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Supreme Court No. 83645 BYRONALD R. CARPENTER

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THE SUPREME COURT STATE OF WASHINGTON

TACOMA NEWS, INC., a Washington Corporation,
d/b/a THE NEWS TRIBUNE,

Petitioner,

vs.

THE HONORABLE JAMES D. CAYCE,

Respondent.

RESPONDENT'S ANSWER IN OPPOSITION TO PETITIONER'S
APPLICATION FOR WRIT OF MANDAMUS AND REQUEST FOR
EMERGENCY RELIEF

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By: *Thomas Kuffel*
THOMAS KUFFEL, WSBA #20118
OMA LaMOTHE, WSBA #21049
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
The Honorable James D. Cayce

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BY RONALD R. CARPENTER

CLERK

SUPREME COURT OF THE STATE OF WASHINGTON

TACOMA NEWS, INC., a)	
Washington corporation, d/b/a)	
THE NEWS TRIBUNE,	)	No. 83645-1
)	
Petitioner,)	
	)	RESPONDENT'S ANSWER IN
vs.	)	OPPOSITION TO
	)	PETITIONER'S APPLICATION
THE HONORABLE JAMES D.	)	FOR WRIT OF MANDAMUS
CAYCE,	)	AND REQUEST FOR
	)	EMERGENCY RELIEF
Respondent,)	

1. IDENTITY OF RESPONDING PARTY

Respondent, the Honorable James D. Cayce, King County Superior Court Judge, seeks the relief designated in part 2.

2. STATEMENT OF RELIEF SOUGHT

Respondent respectfully requests that this Court dismiss with prejudice the Mandamus Action Against State Officer filed by Petitioner Tacoma News, Inc.

3. FACTS RELEVANT TO MOTION

A. Nature of the Case

This action arises out of the State's prosecution of Michael Andrew Hecht, a Pierce County superior court judge, on one count of harassment and one count of patronizing a prostitute. *State v. Hecht*, Pierce County Cause No. 09-1-01051-1. The Respondent is presiding over the case as a visiting judge in Pierce County superior court. The State is appearing through Assistant Attorney General John C. Hillman; the Defendant is represented by Wayne C. Fricke. Trial is scheduled for October 12, 2009.

B. The State's CrR 4.6 Preservation Deposition

On September 16, the State moved pursuant to CrR 4.6 for an order granting the preservation of testimony by deposition of witness Joseph Robert Pfeiffer.¹ The State was concerned that Pfeiffer, who was in custody at the time on a material witness warrant issued in the case, would not remain in contact with the State upon his release or appear at trial. Declaration of Thomas W.

¹ CrR 4.6 authorizes the court to order the deposition of a witness if (1) the witness may be unable to attend or prevented from attending the trial, (2) the witness' testimony is material, and (3) taking the witness' testimony is necessary to avoid a failure of justice. CrR 4.6(a).

Kuffel ("Kuffel Decl."), Ex. A (Motion for Order for Deposition of Witness Joseph Robert Pfeiffer) at pp.1-2.

At a hearing that same day, Respondent granted the State's motion and entered a written order setting Mr. Pfeiffer's deposition for 9:00 am on September 21, 2009. Kuffel Decl. Ex. A at p. 4. The order further instructed the State to notify opposing counsel of the location of the deposition. *Id.*

Because Mr. Pfeiffer was in jail and it was more convenient for the jail staff to transport him to a courtroom and maintain custody of him there during the deposition, the State indicated that it was seeking an available room in the courthouse to hold the deposition. Kuffel Decl. Ex. B (9-16-09 Hearing Transcript) at p. 8. At defense counsel's request, Respondent agreed to be present at the deposition. The specific colloquy on the record reads as follows:

THE COURT: Deposition in the morning and I think the --

MR. FRICKE: Where's that going to be?

THE COURT: You will have [sic] make arrangements.

MR. HILLMAN: I will make those arrangements. Pursuant to the court rule, I will provide Mr. Fricke with notice of the place of the deposition and it will be I think obviously have to be here in [sic] Pierce County courthouse, given his custody status, so he knows the address. I will just have to let him know the courtroom once I have an opportunity to communicate with superior court administration.

THE COURT: And it may be a jury room or something.

MR. FRICKE: Is your Honor going to be here?

THE COURT: I don't know.

MR. FRICKE: Well, if we are going to do this and that has that potential, I think the court should be present. That's my preference. Always been when two weeks ago whatever I suggested that I would want the court there for any preservation dep, I am consistent with that.

THE COURT: All right, I will make myself available. And bail will be set at this time at 75,000 and we will revisit that, then, on Monday.

Kuffel Decl., Ex. B (9-16-09 Hearing Transcript) at p. 8.

On September 21, 2009, before the deposition began, Respondent heard several motions, including the State's motion to grant Mr. Pfeiffer transactional immunity for (a) testimony about any acts of prostitution that may have occurred in Pierce County between September 21, 2008 and January 14, 2009, (b) a false statement he made in an earlier affidavit. These matters were

heard in open court. Kuffel Decl. Ex. C (9-21-09 Hearing Transcript) at pp. 5 – 6.

Defense counsel then moved to close the courtroom during the deposition. TR 7; Ins. 14-15. Following discussion with both counsel, Respondent acknowledged that the parties were not in trial and that the deposition may not be admissible at trial, so it would be proper to close the courtroom. Nevertheless, at the State's suggestion, Respondent allowed the courtroom doors to remain open and agreed to take up the issue of excluding non-parties should any non-parties arrive. Kuffel Decl. Ex. C (9-21-09 Hearing Transcript) at p. 9, Ins. 10 -20.

THE COURT: All right. I think that is the best approach. But we're certainly not in trial. This may or may not be admissible at trial. And I think I can close the courtroom and would probably intend to, although, if the press showed up, I'd give them an opportunity, or if the public showed up and wanted to weigh in on this, I would give them an opportunity to try to convince me otherwise. But at this point the doors are open, there's no sign, and a moot issue unless someone does come. And certainly it's Mr. Quillian [Mr. Pfeiffer's attorney] has a right to be here.
Id.

The deposition began shortly after 9:30 a.m. and the parties went off the record. Kuffel Decl. Ex. D (Memorandum of Journal Entry); Ex. C (9-21-09 Hearing Transcript) at 7; Ins. 11-13. At 1:30

p.m., shortly before its conclusion, a News Tribune reporter and Attorney James Beck entered the courtroom. Kuffel Decl. Ex. C (9-21-09 Hearing Transcript) at pp.11-12. Respondent explained to Mr. Beck that a deposition was taking place. Defense counsel moved the court to exclude Beck and the reporter from the courtroom. Id. Respondent gave Mr. Beck the opportunity to argue against excluding non-parties from the deposition. Kuffel Decl. Ex C (9-21-09 Hearing Transcript) at pp. 12-14.

MR. HILLMAN: Your Honor, I think it's kind of an unusual issue and I'll defer to your discretion, but I would ask that if the defendant's making that motion that he also waive his right to a public trial, at least for this deposition.

MR. FRICKE: This is -- I'm not -- obviously this is not the trial, so -- and I'm not going to waiver that right.

THE COURT: Waive your right to a public deposition, if there is any right to a public deposition?

MR. FRICKE: If there is any right. I'm asking that the only people, as I stated earlier, that are in this courtroom are those necessary for purposes of this. Otherwise, I'd ask that we move it to a law office and it won't be an issue.

THE COURT: And then since we are in a courtroom, if we were in a law office, I wouldn't ask the individuals that have just come in if they wish to weigh in on this, but do either of you have any position with respect to whether you should be allowed to stay or not?

MR. BECK: Yes, Your Honor. This is James Beck on behalf of the News Tribune. This is – Ishikawa v. Seattle Time I think governs this. This is a proceeding in open court. There's five factors the Court must consider.

THE COURT: But let's talk about what this is. What – what is this hearing?

MR. BECK: It's – we're in open court, so it's testimony of a witness.

Id.

THE COURT: Are depositions open to the public?

MR. BECK: You Honor, this is not a deposition, as I understand it. It's a court presiding over a witness in open court. If it's – if the judge is going to be – Your Honor is going to be presiding over the same witness in another room in this courthouse, I don't see how that changes matters either.

THE COURT: Well, for instance, we get calls at the office when the attorneys are in the middle of a deposition. Is that open to the public because the judge is involved?

MR. BECK: Your Honor, I think this proceeding here today is a court proceeding subject to Ishikawa.

Id.

After hearing argument, Respondent ruled that the deposition was not open to the public and ordered Beck and the reporter to leave. *Id.*

Nevertheless, because *Seattle Times v. Ishikawa*, 97 Wn.2d 30, 35, 640 P.2d 716 (1982) suggests that a trial court must appear and justify its actions in excluding the public from a hearing, Respondent does so here and respectfully requests that Petitioner's writ be denied because Respondent has not acted contrary to a clear legal duty. That is so for two reasons:

(1) A CrR 4.6 preservation deposition held in a courtroom for the convenience and security of the parties and the witness is not a proceeding that triggers application of the factors stated in *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982); and

(2) Disclosure of the deposition transcript and video is premature because no ruling as to admissibility of this information has been raised.

B. PETITIONER HAS NO CONSTITUTIONAL RIGHT TO ATTEND A PRETRIAL DISCOVERY DEPOSITION IN A CRIMINAL CASE NOR ACCESS DEPOSITION TRANSCRIPTS OR VIDEOS THAT HAVE NOT BEEN FILED WITH THE COURT OR OTHERWISE ADMITTED INTO EVIDENCE.

- i. The court rules do not prohibit a deposition from being conducted at a courthouse.

CrR 4.6(a) authorizes the trial court to order the deposition of a witness if (1) the witness may be unable to attend or prevented from attending the trial, (2) the witness' testimony is material, and (3) taking the witness' testimony is necessary to avoid a failure of justice. CrR 4.6 (c) provides that "[a] deposition [authorized under subsection (a)] shall be taken in the manner provided in civil actions."

CR 30 governs depositions upon oral examination in civil proceedings. CR 30(b) assumes the party setting the deposition may choose the location and notify the deponent. In addition, "[a] judge of the superior court . . . may make telephone rulings on objections made during depositions." CR 30(c).³

³ CR 28(4) and RCW 2.28.080(3) also specifically name superior court (and supreme court) judges as one category of persons before whom depositions may be taken.

In this instance, the State scheduled Mr. Pfeiffer's deposition in an available courtroom and Respondent agreed to be present to rule on objections. On their face, there is nothing in the Court Rules that precludes a deposition from being held in a courthouse, or bars the trial court from ruling on objections in person, or renders a deposition open to the public.

- ii. A deposition conducted by a party to litigation is not a judicial proceeding that is constitutionally required to be open to the public.

Notwithstanding the above, Petitioner contends that it was entitled to attend Mr. Pfeiffer's deposition and obtain transcripts and videotapes of his testimony.

Article I, section 10 of the Washington State Constitution provides that "[j]ustice in all cases shall be administered openly, and without unnecessary delay."⁴ This provision guarantees the public and the press a right of access to judicial proceedings and court documents in both civil and criminal cases. *Dreiling v. Jain*, 151 Wn.2d 900, 908, 93 P.3d 861 (2004). It has been found to apply to trials, pretrial hearings, transcripts of pretrial hearings or

⁴ A related provision, Article I, section 22, guarantees criminal defendants the right to a speedy, public trial.

trials, and exhibits introduced at pretrial hearings. *Seattle Times v. Eberharter*, 105 Wn.2d 144, 155, 713 P.2d 710 (1986). The right of access also applies to summary judgments and other dispositive motions that adjudicate the substantive rights of the parties, like a full trial. *Dreiling*, 151 Wn.2d at 910, 918 (motion to terminate shareholder derivative action with the scope of article I, section 10).

Conversely, this Court has declined to find a right of access in matters that are not trials or pretrial hearings or do not involve documents introduced into the record. In *Eberharter*, this Court found no public right of access to judicial proceedings relating to the criminal investigatory process, such as search warrant affidavits in unfiled criminal cases. *Eberharter*, 105 Wn.2d at 156-57; see also, *Buehler v. Small*, 115 Wn. App. 914, 921, 64 P.2d 78 (2003) (no constitutional right to access a judge's notes as they were not part of any case record and did not constitute transcripts of criminal proceedings or exhibits).

This Court has specifically recognized a distinction between information obtained by the parties during pre-trial discovery and the subsequent introduction of that information into the record:

As this information [obtained in discovery] does not become part of the court's decision making process, article I, section 10 does not speak to its disclosure. However the same cannot be said for materials attached to a summary judgment motion. Summary judgment effectively adjudicates the substantive rights of the parties, just like a full trial. Accordingly, when previously sealed discovery documents are attached in support of a summary judgment motion, they lose their character as the raw fruits of discovery.

(Emphasis added.) *Dreiling*, 151 Wn.2d at 909-910.

The United States Supreme Court has also recognized the difference between discovery obtained by the parties in preparing their case, and the introduction of that information into the case itself. In *Seattle Times v. Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984), a defamation case, the defendant Seattle Times sought extensive discovery which the plaintiff opposed on the grounds that the discovery violated his First Amendment rights. The trial court granted a motion to compel discovery but also issued a protective order prohibiting the Times from publishing, disseminating, or using the information in any way except where necessary to prepare for and try the case. The order did not apply to information that the Seattle Times might gather outside the discovery process. The United States Supreme Court reviewed

this Court's decision upholding the protective order. In finding no First Amendment violation, the Supreme Court stated:

[P]retrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law. Much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action. Therefore, restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information.

(Citations omitted.) *Seattle Times*, 467 U.S. at 36.

Although *Seattle Times*, unlike the present case, involved a civil suit and dealt with the validity of a protective order, its rationale has been found applicable to criminal prosecutions in at least one other jurisdiction and to the issue of access by the press to discovery proceedings. See *Palm Beach Newspaper, Inc. v. The Honorable Richard Bryan Burk*, 504 So. 2d 378 (1987),

In *Palm Beach*, a local newspaper, over the objection of both the prosecutor and the accused in an attempted murder case, sought to be present at pretrial depositions and to obtain unpublished transcripts of the depositions. Citing *Seattle Times*, the Florida Supreme Court held that the press had no First

Amendment right of access to a deposition in a criminal case,
reasoning as follows:

A deposition is nothing more than a statement of a witness taken under oath in accordance with the rules. As the *Seattle Times* Court said, '[l]iberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement of litigated disputes.' Open access would not service this purpose. The discovery rules are aimed at protecting the rights of the parties involved in the judicial proceeding and of non-parties who are brought into the proceedings because of purported knowledge of the subject matter. Transforming the discovery rules into a major vehicle for obtaining information to be published by the press even though the information might be inadmissible, irrelevant, defamatory or prejudicial would subvert the purpose of discovery..."

(Citation omitted). *Palm Beach Newspapers*, 504 S.2d at 384. See also, *United States v. Acevedo-Ramos*, 842 F.2d 5 (1st Cir. 1988)

(court did not err by ordering courtroom in which video-taped deposition was taken cleared of press and spectators).

Applying the foregoing rationale to the circumstances presented here, the State's pretrial discovery deposition of Mr. Pfeiffer is not a proceeding that implicates Petitioner's constitutional right of access.

First, just as the Supreme Court observed that pretrial depositions in a civil trial were not open to the public at common

law, there is no indication that such proceedings have historically been treated any differently in the criminal context. Indeed, in their current form, the criminal and civil rules expressly describe discovery as a process that is available to the "parties." See e.g., CR 26(a) ("Parties may obtain discovery" via specified methods in the rules); CR 26(b) ("Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action"); CrR 4.6(a) (the court may "upon motion of a party and notice to the parties order that ... testimony be taken by deposition"). Petitioner is not a "party" to the criminal prosecution.

Second, the purpose of discovery is to assist counsel in the preparation and trial, particularly where, as in this case, the witness may later be unavailable. The discovery process is not intended to serve as a vehicle for obtaining information to be disseminated by the press even though the information may be inadmissible, irrelevant, defamatory or prejudicial.

Third, the location of the deposition should not alter its fundamental character as a process that solely involves the parties and the witness who has been brought into the proceedings

because of his knowledge of the subject matter. In this case, there were legitimate proximity and security reasons for holding the deposition in the Pierce County courthouse. That plus Respondent's willingness to be present and rule on objections does not convert the deposition into an open public hearing. Such a conclusion elevates form over substance⁵.

Finally, as this Court's decisions have held, Petitioner's right of access is not implicated unless and until specific deposition testimony or video footage is admitted into evidence. Should that occur then a legitimate question exists as to whether the testimony loses its character as "the raw fruits of discovery."

For the above reasons, Respondent respectfully maintains that it did not contravene a clear legal authority in denying Petitioner's request to attend the State's deposition of Mr. Pfeiffer.

⁵ This conclusion is even more stark when applied to Petitioner's request that any future preservation depositions be open to the public. The State may choose to conduct the deposition at a location outside the courthouse and Respondent's presence.

C. IN THE EVENT A WRIT IS ISSUED, RESPONDENT IS A NOMINAL PARTY AND SHOULD NOT BE ASSESSED COSTS.

If the Court nonetheless determines that a writ should issue in this matter, RAP 16.2(g) states that "[c]osts are determined and awarded as provided in Title 14." RAP 14.2 provides that "[a] party who is a nominal party only will not be awarded costs and will not be required to pay costs." (Emphasis supplied.) This Rule further states that "[a] 'nominal party' is one who is named but has no real interest in the controversy."

As indicated above, Respondent is a named party because, in a mandamus setting, Petitioner is required to do so. However, Respondent has no personal stake in the outcome of this proceeding and respectfully requests that he be assessed no costs relating thereto.

Submitted this 29th day of September, 2009.

DANIEL T. SATTERBERG
Prosecuting Attorney



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EXHIBIT A



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STATE OF WASHINGTON
PIERCE COUNTY SUPERIOR COURT

THE STATE OF WASHINGTON,

Plaintiff,

v.

MICHAEL ANDREW HECHT,

Defendant.

NO. 09-1-01051-1

MOTION FOR ORDER FOR
DEPOSITION OF WITNESS JOSEPH
ROBERT PFEIFFER

I. MOTION

COMES NOW the State of Washington, by and through its attorney Robert M. McKenna, and his assistant John Hillman, and moves the court for an order granting the preservation of testimony by deposition of witness Joseph Robert Pfeiffer. The motion is based upon the following declaration and CrR 4.6.

II. DECLARATION

JOHN C. HILLMAN declares under penalty of perjury:

Defendant is charged with (1) Harassment, and (2) Patronizing a Prostitute. In Count II, the defendant is accused of paying Robert Joseph Pfeiffer for sex on multiple occasions between April 1, 2008, and January 14, 2009. Pfeiffer was an eyewitness to the events that are the basis of Count I. Pfeiffer is a material witness in this case and essential to prosecution of both Counts I and II.

Pfeiffer has repeatedly reported that he is indigent and transient. Pfeiffer has reported

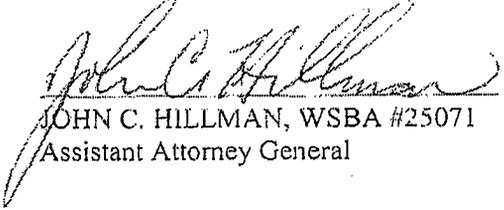
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1 to both the undersigned and others that he was aware that the State was attempting to serve
2 both a subpoena and a material witness warrant on him during the past several months; and that
3 Pfeiffer was evading service of both. Police arrested Pfeiffer in Tumwater, WA on September
4 15, 2009, and Pfeiffer is currently in custody.

5 Pfeiffer reports living at various residences between Seattle, Tacoma, and Thurston
6 County during the pendency of this case. Pfeiffer sometimes has a working cell phone, but he
7 often changes phones and there are times the phones are inactive. The State's past inability to
8 compel Pfeiffer's attendance at trial caused the court to grant a continuance of the September
9 8th trial date. The State does not want a repeat of that scenario.

10 While in-custody today, Pfeiffer was served with a subpoena to attend the trial
11 currently scheduled for October 12, 2009. Due to Pfeiffer's transient lifestyle and past record
12 of uncooperativeness, the State has concerns that upon release Pfeiffer will not remain in
13 contact with the State or appear at trial as required by the subpoena. The State desires to
14 preserve Pfeiffer's testimony by deposition in the event that he does not appear for trial on
15 October 12 2009.

16 DATED this 15th day of September, 2009 in Seattle, Washington.

17
18 
19 JOHN C. HILLMAN, WSBA #25071
20 Assistant Attorney General

21 **III. LAW AND ARGUMENT**

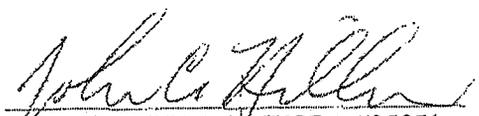
22 CrR 4.6 authorizes the court to order the deposition of a witness if (1) the witness may
23 be unable to attend or prevented from attending the trial, (2) the witness' testimony is material,
24 and (3) taking the witness' testimony is necessary to avoid a failure of justice. CrR 4.6(a)
25 (emphasis added).
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Here, witness Pfeiffer is indigent and transient. He is extremely difficult to contact. Pfeiffer has admitted purposefully avoiding service of process. Pfeiffer's transiency is such that he may be unable or prevented from appearing at the trial. It cannot be disputed that Pfeiffer's testimony is material to both Counts I and II. Pfeiffer eyewitnessed the events alleged in Count I; and participated in the crime alleged in Count II. A failure of justice would occur if the jury did not hear Pfeiffer's testimony in deciding this case. The Court should order a preservation deposition.

DATED this 15th day of September, 2009.

ROBERT M. MCKENNA
Attorney General


JOHN C. HILLMAN, WSBA #25071
Assistant Attorney General

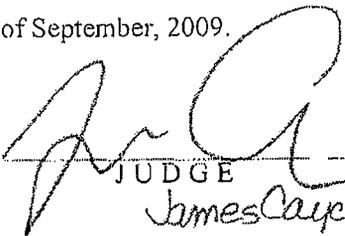
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IV. ORDER

The court having considered the declaration above, the representations of counsel in court, CrR 4.6, and the files herein.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the parties, including the defendant, and counsel for Mr. Pfeiffer, shall appear for preservation depositions of witnesses Joseph Robert Pfeiffer on the ~~16th~~^{21st} day of September, at ~~9:00~~ a.m./p.m. The State shall notify opposing counsel of the location of the deposition.

DONE IN OPEN COURT this ~~16th~~ day of September, 2009.



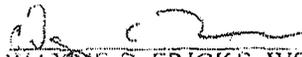
JUDGE
James Cayce

Presented by:



JOHN C. HILLMAN, WSBA #25071
Assistant Attorney General

Copy Received:



WAYNE C. FRICKE, WSBA #16550
Attorney for Defendant

Copy Received:



ROBERT QUILLIAN, WSBA # 6836
Attorney for Witness Robert Pfeiffer

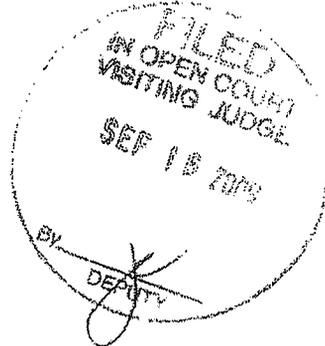


EXHIBIT B

1 IN THE SUPERIOR COURT IN AND FOR THE COUNTY OF PIERCE

2 STATE OF WASHINGTON

3
4 STATE OF WASHINGTON,)
5 Plaintiff,) PARTIAL VERBATIM
6 vs) REPORT OF PROCEEDINGS
7 MICHAEL ANDREW HECHT,) Superior Court No. 09-1-01051-1
8 Defendant.)

9
10 APPEARANCES

11 PROSECUTING ATTORNEY in and for the County of Pierce,
12 State of Washington, by MR. JOHN HILLMAN, Deputy Prosecuting
13 Attorney, appeared on behalf of the State.

14 MR. WAYNE FRICKE, Attorney at Law, appeared on behalf
15 of the Defendant, who was not present in person.

16 MR. ROBERT QUILLIAN, Attorney at Law, appeared on
17 behalf of Witness Pfeiffer.

18 BE IT REMEMBERED that on the 16th day of September
19 2009, the above-captioned cause came on duly for hearing
20 before the HONORABLE JAMES D. CAYCE, Judge of the Superior
21 Court in and for the County of King, State of Washington;
22 the following proceedings were had, to-wit:

23
24 COA # 82104
25 Randy Kay York, CCR, RDR
930 Tacoma Avenue South
Tacoma, Washington 98402

Official Court Reporter
Dept. 1, Superior Court
(253) 798-7482

* * * * *

1
2 **THE COURT:** Do you want the court to be there or are
3 you going to be able --

4 **MR. HILLMAN:** Certainly have no objection to the court
5 being there; I don't know that it's necessary. We can do
6 the deposition, each party makes objections. Then, in
7 the event -- that might not even occur -- but in the
8 event that the State offers the deposition at trial, the
9 court can review it, rule on the objections, and you can
10 delete out any objections and answers and things that the
11 court rules are not admissible.

12 **THE COURT:** My experience with that, it's fairly
13 difficult, depending on the nature of the objections.

14 **MR. HILLMAN:** I have had a different experience. I
15 think the videographers are pretty good about being able
16 to delete that stuff as long as the parties are good
17 about saying objection, giving their reasons then moving
18 on to the next question.

19 **THE COURT:** So you will have someone there at trial
20 that will be able to do that for us?

21 **MR. HILLMAN:** Yes, prior to trial preferably or at
22 least during trial. You know, usually they'll create a
23 transcript of the deposition, then after the court rules,
24 you just go through the transcript, tell them what you
25 want deleted out, based on the court's ruling, and

1 they'll zip that right out of the video.

2 THE COURT: Okay.

3 MR. HILLMAN: But it would have to be done in a
4 courtroom, given Mr. Pfeiffer's current custody status,
5 if it remains the same.

6 THE COURT: Well, I think we need to continue this
7 over. I think there is a basis to hold Mr. Pfeiffer,
8 based upon the declaration of Mr. Hillman indicating --
9 well, first of all, he clearly is a material witness.
10 His absence at trial was the sole reason the trial was
11 continued. Although he hadn't been served, counsel
12 indicates that Mr. Pfeiffer reported to both he,
13 Mr. Hillman, and others that he was aware of the State's
14 attempts to serve him with both the subpoena and the
15 material witness warrant over the past several months --
16 although both of those were not out for several months,
17 subpoena may have been -- and that he was evading service
18 of both of those.

19 But I don't want him held until October 12th. I do
20 want a video deposition taken as soon as reasonably
21 possible. And then I will consider conditions of release
22 that were requested and agreed to are fine, but I do
23 think if there is some kind of an ankle or other bracelet
24 that he could be required to wear, that it's going to be
25 much more likely that he will appear at trial, or at

1 least we will know that he's again attempting to avoid
2 having to testify.

3 So I think we need to set another hearing.

4 MR. QUILLIAN: I will grab my calendar.

5 THE COURT: So how soon?

6 MR. FRICKE: Well, that will depend, Your Honor, on --
7 I was told -- he told you he doesn't know if there are
8 going to be reports; he told me there were going to be
9 reports I would receive. And I would expect the police
10 to prepare reports. I mean, that's what they do. But
11 until I have those, I can't tell you when I'll be ready
12 to do a preservation deposition, because I don't know
13 what I need to do in that context, I guess that's --

14 THE COURT: Let's schedule it for Monday.

15 MR. HILLMAN: The hearing?

16 THE COURT: Monday morning; hearing Monday afternoon.

17 MR. FRICKE: Either or --

18 MR. QUILLIAN: Scheduling the deposition for Monday.

19 MR. FRICKE: The deposition?

20 THE COURT: Yes.

21 MR. FRICKE: I can't, Your Honor, how can -- how can
22 you put me in that box right now?

23 THE COURT: You can ask for a continuance if you
24 haven't had enough time.

25 MR. FRICKE: Why don't we -- I figure we would set a

1 motion to know when we can do the dep, but why don't we
2 set.

3 **THE COURT:** How much new information is there going to
4 be?

5 **MR. FRICKE:** I don't know, Your Honor.

6 **THE COURT:** Sounds like a brief conversation.

7 **MR. FRICKE:** I have no idea.

8 **THE COURT:** So don't cover that in that deposition.
9 If we need to schedule another one, we will schedule
10 another one but limit the deposition to what's already
11 known.

12 **MR. FRICKE:** Well, the preservation deposition is for
13 trial purposes. Usually when -- if that's the potential,
14 has to be played to a jury, I would want some consistency
15 in it for purposes you have examination since the court
16 is entertaining wanting him released, I mean what is not
17 coming out in this I guess there's no indication about
18 the defendant's right to a fair trial. In a fair trial
19 is being prepared for the deposition that might be
20 testimony and presumably at this point I guess because
21 you are allowing it, it will be testimony at trial.

22 But to say, "Let's do this Monday" --

23 **THE COURT:** Why would you assume it's admissible at
24 trial? We haven't even addressed that issue.

25 **MR. FRICKE:** What's that?

1 **THE COURT:** We haven't addressed that issue.

2 **MR. FRICKE:** If you are allowing it for preservation
3 purposes, it's presumed it's going to be admissible.

4 **THE COURT:** If you are going to give up on that,
5 indicate it's admissible, that's fine.

6 **MR. FRICKE:** That's --

7 **THE COURT:** We haven't had a hearing.

8 **MR. FRICKE:** I am not giving up on my rights to --

9 **THE COURT:** We'll schedule it for Monday. I think you
10 know how to conduct yourself at a deposition. I think
11 you have the vast majority of the information. If
12 there's additional information that you will need time to
13 prepare for, I'll certainly give you time. And if you
14 can otherwise convince me that you can't be ready, then
15 file a motion for continuance.

16 **MR. FRICKE:** Well, then could you order the prosecutor
17 provide me that information by the end of the day
18 today --

19 **MR. HILLMAN:** I will absolutely do that.

20 **THE COURT:** -- whatever information you have.

21 **MR. HILLMAN:** Just received it yesterday afternoon. I
22 verbally have given it to Mr. Fricke, I will put it in
23 writing or gather whatever reports the police have and
24 provide those to Mr. Fricke.

25 Like I said, the gist of the information is just that

1 two witnesses, who are on the State's witness list and I
2 think may be on the defendant's witness list, they're
3 friends of his client, that Mr. Pfeiffer reported that
4 they were two people who were telling him to stay in
5 hiding, and that's in part why he was gone for so long.

6 And that the second part related to the same two
7 individuals influencing Mr. Pfeiffer's decision to go
8 give Mr. Fricke's affidavit, sort of quasi-recanting his
9 prior statements. That's the gist of it. Two people
10 that are friends with his client, that knows how to get
11 ahold of both, get here in Tacoma, I don't think would
12 take a long time for Mr. Fricke to contact them,
13 interview them, be ready for a deposition on Monday.

14 **MR. FRICKE:** Might very well not take a long time, but
15 might also I need to talk to other individuals who have
16 knowledge of it as well. I don't know. But I think when
17 the court challenges me on a presumption I am making but
18 then makes presumption I have most of the information, I
19 mean what's the difference there? I don't know what I
20 have. I don't know. I know what I do have; I don't know
21 what I don't have. And but you made your ruling and so
22 if he provides me, I will do the best I can under the
23 circumstance. That's all I can do.

24 **THE COURT:** All right.

25 **MR. FRICKE:** So are we in the morning or afternoon on

1 Monday?

2 THE COURT: Deposition in the morning and I think
3 the --

4 MR. FRICKE: Where's that going to be?

5 THE COURT: You will have make arrangements.

6 MR. HILLMAN: I will make those arrangements.

7 Pursuant to the court rule, I will provide Mr. Fricke
8 with notice of the place of the deposition and it will be
9 I think obviously have to be here in Pierce County
10 courthouse, given his custody status, so he knows the
11 address. I will just have to let him know the courtroom
12 once I have an opportunity to communicate with superior
13 court administration.

14 THE COURT: And it may be a jury room or something.

15 MR. FRICKE: Is Your Honor going to be here?

16 THE COURT: I don't know.

17 MR. FRICKE: Well, if we are going to do this and that
18 has that potential, I think the court should be present.
19 That's my preference. Always been when two weeks ago
20 whatever I suggested that I would want the court there
21 for any preservation dep, I am consistent with that.

22 THE COURT: All right, I will make myself available.
23 And bail will be set at this time at 75,000 and we will
24 revisit that, then, on Monday.

25 (Partial transcript concluded.)

C E R T I F I C A T E

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2
3 STATE OF WASHINGTON)

4)

5 COUNTY OF PIERCE)
6

7 I, Randy Kay York, Official Shorthand Reporter in
8 and for the County of Pierce, State of Washington, do hereby
9 certify that the foregoing proceedings were reported by me
10 on September 16, 2009 and reduced to typewritten form.

11 I further certify that the foregoing transcript of
12 proceedings is a full, true and correct transcript of my
13 machine shorthand notes of the aforementioned matter.

14 Dated this 28th day of September, 2009.
15
16
17

18 _____
19 Randy Kay York, CCR, RDR
20 CCR # 2477
21
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23
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EXHIBIT C

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

STATE OF WASHINGTON,)
)
 Plaintiff,)
)
 vs.) No. 09-1-01051-1
)
 MICHAEL ANDREW HECHT,)
)
 Defendant.)
)
)

VERBATIM RECORD OF PROCEEDINGS

(Requested excerpts)

September 21, 2009

Tacoma, Washington

Byers & Anderson, Inc.

Court Reporters/Video/Videoconferencing

One Union Square 2208 North 30th Street, Suite 202
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1 APPEARANCES

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21 For the Witness:

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For Tacoma News Tribune (for a portion of the
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1 APPEARANCES (continuing)

2

3 Also present:

4

Judge James D. Cayce

Valerie Meade, JA

5

Cody Malone, Videographer,

Byers & Anderson, Inc.

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Court Reporters & Video

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1 BE IT REMEMBERED that on Monday,
2 September 21, 2009, at 930 Tacoma Avenue South, Courtroom
3 2-A, Tacoma, Washington, at 9:27 a.m., before the
4 Honorable James D. Cayce, the following proceedings were
5 had, to wit:

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(First requested excerpt of
10 verbatim record of proceedings.)

11

12

THE COURT: Good morning.

13

14

MR. HILLMAN: Good morning, Your

15 Honor. This is State of Washington versus Michael Andrew
16 Hecht, Cause 09-1-01051-1. John Hillman for the State.

17 The defendant is present with his counsel, Mr. Fricke.

18 We also have a witness who is present for a
19 deposition, Joseph Pfeiffer. His attorney, Mr. Quillian
20 is also present. But before we get in to the deposition,
21 there were a couple of matters that I think needed to be
22 addressed.

23 And the first is that the State's going to be asking
24 questions of Mr. Pfeiffer about prior acts of
25 prostitution that could potentially be charged, and he
would be asking to give answers that might incriminate

1 himself. In speaking with his counsel, Mr. Quillian,
2 obviously he would advise his client not to answer those
3 questions.

4 And so pursuant to Rule 6.14, the State's asking the
5 Court to allow a grant of transactional immunity to
6 Mr. Pfeiffer for testimony about any acts of prostitution
7 that may have occurred in Pierce County between September
8 21st, 2008 and January 14th, 2009. And I selected those
9 dates because the statute of limitations for prostitution
10 is one year.

11 So by law, Mr. Pfeiffer could not be charged with
12 any acts of prostitution that occurred prior to September
13 21st, 2008. And I don't believe anybody's going to
14 inquire of him of any prostitution acts subsequent to our
15 charging period.

16 I did prepare a motion and order that Mr. Quillian
17 has gone over with his client and both his client and
18 Mr. Quillian have signed. I've provided a copy of that
19 to Mr. Fricke and ask the Court to enter that order.

20 THE COURT: Thank you. Mr. Fricke, do
21 you have a position on this?

22 MR. FRICKE: I'll just object. I'm
23 not sure if I can take much of a position on it, but I'll
24 register an objection.

25 THE COURT: Mr. Quillian, did you want

1 to add anything?

2 MR. QUILLIAN: No, Your Honor, that's
3 fine. We reviewed it.

4 THE COURT: I'll grant the motion.
5 I've signed the order.

6 MR. HILLMAN: There's an additional
7 issue that Mr. Quillian alerted me to. And as the Court
8 may know from hearing past arguments about the facts of
9 this case, on March 16th of this year, Mr. Pfeiffer went
10 to Mr. Fricke's office and signed an affidavit covering
11 that he had sex with the defendant in the past, he then
12 was provided money by the defendant in the past but they
13 were not in exchange for each other.

14 Mr. Fricke and I both have had the opportunity to
15 interview Mr. Pfeiffer over the weekend. The police
16 interviewed him when he was arrested on the material
17 witness warrant, and I expect him to testify that that
18 part of the affidavit was not true. And so that could
19 potentially subject him to criminal liability, and that's
20 a concern that Mr. Quillian has.

21 And the State would move orally again to grant him
22 transactional immunity just for the March 16th, 2009
23 affidavit so that Mr. Pfeiffer cannot exercise his right
24 to remain silent on that issue and would be compelled to
25 testify about. And if necessary, I can -- if the Court

1 grants the motion, I can memorialize that in another
2 written order.

3 MR. FRICKE: And I register another
4 objection, Your Honor.

5 THE COURT: And I will grant that
6 motion as well and sign an order when it's presented.

7 MR. HILLMAN: Second thing, Your
8 Honor, is prior to court Mr. Fricke and I discussed, and
9 we also discussed with Your Honor in chambers, whether
10 the deposition itself should be open to the public.

11 I would make a record that the deposition was
12 scheduled at 9. It's 9:31. The doors are open and
13 there's nobody in here except for Mr. Quillian. But I
14 believe that the defense had a motion to close the
15 deposition.

16 MR. FRICKE: Yes, Your Honor. I just
17 don't think it's appropriate to have this done in any way
18 other than a closed hearing because of the nature of the
19 process and where we are at in the proceedings. And no
20 one has a right, as far as the public goes or press goes,
21 to be there when you're doing witness interviews during
22 the course of an investigation.

23 And while this is called a preservation deposition,
24 it's still an interview process, and I don't think it
25 would be appropriate for anyone to be allowed to be here

1 other than those necessary to be here. In particular, I
2 think we would have the potential if a reporter showed up
3 and then put in the newspaper potential actual testimony
4 in the record or publicized it in the newspapers or on
5 radio or on TV prior to trial, and I think for those
6 reasons I think this should be a closed hearing.

7 And I believe Ms. Meade, the judicial assistant, has
8 closed hearing signs that she can put on the door and/or
9 lock the door.

10 MR. HILLMAN: Your Honor, I think this
11 is more than an interview. There's discovery depositions
12 and then there's what we're doing here today which is
13 basically the taking of testimony. It's a preservation
14 deposition. There is a distinction.

15 However, I would acknowledge that we don't have to
16 do this in a courtroom. We could do this at my office;
17 we could do it in chambers. Your Honor's not required to
18 be here. And obviously, if we did it those ways, it
19 wouldn't be open to the public. We just happen to be
20 doing this in a courtroom today so I understand what
21 Mr. Fricke's saying there, and I understand the concern
22 about the press potentially coming in and reporting
23 things that may not even be admitted at trial.

24 The State is concerned, you know, the defendant and
25 the public, you know, have a constitutional right to a

1 public trial. As I said before, the case law on that is
2 just very, very strict. It says if the right to a public
3 trial is denied, then it's automatic, you know,
4 reversible error; there's no harmless error analysis, and
5 that's concerning to the State.

6 And the suggestion I was going to make, given that
7 nobody is here, nobody's come in, is just to leave the
8 doors open and unlocked, and if somebody comes in or
9 tries to come in, we could address it at that time.

10 THE COURT: All right. I think that
11 is the best approach. But we're certainly not in trial.
12 This may or may not be admissible at trial. And I think
13 I can close the courtroom and would probably intend to,
14 although, if the press showed up, I'd give them an
15 opportunity, or if the public showed up and wanted to
16 weigh in on this, I would give them an opportunity to try
17 to convince me otherwise. But at this point the doors
18 are open, there's no sign, and it's a moot issue unless
19 someone does come. And certainly Mr. Quillian has a
20 right to be here.

21 MR. HILLMAN: The State didn't have
22 any other issues to address prior to the testimony.

23 MR. FRICKE: I'm ready to go, Your
24 Honor.

25 THE COURT: Okay.

(Conclusion of first requested
excerpt of verbatim record of
proceedings at 9:34 a.m.)

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1 BE IT REMEMBERED that on Monday,
2 September 21, 2009, at 930 Tacoma Avenue South, Courtroom
3 2-A, Tacoma, Washington, at 1:30 p.m. before KATIE A.
4 ESKEW, CCR, RPR, Notary Public in and for the State of
5 Washington, the following proceedings were had and
6 videotaped, to wit:

7 (Seconded requested excerpt of
8 verbatim record of proceedings.)

9 (Mr. Beck enters.)

10

11 MR. FRICKE: Okay. That's all I have,
12 Your Honor. Your Honor, I guess now we have the issue.

13 THE COURT: Unless there's no
14 redirect.

15 MR. HILLMAN: I do have some redirect.

16 MR. FRICKE: I think we need to bring
17 this up.

18 THE COURT: Yeah. We now have
19 observers, one individual from the press. And this is a
20 deposition normally conducted in a law office. The
21 defense is moving to exclude all witnesses, and the
22 State -- are you still objecting?

23 MR. HILLMAN: Your Honor, I think it's
24 kind of an unusual issue and I'll defer to your
25 discretion, but I would ask that if the defendant's

1 making that motion that he also waive his right to a
2 public trial, at least for this deposition.

3 MR. FRICKE: This is -- I'm not --
4 obviously this is not the trial, so -- and I'm not going
5 to waive that right.

6 THE COURT: Waive your right to a
7 public deposition, if there is any right to a public
8 deposition?

9 MR. FRICKE: If there is any right.
10 I'm asking that the only people, as I stated earlier,
11 that are in this courtroom are those necessary for
12 purposes of this. Otherwise, I'd ask that we move it to
13 a law office and it won't be an issue.

14 THE COURT: And then since we are in a
15 courtroom, if we were in a law office, I wouldn't ask the
16 individuals that have just come in if they wish to weigh
17 in on this, but do either of you have any position with
18 respect to whether you should be allowed to stay or not?

19 MR. BECK: Yes, Your Honor. This is
20 James Beck on behalf of the News Tribune. This is --
21 Ishikawa v. Seattle Times I think governs this. This is
22 a proceeding in open court. There's five factors the
23 Court must consider.

24 THE COURT: But let's talk about what
25 this is. What -- what is this hearing?

1 MR. BECK: It's -- we're in open
2 court, so it's testimony of a witness.

3 THE COURT: Okay. Let's all just
4 move. It's going to be easier to move to another room.

5 MR. FRICKE: Either that or we put a
6 "closed hearing" on -- sign on. The only reason we
7 didn't put a closed hearing sign on this thing was
8 because it wasn't an issue this morning.

9 THE COURT: Right. But this is just a
10 deposition normally conducted in a law office. And
11 you're a lawyer?

12 MR. BECK: Yes, Your Honor.

13 THE COURT: Are depositions open to
14 the public?

15 MR. BECK: Your Honor, this is not a
16 deposition, as I understand it. It's a court presiding
17 over a witness in open court. If it's -- if the judge is
18 going to be -- Your Honor is going to be presiding over
19 the same witness in another room in this courthouse, I
20 don't see how that changes matters either.

21 THE COURT: Well, for instance, we get
22 calls at the office when the attorneys are in the middle
23 of a deposition. Is that open to the public because the
24 judge is involved?

25 MR. BECK: Your Honor, I think this

1 proceeding here today is a court proceeding subject to
2 Ishikawa.

3 THE COURT: I think you're wrong, but
4 you can certainly appeal.

5 MR. BECK: Thank you.

6 THE COURT: We'll just -- we'll go
7 ahead and put a closed sign on the courtroom.

8 (Mr. Beck exits.)

9 (Conclusion of second requested
10 excerpt of verbatim record of
11 proceedings at 1:30.)

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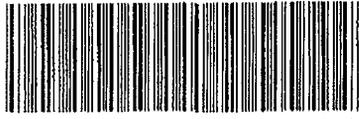
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EXHIBIT D



09-1-01051-1 32901879 CME 09-25-09



IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

STATE OF WASHINGTON

Cause Number: 09-1-01051-1

MEMORANDUM OF JOURNAL ENTRY

vs.

Page 1 of 2

HECHT, MICHAEL ANDREW

Judge: JAMES D. CAYCE VJ

Court Reporter: Katie Eskew

Judicial Assistant/Clerk: VALERIE MEADE

John Christopher Hillman

Prosecutor

WAYNE C. FRICKE

Defense Attorney

Proceeding Set: MATERIAL WITNESS WARRANT

Proceeding Date: 09/21/09 13:30

Proceeding Outcome: HELD

Resolution:

Clerk's Code:

Proceeding Outcome code: **MTHRG**

Resolution Outcome code:

Amended Resolution code:

IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

STATE OF WASHINGTON

Cause Number: 09-1-01051-1

**MEMORANDUM OF
JOURNAL ENTRY**

vs.

HECHT, MICHAEL ANDREW

Page: 2 of 2

Judge: JAMES D. CAYCE VJ

MINUTES OF PROCEEDING

Judicial Assistant/Clerk: VALERIE MEADE

Court Reporter: Katie Eskew

Start Date/Time: 09/21/09 9:28 AM

September 21, 2009 09:28 AM Present: AAG John Hillman on behalf of the State; Wayne Fricke on behalf of the defendant who is also present; Robert Quillian on behalf of material witness Joseph Pfeiffer who present in custody. Motions and orders compelling witness to testify with a grant of immunity entered. Mr. Fricke's objections noted for the record. Mr. Quillian has no objection. Defense motion to close hearing/video deposition to the public argued by counsel. The Court will allow the courtroom to remain open and address the issue if spectators enter the courtroom. Off the record; video deposition commences.

End Date/Time: 09/21/09 10:00 AM

Judicial Assistant/Clerk: VALERIE MEADE

Court Reporter: RANDY YORK

Start Date/Time: 09/21/09 2:07 PM

September 21, 2009 02:04 PM Video deposition completed. All parties present with the exception of the defendant. This matter comes on for bail hearing in re: material witness Joseph Pfeiffer. Mr. Hill advises the Court that the State has no objection to the witness being released on his own personal recognizance. Colloquy, 02:15 PM Conditions of release entered. Court adjourned in this matter.

End Date/Time: 09/21/09 2:15 PM

SUPREME COURT OF THE STATE OF WASHINGTON

TACOMA NEWS, INC., a)	
Washington corporation, d/b/a/)	
THE NEWS TRIBUNE,	)	No. 83645-1
)	
Petitioner,)	
	)	DECLARATION OF THOMAS
vs.	)	KUFFEL IN SUPPORT OF
	)	RESPONDENT'S ANSWER IN
THE HONORABLE JAMES D.	)	OPPOSITION TO
CAYCE,	)	PETITIONER'S APPLICATION
	)	FOR WRIT OF MANDAMUS
Respondent,)	

Thomas W. Kuffel declares as follows:

1. I am a senior Deputy Prosecuting Attorney for King County and the attorney representing Judge James D. Cayce, respondent. This declaration is submitted in support of Respondent's Answer in Opposition to Petitioner's Application for Writ of Mandamus. I make this declaration based on personal knowledge and I am competent to testify to the facts set forth herein.
2. A true and correct copy of the Motion for Order for Deposition of Witness Joseph Robert Pfeiffer, dated September 16,

2009 and filed in Pierce County Superior Court Cause Number 09-1-01051-1, is attached hereto as Exhibit A.

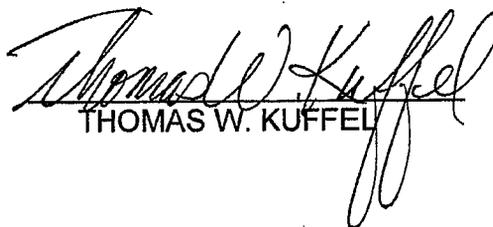
3. A true and correct copy of the Partial Verbatim Report of Proceedings in Pierce County Superior Court Cause Number 09-1-01051-1, dated September 16, 2009, is attached hereto as Exhibit B.

4. A true and correct copy of the partial Verbatim Report of Proceedings in Pierce County Superior Court Cause Number 09-1-01051-1, dated September 21, 2009, is attached hereto as Exhibit C.

5. A true and correct copy of the Memorandum of Journal Entry, dated September 21, 2009 and filed in Pierce County Superior Court Cause Number 09-1-01051-1, is attached hereto as Exhibit D.

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

DATED this 27th day of September, 2009 in Seattle, Washington.


THOMAS W. KUFFEL