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Federal Court Rejects City of Phoenix's Subpoena of Video from Television Reporter Who Exposed Police Misconduct

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A federal magistrate judge in Arizona denied a motion by the City of Phoenix to compel production of unaired footage of a television station's interview with a civil rights plaintiff and her attorneys, concluding the city had not satisfied its burden to overcome the station's qualified First Amendment journalist's privilege. [Salazar v. City of Phx.](#), No. CV-19-01188-PHX-SRB (ESW), 2021 U.S. Dist. LEXIS 224250 (D. Ariz. Nov. 18, 2021).

Plaintiff Frances Salazar had served nearly two years in prison on drug charges before it was revealed that the officer who arrested her, and whose testimony was crucial to her conviction, had a history of lying on the job and falsifying police reports. Prosecutors had withheld this exculpatory "Brady" evidence from her criminal defense attorneys. In the criminal case against Salazar, the City had failed to disclose a Phoenix police internal affairs report that sustained allegations that the officer who arrested Salazar had (in another case) unlawfully entered an apartment, falsely arrested one of its residents, lied to his supervisor about the arrest, booked the resident in jail after being instructed to release her and then lied again about the arrest in a police report. Once this *Brady* violation was revealed, prosecutors dropped the charges against Salazar and she was released from prison. Salazar then filed a civil rights lawsuit against the City, the officer and other police officials, claiming that the City's failure to disclose the *Brady* evidence before her trial violated her constitutional due process rights.

Phoenix television station KNXV-TV (ABC15) reported extensively on Salazar's overturned conviction and civil rights lawsuit as part of an investigative series by reporter David Biscobing about the multiple failures by police and prosecutors to properly disclose *Brady* material about officers' misconduct. Months later, the station aired another series of reports by Biscobing titled *Politically Charged* that exposed how Phoenix police colluded with prosecutors to falsely charge racial justice protesters as members of a fictional "gang." *Politically Charged* spurred an independent investigation into the Phoenix police department that confirmed ABC15's reporting and led to discipline of the police chief, demotion of multiple assistant chiefs and the criminal investigation of some officers. ABC15's award-winning reporting also played a significant role in prompting the U.S. Department of Justice to open a sweeping pattern-or-practice civil rights investigation into the City of Phoenix and the Phoenix Police Department.

In the midst of these news reports and investigations, the City served ABC15 with a subpoena to produce ABC15's unedited and unaired footage of its interviews with Salazar and her attorneys. ABC15 objected to the subpoena on the basis that the requested materials were protected by the journalist's privilege recognized by the Ninth Circuit. Pursuant to the seminal case *Shoen v. Shoen*, 48 F.3d 412 (9th Cir. 1995), a litigant seeking information and materials gathered by a third-party journalist in the course of their reporting must show that the requested materials are (1) unavailable despite exhaustion of all reasonable alternative sources; (2) non-cumulative; and (3) clearly relevant to an important issue in the case. Arguing that the City had not made such a showing, ABC15 refused to produce its unedited recordings of the interviews, and the City filed a motion to compel.

The City's biggest hurdle in overcoming the privilege involved trying to show that the footage was "clearly relevant" to an "important" issue in the case. Under Ninth Circuit precedent, this standard required the City to show *actual* relevance; *potential* relevance would not suffice. The City argued that the recordings were relevant to the facts of the case because Salazar discussed the factual circumstances leading to her arrest. ABC15 responded

that general relevance to “facts” satisfies neither the “important issue” nor “clearly relevant” requirements. The City suggested that the unaired interviews could provide information relevant to Salazar’s credibility, but under *Shoen*, a witness’s credibility does not qualify as an “important issue” sufficient to overcome the assertion of journalist’s privilege. ABC15 noted that the City’s failure to identify an “important issue” to which the recordings relate suggested that the discovery was simply retribution for ABC15’s extensive reporting on the Phoenix police department, rather than a genuine, legally sound basis for the requested materials. Of course, the City denied this allegation.

The parties also disputed whether the City had met its burden to exhaust all reasonable alternative sources. The City initially argued that ABC15 was the “only source” available for the recordings. After ABC15 pointed to Salazar herself as another source who could divulge what she said during her interview, the City took her deposition while the motion to compel was pending. ABC15 argued that the City had still failed to seek alternative sources before targeting ABC15, thus circumventing the clear requirement for parties to seek out alternative sources *before* subpoenaing journalists. Furthermore, ABC15 pointed out that, even when the City did eventually depose Salazar, counsel for the City did not ask her what she said in her interview about any particular relevant issue. As such, the City had not met its duty to “exhaust” this alternative source.

After briefing by both parties, Magistrate Judge Eileen S. Willett ultimately agreed with ABC15 that the City had not overcome the journalist’s privilege and therefore denied the City’s motion to compel. Judge Willett’s order relied on the three-factor *Shoen* test and concluded that the City had not satisfied it. Judge Willett did not award ABC15 attorneys’ fees, however, suggesting the City’s unsuccessful discovery attempt was at least “substantially justified.”

Kennison Lay is an associate in the Phoenix office of Ballard Spahr LLP. Scripps Media, Inc. (ABC15) was represented by David J. Bodney and Matthew E. Kelley of Ballard Spahr LLP. The City of Phoenix was represented by Lori V. Berke and Jody C. Corbett of the Berke Law Firm, PLLC.

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