

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

STATE OF WASHINGTON

SW No. 20-0-616926

COUNTY OF KING

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

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

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

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

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

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

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

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

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

I. FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

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

12. The Seattle Times published a photo showing Margaret Channon in 1600 block of 6th Avenue on May 30 lighting an SPD vehicle on fire. Affidavit, at 12. The Red Adidas Tracksuit Suspect can be seen in the background in that photograph. Based on the sequence of events set forth in the Affidavit, that photograph was likely taken between 4 pm and 4:30 pm that day. Seattle Times photographer Dean Rutz took that photo, which was described as being photo number 29 of 69. At the hearing, counsel for the Seattle Times represented that all 69 photos in that series remain available online at the Seattle Times website: <https://seattletimes.com/seattle-news/photos-protests-in-seattle-sparked-by-the-death-of-george-floyd-in-minneapolis/>.

Detective Magan clarified (under oath) in a hearing on July 31, 2020 that on the morning of June 8, 2020, he did look at and review the gallery of 69 photographs available online at the aforementioned website. He further clarified that during previous testimony, his response during cross-examination that he had not viewed the online gallery of 69 photographs was in reference to Mr. Rutz's photograph of Red Adidas Tracksuit Suspect. His response was intended to convey that he had not reviewed a gallery of 69 photographs associated with Mr. Rutz. He explained that he mistakenly thought the question posed by Counsel for News Media meant that Mr. Rutz also had a gallery of 69 photographs.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

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

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

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

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

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

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

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

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

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

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

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

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

DATED this 31st day of July, 2020.



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