supervise its photojournalists. I have held my current position for two years and have been a Times employee since 2009.

3. I have worked as a photojournalist for 15 years. As a photo and video editor, my work has been recognized with two staff Pulitzer Prizes and numerous other national journalism awards. In 2016, I served as President of the Associated Press Photo Managers, a national association of newsroom managers overseeing photographers. From 2015 to 2018, I was Director of the Kalish Visual Editing Workshop, which teaches photojournalism ethics to

1 industry leaders from around the world.

2 4. I was responsible for managing and coordinating Times photojournalists covering
3 the protests in downtown Seattle on May 30, 2020, and their aftermath. I understand the Seattle
4 Police Department (“SPD”) has issued a subpoena seeking all digital and video images captured
5 by Seattle Times journalists from 3:30 to 5 pm on May 30, 2020, in a four-square block area in
6 downtown Seattle, in connection with the police investigation of alleged criminal activity.

7 5. Requiring journalists to disclose newsgathering material undermines their ability
8 to cover and report the news freely and effectively. Among other things, responding to such
9 requests detracts from journalists’ regular work – a particular concern at present in light of
10 diminished newsroom resources, increased workloads, and the burdens of covering the ongoing
11 COVID-19 pandemic. Responding to the SPD subpoena would require the Times to interrupt
12 normal work to search images recorded by four photojournalists and two videographers who
13 covered the May 30 protests, as well as additional material gathered by the approximately nine
14 Times news reporters at the scene. Their work is spread out across multiple publishing, archive
15 and social media platforms. Identifying the responsive images would require hours of time from
16 each of the individual journalists, as well as review by at least a dozen editors and production
17 staff. The burden and disruption to the newsroom and to regular news production would be
18 tremendous.

19 6. More significantly, the SPD subpoena, if enforced, would pose an additional,
20 specific risk to journalists: it will contribute to the perception that journalists are operating not as
21 independent newsgatherers, but rather as arms of government investigators. The perception that
22 a journalist might be collaborating with police or other public officials poses a very real, physical
23 danger to journalists, particularly when they are covering protests or civil unrest. Enforcing the
24 subpoena also will aggravate the distrust journalist already face in covering protests.

25 7. These risks were evidenced numerous times during the events in Seattle in May
26 and June 2020. For example, in the course of the first week of the protests, one Times staff
27 photographer was hit in the head with a rock thrown by protesters (fortunately he was wearing a

1 helmet, and was not injured). In a separate incident, the same photographer also was punched in
2 the face by a protester. Another Times staff photographer was told by multiple protesters that
3 they did not want their photographs taken because they feared identification or police retaliation
4 if they were recorded.

5 8. In covering the “Capitol Hill Occupied Protest,” Times photographers have had to
6 explain repeatedly that the Times is independent from the police, and that journalists do not serve
7 as an extension of law enforcement. Such assurances have been instrumental in our journalists’
8 ability to gain trust with protesters so that the Times can safely and accurately report news from
9 the protest zone. The perception that the news media is cooperating with police investigations
10 would subvert that effort, degrade the trust our journalists have built, and undermine our ability
11 to inform the public.

12 9. Simply put, enforcing the SPD subpoena poses a substantial risk both to the
13 physical safety of Times journalists and other news reporters, and to their ability to inform the
14 public effectively.

15 I declare under penalty of perjury under the laws of the State of Washington that the
16 foregoing is true and correct.

17 Executed this 29th day of June, 2020, at Seattle, Washington.

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27


Danny Gawlowski

DECLARATION OF SERVICE

The undersigned, hereby declares under the laws of the State of Washington, that on this day he caused to be served, a copy of the foregoing document on the following counsel of record in the manner indicated:

Brian W. Esler [] Via First Class Mail
Miller Nash Graham & Dunn LLP [] Via Overnight Mail
Pier 70, 2801 Alaskan Way, Suite 300 [X] Via Email
Seattle, WA 98121-1128 [] Via Messenger
brian.esler@millernash.com

DATED this 29th day of June, 2020, at Seattle, Washington.

/s/Eric M. Stahl
Eric M. Stahl, WSBA #27619

APPENDIX E

1 FILED
2 2020 JUN 30 HONORABLE NELSON K.H. LEE
3 KING COUNTY Hearing Date: July 2, 2020 at 1pm
4 SUPERIOR COURT CLERK

5 CASE #: 20-0-61692-6 SEA

6
7 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

8 IN AND FOR THE COUNTY OF KING

9 SUBPOENA DUCES TECUM TO KIRO
10 TV, INC.; TEGNA, INC.; SINCLAIR
11 MEDIA OF SEATTLE LLC; TRIBUNE
12 BROADCASTING SEATTLE LLC;
13 SEATTLE TIMES COMPANY
14 PURSUANT TO CrR 2.3(f) AND
15 10.79.015(3)

SW No. 20-0-616926

AMICUS CURIAE BRIEF OF THE
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS

16 **I. INTEREST OF AMICUS CURIAE**

17 Amicus Curiae the Reporters Committee for Freedom of the Press (“Reporters
18 Committee”) is an unincorporated nonprofit association of reporters and editors dedicated to
19 defending the First Amendment and newsgathering rights of journalists. As an organization
20 that advocates on behalf of the news media, the Reporters Committee has a strong interest in
21 ensuring that courts apply the qualified privilege for journalistic work product set forth in
22 Washington’s reporter shield statute (the “Shield Law”), RCW 5.68.010, as well as the
23 qualified reporter’s privilege based in the First Amendment, in a manner that fully protects
24 journalists’ ability to gather and disseminate news.
25
26
27

28 AMICUS CURIAE BRIEF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

- 1 -

1 Since the enactment of the Shield Law, there have been no published decisions
2 interpreting the statute in the context of a criminal matter or investigation. *See Republic of*
3 *Kazakhstan v. Does 1–100*, 192 Wn. App. 773, 781, 368 P.3d 524, 528 (2016) (interpreting
4 the statute in context of a civil suit and noting that, at that time, no prior court had interpreted
5 the Shield Law). Thus, the matter before this Court is one of first impression. The Reporters
6 Committee has significant experience with legal issues relating to the reporter’s privilege and
7 shield laws and can aide the Court in its interpretation of the Shield Law in this case. For the
8 reasons set forth below, the Reporters Committee urges the Court to enter an order holding
9 that the subpoena duces tecum issued on June 18, 2020, to non-parties the Seattle Times Co.,
10 Sinclair Media of Seattle, LLC, KING Broadcasting Company, KIRO TV, Inc. and Fox
11 Television Stations, LLC (collectively, the “News Media Companies”)¹ (the “Subpoena”) is
12 unenforceable.

13 II. ARGUMENT

14 Washington courts have long recognized the importance of a journalist’s privilege.
15
16 *See, e.g., State v. Rinaldo*, 102 Wash.2d 749, 754, 689 P.2d 392, 395 (1984); *Senear v. Daily*
17 *Journal-American*, 97 Wash.2d 148, 157, 641 P.2d 1180, 1184 (1982). With the enactment
18 of the Shield Law in 2007, the Washington State Legislature not only codified the common
19 law reporter’s privilege previously recognized by Washington courts, but also strengthened
20 it. To overcome the privilege under the Shield Law, the party seeking disclosure must show
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27 ¹ The Reporters Committee understands that the Subpoena misidentifies the entities that
28 operate KING-5 and KCPQ-13. The list of entities is based on that in the News Media
Companies’ Objections and Request to Quash.

1 that the information sought is both “highly material and relevant,” and “critical or necessary
2 to the maintenance of a party’s claim, defense, or proof of an issue material thereto.” RCW
3 5.68.010(2)(b)(i)–(ii). In addition, the party seeking disclosure must demonstrate that it has
4 “exhausted all reasonable and available means to obtain [the desired information] from
5 alternative sources.” RCW 5.68.010(2)(b)(iii). Finally, the party seeking disclosure must
6 show a “compelling public interest in the disclosure.” RCW 5.68.010(2)(b)(iv).
7

8 The First Amendment also affords a qualified privilege against compelled disclosure
9 of “facts acquired by a journalist in the course of gathering the news.” *Shoen v. Shoen*, 5
10 F.3d 1289, 1292 (9th Cir. 1993). To determine whether that constitutional privilege is
11 overcome, courts weigh “the claimed First Amendment privilege and the opposing need for
12 disclosure . . . in light of the surrounding facts . . . to determine where lies the paramount
13 interest.” *Id.* (quoting *Farr v. Pitchess*, 522 F.2d 464, 468 (9th Cir. 1975)).
14

15 The Reporters Committee agrees with the News Media Companies that the Subpoena
16 is unenforceable under the Shield Law and the First Amendment for the reasons set forth in
17 the News Media Companies’ Objections and Request to Quash. *See News Media Obj. &*
18 *Req. to Quash Purported Subpoena for Protected Newsgathering Material* at 7–13. The
19 Reporters Committee separately writes to emphasize for the Court the effect that enforcement
20 of the Subpoena would have on all journalists and news media organizations in Washington,
21 especially those engaged in covering protests and other demonstrations.
22

23 Requiring members of the news media to assist law enforcement officers in an
24 ongoing investigation by turning over their journalistic work product increases the likelihood
25 that members of the public will incorrectly perceive journalists to be an extension of law
26 enforcement, rather than independent press. *See Gonzales v. Nat’l Broad. Co.*, 194 F.3d 29,
27

28 AMICUS CURIAE BRIEF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

1 35 (2d Cir. 1999) (noting that “permitting litigants unrestricted, court-enforced access to
2 journalistic resources would risk the symbolic harm of making journalists appear to be an
3 investigative arm of . . . the government”; emphasizing “paramount public interest in the
4 maintenance of a vigorous, aggressive and independent press capable of participating in
5 robust, unfettered debate over controversial matters”); *Shoen*, 5 F.3d at 1295 (finding
6 persuasive concerns about “the disadvantage of a journalist appearing to be . . . a research
7 tool of government” (quoting *United States v. La Rouche Campaign*, 841 F.2d 1176, 1182
8 (1st Cir. 1988)); *La Rouche Campaign*, 841 F.2d at 1182 (“observing Justice Powell’s
9 essential concurring opinion in *Branzburg*, ‘certainly, we do not hold . . . that state and
10 federal authorities are free to annex the news media as an investigative arm of government’”
11 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 709, 92 S. Ct. 2646, 2671 (1972) (Powell, J.,
12 concurring)); *cf.* Leslie A. Warren, *A Critique of an Illegal Conduct Limitation on the*
13 *Reporters’ Privilege Not to Testify*, 46 Fed. Comm. L.J. 549, 557 (1994) (noting that if the
14 reporter’s privilege were weakened, “the press would face the possible image of being an
15 arm of law enforcement, rather than a neutral observer”). Undermining the public’s
16 perception of journalists as independent of government entities, including and especially law
17 enforcement, is particularly problematic in the context of protests, where reporters may be
18 exposed to risk of physical harassment and harm.

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23 As the U.S. Court of Appeals for the Ninth Circuit has explained:

24 If perceived as an adjunct of the police or of the courts, journalists might well be
25 shunned by persons who might otherwise give them information without a promise of
26 confidentiality, barred from meetings which they would otherwise be free to attend
27 and to describe, or even physically harassed if, for example, observed taking notes or
28 photographs at a public rally.

1 *Shoen*, 5 F.3d at 1295 (9th Cir. 1993) (quoting Duane D. Morse & John W. Zucker, *The*
2 *Journalist’s Privilege, in Testimonial Privileges* 474–75 (Scott N. Stone & Ronald S.
3 Liebman eds., 1983)).

4
5 Recent examples of violence against journalists covering protests demonstrate that
6 these concerns are well-founded. Protests have consistently been the most dangerous place
7 for working journalists in the United States in recent years. *See* Sarah Matthews, *Press*
8 *Freedoms in the United States 2019*, 8 (2020), [https://www.rcfp.org/wp-](https://www.rcfp.org/wp-content/uploads/2020/03/2020-Press-Freedom-Tracker-Report.pdf)
9 [content/uploads/2020/03/2020-Press-Freedom-Tracker-Report.pdf](https://www.rcfp.org/wp-content/uploads/2020/03/2020-Press-Freedom-Tracker-Report.pdf) (nine of 34 physical
10 attacks on journalists in 2019 occurred at protests); Sarah Matthews, *Press Freedoms in the*
11 *United States 2018*, 11 (2019), [https://www.rcfp.org/wp-content/uploads/2019/05/2018-US-](https://www.rcfp.org/wp-content/uploads/2019/05/2018-US-Press-Freedom-Report.pdf)
12 [Press-Freedom-Report.pdf](https://www.rcfp.org/wp-content/uploads/2019/05/2018-US-Press-Freedom-Report.pdf) (13 of 35 physical attacks on journalists in 2018 occurred at
13 protests); Sarah Matthews, *Press Freedoms in the United States 2017*, 10 (2018),
14 [https://www.rcfp.org/wp-content/uploads/imported/20180403_100407_press_freedoms_](https://www.rcfp.org/wp-content/uploads/imported/20180403_100407_press_freedoms_in_the_us_2017.pdf)
15 [in_the_us_2017.pdf](https://www.rcfp.org/wp-content/uploads/imported/20180403_100407_press_freedoms_in_the_us_2017.pdf) (31 of 45 physical attacks on journalists in 2017 occurred at protests).
16
17 Amidst the wave of physical assaults on journalists covering the recent nationwide protests
18 sparked by the killings of George Floyd, Breonna Taylor, and other Black Americans, some
19 assailants have made clear that they view journalists as an unwelcome extension of law
20 enforcement. For example, a journalist covering protests in Tucson, Arizona, with his press
21 credentials clearly visible was punched, pushed, and kicked by protestors, who stated he was
22 “with the police.” *Individuals at Protest in Tucson Target Journalist with Repeated Physical*
23 *Attacks*, U.S. Press Freedom Tracker (May 29, 2020), <https://perma.cc/3N7Q-PVNU>. His
24 assailants stated, “This is a protest and we’re protesting you, [expletive].” *Id.* Protestors hit
25 another journalist covering protests in Tucson in the arm and made statements including
26
27
28

1 “[w]hen you put our faces on TV, it gets us killed,” and “[i]f you use our faces, we’re going
2 to come find you.” *Individuals in Crowd Accost Newspaper Reporter Covering Protests in*
3 *Tucson*, U.S. Press Freedom Tracker (May 29, 2020), <https://perma.cc/N2T6-2EC8>.

4
5 As these recent examples show, journalists covering protests are already at
6 heightened risk. Compelling them to turn over to the police unaired video footage and
7 photographs gathered to report the news will sharply increase that risk. Enforcement of the
8 Subpoena could mislead the public into perceiving reporters at protests as a mere arm of law
9 enforcement, thus eroding public trust in the news media and increasing the already-
10 significant risk of physical harm that journalists face when covering protests. Accordingly,
11 the Subpoena is contrary to the public interest, and the Court should not enforce it.
12

13 III. CONCLUSION

14 For the reasons set forth above, the Reporters Committee respectfully urges the Court
15 to enter an order holding that the Subpoena is unenforceable.
16

17 Dated this 29th day of June, 2020.

18
19 

20 _____
21 Madeline Lamo, WSBA #55021
22 THE REPORTERS COMMITTEE FOR
23 FREEDOM OF THE PRESS
24 1156 15th St. NW, Suite 1020
25 Washington, DC 20005
26 Tel: (202) 795-9300
27 Email: mlamo@rcfp.org

28 *Attorney for Amicus Curiae the Reporters
Committee for Freedom of the Press*

1 **CERTIFICATE OF SERVICE**

2 I, Madeline Lamo, declare that I am employed by the Reporters Committee for Freedom
3 of the Press, a citizen of the United States of America, a resident of Arlington, Virginia, over the
4 age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness
5 herein.
6

7 On June 29, 2020, I caused a true and correct copy of the foregoing document to be
8 served on the persons listed below in the manner indicated:

9 Via Email:

10
11 Eric M. Stahl
12 Davis Wright Tremaine LLP
13 920 Fifth Avenue, Suite 3300
14 Seattle, WA 98104
15 Tel: (206) 757-8148
16 Email: ericstahl@dwt.com
17 *Attorney for the Seattle Times Co., Sinclair Media of Seattle, LLC, KING*
18 *Broadcasting Company, KIRO TV, Inc., and Fox Television Stations, LLC*

16 Brian W. Esler
17 Miller Nash Graham & Dunn LLP
18 Pier 70, 2801 Alaskan Way, Suite 300
19 Seattle, WA 98121-1128
20 brian.esler@millernash.com
21 *Attorney for the Seattle Police Department*

22 I declare under penalty of perjury under the laws of the state of Washington that the
23 foregoing is true and correct.

24 DATED this 29th day of June, 2020 at Arlington, Virginia.

25 
26 _____
27 Madeline Lamo, WSBA #55021

APPENDIX F

1 FILED The Honorable Nelson K.H. Lee
2 2020 JUL 15 Hearing Date: July 16, 2020 at 1:30 p.m.
3 KING COUNTY Telephonic Hearing
4 SUPERIOR COURT CLERK

5
6
7
8 CASE #: 20-0-61692-6 SEA

9
10 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
11 IN AND FOR THE COUNTY OF KING

12 STATE OF WASHINGTON

SW No. 20-0-616926

13 COUNTY OF KING

SEATTLE POLICE DEPARTMENT'S
RESPONSE IN OPPOSITION TO NEWS
MEDIA OBJECTIONS AND
REQUEST TO QUASH

14 **I. OVERVIEW AND RELIEF REQUESTED**

15 The City of Seattle's Police Department ("SPD") seeks to identify the persons who
16 helped set SPD cars on fire and stole SPD firearms on May 30, 2020. Some of these firearms are
17 still missing and represent a danger to the community. SPD's subpoena to the News Media
18 parties seeks raw footage and photographs for a 90-minute period from a four-block area of
19 downtown to help identify the persons who committed those felonies. Courts have enforced
20 similar subpoenas to allow identification of suspects via news organizations' footage of public
21 events. *E.g., In Re Grand Jury Subpoena to National Broadcasting Co., Inc.*, 178 Misc.2d 1052,
22 683 N.Y.S.2d 708 (N.Y. Sup. Ct. 1998) (ordering production of raw video of assaults occurring
23 during protest pursuant to New York's shield statute); *In re Grand Jury Subpoena*, 201 Fed.
24 Appx. 430, 432 (9th Cir. 2006) (unpublished) (upholding subpoena for raw footage to identify
25 suspects who burned police vehicles).

1 The outcome should be no different here. The court-ordered production of such raw
2 footage and photographs to aid in an ongoing criminal investigation is neither procedurally nor
3 substantively improper, as explained further below.

4 **II. STATEMENT OF FACTS**

5 The facts are described in greater detail in the Affidavit of Michael Magan (which was
6 attached to the subpoena issued by the court, and served on the News Media defendants), and are
7 summarized below.

8 **A. THE UNRECOVERED WEAPONS.**

9 Five loaded weapons were stolen from SPD vehicles in the late afternoon of May 30,
10 2020: two Colt AR 15 rifles, two Colt M4 carbine rifles, and a Glock Model 43 semi-automatic
11 pistol. Magan Aff., at 3-4. Three of those weapons were eventually recovered; two of those
12 weapons (a loaded Colt M4 carbine rifle with suppressor and a Glock Model 43 semi-automatic
13 pistol) have not been recovered.

14 **B. THE UNIDENTIFIED SUSPECTS.**

15 The Arson Suspect. While one suspect who participated in lighting SPD vehicles on fire
16 (Margaret Channon) has been apprehended, another adult male wearing a knit cap who assisted
17 Ms. Channon in burning police vehicles remains unidentified and at large. Magan Affidavit, at
18 pp. 9-10.

19 Shooter Wearing a Red Sweatshirt. At approximately 4:06 pm, an unidentified adult
20 male wearing a red hooded sweatshirt and blue jeans smashed out the side window of an SPD
21 vehicle and stole a loaded Colt AR-15 rifle from the vehicle. Magan Affidavit, at 4. He
22 proceeded to fire four rounds through the front windshield of that SPD vehicle. A contract
23 security guard (who works for Media Defendant and Fox-affiliate KCPQ) drew his personal
24 firearm, confronted the suspect and ordered him to drop the weapon. Magan Affidavit, at 4. The
25 suspect complied, and the gun was recovered. However, the suspect is still at large.
26

1 The Red Adidas Tracksuit Suspect. At approximately 4:10 pm, an unidentified adult
2 male wearing a blue surgical mask and wearing red Adidas-branded clothing stole a Colt AR 15
3 rifle from inside of an SPD vehicle on the 1600 block of 6th Avenue. He then runs away
4 southbound on 6th Avenue to Pine Street. However, as he turns westbound on Pine Street, he is
5 confronted by an unidentified adult male, who takes the bag containing the rifle. Magan
6 Affidavit, at 4. That rifle was eventually recovered.

7 The individual in the red tracksuit is seen on video later breaking into the Old Navy store
8 in downtown Seattle. Magan Affidavit, at 11-12. That suspect remains at large and unidentified.

9 The Suspect Who Stole the Glock. At approximately 4:16 pm, an unidentified male with
10 his face covered and dressed in a dark-colored top, shorts and a backpack reached through the
11 broken window of an SPD vehicle parked in the 1600 block of 6th Avenue and removed a tan-
12 colored fanny pack containing a loaded Glock Model 43 semi-automatic pistol. Magan
13 Affidavit, at 5. Unfortunately, no additional surveillance video captures this suspect as he walks
14 towards Pine Street. Both that suspect and the loaded pistol remain at large.

15 The Suspect Wearing a Rolling Stones sweatshirt. At approximately 4:23 pm, an adult
16 male in a hooded sweatshirt with a Rolling Stones logo on it broke open the window on an SPD
17 vehicle and removed a loaded Colt AR 15 rifle. Once again, the contract security working for
18 Media Defendant and Fox-affiliate KCPQ drew his personal firearm and confronted this suspect,
19 convincing him to drop the weapon. The weapon was returned; the suspect remains at large.

20 **C. THE NEWS MEDIA PARTIES LIKELY CAPTURED IMAGES OF THESE**
21 **SUSPECTS THAT WOULD HELP IDENTIFY AND APPREHEND THEM.**

22 Detective Magan watched the civil unrest of May 30, 2020 unfold via local television
23 stations while off-duty that day. Magan Aff., at 13. He noted that the majority of the coverage
24 by the Media Defendants occurred within a four-block area between 4th Avenue to 6th Avenue
25 and Olive Way to Pike Street. Magan Aff., at 13. “Based on when the incidents under
26 investigation occurred, there is probable cause to believe that those media sources captured

1 images of the suspects in the footage/photographs taken in that area between 3:30 PM to 5 PM,
2 which footage/photographs have not yet been published.” Magan Aff., at 13-14.

3 After that day, Detective Magan was assigned to the joint SPD, FBI and ATF Task Force
4 to investigate the felonies. Magan Aff., at 14. As part of that task force, Detective Magan
5 reviewed numerous hours of surveillance and other video footage, as well as published
6 photographs. Magan Aff., at 14. This included surveillance footage from Nordstrom, Pacific
7 Place, Westlake Mall, as well as video footage sent to the SPD by concerned citizens. Magan
8 Aff., at 15. However, the quality of that footage is poor, limited and often does not capture all of
9 the events. Magan Aff., at 15.

10 Detective Magan reviewed published footage and photographs from the News Media
11 parties of these events, which is generally of much better quality. Magan Aff., at 15. Further,
12 that footage and those photographs, along with other images showing news cameras filming
13 portions of the events in question, show that these News Media parties were filming in the area at
14 the time and likely have further unpublished footage or photographs that may help identify the
15 suspects who committed these felonies and recover the still-missing firearms. Magan Aff., at 12
16 – 16.

17 For that reason, SPD sought and obtained from the court a subpoena to have these News
18 Media parties produce the following evidence:

19 Unedited or raw video footage/photographs from KIRO TV, KING TV, KOMO
20 TV and KCPQ, and the Seattle Times for Saturday, 05-30-20, taken from 1530
21 hrs: to 1700 hrs: in the area from Olive Street to Pike Street and from 6th Avenue
22 to 4th Avenue.

23 Magan Aff., at 16. On June 18, 2020, Judge Oishi issued a subpoena to these News Media
24 parties; however, he required a hearing first before any production. Since the News Media
25 parties filed their objections, SPD has offered to enter into a protective order to ensure that the
26 requested materials are used only to identify felony suspects and recover firearms, but SPD has
received no response to that suggestion. Esler Decl., Ex. 1.

1 **III. ISSUES PRESENTED**

- 2 1. Whether the subpoena is procedurally proper?
3 2. Whether this Court should order production?

4 **IV. EVIDENCE RELIED UPON**

5 “Magan Affidavit,” completed by Detective Michal Magan of the Seattle Police
6 Department, dated June 18, 2020; the “Subpoena,” signed by Judge Oishi, dated June 18, 2020;
7 Declaration of Brian W. Esler; and any evidence or argument taken at the hearing.

8 **V. LEGAL AUTHORITY**

9 SPD recognizes the essential role that journalists play in American society; however, just
10 like other citizens who witness crimes, the media can be compelled to produce evidence
11 regarding those crimes in some circumstances.¹ The subpoena does not seek any confidential
12 information, but only footage and photographs of events occurring in public during a limited
13 time. Under both the common law, and RCW 5.68.010 (the “Shield Statute”), SPD’s request
14 should be granted.

15 **A. THE SUBPOENA IS PROCEDURALLY PROPER.**

16 This matter arises from a criminal investigation, not a civil lawsuit. The normal
17 procedure for seeking such evidence is for the court to issue a search warrant. However, when
18 the evidence is held by media organizations, both the Criminal Rules and certain statutes require
19 a slightly different procedure, which is the procedure SPD followed in this instance.

20 Criminal Rule 2.3(f) specifically deals with “Searches of Media.” That section states that
21 if the “application for a search warrant is governed by RCW 10.79.015(3)” and the court
22 determines that there is probable cause for issuing a search warrant, “the court shall issue a
23 subpoena deuces tecum in accordance with CR 45(b).” CrR 2.3(f)(2). The referenced RCW
24

25 ¹ *Branzburg v. Hayes*, 408 U.S. 665, 691, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972) (“the Constitution does not, as it
26 never has, exempt the newsman from performing the citizen’s normal duty of appearing and furnishing information”
relevant to a criminal investigation).

1 authorizes issuance of a search warrant to “search for and seize any evidence material to the
2 investigation or prosecution of . . . any felony: PROVIDED, That if the evidence is sought to be
3 secured from [any news media], the evidence shall be secured only through a subpoena duces
4 tecum.” RCW 10.79.015(3).

5 Notably, CrR 2.3(f)(2) only requires that the subpoena issue “in accordance with CR
6 45(b).” In turn, CR 45(b) addresses only how the subpoena needs to be served. Contrary to the
7 New Media parties’ arguments, neither CrR 2.3 nor RCW 10.79.015 incorporate *all* of CR 45,
8 nor the full panoply of the Civil Rules.

9 Had the Legislature intended for such incorporation, it would have said so. Instead, the
10 Legislature only required that the news media be served with a subpoena pursuant to CR 45(b)
11 and (as explained below) have an opportunity for the court to consider whether the requirements
12 of the Shield Statute (RCW 5.68.010) have been met before they are required to produce the
13 evidence. There is nothing procedurally improper about the issuance of this subpoena.

14 **B. SPD’S REQUEST COMPLIES WITH THE SHIELD STATUTE, THE FIRST**
15 **AMENDMENT, AND THE COMMON LAW.**

16 While the criminal rules authorize issuance of a subpoena, Washington’s Shield Statute
17 adds an additional gloss. That statute prohibits any judge from “compel[ling] the news media to
18 testify, produce, or otherwise disclose” non-confidential information until certain criteria are
19 met. RCW 5.68.010(1). While the News Media parties complain that the subpoena does not
20 have a definite return date,² the Shield Statute prohibits “compelling” the News Media parties to
21 produce evidence until a hearing is held. Judge Oishi followed the correct procedure in setting a
22 hearing date for the News Media defendants to air their objections, and for the court to determine
23 whether SPD has met its burden under the Shield Statute. *See* RCW 5.68.010(6) (court may
24 “conduct all appropriate proceedings required”).

25 _____
26 ² The Legislature only requires compliance with CR 45(b), not the rest of CR 45. Service of the subpoena is how
the news media defendants get notice of what SPD is seeking, and when the hearing will be held.

1 It is undisputed that SPD is investigating numerous felonies, and that the information
2 sought is not confidential. The Washington Supreme Court (like federal courts) has only
3 recognized a qualified news media privilege even for confidential sources. *State v. Rinaldo*, 102
4 Wn.2d 749, 689 P.2d 392 (1984). As recognized by the Shield Statute,³ “where the protection of
5 confidential sources is not involved, the nature of the press interest protected by the privilege is
6 narrower.” *Gonzalez v. National Broadcasting Co., Inc.*, 194 F.3d 29, 36 (1999) (ordering
7 production of non-confidential raw video). The Shield Statute specifically allows the court to
8 compel production of “outtakes, photographs, video or sound tapes, [or] film . . .” RCW
9 5.68.010(1)(b).

10 Before ordering production, the Court must determine whether SPD has established “by
11 clear and convincing evidence” that the information sought is (i) “highly material and relevant,”
12 (ii) “critical or necessary” to the issue sought to be proven, (iii) that SPD “has exhausted all
13 reasonable and available means to obtain” that information from alternative sources, and (iv) that
14 there “is a compelling public interest in the disclosure.” RCW 5.68.010(2)(b)(i) – (iv). This is
15 similar to the test in federal courts. *E.g., Gonzales*, 194 F.3d at 36 (also noting that “when
16 protection of confidentiality is not at stake, the privilege should be more easily overcome).

17 Clear, cogent, and convincing evidence exists when the fact at issue has been shown by
18 the evidence to be “highly probable.” *State v. Dobbs*, 180 Wn.2d 1, 11, 320 P.3d 705, 710
19 (2014). As explained below, SPD’s evidence meets the requirements of the Shield Statute.

20 1. **SPD Has Shown The Requested Information is Highly Material And**
21 **Relevant.**

22 SPD’s Subpoena requests videotape and photographs in and around the time and location
23 where these serious felonies occurred on May 30, 2020. The Respondents’ already-public
24

25 ³ There is only one reported decision under the Shield Statute. *Republic of Kazakhstan v. Does 1-100*, 192 Wn. App.
26 773, 368 P.3d 524 (2016). That case arose out a civil action, and involved an attempt to identify a confidential
source. *Kazakhstan*, 192 Wn. App. at 781. The subpoena was quashed, as the Shield Statute categorically prohibits
compelling such disclosure (i.e., the “absolute privilege”). *Kazakhstan*, 192 Wn. App. at 786.

1 broadcast material shows that they were filming or broadcasting at that time and in that area, and
2 likely captured images of the suspects. *See* Magan Affidavit at 15.

3 “It is the rare case in which a litigant, in advance of looking at items sought by subpoena,
4 can actually establish that such items contain the very evidence the litigant needs.” *In re Grand*
5 *Jury Subpoenas (NBC)*, 178 Misc.2d at 1058, 683 N.Y.2d at 713. However, if the evidence
6 sought from the media is “sufficiently connected with the crime to satisfy the probable cause
7 requirement, it will very likely be sufficiently relevant to justify a subpoena and to withstand a
8 motion to quash.” *Zurcher v. Stanford Daily*, 436 U.S. 547, 567, 98 S.Ct. 1970, 56 L.Ed.2d 525
9 (1978).

10 It is difficult to understand Respondents’ position that the requested footage is not highly
11 material and relevant. *In re Grand Jury Subpoena*, 201 Fed. Appx. at 432 (holding that a
12 journalist’s video footage of a protest where a police car was burned was “directly relevant to the
13 grand jury’s investigation.”). The aim of the Subpoena is to gather higher quality images of the
14 felony suspects. *See* Magan Affidavit at 15; *see also, Gonzalez*, 194 F.3d at 36 (unaired footage
15 was relevant if it would assist in establishing fact at issue); *United States v. King*, 194 F.R.D.
16 569, 573 (2000) (relevance standard requires only a showing that the tapes are likely to contain
17 relevant information and does not require describing precisely what is on the videotapes, as that
18 can only be determined once the tapes are actually produced).⁴ It is highly probable that the
19 requested footage will contain material and relevant information because of the selected time and
20 location. *See* Magan Affidavit at 15; *see also* Gawlowski Decl., ¶ 5 (suggesting Seattle Times
21 had four photojournalists and two videographers covering the May 30 protests).

22 Respondents point to *United States v. Thompson*, where the court held requests were too
23 speculative because the defendant speculated that certain events may have or have not occurred.
24 14-20522-CR, 2015 WL 1608462 at 2 (S.D. Fla. Apr. 10, 2015). Here, published materials

25 _____
26 ⁴ For that reason, federal courts sometimes conduct *in camera* review of the requested materials. *E.g., King*, 194
F.R.D. at 573.

1 demonstrate the News Media parties had persons filming at the time and locations where the
2 felonies occurred. *See* Magan at 15. As noted by a New York court applying its similar shield
3 statute, evidence that the media was filming where and when the crimes occurred is sufficient to
4 show the unaired footage is “highly relevant and material” to the investigation. *In re Grand Jury*
5 *Subpoenas*, 178 Misc.2d at 1058, 683 N.Y.S.2d at 712.

6 2. **SPD Shows That the Requested Information is “Critical or Necessary” For**
7 **SPD’s Investigation.**

8 SPD’s Subpoena seeks information “critical or necessary” for its investigation of these
9 felonies. RCW 5.68.010(2)(b)(ii). As explained by Detective Magan, he reviewed other
10 available sources, but they do not provide good enough footage for identification, which makes
11 the better-quality footage critical or necessary. *In re Grand Jury Subpoenas*, 178 Misc. 2d at
12 1058, 683 N.Y.S.2d at 712. The News Media parties’ citations do not support their claim that
13 this is a “fishing expedition.”

14 For example, *In re Application to Quash Subpoena to Nat. Broad. Co., Inc.*, the
15 defendant had an opportunity to elicit the information at the plaintiff’s deposition; SPD has no
16 such opportunity here. 79 F.3d 346 (2d Cir. 1996). Moreover, the defendant there was seeking
17 the outtakes for impeachment purposes, which the Second Circuit noted is almost never “critical
18 or necessary.” *In re Application to Quash*, 79 F.3d at 352. The raw footage shot by these News
19 Media parties during the critical 90 minutes may be the best evidence available to identify these
20 suspects. *E.g., Gonzales*, 194 F.3d at 36 (outtakes were necessary because they were likely the
21 best evidence available).

22 Similarly, the News Media parties cite *Flynn v. Roanoke Companies Grp., Inc.*, a
23 personal injury action, where a federal district court judge determined that a defendant’s request
24 for unaired footage of an interview with a witness was permissible because it provided certain
25
26

1 probative evidence. 1:07-MD-1804-TWT, 2007 WL 4564113 (N.D. Ga. Dec. 21, 2007). The
2 court only held that the defendant’s “open ended request for unaired footage that has nothing to
3 do with” the defendant would not be permitted. *Id.*, at *3.

4 SPD’s Subpoena demonstrates that it is highly probable that Respondents’ unpublished
5 material contains information critical or necessary to its investigation. Magan Aff., at 2. SPD’s
6 request here is similar to the subpoena upheld in *In re Grand Jury Subpoenas Served on Nat.*
7 *Broad. Co., Inc.*, 178 Misc. 2d 1052, 683 N.Y.S.2d 708 (N.Y. Sup. Ct. 1998). There, a
8 prosecutor issued a grand jury subpoena to media companies for video footage of assaults on
9 police officers during a demonstration. Applying New York’s similar shield statute, the trial
10 court found the footage was “critical or necessary” because “other than the broadcast camera
11 crews, there are no witnesses available to [the prosecution] now who were uniquely in a position
12 to see the assaults and the perpetrators of the assaults in such a manner as to reliably record the
13 details and identities.” *In re Grand Jury Subpoenas (NBC)*, 178 Misc. 2d at 1058, 683 N.Y.S.2d
14 at 712; *see also People v. Bonie*, 141 A.D.3d 401, 404, 35 N.Y.S.3d 53, 56 (N.Y. App. Div.
15 2016)(outtakes were “critical or necessary” because witnesses alone could not reliably repeat
16 what was on the video).

17 Here, the video footage that SPD has obtained is low quality and damaged: “surveillance
18 footage that was provided to [affiant] from [local businesses] as well as video that was sent to the
19 SPD from citizens who were in the area . . . and [affiant] found that the quality of video footage
20 is poor, limited, or cameras that are in fixed positions do not capture events. Certain cameras
21 from the Nordstrom store were damaged from the fires that were set by [Margaret A. Channon]
22 or that the heavy smoke from the fires make the camera footage useless.” Magan Affidavit at 15.
23
24
25
26

1 Like the media's footage in *In re Grand Jury Subpoenas (NBC)*, the News Media's video and
2 photo quality is superior to that available to SPD, and was collected under circumstances that
3 make it highly probable that suspects' conduct was captured, which is enough to show it is
4 "critical or necessary." *See* Magan Affidavit at 15.

5
6 3. **SPD Has Exhausted All Reasonable and Available Means to Obtain Proof of
Suspects' Identity from Alternative Sources.**

7 Washington's Shield Statute requires the party to have exhausted all reasonable and
8 available means to obtain it from alternative sources. RCW 5.68.010(2)(b)(iii) (emphasis
9 added). Washington decisions before the enactment of the shield statute held that the party
10 should demonstrate that it attempted to use alternative sources for the requested information.
11 *Clampitt v. Thurston Cty.*, 98 Wn.2d 638, 644, 658 P.2d 641, 645 (1983). Generally, cases
12 discussing this issue involve a civil litigant that has not exhausted, for example, their use of
13 discovery tools such as depositions. *See, e.g., Clampitt v. Thurston*, 98 Wn.2d 638, 644, 658
14 P.2d 641, 645 (1983); *Shoen v. Shoen (Shoen I)*, 5 F.3d 1289, 1295 (9th Cir. 1993).

15 SPD exhausted all reasonable and available means to obtain the requested
16 information from alternative sources and only makes this request as a "last resort." *See* RCW
17 5.68.010(2)(b)(iii); *Clampitt.*, 98 Wn.2d at 644, 658 P.2d at 645. SPD sought the requested
18 information from: (1) an incident report from a citizen that recovered two of the stolen firearms;
19 (2) video captured by the SPD Police Department Video Unit who was located inside the
20 Nordstrom Store during the unrest; (3) surveillance footage from the Nordstrom Corporation,
21 Pacific Place, and West Lake Mall; (4) video footage that was sent to the SPD Police Department
22 by citizens who were in the area of the during the civil unrest; (5) published video footage from
23 KIRO TV, KING TV, KOMO TV, KCPQ, and published photos from Seattle Times. Magan
24 Affidavit at 6; 8-9; 15. Clear and convincing evidence demonstrates that SPD has exhausted the
25 reasonable and available sources for the information that it seeks; it does not need to show more.
26 *In re Grand Jury Subpoenas (NBC)*, 178 Misc. 2d at 1056, 683 N.Y.S.2d at 711.

1 4. There is a compelling public interest here.

2 SPD does not take its requests to the press lightly or as routine. But Washington’s
3 Legislature, through enacting the Shield Statute, allows this court to compel raw footage for a
4 criminal investigation. RCW 5.68.010(2)(a)(i). And when balancing the public policy
5 considerations, this Court should also consider the continued danger represented by the firearms
6 that have not been recovered, and the suspects who were willing to steal such firearms from SPD
7 vehicles. Freedom of the press is not the only interest at play here.

8 “A court may consider whether or not the news or information was obtained from a
9 confidential source in evaluating the public interest in disclosure.” RCW 5.68.010(2)(a)(iv); *see*
10 *also Shoen II*, 48 F.3d at 416 (citing *Shoen v. Shoen*, 5 F.3d 1289, 1295 (9th Cir. 1993)). The
11 Subpoena only requests footage of individuals’ conduct in the *public space* “from the locations
12 of Olive Street to Pike Street and also from 6th Avenue to 4th Avenue.” Subpoena at 2.
13 Compelling the media to produce “photographs taken in a public place carries no realistic threat
14 of prior restraint or of any direct restraint whatsoever” on the media’s ability to publish. *Zurcher*
15 *v. Stanford Daily*, 436 U.S. 547, 567, 98 S.Ct. 1970, 56 L.Ed. 525 (1978).

16 Respondents and Amicus point to potential violence against journalists as an interest
17 weighing against disclosure. But the News Media and Amicus point to incidents that occurred
18 in the absence of any subpoena. SPD’s (and the public’s) interest in identifying these very
19 specific suspects and recovering stolen firearms should outweigh the News Media parties’
20 speculative claim that responding to this specific subpoena might increase distrust of journalists.

21 **C. THERE IS NO “OVERBROAD AND UNDULY BURDENSOME” EXCEPTION.**

22 The Legislature did not incorporate the full Civil Rules into CrR 2.3, RCW 10.79.015, or
23 the Shield Statute; this Court should not accept the News Media parties’ invitation to do so on its
24 own. Rather, if the Court finds SPD has shown “clear and convincing evidence” on all four
25 elements in RCW 5.68.010(2)(b), the Court should compel disclosure.

1 SPD's Subpoena seeks video and photographs from a 90-minute time-period in particular
2 locations where the felonies occurred. The News Media parties do not offer any suggestions as
3 to how that could be narrowed further; rather, their stance seems to be that any request would be
4 "overbroad and unduly burdensome," without even a particularized showing as to how much
5 responsive footage they have. SPD has offered a protective order, but received no response. For
6 most citizens, once a judge finds probable cause, SPD would execute the warrant and seize the
7 evidence without the court hearing objections first. *E.g., Zurcher*, 436 U.S. at 567 (approving of
8 such procedure). Responding to any subpoena entails some burden, but the Legislature set the
9 standard; if it is met, the News Media parties should have to comply.

10 VI. CONCLUSION

11 While the News Media has unique protections as a result of the Shield Statute, that does
12 not render them immune from producing the evidence that they may have to help SPD catch
13 these suspects and recover the stolen firearms.

14 DATED this 13th day of July, 2020.

15
16 *s/ Brian W. Esler*

17 Brian W. Esler, WSBA No. 22168
18 Nicholas A. Valera, WSBA No. 54220
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26 Attorneys for Seattle Police Department

I certify that this pleading contains 4,079 words, in compliance with the Local Civil Rules.

1 CERTIFICATE OF SERVICE

2 I certify that on the 13th day of July, 2020, a true and correct copy of the foregoing
3 document was served on counsel for the parties by the method indicated below:

4 Eric M. Stahl via Hand Delivery
5 Davis Wright Tremaine LLP via U.S. Mail
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23 Under the laws of the state of Washington, the undersigned hereby declares, under the
24 penalty of perjury, that the foregoing statements are true and correct to the best of my
25 knowledge.

26 Executed at Seattle, Washington, this 13th day of July, 2020.

27 s/ Gillian Fadaie
28 Gillian Fadaie, Legal Assistant

APPENDIX G

FILED
KING COUNTY, WASHINGTON

JUL 27 2020

SUPERIOR COURT CLERK
BY Heather Gordon
DEPUTY

The Honorable Nelson K. H. Lee
Hearing Date: July 16, 2020 at 1:30 pm

SUPERIOR COURT OF THE STATE OF WASHINGTON
KING COUNTY

STATE OF WASHINGTON

COUNTY OF KING

SW No. 20-0-616926

**NEWS MEDIA REPLY IN
SUPPORT OF OBJECTIONS AND
REQUEST TO QUASH
PURPORTED SUBPOENA FOR
PROTECTED NEWSGATHERING
MATERIAL**

The News Media entities targeted in the Seattle Police Department's proposed subpoena submit this Reply in further support of their objections and request to quash. In its July 13, 2020 Response memorandum ("Opp."), SPD fails to justify, by "clear and convincing" evidence, compelled production of the privileged newsgathering material at issue here. *See* RCW 5.68.010. SPD's asserted need to rifle through raw media footage rests on readily distinguishable cases and on sheer speculation, which is an insufficient basis for breaching the journalists' shield. Its response fails to demonstrate that it has exhausted alternative sources for the information it is demanding from the press. SPD also downplays the significant safety risk to local journalists posed by the subpoena, which is contrary to the public interest. The Court should decline to enforce the subpoena.

I. THE SUBPOENA IS PROCEDURALLY IMPROPER.

SPD argues that Washington's legal restrictions on newsroom search warrants require merely that a demand for journalistic work product be "served" in accordance with CR 45(b),

1 and that none of the other protections applicable to third-party subpoenas duces tecum apply
2 here. Opp. at 5-6. This is an untenable reading of the law, and attempts to paper over the facial
3 procedural defects in SPD’s purported subpoena. See Objections at 4-6. In Washington, police
4 may obtain evidence from the news media “**only** through a subpoena duces tecum.” RCW
5 10.79.015(3) (emphasis added). And “subpoenas in criminal proceedings are issued in the same
6 manner as subpoenas in civil actions, so we look to the civil rules to determine whether they
7 require notice. Civil Rule (CR) 45 sets out the rules for issuing subpoenas in civil cases.” *State*
8 *v. White*, 126 Wn. App. 131, 134, 107 P.3d 753, 754 (2005). Civil Rule 45, in turn, provides
9 third-party recipients of subpoenas procedural protections, such as the right to object; to shift the
10 burden to the issuing party to justify the subpoena; and to have an avenue for appeal. See
11 Objections at 6; CR 45(a), (c); *Republic of Kazakhstan v. Does 1-100*, 192 Wn. App. 773, 781,
12 368 P.3d 524 (2016) (nonparty appeal of denial of motion to quash subpoena); *Eugster v. City of*
13 *Spokane*, 121 Wn. App. 799, 91 P.3d 117 (2004) (appeal of order quashing CR 45 subpoena
14 *duces tecum*).

15 SPD contends that CrR 2.3(f)((2) specifically incorporates only CR 45’s service
16 provision, and therefore that none of CR 45’s other provisions – not even the right to object to
17 overbroad subpoenas – applies. Opp. at 6, 12-13. This argument cannot be squared with the
18 plain language of RCW 10.79.015(3), which unambiguously requires that demands for news
19 material be made via a “subpoena duces tecum.” SPD’s position, if accepted, would mean that
20 the press is entitled to **less** protection than other subpoenaed third parties who – even in criminal
21 matters – have a right to object on overbreadth and other grounds. See CrR 4.8(b)(4).¹ That
22 view is contrary to the history of RCW 10.79.015(3). See Objections at 5; *Jimenez v. City of*
23
24

25 ¹ SPD does not really believe its own argument on this point, as evidenced by its offer to
26 subject its subpoena to a “protective order” that would not apply were it simply serving a search
27 warrant. Opp. at 13. SPD’s proposed protective order does not address the News Media’s
overbreadth concerns; among other things, it would still require full production to the police of
scores of individual journalists’ footage. See Esler Decl. Ex. 1.

1 *Chicago*, 733 F. Supp. 2d 1268, 1273 (W.D. Wash. 2010) (quashing subpoena as unduly
2 burdensome, in addition to violating the journalist’s privilege).

3 SPD also ignores the News Media’s objection that this matter remains pending under a
4 search warrant cause number that is not available on the public docket. This defect is of
5 constitutional magnitude, because it deprives the public of its right to access judicial documents.
6 *State v. Richardson*, 177 Wn.2d 351, 360, 302 P.3d 156 (2013) (article I, section 10 right to open
7 court records applies to court dockets), citing *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640
8 P.2d 716 (1982). This further demonstrates that SPD has failed to follow proper procedure in
9 pursuing the subpoena.

10 **II. SPD HAS NOT SHOWN A COMPELLING NEED.**

11 To overcome the shield law’s protections, SPD’s burden was to establish, by “clear and
12 convincing evidence,” that the news footage it seeks is both “highly material and relevant” and
13 “critical or necessary[.]” RCW 5.68.010(2)(b)(i-ii). It is well established that this requirement
14 of heightened need cannot be demonstrated by speculation. Objections at 9-10; *see also, e.g.*,
15 *State v. Rinaldo*, 102 Wn.2d 749, 760, 689 P.2d 392 (1984) (Dimmick, J., concurring)
16 (journalist’s common law shield cannot be overcome by “affidavit broadly speculat[ing],
17 without citing specifics, that information needed for the defense was being held by the
18 newspaper”); *Durand v. Massachusetts Dep’t of Health*, 2013 WL 2325168, at *1 (D. Mass. May
19 28, 2013) (granting motion to quash under journalist’s shield where alleged relevance of
20 information was “based on speculation”); *People v. Novak*, 41 Misc. 3d 749, 755, 971 N.Y.S.2d
21 853, 857 (2013) (enforcing shield statute where materiality was “speculative”).

22 Yet speculation is all that SPD offers. It contends the News Media’s raw footage “**may**
23 be the best evidence available to identify” suspects Opp. at 9 (emphasis added). This wholly
24 conclusory assertion of possible relevance is not enough to overcome the News Media’s
25 privilege. *See In re Subpoena Duces Tecum to Ayala*, 162 Misc. 2d 108, 114, 616 N.Y.S.2d 575,
26 579 (1994) (contention that news video “‘may’ be [a litigant’s] most reliable version” of events
27 at issue fails to overcome privilege; “Mere speculation without demonstrative factual

1 corroboration is legally insufficient to impinge upon the First Amendment safeguards embodied
2 within” state shield laws). At best, SPD is raising the mere possibility that unaired journalistic
3 work product **might** produce better images than the hours of live and otherwise published images
4 that SPD already has available from other sources. Magan Aff. at 15. SPD already has, for
5 example, a head-on image of the suspect in the red Adidas sweatsuit, and a clear picture of the
6 arson suspect in the knit cap (*id.* at 10, 13); and footage of the “suspect wearing a Rolling Stones
7 sweatshirt” is widely available online.² SPD offers no reason to believe that any better images
8 exist in the raw footage. Its mere conjecture “is not enough to compel journalists to empty their
9 newsroom files.” *Flynn v. Roanoke Companies Grp.*, 2007 WL 4564113, at *3 (N.D. Ga. Dec.
10 21, 2007) (emphasis added). SPD has failed to show any “actual,” as opposed to merely
11 “potential” relevance,³ and it cannot show that any prosecution “virtually rises or falls with the
12 admission or exclusion” of the evidence sought from the press. *In re Application to Quash*
13 *Subpoena to NBC*, 79 F.3d 346, 351 (2d Cir. 1996). The shield law applies because SPD has
14 offered no clear and convincing evidence that the subpoena seeks “highly material and relevant”
15 and “critical or necessary” information.

16 **III. SPD HAS NOT SHOWN IT HAS EXHAUSTED ALTERNATIVE SOURCES.**

17 The News Media’s Objections identified multiple independent ways in which SPD has
18 failed to exhaust alternative sources for the information it is seeking from the press, as required
19 to overcome the shield law’s protection. RCW 5.68.010(2)(b)(iii); Objections at 10. SPD fails
20 to explain why it has disregarded the many obvious alternatives to obtaining this information. It
21 asserts merely that it has reviewed surveillance footage from three nearby businesses, and images
22 sent to it by citizens and published by the News Media. Opp. at 11. SPD does not assert that it
23 has reviewed **all** publicly available footage, such as social media posts from May 30, 2020;
24 indeed, it fails to indicate whether it has completed a review of the footage it already has. Nor
25 does SPD dispute that it has failed to issue search warrants to other businesses with surveillance

26 _____
27 ² See, e.g. <https://www.thesun.co.uk/news/11748320/security-guard-seattle-protest-rifle/>.

³ *Shoen v. Shoen*, 48 F.3d 412, 416 (9th Cir. 1995).

1 cameras in the area, or to pursue other readily available alternatives such as publicizing the
2 images it already possesses to seek the public’s help in identifying suspects, or interviewing
3 witnesses to the events described in its supporting affidavit. In short, SPD has failed to meet its
4 burden of showing, with clear and convincing evidence, that it has no “reasonable and available
5 means to obtain” the information from alternative sources. RCW 5.68.010(2)(b)(iii).

6 The primary case SPD relies on, *In re Grand Jury Subpoena to NBC*, 178 Misc.2d 1052,
7 683 N.Y.S.2d 708 (1998), is readily distinguishable. In that case, the court approved a subpoena
8 for media footage of an assault on police officers only after presented with evidence that “all
9 police officers and supervisors claiming knowledge of the circumstances of the assaults were
10 interviewed (with the exception of one who has not yet returned to duty because of injuries) and
11 all of these officers reviewed the available tapes to see if they could recognize the location of the
12 attacks on them and identify the persons responsible.” *Id.*, 683 N.Y.S.2d at 710.⁴ SPD has not
13 demonstrated such exhaustion of alternate sources here.

14 **IV. SPD’S SUBPOENA IS NOT IN THE PUBLIC INTEREST.**

15 SPD pays lip service to the shield law’s public interest provision, arguing that the
16 requested unpublished news material was photographed in a public space. Opp. at 12. But the
17 shield law requires the Court to determine whether “[t]here is a compelling public interest in the
18 disclosure,” even in cases involving non-confidential newsgathering material. RCW
19 5.68.010(2)(b)(iv).

20 SPD attempts to downplay the compelling public interest in assuring that the News
21 Media is not perceived as an arm of law enforcement, dismissing these concerns as existing even
22

23 ⁴ The case also is distinguishable on the ground that the New York shield statute, unlike RCW
24 5.68.010, lacks a “public interest” requirement. Indeed, the court expressly declined to weigh
25 “the value to the prosecution” of the news outtakes against “the qualified privilege afforded to
26 the media against disclosure.” *Id.* at 711. SPD’s reliance on *In re Grand Jury Subpoena*, 201 F.
27 App’x 430 (9th Cir. 2006) is entirely misplaced, as the Ninth Circuit expressly found that the
recalcitrant witness objecting to the subpoena was **not** a working journalist, and thus was not
subject to California’s shield law. *Id.* at 433 n.1

1 “in the absence of any subpoena.” Opp. at 12. This argument blithely disregards the public
2 interest, recognized by case law, in assuring that journalists are not treated or **perceived** “as an
3 adjunct of the police or of the courts,” because doing so imperils both their ability to report the
4 news, and their physical safety. *Shoen v. Shoen*, 5 F.3d 1289, 1295 (9th Cir. 1993) (citation
5 omitted). The News Media documented the very real risks SPD’s subpoena poses to local
6 journalists, including specifically in the context of covering the mass demonstrations and civil
7 unrest that has unfolded in Seattle since May 30. See Objections at 11-12 & Gawlowski Decl.
8 SPD cannot meet its burden under the shield law simply by waving off these concerns. The
9 Court should hold that SPD has failed to show, by clear and convincing evidence, that the
10 disclosures sought by SPD’s subpoena are in the public interest.

11 **V. CONCLUSION**

12 For the reasons set out above and in the News Media’s objections, the Court should enter
13 an order holding that the Subpoena is not enforceable.

14 -----

15 I certify that this memorandum contains 1729 words, in compliance with the Local Civil
16 Rules.

17 DATED this 14th day of July, 2020.

18 Davis Wright Tremaine LLP
19 Attorneys for Seattle Times Co., Sinclair Media of
20 Seattle, LLC, KING Broadcasting Company, KIRO
TV, Inc. and Fox Television Stations, LLC

21
22 By /s/ Eric M. Stahl
Eric M. Stahl, WSBA #27619

DECLARATION OF SERVICE

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The undersigned, hereby declares under the laws of the State of Washington, that on this day he caused to be served, a copy of the foregoing document on the following counsel of record in the manner indicated:

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DATED this 14th day of July, 2020, at Seattle, Washington.

/s/ Eric M. Stahl
Eric M. Stahl, WSBA #27619

DAVIS WRIGHT TREMAINE LLP

August 11, 2020 - 12:37 PM

Filing Motion for Discretionary Review of Superior Court (RAP 15.2(h))

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: Case Initiation
Trial Court Case Title: in Re King County Search Warrant - Other
Trial Court Case Number: 20-0-61692-6
Trial Court County: King County Superior Court
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