UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	(	**Case No. 5:11-CR-594**
Plaintiff,	(	**Judge Dan Polster**
vs.	(	
	(	**Revised memorandum of non-party Associated Press opposing motion of defendant Samuel Mullet for order to issue post-trial subpoena duces-tecum upon Associated Press**
SAMUEL MULLET, SR.,	(	
Defendant.	(	

Preliminary statement

The law in this circuit governing the power to subpoena the press seems to need a decoder, which this memorandum tries to provide. Despite the doctrinal disarray here, one canon is certain: Litigants do not enjoy unfettered subpoena power to command that the press divulge information that the press has collected but not yet published.

In exercising their First Amendment rights, news organizations collect information 24 hours-a-day, seven days-a-week from all over the world, publishing

news reports continually. All of that First Amendment activity naturally attracts subpoenas. And subpoenaing the press is expedient for those with subpoena power. It requires no legwork — just writing down what you want on a subpoena form, signing it, and delivering it to an office.

But the First Amendment does not require the press to accept the burden of divulging to everyone with subpoena power the unpublished news that the press collects. Indeed, exercising the right to gather and report the news becomes a burden if it means that the press regularly must surrender control over when, whether, and in what context to publish the information that it collects.

Furthermore, because the press collects so much information of such frequent interest to those with subpoena power, complying with the constant parade of subpoenas effectively would transform the press into involuntary investigatory agents for whomever serves the next subpoena. The press, then, loses a significant degree of the independence that the First Amendment protects.

Here, this Court need not unravel and then reconstruct the differing analyses in this circuit about a litigant's power to subpoena the press. Defendant Mullet cannot overcome even the most deferential test of his subpoena power because he chose to ignore that power continually — when his authority to use subpoena power was highest and his potential need to use it greatest.

Mullet knew long before his trial that the government was using his interview with the Associated Press against him. Yet Mullet never sought any record of that

interview until now, weeks after the jury convicted him. The Associated Press is unwilling to bear the burden today for Mullet's lack of interest before and during his trial.

This Court should decline to revive posthumously Mullet's subpoena power so that he can belatedly intrude upon the press to produce records that Mullet has known about since his indictment.

Basic background

1. The Associated Press & Andrew Welsh-Huggins generally.

Movant Associated Press is a not-for-profit news organization that reports news and information to the general public, including news about judicial proceedings in the United States District Court for the Northern District of Ohio. The Associated Press employs Andrew Welsh-Huggins as a news reporter.

2. Events in the above-captioned criminal prosecution relevant to the asserted legal interests

About a year ago, on October 10, 2011, Associated Press reporter Andrew Welsh-Huggins interviewed Samuel Mullet, Sr. regarding a string of religiously motivated "beard-cuttings" in the Amish community. (R. 166, Gov't's Exhibit List, p. 4.)[1] The following day, the Associated Press published the article at issue in this proceeding.

On December 20, 2011, the government indicted Mullet for offenses relating to

[1] Filed separately as AP's Exhibit 3.

his role in the Amish beard-cuttings. (R. 10, Indictment, p. 1.)[2] In the section of the indictment titled "Overt Acts," the government alleged that "on or about October 2011, Samuel Mullet, Sr. gave several media interviews" in which he made statements concerning the beard cuttings. (R. 10, Indictment, p. 8.)

On August 13, 2012—about eight months after the indictment and two weeks before opening statements— the government submitted a list of proposed exhibits to the defense. (R. 166, Gov't's Exhibit List.) The government listed the Associated Press article among its 31 proposed exhibits, along with only one other news story: a recording of a television news broadcast. (R. 166, Gov't's Exhibit List, nos. 21-22, p. 4).

Also in August, the government served the Associated Press with a subpoena. The Associated Press said that it would contest the subpoena for unpublished information, and eventually reached an accord with the government. AP supplied a declaration authenticating a copy of the published AP dispatch that the government listed as an exhibit. (Gov't's Exhibit 22.)[3]

The trial started on August 28, 2012, and the government introduced the AP article into evidence on September 10, 2012. At that time, Mullet did not advise the Court that he wanted to subpoena the Associated Press or its reporter Andrew Welsh-Huggins. (Excerpt from transcript; see AP exhibits 2 and 1, filed separately.)

The jury returned a verdict against Mullet on September 20, 2012. (R. 230, Jury

---

[2] Filed separately as AP's Exhibit 4.

[3] The AP dispatch and the AP affidavit are filed separately as AP's Exhibit 7.

Verdicts, p. 1.)[4]

Three weeks later, Mullet moved for this Court's permission to subpoena "any and all interview notes taken, and/or audio and/or video tape recordings made during an interview of Samuel Mullet at his home on or about October 10, 2011." (Defendant's Motion, p. 1.)[5]

This Court should deny Mullet's motion for the reasons expressed in this memorandum, and also for the reasons expressed in the government's memorandum in opposition.

Argument

1. Litigants do not enjoy unfettered discretion to subpoena information that news organizations have collected, but not yet published.

A. The United States Court of Appeals for the Sixth Circuit has not afforded litigants unfettered subpoena power when seeking unpublished news from the press.

Neither the United States Supreme Court nor any federal court of appeals has ruled that litigants enjoy unfettered discretion to subpoena information that news organizations have collected, but not yet published.

Although the doctrine within the Sixth Circuit is unsettled, that doctrine is not to the contrary. In probably the most cited decision — In re Grand Jury Proceedings, 810 F.2d 580 (6th Cir. 1987) — a county grand jury subpoenaed a TV reporter's unpublished video of local gang members. They'd cooperated with him because he

---

[4] Attached separately as AP Exhibit 5.

[5] Attached separately as AP Exhibit 6.

vowed not to disclose any video showing their faces, but the grand jury wanted the video to identify gang members suspected of murdering a police officer.

The state court judge jailed the reporter for contempt when he declined to produce the video. The reporter then sought a writ of habeas corpus in federal district court, which denied the writ.

The Sixth Circuit affirmed, concluding that the United States Supreme Court has not interpreted the First Amendment as affording any privilege to the press to avoid divulging unpublished information when subpoenaed. The Sixth Circuit identified relaxed criteria that largely deferred to the grand jury's discretion to issue the subpoena to satisfy its perceived law enforcement need. 810 F.2d at 584-586.

Yet, in upholding the grand jury's subpoena, the Sixth Circuit also decided that the more demanding First Amendment privilege —recognized in every other federal circuit — required the same result in that case.

Applying core First Amendment law, the Sixth Circuit decided that the grand jury had shown a "compelling" need for the video, which was clearly relevant to its investigation and unavailable elsewhere.[6] Judge Guy concurred separately to "emphasize" that "even if one applies" the more demanding First Amendment criteria urged by the reporter, "the result of that balancing commands disclosure under these circumstances." 810 F.2d at 588 (J. Guy, concurring).

Thus, the Sixth Circuit's rebuff of the First Amendment privilege was not

---

[6] 810 F.2d at 584-585 n.6, 856.

necessary to reach its result.

Then, 11 years later in 1998, the Sixth Circuit explicitly applied First Amendment law to affirm a district court's refusal to compel a newspaper to comply with a federal agency's investigatory subpoena. Nat'l Labor Rtns Bd. v. Midland Daily News, 151 F.3d 472, 474-475 (6th Cir. 1998).

The subpoena required the newspaper to produce records that identified the source of an anonymous classified ad seeking to employ electricians. Its purpose was to support a charge of unfair labor practices against the unknown advertiser. In ruling against the agency, the Sixth Circuit concluded in its only holding that the subpoena unnecessarily burdened the newspaper's "constitutional right to free expression." Applying First Amendment law governing infringements of commercial speech, the court ruled that the agency failed to show a "substantial" need for the information. 151 F.3d at 475.

The Midland Daily News court did not mention the earlier Grand Jury decision; Judge Norris was on the panel in both cases.

So, the precedential strength of the Sixth Circuit's rejection of a First Amendment reporter's privilege in Grand Jury was diluted when the Court decided that case on alternate grounds that applied the privilege, and made less resolute, if not destroyed, when the Sixth Circuit applied the First Amendment to the subpoena in Midland Daily News.

B. Despite doctrinal uncertainty among district courts in this circuit, they do not afford litigants unfettered power to subpoena unpublished news from the press.

A federal district judge in Michigan has raised doubt about the meaning of the Sixth Circuit's analysis in Midland Daily News. Convertino v. United States Dept. of Justice,2008 WL 4104347 (E.D. Mich. 2008).

That court concluded that Midland Daily News did not adopt substantive First Amendment law as blunting the reach of subpoenas upon the press. Instead, the court opined, the Sixth Circuit viewed the federal agency's use of subpoena power as tantamount to regulating the newspaper's and the anonymous advertiser's commercial speech. Only in that sense was it "an unwarranted governmental intrusion on the First Amendment," the court reasoned. 2008 WL 4104347 at *6.

The Convertino judge, of course, cannot control the Sixth Circuit's analysis. Moreover, the Convertino judge did not explain why his reasoning would not apply as well to subpoenas that seek to take unpublished news from press newsrooms — intruding on the First Amendment right to control what to publish and when to publish it and to gather news.

Ten years ago, a judge of this Court enforced a civil subpoena against the press, treating the markedly relaxed criteria identified in Grand Jury as the only criteria allowed when resolving a newspaper's challenge to a subpoena.

He concluded that Grand Jury rejected a constitutional privilege to overcome subpoenas. Hade v. City of Fremont, 233 F. Supp. 2d 884, 890 (N.D. Ohio 2002).

A federal district court in Michigan concluded that the Sixth Circuit's rejection of a First Amendment reporter's privilege in Grand Jury is *dictum*, but the Hade opinion disagrees.[7]

The Hade opinion, however, did not mention the Sixth Circuit's decision in Midland Daily News. Nor were the judge's observations in Hade necessary to reach the court's ultimate ruling. The judge decided that even the more demanding First Amendment analysis urged by the newspaper required enforcing the subpoena. 233 F. Supp. 2d at 890.

Not only were the Hade court's observations about Grand Jury inessential to Hade's ultimate ruling, but those observations otherwise do not bind this Court. Even a federal district judge's core ruling "is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." Camreta v. Greene, 131 S.Ct. 2020, 2033 n.7 (2011) (quotation marks and citation omitted).

C. This circuit's common ground: the press' First Amendment interests justify inhibiting the power to subpoena the press.

Even when saying that the press doesn't have "a first amendment constitutional privilege," the Sixth Circuit in Grand Jury instructed lower courts "to make certain that the proper balance is struck between freedom of the press and the obligation of all citizens to give relevant testimony." 810 F.2d at 586.

---

[7] *Compare* Southwell v. Southern Poverty Law Center, 949 F. Supp. 1303, 1311-1312 & n.23 (W.D. Mich. 1996) *with* Hade, 233 F. Supp.2d at 888.

The court identified criteria that addressed the asserted needs of the grand jury in that case, but did not expressly foreclose other analytical criteria that fit different contexts and implicate different rationales. 810 F.2d at 586. Indeed, grand jury subpoenas may get the greatest deference when pitted against the press' First Amendment interests because the grand jury's proceedings are confidential, and so do not publicly expose the unpublished news collected by the press, and because of the government's powerful interest in investigating crimes and enforcing the criminal laws. See, e.g., Zerilli v. Smith, 656 F.2d 705, 711-712 (D.C. Cir. 1981).

So, even the legal standard most deferential to subpoena power — the relaxed criteria identified in Grand Jury — invokes "freedom of the press" as supplying a singular ground for curbing the power to subpoena news organizations, even when undertaken by grand juries.

2. Singling out the press for unique protection from subpoenas reflects the press' unique constitutional role.

A. The First Amendment protects news gathering as one of several qualified constitutional freedoms specially enjoyed by the press.

Protecting the press from unchecked subpoena power reflects one of several unique interests that separate the First Amendment's distinct guarantee of a free press from its separate guarantee of free speech.

For example, in 1936, the United States Supreme Court ruled that the First Amendment barred a Louisiana tax on advertising in newspapers, and decades later invalidated a Minnesota tax on the cost of paper and ink used in producing

newspapers.[8]

Applying the First Amendment, the Supreme Court endorsed preferential seating for the press at trials because the press will inform more people than would other spectators.[9] Thus, protecting "news gathering" is another First Amendment interest that applies specially to the press.[10]

"The right to publish implies a freedom to gather information." Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 599 (1980) (Stewart, J., concurring).

The press has strong First Amendment interests in "shaping the mode, form, and timing of disclosure" of information that it gathers. Shoen v. Shoen, 5 F.3d 1269, 1301 (Kleinfeld, J. concurring) (9th Cir. 1993); see Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 258 (1974).

And the press also has strong First Amendment interest in maintaining its independence of those who would employ the compulsive powers of the state. See, e.g., Tornillo, 418 U.S. at 258 (maj.) and 259-263 (White, J., concurring); Times Picayune Pub. Co. v. United States, 345 U.S. 594, 602 (1953).

---

8 Grosjean v. American Press Co., 297 U.S. 233 (1936); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Rev., 460 U.S. 575 (1983).

9 Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573, 582 n.118 (plurality op.) (1980) and 600 & n.3 (Stewart, J., concurring); United States v. Beckham, 789 F.2d 401, 406 (6th Cir. 1986).

10 Beacon Journal Pub. Co., Inc. v. Blackwell, 389 F.3d 683, 685 (6th Cir. 2004); CBS, Inc. v. Young, 522 F.2d 234, 238 (6th Cir. 1975).

B. The First Amendment does not require the press to accept the burden of divulging to everyone with subpoena power the unpublished news that the press has collected.

Exercising First Amendment rights is the lifeblood of the Associated Press and other news organizations; it is their *raison d'être*. They send hundreds of professional journalists to locales across the nation and the world to collect information and then, in concert with editors, select which of that information to summarize in reports to the public. Their news gathering is underway 24 hours-a-day, seven days-a-week.

That continual collecting and reporting of news has the unintended effect of attracting a near constant flow of subpoenas from federal, state, and local prosecutors; federal, state, and local government regulatory agencies; and private citizens litigating in federal, state, and municipal courts and other agencies.

When they see useful information in news reports, they want more than the self-authenticating publications. They want to see what the news organization collected but not yet published, and they serve subpoenas to get it.

The First Amendment is supposed to keep the press free from governmental interference, yet constantly exercising its First Amendment freedoms has made the press especially vulnerable to intruding subpoenas. Although private litigants are not state actors, all subpoenas derive their compulsive power from governmental authority.

Filling out a subpoena, signing it, and then serving it on the press is remarkably simple, cheap, and expedient, requiring no investigative effort by the person using it.

But the First Amendment does not condition its guarantee of a free press on the press serving as a records repository for every government agent and private litigant with subpoena power. Engaging in round-the-clock, constitutionally-protected news gathering cannot mean that every government agent and private citizen can impress a professional journalist into involuntary service as an investigator simply by signing and delivering a subpoena.

The state is not free to "annex the news media as an investigative arm of government." Branzburg, 408 U.S. at 709 (Powell, J., concurring); accord Gonzales v. Nat'l Broadcasting Co., 194 F.3d 29, 35 (2d Cir. 1999).

Litigants and government agencies, therefore, should not receive the usual wide-ranging deference when subpoenaing information from the press.

3. This Court should deny post-trial subpoena power to defendant Mullet because he seeks to intrude upon the Associated Press as a belated afterthought.

This Court need not resolve the differing views in this circuit about the degree to which "freedom of the press" inhibits subpoena power. Under any standard that respects "freedom of the press" and the constitutional right to gather news, defendant Mullet's post-trial plea for a subpoena can't justify intruding upon the Associated Press.

Mullet seeks to compel the Associated Press to produce those recorded portions of Mullet's interview with AP that AP has not yet published. Mullet gave the interview about one year ago, and the Associated Press published excerpts of it at that

time, which dozens of newspapers carried.

Then, in December last year, a federal grand jury indicted Mullet, citing his remarks in "news media interviews" as one of the "Overt Acts" comprising his alleged crimes. But Mullet did not subpoena the Associated Press.

About eight months later, on August 13, 2012, the prosecutor presented Mullet with the government's list of 39 exhibits. Only two were news stories. One was the Associated Press dispatch. (R. 166; Gov't's Exhibit List, p. 4.)

But Mullet did not subpoena the Associated Press.

Trial started two weeks later, and more than a week after that, on September 10, the government introduced the AP dispatch as evidence of statements made by defendant Mullet.

But Mullet did not subpoena the Associated Press.

The trial proceeded for another ten days, but Mullet did not subpoena the Associated Press. Only now, weeks after the guilty verdict, Mullet moves the Court to compel the Associated Press to divulge the very records that he chose to ignore for most of the past year.

If those records were not important enough to seek after Mullet's indictment; or after seeing the AP dispatch as a government exhibit two weeks before trial; or when the government introduced AP's dispatch at trial, then the records cannot be important enough now to justify intruding upon AP's rights.

Conclusion

If the press must tolerate a steady flow of subpoenas attracted by its ongoing exercise of First Amendment rights, then the Court should require — at a minimum — that litigants use their subpoena powers promptly when faced with an apparent need for the information. In resolving the circumstances here, the Associated Press urges this Court to adopt a standard that is at least that modest in weighing the First Amendment interests of this news organization.

Mullet allowed his subpoena power to grow stale and eventually expire as he passed up months of opportunities to demand information that he has known about since long before his trial. This Court, therefore, should deny Mullet's post-trial motion to subpoena the Associated Press.

Respectfully submitted,

/s/ David Marburger
David Marburger (0025747)
Baker & Hostetler LLP
1900 E. 9th St.
PNC Center, Suite 3200
Cleveland, Ohio 44114
(216) 621-0200
dmarburger@bakerlaw.com

Attorney for the Associated Press

Certificate of Service

On Monday, October 22, 2012, counsel for the Associated Press filed this memorandum through the court's electronic filing system, which makes it available to counsel for all parties in this case.

/s/ David Marburger
Counsel for the Associated Press