

After reviewing the thorough briefing, the testimony and exhibits¹, counsels' oral arguments, and the law, the Court finds that the motion to quash shall be DENIED and

¹ The following exhibits were admitted at the March 25, 2010 hearing:

- Exhibit 1: DVD of *Gangland* episode titled "Hunt and Kill", which first aired on HISTORY® on Aug. 6, 2009, documenting the "Brown Pride" gang in Nashville and including portions of recorded interview with Defendant
- Exhibit 1A: DVD containing excerpt of "Hunt and Kill" episode, created by Gangland Productions for this case, which contains a string of elements from the show relating to Defendant
- Exhibit 2: Affidavit of Thomas Steffus, filed Mar. 24, 2010
- Exhibit 3: MPD Investigative Supplement Report regarding Incident No. 2007-527668 (nine pages summarizing investigation) prepared by Detective Achord
- Exhibit 4: MPD Investigative Supplement Report regarding Incident No. 2007-527668 (one page summarizing third interview of Hector Lopez) prepared by Detective Achord
- Exhibit 5: MPD Investigative Supplement Report regarding Incident No. 07-527668 (one page summarizing statements made by Defendant on way to booking) prepared by Brad Corcoran
- Exhibit 6: TBI Official Firearms Report dated Nov. 4, 2009
- Exhibit 7: TBI Official Serology/DNA Report dated Nov. 4, 2009
- Exhibit 8: MPD Investigative Supplement Report regarding Incident No. 07-527668 (seven pages summarizing on-scene observations and interviews) prepared by Detective Cocoran
- Exhibit 9: MPD Gang Unit Investigative Report regarding Incident No. 2007-527668, dated Aug. 26, 2007, prepared by Officer Mark Anderson
- Exhibit 10: MPD Supplement Report regarding Incident No. 2007-527668, dated Aug. 26, 2007, prepared by Officer Jason Kausch
- Exhibit 11: MPD Supplement Report regarding Incident No. 2007-527668, dated Aug. 26, 2007, prepared by Detective Marvin Rivera
- Exhibit 12: Final Case Summary prepared by Detective Achord
- Exhibit 13: Affidavit of Assistant District Attorney Bret Gunn, dated Mar. 19, 2010 (regarding witnesses the State plans to call at the April 12, 2010 trial)
- Exhibit 14: Affidavit of Assistant District Attorney Bret Gunn, dated Mar. 24, 2010 (regarding email correspondence between General Gunn and an individual named Tom LNU at Gangland Productions)
- Exhibit 15: Subpoena issued to Gangland Productions on behalf of the State, dated Jan. 10, 2010

Gangland Productions is ordered to provide the State the outtakes from Defendant's interview relating to the offenses charged in this matter.

II. Factual Background

The underlying criminal case against Defendant Jonathon Gutierrez (a/k/a "Spook") charges him with the first degree premeditated murder of Lucio Garcia among other related counts. The charges stem from an incident that occurred on August 26, 2007.

While Defendant's criminal charges were pending, he voluntarily submitted to an interview with Gangland Productions for a documentary regarding the "Brown Pride" gang in Nashville. This documentary is part of the *Gangland* series and the episode in which Defendant appears is titled "Hunt and Kill". This episode first aired on August 6, 2009, on the HISTORY® channel.

The local District Attorney's Office began inquiring about the footage in late 2009. By letter dated December 2, 2009, the State requested that Gangland Productions provide a copy of the "raw interview footage" of Defendant's interview that was not broadcast during the episode. In response, Gangland Productions sent a letter by counsel dated December 16, 2009, asserting the newsmen's privilege and declining to produce the material requested.

Thereafter, the State sought and obtained from this Court a "Certificate of Materiality of Out of State Witness" to compel the Chief Executive Officer of A&E

Television Networks, LLC (AETN) to appear to testify at Defendant's trial, currently scheduled for April 12, 2010, and to produce all video and audio recorded interviews in conjunction with the episode, along with all documents containing the names of persons employed in the production of the episode.

Pursuant to the Certificate, the Supreme Court of New York issued a Show Cause Order as to why the CEO of AETN should not be directed to appear at Defendant's trial in Nashville, Tennessee. Prior to such hearing, and in resolution of the Order to Show Cause, AETN, Gangland Productions, and the State of Tennessee via the Davidson County District Attorney's Office entered into a written agreement whereby the State agreed to withdraw its application filed with the Supreme Court of the State of New York, and the parties agreed upon the manner in which the dispute would proceed. Specifically, the parties agreed that Gangland Productions would accept service of a subpoena without waiving any substantive defense of privileges, including the right to file a motion to quash.

Gangland Productions filed a Motion to Quash accompanied by a thorough Memorandum of Law on March 10, 2010. Shortly thereafter, on March 16, 2010, Gangland Productions filed a DVD containing the "Hunt and Kill" episode which aired.² The State filed a comprehensive response brief received by this Court on March 22, 2010.

² The DVD attached to the "Notice of Filing DVD in Support of Motion to Quash Subpoena *Duces Tecum* Based Upon Newspersons' Privilege", filed on Mar. 16, 2010, has since been moved into evidence as Ex. 1 of the hearing. The Court reviewed this DVD upon receipt. The DVD does not contain a time stamp within the recording; however, the DVD player used by the Court to review the recording shows that the relevant footage occurs at approximately 4021-4230. For DVD players that fast forward by "chapters", this portion occurs within "chapter 9."

At the request of the Third-Party Movant, who has asserted privilege, the State orally moved for divestiture of said privilege.

III. Legal Analysis

A. Reporter Shield Law

The United State Supreme Court last considered a constitutionally based reporter's privilege in 1972 in Branzburg v. Hayes, 408 U.S. 665 (1972), where it declined to create an absolute testimonial privilege for newspeople; however, newsgathering is not without its First Amendment protection. And, although the high court has not revisited this issue almost all the federal circuits and many state courts have acknowledged at least some form of qualified constitutional privilege.

At least thirty-five states have enacted a reporter "shield law," and of those states the majority have enacted qualified shield laws providing for divestiture should certain requirements be met, while the balance have enacted unqualified protection. See, e.g., Practising Law Institute, *Communications Law in Digital Age 2009, Reporter's Privilege*, P.L.I. Order No. 18947, *available on Westlaw at 987 PLI/Pat 135* (this 312 page document provides an overview of how various jurisdictions have addressed the reporter shield privilege); see also The Reporters Committee for Freedom of Press, Reporter's Privilege Compendium, <http://www.rcfp.org/privilege/>.

B. Tennessee Shield Law (TCA § 24-1-208)

Here, in Tennessee, the General Assembly, has enacted a qualified reporter shield law in 1974, codified at TCA § 24-1-208, which sets forth three elements that

must be established for divestiture.³ This Tennessee Shield Law applies in both civil and criminal cases. See State ex rel. Gerbitz v. Curriden, 738 S.W.2d 192 (Tenn.

³ The Tennessee Shield Law provides as follows:

§ 24-1-208 Privileges and immunities; news media; exceptions

(a) A person engaged in gathering information for publication or broadcast connected with or employed by the news media or press, or who is independently engaged in gathering information for publication or broadcast, shall not be required by a court, a grand jury, the general assembly, or any administrative body, to disclose before the general assembly or any Tennessee court, grand jury, agency, department, or commission any information or the source of any information procured for publication or broadcast.

(b) Subsection (a) shall not apply with respect to the source of any allegedly defamatory information in any case where the defendant in a civil action for defamation asserts a defense based on the source of such information.

(c)(1) Any person seeking information or the source thereof protected under this section may apply for an order divesting such protection. Such application shall be made to the judge of the court having jurisdiction over the hearing, action or other proceeding in which the information sought is pending.

(2) The application shall be granted only if the court after hearing the parties determines that the person seeking the information has shown by clear and convincing evidence that:

(A) There is probable cause to believe that the person from whom the information is sought has information which is clearly relevant to a specific probable violation of law;

(B) The person has demonstrated that the information sought cannot reasonably be obtained by alternative means; and

(C) The person has demonstrated a compelling and overriding public interest of the people of the state of Tennessee in the information.

(3)(A) Any order of the trial court may be appealed to the court of appeals in the same manner as other civil cases. The court of appeals shall make an independent determination of the applicability of the standards in this subsection to the facts in the record and shall not accord a presumption of correctness to the trial court's findings.

(B) The execution of or any proceeding to enforce a judgment divesting the protection of this section shall be stayed pending appeal upon the timely filing of a notice of appeal in accordance with Rule 3 of the Tennessee Rules of Appellate Procedure, and the appeal shall be expedited upon the docket of the court of appeals upon the application of either party.

(C) Any order of the court of appeals may be appealed to the supreme court of Tennessee as provided by law.

1987); Austin v. Memphis Publ'g Co., 655 S.W.2d 146 (Tenn. 1983)(rejecting contention that Tenn. Code Ann. § 24-1-208 is limited to civil cases); State v. Jerry Douglas Franklin, No. 01C01-9510-CR-00348, 1997 WL 83772 (Tenn. Crim. App., at Nashville, Feb. 28 1997), perm. to appeal denied (Tenn. Nov. 17, 1997); State v. Shaffer, (not reported in S.W.2d), 1990 WL 3347, 17 Med. L. Rptr. 3347 (Tenn. Ct. App., at Nashville, Jan. 19, 1990); see also State v. Lane, 1991 WL 34649 (Tenn. Cir. Ct. 1991). Tennessee's Shield Law protects both confidential and non-confidential information.⁴

The Tennessee Shield Law provides that the party seeking to enforce a subpoena directed to a reporter must show by clear and convincing evidence three elements to divest the privilege: (A) there is probable cause that the information sought by the subpoena is clearly relevant to a specific probable violation of law; (B) the information sought cannot be obtained by alternative means; and (C) there is a compelling and overriding public interest in the information. TENN. CODE ANN. § 24-1-208(c)(2). See Haney v. Copeland, 291 B.R. 740, 756 (Bankr. E.D. Tenn. 2003)(finding that a party's application for divestiture will be denied if all three requirements of subsection (c)(2) are not proven by clear and convincing evidence); Moore v. Domino's Pizza, L.L.C., 199 F.R.D. 598 (W.D. Tenn. 2000)(finding that each of the three factors set forth in section 24-1-208(c) must be established by clear and convincing evidence to divest a news reporter of the privilege); State ex rel. Gerbitz v. Curriden, 738 S.W.2d 192 (Tenn. 1987); State v. Kendrick, 178 S.W.3d 734, 737 (Tenn. Crim. App. 2005);

⁴ Footage not contained in broadcast is generally referred to as "outtakes". Courts in several jurisdictions have held that outtakes constitute non-confidential information. See, e.g., People of New York v. Mercereau, 875 N.Y.S.2d 857, 860 (N.Y. Sup. 2009)(recognizing "a stark divergence between the compelled production of nonconfidential 'material' (e.g., video footage) and a journalist having to testify about the details of newsgathering efforts")(copy attached to State Response brief).

State v. Shaffer, 1990 WL 3347, 17 Med. L. Rptr. 3347 (Tenn. Ct. App. 1990)(holding that, unless and until each element set forth in subsection (c)(2) is proven by clear and convincing evidence, the court will not enter an order divesting the privilege).

The Court shall address each of the above-referenced factors below. Prior to engaging in the legal analysis, this Court notes that at the time of this Order, there appears to be very limited Tennessee case law applying Tennessee's Shield Law. In fact, the parties refer to only three Tennessee cases in their briefing.⁵ As such, the parties rely on law from other jurisdiction to provide guidance on the issue before the Court. The parties place strong emphasis on New York law since the New York Shield Law is similar to that of Tennessee.⁶

⁵ The three Tennessee cases cited by the Third-Party Movement and referenced by the State in response briefing are:

- Austin v. Memphis Publ'g Co., 665 S.W.2d 146 (Tenn. 1983)
- State v. Jerry Douglas Franklin, No. 01C01-9510-CR-00348, 1997 WL 83772 (Tenn. Crim. App., at Nashville, Feb. 28 1997), perm. to appeal denied (Tenn. Nov. 17, 1997)
- State v. Shaffer, (not reported in S.W.2d), 1990 WL 3347, 17 Med. L. Rptr. 3347 (Tenn. Ct. App., at Nashville, Jan. 19, 1990)

The Third-Party Movant cites these cases throughout its briefing. In its response, the State distinguishes each of these cases from the case before this Court. The State did not number the pages of its brief, but the briefing is in two parts with a packet of case materials inserted in between to provide background information on the investigation. The portion detailing the above-referenced cases commences on the sixth to last page of the brief.

⁶ New York's reporter shield law, referenced by both parties, requires similar elements for divestiture. Specifically, to overcome the qualified privilege, the party seeking such news must make "a clear and specific showing that the news: (1) is highly material and relevant; (2) is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto; and (3) is not obtainable from any alternative source." Civil Rights Law §79-h (c). The relevant statute reads as follows:

§ 79-h. Special provisions relating to persons employed by, or connected with, news media

(a) Definitions. As used in this section, the following definitions shall apply:

(1) "Newspaper" shall mean a paper that is printed and distributed ordinarily not less frequently than once a week, and has done so for at least one year, and that contains news, articles of opinion (as editorials), features, advertising, or other matter regarded

as of current interest, has a paid circulation and has been entered at United States post-office as second-class matter.

(2) "Magazine" shall mean a publication containing news which is published and distributed periodically, and has done so for at least one year, has a paid circulation and has been entered at a United States post-office as second-class matter.

(3) "News agency" shall mean a commercial organization that collects and supplies news to subscribing newspapers, magazines, periodicals and news broadcasters.

(4) "Press association" shall mean an association of newspapers and/or magazines formed to gather and distribute news to its members.

(5) "Wire service" shall mean a news agency that sends out syndicated news copy by wire to subscribing newspapers, magazines, periodicals or news broadcasters.

(6) "Professional journalist" shall mean one who, for gain or livelihood, is engaged in gathering, preparing, collecting, writing, editing, filming, taping or photographing of news intended for a newspaper, magazine, news agency, press association or wire service or other professional medium or agency which has as one of its regular functions the processing and researching of news intended for dissemination to the public; such person shall be someone performing said function either as a regular employee or as one otherwise professionally affiliated for gain or livelihood with such medium of communication.

(7) "Newscaster" shall mean a person who, for gain or livelihood, is engaged in analyzing, commenting on or broadcasting, news by radio or television transmission.

(8) "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.

(b) Exemption of professional journalists and newscasters from contempt: Absolute protection for confidential news. Notwithstanding the provisions of any general or specific law to the contrary, no professional journalist or newscaster presently or having previously been employed or otherwise associated with any newspaper, magazine, news agency, press association, wire service, radio or television transmission station or network or other professional medium of communicating news or information to the public shall be adjudged in contempt by any court in connection with any civil or criminal proceeding, or by the legislature or other body having contempt powers, nor shall a grand jury seek to have a journalist or newscaster held in contempt by any court, legislature or other body having contempt powers for refusing or failing to disclose any news obtained or received in confidence or the identity of the source of any such news coming into such person's possession in the course of gathering or obtaining news for publication or to be published in a newspaper, magazine, or for broadcast by a radio or television transmission station or network or for public dissemination by any other professional medium or agency which has as one of its main functions the dissemination of news to the public, by which such person is professionally employed or otherwise associated in a news gathering capacity notwithstanding that the material or identity of a source of such material or related material gathered by a person described above performing a function described above is or is not highly relevant to a particular inquiry of government and notwithstanding that the information was not solicited by the journalist or newscaster prior to disclosure to such person.

One of the primary Tennessee cases cited by the parties is the unpublished decision in State v. Shaffer, which is the most factually similar to the case before this Court. 1990 WL 3347, 17 Med. L. Rptr. 3347 (Tenn. Ct. App., at Nashville, Jan. 19, 1990). In Shaffer, the State moved to compel outtakes of an interview made by the defendant to a local news affiliate regarding his pending murder case. The Tennessee

(c) Exemption of professional journalists and newscasters from contempt: Qualified protection for nonconfidential news. Notwithstanding the provisions of any general or specific law to the contrary, no professional journalist or newscaster presently or having previously been employed or otherwise associated with any newspaper, magazine, news agency, press association, wire service, radio or television transmission station or network or other professional medium of communicating news to the public shall be adjudged in contempt by any court in connection with any civil or criminal proceeding, or by the legislature or other body having contempt powers, nor shall a grand jury seek to have a journalist or newscaster held in contempt by any court, legislature, or other body having contempt powers for refusing or failing to disclose any unpublished news obtained or prepared by a journalist or newscaster in the course of gathering or obtaining news as provided in subdivision (b) of this section, or the source of any such news, where such news was not obtained or received in confidence, unless 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. A court shall order disclosure only of such portion, or portions, of the news sought as to which the above-described showing has been made and shall support such order with clear and specific findings made after a hearing. The provisions of this subdivision shall not affect the availability, under appropriate circumstances, of sanctions under section thirty-one hundred twenty-six of the civil practice law and rules.

(d) Any information obtained in violation of the provisions of this section shall be inadmissible in any action or proceeding or hearing before any agency.

(e) No fine or imprisonment may be imposed against a person for any refusal to disclose information privileged by the provisions of this section.

(f) The privilege contained within this section shall apply to supervisory or employer third person or organization having authority over the person described in this section.

(g) Notwithstanding the provisions of this section, a person entitled to claim the exemption provided under subdivision (b) or (c) of this section waives such exemption if such person voluntarily discloses or consents to disclosure of the specific information sought to be disclosed to any person not otherwise entitled to claim the exemptions provided by this section.

MCKINNEY'S CIVIL RIGHTS LAW § 79-h.

Court of Criminal Appeals reviewed two specific issues on appeal: (1) “Whether a court may compel disclosure of unbroadcast information and work product for *in camera* review to determine whether the prerequisites for divestiture of the reporter's privilege under the Tennessee Shield Law, Tenn. Code Ann. § 24-1-208, have been met,” and (2) “[w]hether the three prerequisites for divestiture of the Shield Law privilege have been established by clear and convincing evidence in this case.” Shaffer, 1990 WL 3345, at *5.

The Court addressed these two issues together and made some instructive findings in its decision. The relevant part of the opinion is included below.

From the proof the [Trial] Court found that the “out-takes” contain information which is relevant in trial preparation, trial, and sentencing, as the extensive interviews by Ms. Kalodimos would probably help in identification of the two murder victims, in evaluating the defendant's insanity defense and in the investigation of other crimes committed by the defendant. Indeed anything the defendant says regarding his participation in two murders in this case and other criminal activity is relevant.

It is clear that once attorneys were appointed for defendant, the State could have no further access to him. (The WSMV-TV Channel 4 interviews were conducted in Kentucky before he was brought to Tennessee for trial and before counsel was appointed.)

The Court further found that the Metro Police had conducted a competent and thorough investigation which was limited by lack of access to the defendant.

The Court found that the State has an overriding and compelling interest in finding out about the commission of other crimes by the defendant and specifically in gaining information which may help convict him of the two murders with which he is charged.

Therefore the State has shown by clear and convincing evidence that there is probable cause to believe that the information contained on the “out-takes” is clearly relevant to a specific probable violation of law and the State has demonstrated a compelling and overriding public interest in the information contained on the “out-takes”. It is highly likely that because the defendant himself is the source of the information sought and he alone knows exactly what happened, (the victims are dead and there are no known eyewitnesses) there is no way that the State can obtain the information except from the defendant, but the Court cannot say that there is “clear and convincing” proof whether the information can be obtained by alternative means since neither the Court nor the

State knows what is contained in the material. Thus, the Court holds that WSMV-TV Channel 4 should produce the “out-takes” to the Court for *in camera* inspection so that the Court can determine whether the State or the defendant can reasonably obtain the same information by other means.

Shaffer, 1990 WL 3345, at *1-2. Ultimately, the trial court concluded that two of the three prerequisites for divestiture—specifically Prongs 1 and 3—had been met by clear and convincing evidence, but as to Prong 2, the Court indicated it could not determine “that there is clear and convincing proof whether the information can be obtained by alternative means since neither the State nor the Court knows what is contained in the material” and the lower court ordered an *in camera* review to make such a determination Shaffer, 1990 WL 3347, at *7. The Tennessee Court of Criminal Appeals indicated that it concurred with the trial court’s findings in regard to the analysis of all three prongs, and it did not indicate that it questioned the trial court’s conclusions as to either prongs 1 and 3. As such, it held that all three prerequisites set forth in TCA § 24-1-208(c)(2)(B) had not been satisfied. Id. The Court of Criminal Appeals, therefore, reversed the trial court’s order for the outtakes to be provided to the trial court for an *in camera* inspection, holding that all three prongs must be satisfied by clear and convincing evidence before any divestiture, even *in camera* review (which would constitute a form of divestiture), occurs. Id. at *8.

The Shaffer case does not prohibit divestiture occur under all circumstances; rather, under the facts of that case, the State had not shown all three prongs by clear and convincing evidence. Accordingly, the Court now considers the application of the three requirements for divestiture as to the facts in the specific case before the Court.

C. Application of the 3-Prong Test to Instant Case

As noted above, the Tennessee Shield Law, codified at TCA § 24-1-208, provides that the party seeking to enforce a subpoena directed to a reporter must show by “clear and convincing evidence” three elements: (A) there is probable cause that the information sought by the subpoena is clearly relevant to a specific probable violation of law; (B) the information sought cannot be obtained by alternative means; and (C) there is a compelling and overriding public interest in the information. TENN. CODE ANN. § 24-1-208(c)(2).

The “clear and convincing evidence” standard is more exacting than the preponderance of the evidence standard but does not require such certainty as the beyond a reasonable doubt standard. O’Daniel v. Messier, 905 S.W.2d 182, 188 (Tenn. Ct. App. 1995)(citations omitted). “Clear and convincing evidence eliminates any serious or substantial doubt concerning the correctness of the conclusions to be drawn from the evidence.” Id. “It should produce in the fact-finder’s mind a firm belief or conviction with regard to the truth of the allegations sought to be established.” Id. Since case law in Tennessee is limited as far as providing an analysis of the application of three elements for divestiture, when necessary, this Court shall refer case law from other jurisdictions, which has also been relied upon by the parties in briefing, for guidance when necessary.

1. Prong 1: There is probable cause that the information sought by the subpoena is clearly relevant to a specific probable violation of law

This first element actually contains two parts. The party seeking privileged information must demonstrate that there has been a probable violation of the law and

that the information sought by subpoena is clearly relevant to the specific probable violation.

Here, the State has established by clear and convincing evidence through the hearing testimony of MPD Detective Achord and Exhibits 3-12 (consisting of police investigation reports and forensic lab reports) that a probable violation of the law—to wit, homicide—has occurred and that Defendant is a suspect in said criminal activity. The issue then is whether the specific information sought by the subpoena in this case—the raw footage and outtakes from Defendant’s interview—is relevant to the homicide for which he has being tried.

This aspect of Prong 1 has been addressed in a criminal law context by the Tennessee appellate court in the unpublished decision of Shaffer, where the appellate court agreed with the trial court that the State had established by clear and convincing evidence that the outtakes were relevant to a probable violation of law, noting that the “Metro Police had conducted a competent and thorough investigation which was limited by lack of access to the defendant.” Shaffer, 1990 WL 3347, at *1.

Likewise, here, the evidence before the Court is that the MPD has engaged in a thorough and competent investigation of the homicide of Lucia Garcia, which occurred in August 2007. As part of this investigation the police attempted to interview Defendant, and he refused to cooperate. See, e.g., Ex. 1, at 5 (investigative report summarizing interview of Jonathon Gutierrez). Defendant has not provided any confession to the crimes charged; however, the evidence shows that on his way to booking, he did disclose the location of the firearm that has been determined by the TBI to have been used as the murder weapon in this case. (Exs. 5, 6). Although Defendant

disclosed the location of the weapon, one cannot infer that he was the shooter without additional evidence; however, this admission further connects Defendant to the crime.

The State seeks the raw footage of the entirety of Defendant's interview with Gangland. The Court has reviewed the DVD of the "Hunt and Kill" episode where Defendant's interview clips were interspersed among interview clips of other individuals and the narrator. It appears the majority of Defendant's statements concern his childhood, how he became involved in the gang, the gang's general activities, and his experiences with the gang. See. e.g., Ex 1 (complete aired broadcast) and Ex. 2 (excerpts from the episode relating specifically to Defendant, prepared by Gangland Productions for the hearing). However, it is clear in one portion of the interview that Defendant answers questions directly about his charges in this case.

The DVD provided to the Court does not include a time stamp, rather it includes the program as it aired with "black out screens" inserted where the commercial breaks occurred. (Ex. 1). The portion of the program commencing after the last commercial break (approximately 3956-4021 per the DVD clock used by this Court to review the DVD) focuses on the August 26, 2007 crime at issue in the pending criminal case. The narrator provides a brief general overview recapping the "Brown Pride" gang's "first big rite of passage", described as a "war with one of the nation's most violent gangs, MS13", but then notes that "Brown Pride" had another local enemy, the Surrenos gang. The narrator notes that a few "Brown Pride" members firebombed the residence and vehicle of Surrenos member(s), which "started the battle." The narrator then adds that "Brown Pride members like Spook [Defendant Jonathon Gutierrez] got caught in the cross-fire." At this point, a video clip of Defendant is shown where he describes his

house being shot twice. During the hearing and in the State's brief, the State clarified that this statement by Defendant is not related to the August 2007 crime even though it would appear so from the video editing. Petitioner's trial counsel, Paul Walwyn, who was present during the Gangland Production interview established that this statement by Petitioner is not related to the case at issue. However, the following two statements made by Defendant during this portion of the episode are clearly related to the August 23, 2007 homicide as not only acknowledged by defense counsel but also noted by the documentary narrator. Before the clips are aired the narrator states, "By August 2007, Spook was ready to fight back." Following this comment by the narrator, two disjointed clips of Defendant speaking are aired. Defendant's first quote related to the shooting is: "They started disrespecting us, saying all kinds of stuff." The narrator discusses a high speed car chase where "Brown Pride" members shot at a car driven by a Surreno gang member, striking the driver. The narrator continues to say that as a result "Spook" and two other members were arrested ,and Spook was charged with first degree murder. Following this summary is the second statement by Defendant: "Everything happened so quick. Did what we had to do. So things happen."

Given the context of the documentary there is no doubt that Defendant made statements about the August 26, 2007 shooting, and that Defendant's aired statements as well as other unaired statements made by Defendant during this portion of the interview and the phrasing of the reporter's questions eliciting the statements are relevant to the pending homicide charges.

While it is unclear what questions prompted Defendant's statements. Although the reporter's questions are hearsay, the only way to understand the statements made

by Defendant is by way of the questions asked of him. For example, in the State's briefing, the State notes that the Defendant's statements would mean much less "if the interview simply said, 'Tell me about August 26, 2007'" "than if the interviewer asked, "Why did you shoot the man on August 26, 2007'." The fact this information—the specific questions asked of Defendant— is unknown does not undermine the fact the State has established Prong 1 by clear and convincing evidence. This portion of the interview clearly relates to the crime; however, the weight afforded to Defendant's incriminating statements cannot be determined until a full review of questions and answers contained on the interview recording where Defendant discusses the August 2007 shooting.⁷ The facts of the Shaffer case are distinguishable from the instant matter because in Shaffer, the State intended to use information from the outtakes in order to conduct further investigation of the defendant's pending case as well as other crimes. 1990 WL 347, at *1. Here, however, the State has is not requesting the footage in order to engage in a "fishing expedition" to further its investigation in this case or in other crimes possibly committed the Defendant. The Defendant, without attempting to conceal his identify, made statements about his involvement in the shooting that constitutes the basis of this criminal case that were aired in the "Hunt and Kill" episode; thus, the State is requesting the raw footage in order to give context to Defendant's broadcasted statements about the August 26, 2007 homicide.

⁷ It is the court's role to determine admissibility where it is the jury's role as fact finders to determine credibility and how much weight to afford to each piece of evidence admitted at trial.

**2. Prong 2:
The information sought cannot be obtained by alternative means**

In this case, the information sought is Defendant's own statements about the August 2007 crime that he made during the Gangland interview.

At the evidentiary hearing, the Third-Party Movement argued that the State is able to make its case and convict Petitioner without use of the interview footage. While conviction may or may not result without the use of the sought information, that does not appear to be the standard under which this prong should be considered.⁸ The inquiry is not whether the State is able to prove its case by alternative means; rather, the inquiry is whether the information sought can be obtained by alternative means. This distinction may seem slight but bears great importance in how this prong is evaluated.

There is little Tennessee case law on this issue; thus, this Court has turned to sister jurisdictions for guidance. As noted previously, this Court primarily turned to New York case law for guidance since the New York Shield Law is similar to that of Tennessee and both parties chose to cite New York law in their briefing.⁹

One case cited by the State specifically addresses the element of whether or not information is available from other sources. People of New York v. Cheche, 571

⁸ While the evidence before the Court is the State intends to call several eyewitnesses to testify at trial, the State's briefing indicates the credibility of these witnesses may be at issue. Further, while the witnesses can place Defendant in a vehicle where people were shooting at the victim's car, it appears none of the witnesses are able to testify as to whether or not Defendant was one of the shooters or merely in a vehicle with other people shooting.

⁹ The corresponding provision of the New York Reporter Shield Law requires the part seeking the non-confidential information in a criminal proceeding to make a clear and specific showing that the information is "not obtainable from any alternative source. N.Y. Civ. Rights L. § 79-h (c); see also People of New York v. Combest, 795 N.Y.S.2d 481 (2005).

N.Y.S.2d 992 (Cayuga Co. Ct. 1991). In the Cheche case, the People of New York subpoenaed several news reporters to testify as to what the defendant said to them about his involvement in charged crimes. Like in the case before this Court, the defendant's attorney was present during the interview. The New York court found that the presence of the defendant's former attorney did not create an alternative source, noting that the attorney "could very well feel inhibited or have a reason to lack recollection for other than lack of memory. He could clearly be a hostile witness." Id. at 994.

Here, Petitioner's current trial counsel, Mr. Walwyn, testified that while he was present during the interview and is aware that Defendant did make statements concerning the pending criminal case, he is unable to recall verbatim what Defendant said nor is he able to recall what questions were asked by the reporter to solicit the statements. Likewise, the other individual present during the interview, Mr. Carroll of the Davidson County Sherriff's Office, testified he is unable to recall what was said because his function was to serve as security and he had no vested interest in the interview, so he did not pay attention.¹⁰

¹⁰ It is important to note that in Davidson County, Tennessee, employees of the Sherriff's Department (DCSO) serve a different function than sheriff's offices in States or counties. As Mr. Carroll testified, the investigation of criminal cases lies within the province of the police department whereas the overseeing of inmate housing is the duty of the sheriff's department. Although Mr. Carroll is employed as an "investigator" with the DCSO, he explained his investigative role is limited to internal affairs and complaints raised by inmates while housed in DCSO facilities. He has not involvement in investigating criminal cases.

Mr. Carroll testified that there are approximately 3800-3900 inmates housed by DCSO and he did not even know why Defendant was being housed in DCSO custody. His primary role was to make Defendant available for the interview and serve in a security function during the interview. He testified that he sat approximately 20' away from Defendant who was speaking in a soft voice so he was difficult to hear. Mr. Carroll heard Defendant discuss "a shooting" but from where Mr. Carroll was sitting he was unable to discern whether Defendant was talking about a shooting he committed or a shooting where he was the one being shot at.

Thus, in this case, like Cheche, there does not appear that there are any other sources available to the State to obtain Defendant's statements. See also Mercereau, 875 N.Y.S.2d at 860.

While it seems no one expected Defendant to actually make statements about his pending criminal offense (as the documentary centered on how "Brown Pride" developed in Nashville and Defendant's general experiences within the gang), Defendant volunteered information pertaining to his current case. The Defendant by seeking out the press, no matter what his reasons, cannot use the press for a tactical advantage at trial. See, e.g. Cheche, 571 N.Y.S.2d at 994-95 ("It is imperative to guarantee a fair trial not only to the defendant but also the People.").

The MPD attempted to conduct an interview with Defendant about his involvement in the shooting but Defendant did not wish to speak with the police and terminated the interview as memorialized in Detective Achord's supplemental report (Ex. 3 at 5). Although Defendant later, during transportation to booking, after some reluctance, told the police where to find the firearm that shot the victim, (Ex. 5), this statement only shows he knew where the weapon was located; Defendant never admitted to being a shooter in the car.

Through the State's subpoena, it is seeking the direct statements made by Defendant. Whether as direct evidence or for impeachment, the statements preserved on the raw footage and outtakes of the "Hunt and Kill" interview constitute voluntary admissions that cannot be duplicated through subsequent questioning. Furthermore, Defendant has already refused to talk to the police about what occurred on August 26, 2007.

As other courts have noted, “[b]y their very nature, these statements [preserved during the recorded media interview] are not obtainable from any other source. They are unique bits of evidence frozen at a particular place and time.” WBAL-TV Div., The Hearst Corp. v. Maryland, 477 A.2d 776, 782 (Ct. App. Md. 1984)(quoting United States v. Cuthbertson, 630 F.2d 139,148 (3rd Cir. 1980), cert. denied 449 U.S.1126 (1981); see also Doe v. Kohn Nast & Graf, P.C., 853 F. Supp. 147, 150 (U.S. D.C. Pa. 1994)(in determining whether to grant a motion to quash for interview outtakes from a television news program found “[i]n short, verbatim statements are unique. The only source of this information is from the videotapes themselves.”); Mercereau, 875 N.Y.S.2d at 860 (quoting Matter of Magrino, 226 A.D.2d 218, 640 N.Y.S.2d 545 (1st Dept. 1996)(commanding the production of outtakes “since they are the most detailed accounts of the incidence ever made by the defendant himself.”).

Accordingly, for the above reasons, the Court finds that the State has established by clear and convincing evidence that the information sought—i.e., the Defendant’s own admissions regarding his involvement in the August 26, 2007 shooting—cannot be obtained by alternative means.

**3. Prong 3:
There is a compelling and overriding public interest in the
Information**

This particular prong appears to be unique to the Tennessee Reporter Shield Law. States such as New York do not have a comparable provision. This particular prong, however, was also addressed by the Tennessee appellate courts in the

unreported Shafer decision previously discussed. In Shaffer, the appellate court cites the trial court's findings as to Prong 3 as follows:

The Court found that the State has an overriding and compelling interest in finding out about the commission of other crimes by the defendant and specifically in gaining information which may help convict him of the two murders with which he is charged.

Shaffer, 1990 WL 3347, at *1. The appellate Court indicated it concurred with the trial court's findings, but focused its decision on Prong 2 and how under a reading of the Tennessee statute all three prongs must be met before any type of divestiture, including *in camera* review, occurs. Id. at *7.

Here, this Court makes a similar finding as to that of the trial court in Shaffer: the people of Tennessee have an interest in seeing that murders in Tennessee are thoroughly investigated and that the State pursues justice by prosecuting individuals suspected of violent crimes. Accordingly, the Court finds that the State has established by clear and convincing evidence that there is a compelling and overriding public interest in the DVD raw footage and outtakes where Defendant is asked questions and makes statements regarding the August 26, 2007 homicide and the events leading up to the shooting.

4. Defendant's Right to the Outtakes

Although the State has already established the three prerequisites of divestiture, the Court finds it necessary to note that Defendant may also have an interest in reviewing the relevant raw footage and outtakes. Although a pre-trial motion to admit the portion of the Defendant's statements that aired during the documentary broadcast

is not presently before this Court, it is likely that some portion of the Defendant's statements during the "Hunt and Kill" episode may be admissible.

During the oral argument, the State noted that this situation is akin to where the State intends to use a portion of a recorded statement made by the Defendant, such as a portion of a police interview, but the defense requests to admit the entirety of the recording pursuant to the rule of completeness. TENN. R. EVID. 106; State v. Keough, 18 S.W.3d 175, 182-83 (Tenn. 2000)("[W]here the prosecution introduces a statement made by the defendant, the trial court may in the interest of fairness order that the remainder of the statement be admitted as well under Rule 106."); see also Crane v. Kentucky, 476 U.S. 683, 106 S.Ct. 2142, 2145-2147; State v. Robinson, 622 S.W.2d 62, 71 (Tenn. Crim. App.1980); Espitia v. State, 288 S.W.2d 731, 733 (1956).

The portion of the documentary where Defendant's two broadcasted statements regarding the August 2007 shooting is summarized *supra* in Part III.C.1. of this Order. If a portion of these statements are admitted at trial, Defendant, as the accused, is entitled to put in evidence all that was said to at the time which bears upon the subject of controversy including any exculpatory or self-serving declarations connected therewith.

5. *In Camera* Review

In the instant case, however, this Court has found (as details *supra* in Part III.C. of this Order) that the State has established its burden of meeting all three prongs by clear and convincing evidence and, therefore, divestiture is appropriate under Tennessee law. At the evidentiary hearing, the Court inquired of the counsel for the third-party movant his view as to whether Tennessee law affords a trial court an *in camera* inspection once the party seeking the outtakes establishes all three prongs

under the Tennessee Report Shield Law. Counsel indicated this was a novel issue. This Court, however, interprets Shaffer as permitting *in camera* review *after* the divestiture standard is established. However, the Court will defer to the third-party movant as to whether it prefer to provide the relevant raw footage with outtakes to the State, Defendant, and Court simultaneously or if it would prefer to provide to the this information solely to the Court for an initial *in camera* review to determine in any further redaction is necessary before disclosing to the parties. That is, the Court finds the elements for divestiture has been met, but in order to balance the interest of Gangland Productions and the rights of the media under federal and state constitutional law, the Court is willing to entertain an *in camera* review in order to make certain only the most limited portion of the interview necessary is released to the State and Defendant in this matter.

IV. Conclusion

For the reasons set forth above, the Court hereby finds that the Third-Party Movant's "Motion to Quash Subpoena *Duces Tecum* Based Upon Newspersons' Privilege" is hereby DENIED. Accordingly, Gangland Productions is hereby ORDERED to provide the State, Defendant, and the Court a copy of the raw footage/outtakes of Defendant's interview limited to where Defendant is questioned and/or discusses the August 2007 offense that constitutes the basis for the underlying case. Upon Gangland Productions' request, this Court is willing to conduct an *in camera* review of said footage (as discussed in Part III.C.5. of this Order) prior to the release of all or part of this footage to the State and defense. This Court shall also place the Court copy under seal

and only the portion found to be admissible at trial would be included in the public record. Any portion of the raw footage and/or outtakes not used at trial should remain under seal in order to protect Gangland Production's qualified privilege. Further, the State and Defendant shall be prohibited from disseminating or revealing any portion thereof to any other entity, forum, or person outside of introducing relevant portions into evidence at trial.

Pursuant to TCA § 24-1-208(3)(A), the parties are entitled to an appeal. Should either party pursue an appeal, the proceedings are stayed as to the disclosure of the information sought by the State from the Third-Party Movant; however, the State may elect to proceed with the trial of the underlying criminal proceedings, which has been previously scheduled for April 12, 2010.

The Court sets a pre-trial status hearing for the underlying criminal case on Thursday, April 1, 2010, at 9:00 a.m. in order for the parties to advise the Court if an appeal is being sought and whether the parties are prepared to proceed to trial as scheduled.

IT IS SO ORDERED.

ENTERED this 30th day of March, 2010.

Cheryl Blackburn
Judge

cc:

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