

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X

THE PEOPLE OF THE STATE OF NEW YORK,

- against -

AFFIRMATION IN
OPPOSITION TO
MOTION TO QUASH

3303/13

JOSELITO VEGA,

Defendant.

-----X

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Timothy C. Parlatore, Esq., being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice before this Court and I represent Joselito Vega (“Vega”) in the above captioned criminal prosecution. I am fully familiar with the facts and circumstances of this matter and submit this Affirmation in Opposition to the Motion to Quash filed by CBS Broadcasting Inc. (“CBS”). The basis of my knowledge are personal observations, review of the file, and discussions with my client.

INTRODUCTION

2. Defendant is charged with various counts, both here and in a separate Nassau County indictment, related to allegations that he stole artwork from the Kings Point residence of the late Hannelore Schulhof. The first theft allegedly occurred in the spring of 2011 with the second occurring on April 29, 2013. CBS camera crews were embedded into the investigative team leading up to and during the April 29, 2013 incident to film a reality TV show about the Kings County District Attorney’s Office (“KCDAO”).

3. Vega has maintained his innocence, giving a statement to the KCDAO in which he explained that he had been told to take the paintings and sell them by Hannelore Schulhof’s

son, Michael Schulhof.¹ During this statement, Defendant told members of the KCDAO where to find certain pieces of evidence which corroborated his story, which were located in his vehicle. The People have failed to turn over this exculpatory evidence and claim that it was never found. On information and belief, the materials sought from CBS will corroborate Defendant's story, as the search of the vehicle was filmed. This is the chief, but not the sole reason, why these materials were subpoenaed.

4. Notwithstanding discussions to potentially limit the scope of the subpoena, CBS filed the instant Motion to Quash. This Motion is flawed as it attempts to characterize the materials sought as "news," when in fact, this reality TV series arguably does not qualify as legitimate journalism. However, even if the Court were to find that this series qualifies as legitimate news, Defendant can meet its burden under the three-prong test of Civil Rights Law §79-h. Additionally, because of the unique circumstances of this case, the close relationship between the KCDAO and CBS has created an agency relationship, thus transforming the otherwise private conduct of CBS into state action, which requires disclosure.

FACTUAL BACKGROUND²

5. Vega was a house painter for Zimmer Painting, a Queens-based painting company that had a long-standing relationship with Michael Schulhof ("Schulhof"), the complainant in this matter. In this capacity, Vega had done many jobs at Schulhof's various residences, including his Park Avenue apartment, his homes in East Hampton and West Palm Beach, and his mother's home in King's Point, which is the home at issue. As evidence of the close

¹ The notes of this post-arrest statement are noticeably bare, as to this and other information that Defendant told to members of the KCDAO, however in my discussions with ADA Lawrence Oh, he was well familiar with Defendant's version of events.

² Because this affirmation is being submitted for the limited purpose of establishing Defendant's need for the subpoenaed material, it does not include all facts that I have learned in my investigation and preparation of this case which are of an exculpatory nature or form the basis of Vega's defense.

relationship, when Vega went to work on the West Palm Beach house, for example, Schulhof had him flown down to Florida put up in a luxury condo.

6. In 2011, Schulhof approached Vega to offer him an opportunity to make some extra money. He told him to take some of Schulhof's paintings and sell them for him in exchange for a percentage of the profits. He provided Vega with written instructions as to the gallery which the painting should be shipped to and sold. Vega later found the paintings where Schulhof said they would be, together with the necessary paperwork, and contacted Clars Gallery to arrange for the sale.

7. Up until his arrest, Vega didn't believe that there was anything wrong or illegal with this arrangement. What he was unaware of at the time was that the painting at issue was promised to the Guggenheim Museum upon Hannelore Schulhof's death, but was insured for \$200,000. If the painting was discovered missing upon Hannelore Schulhof's death, this insurance money would go back into the estate, presumably to Schulhof's benefit, rather than to the Guggenheim. Thus the painting was worth far more to Schulhof if it went missing and were not recovered.

8. Hannelore Schulhof passed away on February 23, 2012. On April 16, 2012, following an inventory, Schulhof reported the painting missing to the insurance company.³ Schulhof did not report the missing paintings to the Kings Point Police Department until the following day, April 17, 2012, presumably because this was required by the insurance company prior to paying out the claim.⁴ It is this report which led to the investigation by the KCDAO.

9. When the KCDAO decided to conduct a sting operation in April, 2013, Vega informs me that he received a written message from Schulhof instructing him to take and sell

³ A copy of the insurance claim is annexed hereto at Exhibit "A."

⁴ A copy of the police report is annexed hereto at Exhibit "B."

additional paintings. He kept these written messages from Schulhof in the driver's side door pocket of his vehicle when he went to the house on April 29, 2013.

10. On April 29, 2013, Vega informs me that he went to the house and attempted to find which paintings Schulhof wanted him to take and sell. He checked paintings in both the garage and upstairs and was confused, as the KCDAO's office had not left the necessary documents attached to the backs of the paintings, as Schulhof had done during the prior incident. He eventually took three paintings which were "in his workspace," as directed by Schulhof and selected the smallest ones because the shipping would be less expensive, as Schulhof had not advanced him the money for shipping and insurance. He then went on to begin his assigned task of stripping the wallpaper and prepping the rooms for the ordered paint job. At the end of the work day, he left the home and was arrested as he drove down the block.

11. Vega informs me that following his arrest, Vega was first taken to the Kings Point Police Department, where he observed officers searching his vehicle (without a warrant). He was then transported to the KCDAO, where he was provided 18b counsel and gave a statement to investigators and ADA Oh. During this statement, Vega informed the KCDAO about his relationship and plan with Schulhof and the fact that the notes were in the driver's side door of his vehicle.

12. Vega also tells me that he expressed concern to the KCDAO, as he was aware that some law enforcement officers were moonlighting for Schulhof and identified one officer in particular from the Southampton Town Police Department, whom he had met when he was working on Schulhof's East Hampton home. This officer, known to Vega as "Lieutenant Bruce" had given Vega a "Friend of Southampton Town Police" shield. Vega told the KCDAO that the shield was in his car as well. KCDAO investigators never found the shield and deemed

Vega's story uncorroborated. The vehicle was then returned to Vega's ex-wife who, upon inspection, discovered that the shield was still in the vehicle and she provided the same to the undersigned.⁵

13. Upon reviewing the discovery provided in this case, it was revealed that when the original piece of artwork that Vega admits taking, at Schulhof's request and pursuant to his instructions, Lefauteuil II by Jean Dubuffet, had been recovered and returned to Schulhof in May or June of 2012. *See Grand Jury Transcript 4/23/2013*, p. 28. However, I am informed by ADA Oh that neither Schulhof, nor his curator ever showed the painting to any investigators. Rather, Schulhof immediately shipped it overseas to Venice Italy. *Id.* at 15. No photographs were taken of the painting, nor fingerprint analysis, nor even a proper inventory of what, if any documents had been included with the painting were conducted. This is important because Schulhof essentially destroyed the evidence showing that the paperwork, which is normally kept in a locked file cabinet, and which Vega required in order to sell the painting through a legitimate gallery like Clars, had been provided to him by Schulhof.

14. Additionally, subsequent to the commencement of this case, Schulhof made requests of both the KCDAO and the Nassau County District Attorney's Office that the paintings which were used in the sting be returned to him immediately, rather than be kept in possession of the People to be preserved for trial.⁶ I am also informed that there is a significant amount of discovery material, including all photographs taken by investigators, which the People have refused to disclose, at the request of Schulhof, due to some claimed concern about compromising the integrity of the home security system.

⁵ A photograph of the shield is annexed hereto at Exhibit "C."

⁶ I objected to this, explaining to ADA Oh my concerns that Schulhof may cause the paintings to not be available for trial, as he did the Dubuffet, or potentially alter their condition from their current state. I am unaware whether the KCDAO has returned the paintings or not.

15. Finally, the defense has just learned that in addition to “Lieutenant Bruce,” another police officer is believed to be on Schulhof’s payroll, Dan Walsh. I am informed by ADA Oh that he knew that Walsh was working privately for Schulhof, but believes that Walsh was retired at the time of this case. The KCDAO allowed Schulhof to integrate Walsh into their investigative team, including him in witness interviews, and keeping him apprised of tactical progress of the sting.

INVOLVMENT OF CBS IN THE INVESTIGATION

16. Leading up to the 2012 election, in which District Attorney Charles Hynes faced tough opposition from Abe George and the eventual victor, Ken Thompson, the KCDAO entered into an agreement with CBS to produce a reality TV show entitled “Brooklyn DA.”⁷ As part of this reality TV show, CBS camera crews were embedded into the office and permitted to follow investigators and Assistant District Attorneys. However, the relationship went far beyond allowing the camera crews to passively record the normal workings of the office, and included recruiting members of the office to reenact and fabricate scenes and providing a one-sided opportunity for the KCDAO to promulgate it’s propaganda without any attempts at independent, unbiased journalism.

17. One featured segment from the show, which illustrates that the difference between journalistic recording of events and active creation of scenes for entertainment value, involved the case of David Ranta, who was released after being wrongfully imprisoned for over 20-years for a murder he did not commit. Former Assistant District Attorney, Taylor Koss, who handled the case, gave an interview in which he revealed how this show differed from actual news footage:

⁷ This agreement was conveniently never reduced to writing, which renders it difficult, if not impossible to determine what the terms and understandings were between the KCDAO and CBS. *See Abe George v. Charles Hynes*, 13-10070.

Q: Your initial involvement in the show was actually some of the last footage shot?

A: Strangely enough, yes. The release was filmed first and then the show filmed the rest of the footage over a couple of months, backtracking and putting together the story.

Q: By the time the filming started, your work was done?

A: Yes, and that was important to me. I would not have felt comfortable filming an open investigation. By the time of the shooting, I was dying to talk to people about the work that had gone into the case, because during the investigation, I didn't discuss it with anyone. I didn't want to influence anyone's opinion about the case or change anything people might discuss with me...

Q: What were some of the unexpected side effects of being filmed?

A: How time consuming it was. The crew was accommodating but it was a lot of coming in early and leaving late. I certainly had less free time during shooting. I had no idea how much effort was involved. Some days it was take after take. It took me seven takes to correctly get into my elevator – who knew? And my ten-minute walk to the subway took almost two hours. Walk in the front door, walk out the front door. It took 20 minutes to walk half a block. And you wouldn't know it, but I entered the subway station fifteen times. Thankfully, they only had one shot to get me into the subway car, because the doors closed. Otherwise I might have been there all day.

Q: In all that filming, did you work with hair and makeup crews? What about wardrobe?

A: I know some of my colleagues had hair and makeup, but I was never even offered suggestions...⁸

18. While I have no information as to whether Lawrence Oh had hair and makeup done, there are several scenes from this segment which are clearly staged. These include strategy sessions between ADA Oh, ADA Laura Neubauer⁹ and former Bureau Chief Michael

⁸ A copy of an article, which appeared in the September 2013 edition of Brooklyn Barrister, is annexed hereto at Exhibit "D."

⁹ Strangely, ADA Neubauer appeared at Vega's arraignment due to ADA Oh's absence and when I brought the issues of this show to the Court's attention, she claimed to know nothing about the issue and actually claimed that the show was about a different case.

Vecchione.¹⁰ They also include scenes of ADA Oh discussing the case and his intentions to have that strategy session with “Jose,” the employee at the local deli.

19. In addition to the staged scenes, CBS camera crews were embedded into the investigative team to record surveillance of Vega, as well as the setup and conduct of the sting operation, and Vega’s arrest, transport to the Kings Point Police Department, and the search of Vega’s vehicle.

20. Finally, upon airing the segments, CBS made absolutely no attempt to contact the undersigned, or anyone else who might be able to provide a counter to the KCDAO’s story until days before the last of the three episodes aired. I spoke with a CBS producer at some length about the case, but ultimately, presumably because it didn’t fit with the KCDAO’s version of the story, they put up a brief and misleading statement at the end of the segment: “Timothy Parlatore, Mr. Vega’s attorney, said his client maintains his innocence and has an explanation for his actions. He declined to elaborate.”

21. After the show had aired, I sought and obtained a Judicial Subpoena and duly served it upon CBS. As discussed in David Schulz’s affirmation, he contacted me on or about November 22, 2013 by telephone to discuss the subpoena. During this discussion, Mr. Schulz tried numerous times to convince me to withdraw the subpoena in its entirety, which I declined to do. He also asked if I would consider limiting the scope of the subpoena, which I was willing to do, contrary to his claims in his affirmation. However, the problem is that I had asked him if, in limiting the scope of the subpoena, we might come to an agreement whereby CBS would agree to release at least some of the material. Mr. Schulz replied that CBS would not agree to

¹⁰ The presence of camera crews in strategy sessions in the KCDAO presents an interesting quandary for the People. Either these were staged, purely for entertainment purposes, which goes against the claim that this was a legitimate news broadcast, or the privilege and confidentiality of these meetings has been waived and Mr. Vecchione, Ms Neubauer, and Mr. Oh can be called to testify about these meetings, or they can admit that there was an agency relationship formed between the KCDAO and CBS.

release any material and that the only purpose behind limiting the subpoena was to focus the issues for his motion to quash.

22. I am aware that in the case of *People v. Gerazounis*, 3242/12, which is also before this Court and is also being prosecuted by ADA Oh, and also involves this same TV show, Mr. Schulz agreed with Gerald Shargel to release the relevant outtakes, if he would limit the scope of what he was seeking. I had hoped that Mr. Schulz and CBS would afford my client the same courtesy, but he declined to do so, which necessitated this motion practice.¹¹

ARGUMENT

23. Before analyzing the various arguments regarding the applicability of the Shield Law, I will first address the Movant's argument that the subpoena should be quashed as it is speculative, overbroad, and improper. This section of the motion (as well as a good many of the later arguments) is premised on the false assumption that the Defendant is engaging in a fishing expedition without a good faith basis to believe that such relevant and exculpatory materials exist. In our phone conversation, I gave Mr. Schulz a very detailed description of exactly what the factual basis is for our requests, including substantially all of the arguments advanced in these papers. Notwithstanding this, in an attempt to support the argument that the subpoena is speculative, Mr. Schulz has simplified and obscured the content of our conversation into the statement that "Mr. Parlatore asserted that this particular videotape was needed because prosecutors may have removed an item during the search of the vehicle that has not been

¹¹ This is not the first instance where CBS has afforded disparate treatment between the *Gerazounis* matter and the case at bar. As discussed *infra*, Susan Zirinsky previously testified that they decided to pull all footage regarding the *Gerazounis* matter because, although *Gerazounis* had been indicted almost a year prior, the matter "was not yet adjudicated" and she claimed that CBS "would not do anything to impact or jeopardize a case." However, Zirinsky and CBS had no qualms about airing Vega's case immediately after his arraignment and before any discovery had been conducted.

disclosed by prosecutors, and that some unspecified misconduct may have occurred during Vega's arrest. He speculated that this might have been captured in the outtakes."

24. As discussed throughout this submission, Defendant has a specific factual basis to believe that such materials exist and that they are in the possession of CBS. This stands in stark contrast to the cases cited by Movant, most of which involve cases where defendants subpoena materials without a factual basis to believe that they contain relevant material (*See, e.g. People v. Gissendanner*, 48 N.Y. 2d 543 (1979) (Court properly refused to issue subpoena for police officer's personnel files where Defendant failed to show a factual basis to believe that there had been disciplinary action)), or where Defendant issues subpoena without knowing if any records exist at all, but issues subpoena to ascertain the existence of such records.

25. Here, in contrast, we know that CBS filmed Vega's investigation, arrest and the search of his vehicle because the world watched an edited version of the footage on primetime TV. We also know that the conduct of those events, which were documented by CBS will be a contested issue at trial and that ambiguous or conflicting versions of how those events were conducted can be resolved by showing the jury the raw, unedited video of exactly what happened. As opposed to the rule in *Gissendanner*, this is exactly what the proper purpose of a subpoena is.

26. As to the argument that the subpoena is overbroad, I have, and will continue to be open to discussions with CBS to limit the scope of the subpoena to focus on the relevant materials, as much of the materials cited by CBS, such as logistical correspondence, is not necessary, beyond the identities of CBS employees who may be later called as witnesses.

I.

THE SHIELD LAW IS INAPPLICABLE BECAUSE “BROOKLYN DA” DOES NOT FALL UNDER THE DEFINITION OF “NEWS” ANTICIPATED BY THE STATUTE

27. In order for CBS to avail themselves of the protections under Civil Rights Law §79-h (the “Shield Law”), they must first show that the material sought qualifies as “news.” Civ. R. §79-h(a)(8) states that “‘News’ shall mean written, oral, pictorial photographic, or electronically recorded information or communication concerning local, national or worldwide events or other matters of public concern or public interest or affecting the public welfare.”

28. While I recognize that this definition is very broadly defined, the courts have yet to rule definitively where the borderline is between news and entertainment. In *Sullivan v. Hurley*, 167 Misc. 2d 534 (Queens Ct. Sup. Ct. 1995), Judge Joseph Golia ordered Court TV to turn over outtakes to the defendant and remarked:

...[W]hen, as herein, the newsgatherers choose to be participants in a story, beyond that as witnesses and reporters, then this protection may be eradicated. Furthermore, in this age of participatory journalism where news, commentary, and sensationalism have become one, the role of a journalist in the public's mind has become so entangled that it is often difficult to distinguish between news and entertainment. Although the newsgathering privilege is a fundamentally protected right, it should not be considered absolute or for that matter the unwritten "Eleventh Commandment."

Id at 539, citing *In re American Broadcasting Co. [People v Caputo]*, NYLJ, June 8, 1995, at 37, col 3.) Clearly this blurring of the lines has grown only greater in the past 19 years since this decision.

29. Research of the case law nationwide reveals only one case which seems to directly address the issue. In *Kinsella v. Welch*, 362 N.J. Super. 143, the Appellate Division in New Jersey ruled that the reality television show “Trauma: Life in the E.R.,” which was

produced by the New York Times, would be considered journalism under the definitions of New Jersey Shield Law. The court noted that “the mere fact a videotape is taken for use in a television show does not automatically mean that the videotape producer is part of the ‘news media.’ We also recognize that most television shows do not consist of ‘news.’” The court went on to analyze the particular characteristics of “Trauma: Life in the E.R.,” which are distinctly different from the case at bar. The court noted that the show consisted of videotaping in the emergency room of a hospital and was supplemented by interviews where the participants commented on the events which were filmed. This is starkly different from the case at bar, where some live shots are included, but are significantly supplemented and embellished through dramatic enactments by members of the KCDAO, some of which take several “takes” to get right.

30. Neither the critics, nor CBS treated this show as legitimate news. Reviews show that critics recognized the show to be dramatization. Robert Lloyd of the LA Times writes that the show contains “moody soundtrack music telling you when and how to feel. No one will mistake this for the work of Frederick Wiseman. Nor is it any sense investigative journalism; the point is not to examine but to honor.”¹² Similarly, Neil Genzlinger of the New York Times remarked “In the legal dispute over whether the series gives Mr. Hynes an election advantage, CBS has billed this as a news program in an effort to get around equal-time provisions. Maybe, but it looks like a zillion other workplace reality shows.”¹³

31. Even CBS, after seeing the low ratings of the series, shifted the show from prime-time to Saturday nights. It was replaced by re-runs of the fictional drama “Person of

¹² A copy of the entire article, entitled “Review: ‘Brooklyn DA,’ the ‘reality’ and the real” is annexed hereto at Exhibit “E” and is available online at <http://www.latimes.com/entertainment/tv/showtracker/la-et-st-review-brooklyn-da-20130528,0,3733195.story#axzz2pTtHQfQp>.

¹³ A copy of this the entire article, entitled “Never a Crime-Free Moment” is annexed hereto at Exhibit “F” and available online at http://www.nytimes.com/2013/05/28/arts/television/brooklyn-da-begins-on-tuesday-on-cbs.html?_r=0

Interest.” The Saturday timeslot that “Brooklyn DA” moved to has been officially known since 2004 as “CrimeTime Saturday,” because CBS plays various reruns of crime drama procedural series, such as “CSI,” “Criminal Minds,” “NCIS,” “NCIS: Los Angeles,” “Cold Case,” “Flashpoint,” and “The Mentalist.” CrimeTime Saturday currently features reruns of “NCIS: Los Angeles.”

32. Although David Schulz and I discussed these very issues in our phone conversation, their papers are fairly conclusory as to the legitimate issue of whether “Brooklyn DA” actually qualifies as “news.” The only cases cited involve very different types of programming. *People v. Hendrix*, 12 Misc. 3d 447 (Sup. Ct. Kings Cnty. 2006) is arguably similar, in that it involved a show where journalists filmed NYPD officers and then interviewed them. However, this appears to be quite different from the case at bar, as the show did not seem to involve any fabrications or dramatic enactments, as “Brooklyn DA” did. Additionally, the Defendant in *Hendrix* appears not to have even challenged the threshold issue of whether the documentary qualified as “news.” The other case cited by Movant, *In re McCray*, 928 F.Supp.2d 748 (SDNY 2013) is not even close to being analogous or relevant, as it involved a completely independent filmmaker who had filmed interviews as part of a documentary. Furthermore, the Court in *McCray* rejected the notion that the New York Shield Law applies in Federal Court.

33. Instead of qualitatively addressing the issues with “Brooklyn DA,” CBS has attempted to steamroll right past this threshold issue by using the word “news” as many times as it possibly can, even abbreviating the non-party’s corporate name “CBS Broadcasting Inc.” into “CBS News” for use throughout the motion.

34. As the 2nd Department noted in the case of *People v. Le Grand*, 67 A.D.2d 446 (1979), “These provisions evince a clear legislative design to benefit ‘professional journalists’ and ‘newscasters’ only. They should not by judicial fiat and strained interpretation be deemed to

encompass those engaged in a different field...” It is respectfully submitted that although the definition of “news” under the Shield Law is broad, “Brooklyn DA” does not meet that definition and the Shield Law is therefore inapplicable.

II.

CBS MAY NOT HIDE BEHIND THE SHIELD LAW BECAUSE CBS AND THE KCDAO FORMED AN AGENCY RELATIONSHIP, WHICH TRANSFORMS THE OTHERWISE PRIVATE ACTIVITIES OF CBS INTO STATE ACTION

35. Yet another area of law that seems, as of yet, undecided is whether reality shows where camera crews are embedded with law enforcement creates an agency relationship. If such an agency existed, then the issue of whether “Brooklyn DA” qualifies as “news” is not pertinent. In *People v. Combest*, 4 N.Y.3d 341 (2005), the Court of Appeals noted their concern over this exact issue, although the facts of *Combest* mandated disclosure under the statute anyway:

[W]e note our concern with the troubling practice of the police partnering with the media to make a television show depicting custodial interrogations. Defendant argues that by inviting Hybrid into the interrogation room, the police created an agency relationship with the film company, thereby entitling him to copies of his statements. Because we conclude that defendant established his entitlement to the videotapes under the statute, we need not decide whether the indicia of state involvement in this case rise to the level at which private conduct is transformed into state action.

Id. at 349, citing *People v Ray*, 65 N.Y.2d 282, 286 (1985)

36. In *Ray*, the Court explained that:

Private conduct, however, may become so pervaded by governmental involvement that it loses its character as such and invokes the full panoply of constitutional protections. Relevant indicia of State involvement, which may transform private conduct into State action, include: a clear connection between the police and the private investigation; completion of the private act at the instigation of the police; close supervision of the private conduct by the police; and a private act undertaken on behalf of the police to further a police objective.

Id. at 286, citing *People v Adler*, 50 NY2d 730 (1980); *People v Jones*, 47 NY2d 528 (1979); *People v Esposito*, 37 NY2d 156 (1975); *People v Horman*, 22 NY2d 378 (1968); *Corngold v United States*, 367 F2d 1 (9th Cir. 1966). While most of these cases involved airport security or retail store security, the principle applies here, as the indicia of State involvement include: “a clear connection between the police and the private investigation,” and “close supervision of the private conduct by the police.”

37. It is beyond common sense that the KCDAO maintained “close supervision” of the CBS crews. Much of the filming occurred on the 17th Floor of the KCDAO, which is a secure floor, due to this being the home of both the Rackets Bureau and the Major Narcotics Bureau, two of the KCDAO’s three confidential bureaus. Because of the confidential nature of the KCDAO’s work, members of the KCDAO must have exerted both close supervision, as well as some measure of control over the embedded crews.

38. Absent case law, or a hearing to establish conclusively what the parameters were, we can extrapolate that the KCDAO exerted control over the CBS crew, much the same way as the Department of Defense exerted control over the embedded journalists in Iraq and Afghanistan. Consider, for example, the case of freelance journalist Philip Smucker, who was expelled from Iraq in 2003 for revealing the location of a Marine unit or Geraldo Rivera, who was also expelled from Iraq just days after Smucker, after he broadcast the position and plans of U.S. troops. In December 2005, two reporters for the Virginia-Pilot newspaper lost their credentials for violating the military’s prohibition against photographing damaged vehicles. It is silly to think that the KCDAO would not take similar action if the CBS crews had violated any ground rules and even more ludicrous to believe that the KCDAO provided CBS with absolutely no rules, allowing them to wander the secure floor with impunity.

39. As evidence of the tight control that the KCDAO must have exercised over CBS, they have, at the request of Schulhof, refused to turn over photographs of the interior of the house to the defense, instead applying for and obtaining a protective order. ADA Oh explained to me that this was done at Schulhof's request due to his concerns over revealing features of the home security system. It seems a little ridiculous to believe that the KCDAO would go through the extreme measure of obtaining a protective order to prevent me from knowing the features of the security system, yet allowed the CBS crews to wander freely, videotaping anything they wanted to in the house for nationwide broadcast.

40. In her affidavit, Susan Zirinsky makes the claim that CBS "at all times acted independently of the prosecutors." *Zirinsky Aff.* ¶12. What is more accurate is that they acted independently within the small range of choices that the KCDAO allowed them to have.

41. Both here, and in the prior litigation of *Abe George v. Charles Hynes*, CBS has made great efforts to claim that they maintained exclusive editorial control over the show. However, Susan Zirinsky's testimony in *George* is highly questionable and contradicts her own actions.

42. Attorney Gerald Shargel sent this Court a letter, dated May 15, 2013, in which he informed the Court that he had just been contacted by CBS producers and informed that they intended to cover the case of *People v. Gerazounis*, and asked for an injunction preventing the broadcast, as the show was scheduled to premiere 13 days later, on May 28, 2013. One day later, On May 16, 2013, he was informed by ADA Oh that the segment was no longer going to air. In *George*, Ms. Zirinsky testified regarding this incident as follows:

Q: Ms. Zirinsky, were you aware of the letter that Mr. Shargel wrote to the District Attorney's Office?

A: I actually sent it around to multiple press organizations and received publicity, yes.

Q: You mean you became aware of it after you saw something in the newspaper?

A: Well, there were calls from reporters, I guess, about it.

Q: I don't know what that means. Were you aware of this letter when it was sent -- were you aware of this letter on May 15, 2013?

A: I don't know the date of it. I was aware of the letter. I don't know the date I was aware of the letter.

Q: How did you become aware of the letter?

A: Because it had received some press.

Q: So you became aware of it through a newspaper article?

A: Yes, but -- yes.

Q: Is that was the first time you'd heard of it?

A: I knew that Shargel was going into court on an occasion, but I don't know that I knew the letter.

Q: Had you -- are you aware of whether "Brooklyn DA" was planning to prominently feature an investigation involving this individual, this defendant?

A: There are two parts to that case. We were covering -- we were looking at both parts of the case originally, but one part of the case had been adjudicated, and that was the homicide aspect of it, of somebody who set afire in a housing area where there were Guatemalan immigrants, and a family suffered a tragic loss, a wife and a child who had been thrown out the window in order to save the child, wasn't attached to a car seat and fell out of the car seat. The father and the other child survived. So we were covering that aspect of the case. There was another aspect to that case, but that case was not adjudicated to the point that we felt comfortable, so I had made the decision that we were going to use the part that had been adjudicated and hold the other part. It wasn't ripe yet.

Q: When was that decision made?

A: Probably around the same time. I'm not sure. About the same time that Shargel was probably going into court.

Q: Well, before that decision was made, what role was this feature going to have in the show?

A: I had decided to pull that section prior because I knew the -- in the timing of the case, I could look ahead and say this isn't going to be soup yet, and, you know, we had always really said to everybody that we would not do anything to impact or jeopardize a case. My sensibility was that that was going to be -- that was going to be a trouble because it wasn't in a stage that we felt comfortable with. I understand Shargel was going in. We did get a call from the DAs just asking us where that case was for us, and I said I am -- I've held that part of the case. I didn't kill it. That's a very distinct difference. I'm holding that part because we feel it's not ready yet.

Q: And what was the decision that you made around the time of the letter if you had already decided to pull aspects of the case?

A: Well, I think it was at about that time. You know, when you're a reporter, there are constant decisions to be made. You know, we had talked to the District Attorney's Office. We knew that they hadn't really figured out where that case was going or the timing of it. So, I think they also felt that it was not going to be soup yet, and that was -- and I made a decision, and I can't remember who I told. I think -- I probably just told Patti. I said, look. You know, in our discussions editorially it was always -- we always maintain the ability to not go with something, and they also had the ability if something changed or the dynamic changed or the timing changed, and it could affect a case, that, indeed, there would be a discussion, but we always did say we would not air something that we felt could impact a case.

Q: Well, what I'm saying is what was the decision that was made that was different from before this letter?

A: Well, the letter was kind of irrelevant to me because both the District Attorney's Office and we saw that there wasn't -- that there could be some issues if we aired the case that would impact the case. So, therefore, it was an easy decision on my part to hold it, to not air it, and especially because I had the other part of the story. I had an adjudication. It wasn't as if that story had gone away. We had a murder, and it was done, and he had been -- there was a conviction. So it was a fairly simple decision. You know, that part of the case wasn't cooked yet, okay. We don't need that.

Transcript of Proceedings, Abe George, et. al v. Charles Hynes, et. al, 13-100730, May 24, 2013, pp. 44-48.

43. Ms. Zirinsky's testimony at this hearing, which occurred one day after Vega was arraigned before this Court and I first brought the issue of the show to the Court's attention, and two days after the first promotional video was aired showing this case, is unworthy of belief. Her claims that she unilaterally decided to pull the segment on Mr. Shargel's client because "that case was not adjudicated" and that she "would not do anything to impact or jeopardize a case" is belied by the fact that she decided to go ahead and air the segments on Vega. The only difference between the cases is that Mr. Shargel received sufficient advance warning, such that CBS had time to act on his objection, whereas the involvement of CBS in the Vega investigation was kept quiet until almost immediately prior to the airing of the story.

44. Due to the significant discrepancy between Zirinsky's prior testimony, which was offered to try to refute legitimate claims that the KCDAO maintained at least some measure of editorial control, and her actions, this Court may, within its discretion, reject the claims in Ms. Zirinsky's affidavit that CBS acted entirely independently from KCDAO control. This affidavit is yet another attempt to shade the facts to match whatever particular legal challenge is being launched against the show. Additionally, the Court may exercise common sense to understand that the KCDAO certainly must have closely supervised CBS personnel and must have maintained some veto power in the event that CBS failed to follow guidelines on what they could and could not film and disclose.

45. Ultimately, under the test discussed in *Ray*, there is "a clear connection between the police and" CBS's actions, as well as "close supervision of [CBS's] private conduct by the

police.” Therefore, the KCDAO and CBS had created an agency relationship, which transforms the otherwise private activities of CBS into State action, mandating disclosure.

46. It is respectfully submitted that the Court may declare this agency to exist summarily or, in the alternative, order a hearing to determine the full measure and scope of the control exerted by the KCDAO.

III.

EVEN IF THE SHIELD LAW APPLIES, DEFENDANT CAN MEET HIS BURDEN UNDER THE THREE-PRONG TEST

47. Even if this Court were to find that the materials sought properly fall under the purview of the Shield Law, the Motion to Quash still must be denied, as Defendant can make a showing that he satisfies all three parts of the three-prong test codified in the Shield Law. Specifically, the Shield Law provides that a journalist must disclose the material if “the party seeking such news has made a clear and specific showing that the news: (i) is highly material and relevant; (ii) is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto; and (iii) is not obtainable from any alternative source.”

i. The Material Sought is Highly Material and Relevant

48. The materials sought fall into three main categories of relevance:

- a. Direct evidence of the existence of exculpatory material which was in Vega’s vehicle, but which the KCDAO now claims to have never found;
- b. Evidence of police misconduct; and
- c. Impeachment material of potential witnesses.

49. The first category of material is evidence of the existence of exculpatory material that was not produced in discovery. There is no dispute that Vega took the painting by Dubuffet and sold it to Clars gallery. There is also no dispute that on April 29, 2013, Vega went to the

home and removed three additional paintings. The only issue in dispute is whether these takings constituted a crime because Vega maintains that he had Schulhof's permission to take and sell the paintings. We know, from the discovery, that Schulhof will deny this, as he testified before the Grand Jury:

Q. Did you give permission and authority to have the Dubuffet sold at auction by this establishment in California?

A. I did not.

Q. Did you sell, donate or give away the Dubuffet, the Stella or the Lewis, the three pieces that you mentioned discovered missing in April of 2012?

A. I did not.

...

Q. Is it fair to say that neither you or your mother, to the best of your knowledge, gave permission and authority for anyone of these three works to be removed or taken from the estate and the greater collection?

A. That is correct.

Grand Jury Transcript 4/23/2013, p. 13-14

50. There can be no more relevant or material evidence to the defense of this action than the existence of written instructions from Schulhof to Vega. Vega has stated that these were kept in the pocket of the driver's side door of his car, but ADA Oh never received any such documents from investigators, whose search of the vehicle was filmed by CBS cameras. Video from the search at the KCDAO will show the carelessness of the search, as has been evidenced by their failure to retrieve the "Friend of Southampton Town Police" shield. Video from the searches at the scene of the arrest and the Kings Point Police Department may also reveal misconduct by officers who, like "Lieutenant Bruce" were moonlighting for Schulhof. Even if the video failed to capture investigators actually removing the notes, at a minimum, the unaired

video from the arrest should show that when Vega is taken from his vehicle that there was a white paper in the driver's side door and that this paper is on none of the subsequent inventories.

51. The second category of relevant material is evidence of misconduct by the KCDAO. The footage which has already aired has already revealed numerous violations of the People's discovery obligations (I have discussed these items with ADA Oh, who said he is going to check on the existence of these items). These include, but are not limited to:

- a. Surveillance photos and/or video taken by Detective Investigator Lanagan in Easton PA. Although DI Lanagan is seen taking photos and doing surveillance of Vega, absolutely no discovery has been produced on this.¹⁴ DI even goes as far in one scene as to tell ADA Oh that "we" had taken "some great footage"¹⁵ of him and some still photographs."
- b. Photos from the Kings Point house both before and after the sting operation. Several Detective Investigators and ADA Oh himself can be seen taking photos, but none of these were turned over in discovery.
- c. Hidden camera footage. In discussing the setup for the sting, ADA Oh lists all the installed cameras for CBS ("two cameras in the hallway, three cameras in the room with the artwork, one in the garage and then one facing out onto the driveway"). However, the People have failed to disclose the footage from one of the three cameras that were in the room with the artwork. Additionally, the footage from the cameras showing the garage and exterior of the house end at

¹⁴ This segment on the show is also instructive on several of Defendant's earlier arguments, as DI Lanagan, although depicted as if he were operating as the sole representative of the KCDAO, is seen discussing with ADA Oh on the phone how "we" haven't had breakfast and "we" are doing God's work. Presumably, this "we" refers to Lanagan and his partner from CBS. Additionally, several of the scenes appear to be staged, as DI Lanagan's phone calls to ADA Oh although providing progress on his travels around Easton, PA, all seem to have been shot in the same parking spot.

¹⁵ As DI Lanagan is only seen carrying a still photograph camera, it is unclear whether this "great footage" is something that DI Lanagan took himself or if this is the work of his partner from CBS.

approximately 9:00 a.m., but additional footage from these cameras, was broadcast by CBS, but not turned over to the defense.

- d. Items seized from Vega's home in Easton, PA. The show depicts members of the KCDAO and the Easton Police Department dramatically storming the home with automatic weapons and retrieving several items from the home, including multiple laptop computers. However, none of the items seized have been provided in discovery, beyond photocopies of several scraps of paper from Vega's girlfriend's pockets.

52. Given this pattern, the Defendant has good reason to believe that the additional, unaired footage will reveal additional material which the People have failed to disclose under their discovery obligations.

53. Finally, the materials sought will also provide impeachment material on potential witnesses.

54. One of the storylines shown on the TV show (for which there has also been absolutely no discovery) is that after taking the paintings on April 29, 2013, Vega proceeded to strip the wallpaper in the room where the paintings (and the hidden cameras) were located. This causes a very dramatic scene, as KCDAO investigators claim that Vega was not supposed to be working in that room and are concerned that Vega will discover the hidden cameras. However, the reality is that Vega informs me that this is exactly the room that he was told to perform work in by his boss, Mr. Zimmer. This is corroborated by the videos that were turned over in discovery, which show Mr. Zimmer taking Vega into this room at 8:15:36, where they remain for approximately 10 seconds before Vega goes back out into the hall and Zimmer remains in the room for an additional 15 seconds. This was all being monitored live by the same investigators

who are shown on the show panicking that Vega isn't supposed to be working in that room, as well as the CBS cameras who were filming those investigators and their reactions. Is this entire scene a fabrication by CBS and the KCDAO to provide an adrenaline filled cliffhanger? Does this show a significant discrepancy between what the investigator's plan was and what Zimmer actually communicated to Vega?¹⁶

55. There are several instances where it appears that investigators fabricated scenes at the behest of CBS producers, such as DI Lanagan's reports to ADA Oh during his surveillance in Easton, PA and DI Mike Seminara's communications while Vega is actually in the house. It is highly relevant to their credibility that they were able to fabricate these scenes, which they, along with CBS tried to pass off to millions of people as live action, without the normal disclaimer that these scenes were a "dramatic reenactment." Outtakes will show how many times investigators had to practice these scenes and what direction they received from producers to make their fabrications believable so that, when edited, they could be passed off as "news."

56. In another example of how investigators and members of the KCDAO have been invited by CBS producers to embellish and make good commentary to further the storyline, rather than rely on actual facts, Michael Vecchione states that "Lawrence started to peel back the layers and discovered that the Dubuffet wound up in someone's art gallery in California." However, the discovery shows that the curator had already located the painting prior to even contacting the Kings Point Police Department.

57. In *People v. Zagarino*, 97 Misc. 2d 181 (Kings Cty. Sup. Ct. 1979), the Court properly denied a journalist's motion to quash a subpoena for notes, memoranda, and testimony, for impeachment material where the Defendant made a showing of four inconsistencies between

¹⁶ In either event, this scene also provides further evidence of Vega's innocence, as he looks directly at the camera, while stripping wallpaper mere inches away and shows no concern.

the story which was published and the discovery materials provided to the defense, even though only one of those discrepancies was directly attributed to a witness in the case.

58. Here again, the cases cited by Movant are not analogous to the issues at bar. *See, e.g. People v. Lyons*, 151 Misc. 2d 718 (Buffalo Cty. Ct. 1991) (the People subpoenaed outtakes from a documentary and the court held a hearing, at which time the People's witness, a Detective, stated that he could not testify that the tape sought was relevant. Additionally, the witness offered an alternative means to provide the same information); and *People v. Roth*, 157 A.D.2d 494 (1st Dep't 1990) (this case did not even involve the examination of the subpoena under the Shield Law test).

59. A far more analogous case is the matter of *People v. Combest*. In *Combest*, the Court of Appeals reversed a manslaughter conviction on the grounds that the trial court erred in quashing a subpoena to compel the production of a videotaped recording of his interrogation made by TV camera crews. The Court noted:

It is beyond dispute that a defendant's own statements to police are highly material and relevant to a criminal prosecution. It is for this reason that such statements are always discoverable, even when the People do not intend to offer them at trial. Further, the voluntariness of a defendant's statement is highly material and relevant when put in issue by the defense. Indeed, even when a motion to suppress a statement as involuntarily made has been litigated and denied, a defendant is not precluded from attempting to establish at a trial that evidence introduced by the people of a pre-trial statement made by him should be disregarded by the jury or other trier of the facts on the ground that such statement was involuntarily made. The defendant may adduce trial evidence in support of his or her contention, and the court must submit such issue to the jury under instructions to disregard such evidence upon a finding that the statement was involuntarily made.

Id. at 347 (internal citations and quotations omitted). In *Combest*, as in the case at bar, the issue revolves around the videotaping of police conduct which is in dispute and regardless of whether

motions regarding interrogations or searches have been litigated, or even lost, the issue may still be submitted to the jury. The tape's relevance on this issue is beyond intelligent dispute.

ii. The Materials are Critical or Necessary to the Maintenance of Defendant's Claim, Defense or Proof of an Issue Material Thereto

60. In large part, the critical nature of the materials has been discussed in prior sections and, in the interest of judicial economy, need not be repeated here. However, to state it succinctly, at trial, Vega's freedom will hang in the balance of whether sufficient reasonable doubt can be raised as to whether he took the paintings without authority.¹⁷ The existence of written instructions from Schulhof is absolutely critical and necessary to this material issue.

61. Similarly, in seeking to have the People fully comply with their discovery obligations, Vega cannot simply rely on ADA Oh's claims that all materials have been turned over, especially when the evidence that shows whether certain additional discovery materials exist is documented by CBS.

62. Finally, impeachment of the People's witnesses goes to their credibility, which is an issue of tantamount importance to the defense of this matter.

iii. The Material is Not Obtainable From Any Alternative Source

63. As discussed throughout these papers, the materials sought are uniquely within the sole control of CBS. Defendant has already attempted to obtain the exculpatory material from the People, but have been told by ADA Oh that such materials were never found by members of the KCDAO. Movant's theory that prior to issuing a subpoena, Defendant must ignore ADA Oh's statement and interview each individual member of the KCDAO investigative team is as unfounded as it is impractical.

¹⁷ Although Vega is charged with the larceny counts only in the Nassau County indictment, the Kings County case charges money laundering and other counts, which necessarily require the People to first prove the underlying larceny.

64. The Court in *Combest* noting the close relationship between the investigators and the camera crew stated:

[T]he police may not immunize themselves from their obligation to provide defendants with copies of their own taped statements simply by letting a news organization--invited into the room by the police--operate the cameras. Defendant correctly contends that the police here allowed the film company to perform what was in fact a police function--the memorialization of an otherwise private interrogation and admission--by videotaping it, thus possessing the only recording of the event.

Here, as in *Combest*, the KCDAO allowed CBS to memorialize the arrest of the defendant and search of his vehicle. The only tapes that exist of the various searches of the vehicle (at the scene of the arrest, at the Kings Point Police Department, and at the KCDAO) are possessed by CBS.

65. Similarly, under the KCDAO open file discovery policy, they have alleged to have already turned over all discovery and statements of witnesses within the People's control (with the exception of that which was withheld pursuant to the protective order and the other discovery violations noted above). Thus, the only memorialization that exists is kept by CBS.

THE BURDEN OF COMPLIANCE DOES NOT OUTWEIGH VEGA'S RIGHTS

66. Movant's argument that compliance with the subpoena should be quashed because it imposes an undue burden on CBS also fails. When balancing the defendant's right to fair trial, not a single case has been cited, nor exists that stands for the proposition that such a subpoena should be quashed solely because it would require significant effort by the news agency, especially where, as here, Defendant has made a showing under the three-prong test of the Shield Law.

67. To alleviate the claimed burden on CBS, I will continue to remain open to discussions with Mr. Schulz and CBS to limit and focus on the portion of the materials which

will be relevant to introduce at trial. This will also significantly conserve judicial resources as courts frequently choose to resolve the issues of Shield Law challenges by having the requested material produced for *in camera* review to determine the actual degree of relevance and materiality to the case. *See, e.g. Hybrid Films, Inc v. Combest*, 281 A.D.2d 500 (2nd Dep't 2001)(In this related, interlocutory case to *People v. Combest*, the Appellate Division held that the Court erred in turning over the outtakes to the defendant, over the objections of the news agency, without first conducting an *in camera* review and redacting irrelevant portions, as demanded by the news agency). In *People v. Korkala*, 99 A.D.2d 161 (1st Dep't 1984) the appellate division examined the case where the People had subpoenaed recordings for the purpose of impeaching defense witnesses credibility:

Although it seems clear that the unbroadcast material is "relevant" to the subject of the prosecution and that these materials are not obtainable from any other source, it is by no means clear from this record that their production is "necessary" to the Korkala prosecution, even for impeachment or rebuttal purposes. The trial has not yet commenced, and although Korkala has indicated that his defense will take a particular tack, whether or not it will do so in fact, remains to be seen. We conclude, therefore, that the subpoenaed unbroadcast material should be delivered to the Trial Judge for his *in camera* inspection and determination as to whether there exists any necessity for its being made available to the People in respect to any defense proffered by Korkala. Should it be determined that such necessity exists or develops, then the material shall be turned over to the People."

Id. at 168

68. It is therefore respectfully submitted that the best resolution of this matter, which would conserve both judicial resources and the resources of CBS would be for CBS to agree to compromise and work with me to turn over the specific relevant materials, as they agreed to in *Gerazounis*, but have refused to do here.

CONCLUSION

69. For all the reasons stated herein, it is respectfully submitted that the Motion to Quash be denied summarily. In the alternative, Defendant respectfully submits that this Court should Order a hearing to take testimony regarding 1) whether “Brooklyn DA” qualifies as “news;” 2) whether CBS and the KCDAO formed an agency relationship; and 3) whether Defendant has met the three-prong test under the Shield Law for production.

Dated: January 5, 2013
New York, New York

Respectfully submitted,

Timothy C. Parlatore, Esq.
Counsel for Defendant Joselito Vega
260 Madison Avenue, 22nd Floor
New York, New York 10016
tim@parlatorelaw.com
212-679-6312
212-202-4787 Facsimile