UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	
v.	)	Crim. No. 92-10369-Z
	)	
THOMAS A. SHAY and	)	
ALFRED W. TRENKLER	)	

MEMORANDUM OF LAW IN SUPPORT OF GOVERNMENT'S MOTION FOR ORDER DIRECTING WLVI-TV (CHANNEL 56) TO PRODUCE VIDEOTAPED INTERVIEW WITH DEFENDANT THOMAS A. SHAY (Fed. R. Crim. P. 17(c))

The indictment in this case charges defendants Thomas A. Shay ("Shay Jr.") and Alfred W. Trenkler ("Trenkler") with conspiracy, and with violations of certain federal explosives laws (18 U.S.C. §844(d) and 844(i)) (the "Indictment") arising from an October 28, 1991 explosion which resulted in the death of Boston Police Bomb Squad Officer Jeremiah Hurley and in the maiming of Hurley's partner, Francis X. Foley (the "Bombing"). The Government has moved for an order directing WLVI-TV, Boston, Massachusetts (hereinafter, "Channel 56") to produce a videotape containing an interview conducted by Channel 56 with Shay Jr. in October, 1992 at the Plymouth County House of Correction (the "Interview"). The Interview was given in a county corrections facility by a (then) known target in a highly-publicized police homicide case, videotaped by a cameraman in the presence of a corrections officer. As is presently determinable from the brief portions aired thus far, the Interview depicts Shay Jr., on film, making statements and admissions relating to activities which are the subject of the Indictment.

Simply stated, the government's proposed Order is no "fishing expedition" but is specific to a particular item of undisputable evidentiary value and therefore complies fully with the "specificity, relevancy and admissibility" requirements of Rule 17(c) of the Federal Rules of Criminal Procedure.

Moreover, because the scales tip decisively in favor of in camera review when one balances the parties' competing interests, disclosure also comports with the requirements of the First Amendment. Production of the Interview in these circumstances not only poses no real or apparent threat to the newsgathering function or any other concern grounded in the First Amendment, but serves the significantly weightier public interest in effective law enforcement and fair administration of justice. By this Order, the government seeks neither reporter's notes nor information or materials given in confidence or which would identify or otherwise disclose a confidential source (the protection of which the First Circuit recognizes as the leading First Amendment concern); rather, the Order calls for the court's in camera review of the film product of a nonconfidential interview for which Channel 56 cannot persuasively claim any meaningful expectation of confidentiality.

BACKGROUND

On December 16, 1992, a federal grand jury returned the instant Indictment. From March, 1992, until the date of the Indictment, Shay Jr. had been held in state or federal custody on various charges unrelated to the Bombing. During this time,

Shay Jr. was in frequent contact with members of the local print and electronic media, making a series of comments relating to the Bombing, and more particularly, relating to his claimed lack of participation in and knowledge of the circumstances leading up to and surrounding the Bombing.

The Interview

As of early October 1992, Shay was in federal custody (on a since-dismissed charge of making telephonic bomb threat) at the Plymouth County House of Correction. During this period of time, and unbeknownst to either Shay Jr.'s (then) attorneys or the attorneys for the government, Shay Jr. invited Karen Marinella, a reporter from the Channel 56 news department, to visit him at the jail and conduct a videotaped interview.[1] The Interview, which was filmed by a Channel 56 camera man, was apparently conducted in the visiting room of the Plymouth County House of Correction. Also present for the interview, but not taking part, was Captain William Stone of the Plymouth County Sheriff's Department. The Interview is believed to have lasted approximately 45 minutes.

The Broadcasts

On November 3, 1992 (Election day), Marinella telephoned the government's attorneys and advised them that Channel 56 intended to air a brief segment of the Interview (holding the balance for later use) as their lead "non-election" story for their evening

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[1] Marinella first interviewed Shay Jr. with other members of the local print and electronic media on October 31, 1991 -- three days after the Bombing -- during a televised news conference which Shay Jr. had arranged at Boston's Back Bay Greyhound Bus station.

news show.[2] Channel 56 indeed aired a portion (approximately 1 to 1-1/2 minutes) of the Interview during its "News at Ten" broadcast . This portion showed Shay Jr. and Marinella seated alone in a large room. Between Marinella's "voiceover" comments, made while a "video only" portion of the Interview was played, Shay Jr. was seen and heard to read -- from what appeared to be a prepared statement -- as follows:

> I, Thomas Shay am guilty of something in that case, but do not know what.

In another clip and in apparent response to Marinella's (presumably) later questioning, Shay Jr. is seen (at times, looking over his shoulder at the camera) and heard saying as follows: . . .

> I didn't kill nobody. I didn't hire anybody to kill anybody. I didn't put no pieces together. I purchased a piece without the knowledge of -- of a -- what the -- what it was going to. I thought it was going to -- ah -- a antenna.

On December 16, 1992, the "News at Ten" aired another portion (approximately two minutes long) of the Marinella-Shay Jr. interview. This airing coincided with the announcement, made earlier that day, of the grand jury's indictment of Shay Jr. and Trenkler on charges relating to the Bombing. Again, interspersed between Marinella's comments made during the "live" broadcast,

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[2] After briefly describing some of the comments made by Shay Jr. during the Interview to the government's attorneys, Marinella asked whether the government wished to comment; the government's attorneys declined.

Channel 56 showed the following colloquy taking place between Shay Jr. and Marinella:

> Shay Jr.: I am guilty of knowing -- ah -- who built the bomb after the fact. I did not know anything about the bomb or explosives in this case at any time before October 28 at 10: 00 a.m. Not one piece of information . . .
>
> Question (by Marinella): But you helped purchase the equipment for this bomb. You are admitting that.
>
> Answer (by Shay Jr.:) I'm admitting that but not to the fact that I was helped to purchase stuff to build a bomb I was helping to purchase stuff for his work to build antennas or lights or whatever.
>
> . . .
>
> Shay Jr.: He was angry that it -- that it -- had happened to me and made me thought it was my father's fault or my mother's fault because I was in those schools.
>
> Marinella: So he built a bomb.
>
> Shay Jr. Jr.: So he builds a bomb and tries to kill my father and thinks that I am going to be happy over it.[3]

Shortly after the November 3, 1992 "News at Ten" broadcast, the government informally requested that Channel 56 provide the government a videotape of the entire Interview. After informal discussions between the government and its management and, later,

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[3] Through its own means, the government made a videotape of those portions of the Interview aired on the "News at Ten" on November 3, 1992 and December 16, 1992. The government will submit this videotape to the Court on request.

its attorneys, Channel 56 rejected the government's informal request. The government's attorneys then sought and received approval from the Attorney General of the United States to issue a subpoena commanding production of the Interview, and, on January 8, 1993, issued a subpoena duces tecum calling for a videotape of the "complete [Interview]" upon Channel 56 (the "Subpoena") and service was accepted by its attorney, James Dillon, Esquire.[4] The Subpoena was returnable before this Court on January 12, 1993 in connection with the scheduled de novo review of defendant Trenkler's Detention Order. Channel 56's Keeper of the Records, represented by Attorney Dillon, appeared with the subpoenaed videotape at this hearing.[5] Neither Shay Jr. nor either of his attorneys were present at this hearing.

Shortly before the hearing, Channel 56 filed a Motion to Quash the Subpoena, advancing, essentially, three arguments: 1) that such a subpoena "implicates real and important First Amendment concerns" regarding that station's "being annexed as an investigative arm of the government"; 2) that internal Justice Department requirements relating to issuance of any such subpoena had not been met; and 3) that Shay Jr.'s statements during the

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[4] Copies of the government's subpoena duces tecum and cover letter to Attorney Dillon were sent to Nancy Gertner, attorney for Shay, and Terry Segal, attorney for Trenkler.

[5] At this hearing, Attorney Dillon informally told the government's attorneys that while his client would prefer not to do so, Channel 56 was prepared to submit the videotape to the Court for in camera review at the conclusion of the January 12 hearing.

Interview were not sufficiently likely "to be essential, or even relevant" to matters pertaining to the Court's business that day, that is, review of Trenkler's detention order.

On inquiry from the Court at the outset of this hearing, the government advised the Court that it would not seek enforcement of the subpoena for purposes of review of the detention order. The Court later suggested that argument regarding the subpoena be continued to a time when counsel for all parties concerned, to include Shay Jr.'s attorneys, could be present and, if they wished, be heard on the matter. The government agreed with the suggestion, advising the Court that it would file the instant motion. [6]

ARGUMENT

BECAUSE THE PROPOSED ORDER: (1) COMPORTS FULLY WITH THE REQUIREMENTS OF RULE 17(c); AND (2) CALLS FOR DISCLOSURE OF NO CONFIDENTIAL SOURCES OR MATERIAL, THUS IMPLICATING NO PRECLUSIVE FIRST AMENDMENT CONCERNS, BUT, RATHER, DIRECTLY AND SIGNIFICANTLY SERVES THE GREATER PUBLIC INTEREST IN EFFECTIVE LAW ENFORCEMENT, THE INTERVIEW SHOULD BE PRODUCED FOR IN CAMERA REVIEW.

United States v. LaRouche Campaign, 841 F.2d. 1176 (1st Cir. 1988)(hereinafter, "LaRouche") involved review of an order, such as that sought here, granting a pre-trial demand, upon a television broadcaster, for production and in camera review of

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[6] At the conclusion of the January 12 hearing, the government advised the Court that, due to its manifest evidentiary significance, the government intended to make use of the Interview at trial, and therefore intended to seek an order compelling production of the entirety of the Interview from Channel 56 well before trial.

the "outtakes" (videotaped material not previously broadcast) of a partially-aired interview between a television reporter and a key player in an upcoming criminal trial. Because LaRouche is the leading First Circuit case governing both the Rule 17(c) and First Amendment issues associated with the government's instant motion, the opinion merits detailed treatment here.

The indictment in LaRouche charged several defendants and entities with criminal fraud and conspiracy to obstruct justice in connection with Lyndon LaRouche's 1984 campaign for President. In early 1986, NBC interviewed one Fick, on videotape, for approximately one hour and forty minutes: Fick had at one time been an insider in the LaRouche organization and was expected to be called by the government at trial of the above criminal case. In April 1986, NBC aired approximately one minute of the Fick interview, in which Fick made comments about the LaRouche organization and particularly, about statements allegedly made by one of the defendants in the pending prosecution.

Before trial, one of the defendants served a subpoena duces tecum upon NBC, calling for the outtakes of the Fick interview; NBC moved to quash. On motion to enforce the subpoena, the District Court (Keeton, J.) determined, in pertinent part, that the proponent party had indeed made the necessary "threshold showing of likelihood" -- required under Rule 17(c) -- that the subject videotape contained relevant, admissible

evidence.[7] Particularly, the District Court found that Fick was expected to be called as a government witness and that it was "likely that some statements made in the course of Fick's lengthy interview would be inconsistent with his trial testimony and might also show bias." LaRouche, supra, 841 F.2d. at 1177.

The District Court then undertook to weigh NBC's claim of "qualified privilege" as against the defendant's rights to a fair trial. Id. at 1178. After acknowledging the existence, under federal law, of a "qualified news gatherer's privilege" (id. at 1177), the District Court went on to attach great significance to the fact that the subject outtakes involved no confidential sources and observed that:

> [e]ven if the news gatherer's privilege is held to extend beyond the protection of confidential sources, . . . the showing made by . . . NBC . . . is weak showing relative to . . . the interests commonly implicated in circumstances in which the assertion of the news gatherer's privilege is invoked.

Id. at 1178. The District Court ultimately ordered production

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[7] Rule 17(c) reads, in its entirety, as follows:

> (c) **For Production of Documentary Evidence and of Objects.** A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys. Insert Rule 17(c)

of the videotape, under seal, for in camera review and subsequent possible release to all defendants. NBC appealed and the First Circuit affirmed, employing the analysis used in the first instance by the District Court.

On appeal, the LaRouche Court first undertook to determine whether the subpoena met the requirements of Rule 17(c), and in doing so, likened their circumstances with those presented to the Supreme Court on the occasion of the Special Prosecutor's subpoena to the President for the "infamous tapes" in United States v. Nixon, 418 U.S. 683 (1974). Drawing from Nixon, the LaRouche Court restated the "three hurdles" as to the materials sought which a proponent party must clear under Rule 17(c): (1) relevancy; (2) admissibility; and (3) specificity. Id. at 1179, citing United States v. Nixon, 418 U.S. at 700. The LaRouche Court then restated the Supreme Court's ruling in Nixon that, because the contents of the subpoenaed materials could not be fully described at the time demand was made, i.e., at the in camera stage, the proponent party need only make a "sufficient preliminary showing" that is, "a "sufficient likelihood", that the materials sought contained "evidence admissible with respect to the offenses charged in the indictment." Id., quoting United States v. Nixon, supra, at 700.

In reviewing whether the subpoena to NBC cleared the "three hurdles", the LaRouche Court deemed the following to be significant: (1) Fick was understood to be a key government witness at trial; (2) Fick had been involved with several of the

defendants "for most of the period charged in the indictment"; (3) Fick had already testified in a previous trial (against one of the defendants, whose trial had been severed); (4) the videotape interview occupied some 100 minutes, "a very substantial period", in the First Circuit's view, "and likely covered a wide range of subject matter drawn from his association with the LaRouche organization"; and (5) "as counsel pointed out, Fick's facial expressions might well be directly relevant to showing animus against defendants." LaRouche, supra, at 1179-1180.

On this record, the First Circuit readily upheld the District Court's finding (as the First Circuit phrased it) of "likelihood that the outtakes would reveal inconsistent statements and bias; that is, relevant evidence, admissible at trial." Id. at 1180.[8] The LaRouche Court immediately went on

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[8] The LaRouche Court acknowledged that NBC's outtakes cut only towards potential impeachment of Fick at trial, and that "[g]enerally,the need for evidence to impeach witnesses is insufficient to require its production in advance of trial." Larouche, supra, at 1180, quoting United States v. Nixon, 418 U.S. 683, 701. This was so, according to the First Circuit, "because the admissibility prong of Rule 17(c) cannot be fully assessed until the corresponding witness testifies at trial." [citations omitted]. Id. Given Fick's history of prior statements and in view of his role as a "putative key witness", the LaRouche Court upheld the District Court's affirmative finding on the "admissibility" prong of Rule 17(c), thereby favoring production, characterizing it as one "left to the [trial court's] sound discretion." Id.

The circumstances in favor of production on our facts are even stronger than the "possible impeachment of a key witness" situation approved in LaRouche: Shay Jr. is, of course, a defendant-party to this criminal case and his videotaped statements, made during the Interview, would clearly be

(continued...)

to rule that because the material sought consisted of filmed statements, "[n]o other source (by definition)" was available and thus, the "specificity" prong of Rule 17(c) had also been met.[9]

The First Circuit then turned to NBC's claim of journalistic privilege and ruled that, while the concerns said to underlie that claim were "legitimate", they were nonetheless outweighed by the substantial interests of the subpoenaing party, then a defendant in an ongoing criminal case. At the outset of this analysis, the LaRouche Court declined to characterize "the process of taking First Amendment concerns into consideration" as recognition of a "conditional" or "limited" news gatherers privilege. Instead, the First Circuit underscored a reviewing court's duty to "be aware of the possibility that the unlimited or unthinking allowance" of subpoenas upon journalists might "impinge upon First Amendment rights." LaRouche, supra, at 1181, quoting Bruno and Stillman, Inc. v. Globe Newspaper, 633 F.2d 583, 595 (1st Cir. 1980). In the view of the LaRouche Court, First Amendment interests were most significant, and deserving of

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[8](...continued)
admissible during the government's case in chief, as admission of a party-opponent under Fed. R. Evid. 801(d)(2)(A), and should similarly be available to the government for purposes of cross-examination should he chose to testify.

[9] In making its ruling as to "specificity", the First Circuit acknowledged that, where materials such as videotapes and verbatim (or substantially verbatim) interview statements are known to exist, such materials are, by their nature, unavailable from any other source. Id., citing United States v. Cuthbertson, 630 F.2d. 139, 148 (3rd. Cir. 1980)([verbatim] statements constitute "unique bits of evidence that are frozen at a particular place and time").

corresponding protection, where a subpoena sought disclosure of confidential sources or information. Id. The First Circuit reasoned that such disclosure "would clearly jeopardize the ability of journalists and the media to gather information and therefore, have a chilling affect on speech." Id.

Where nonconfidential information is sought, however, these concerns are not, according to the LaRouche Court, nearly as strong:

> When there is no confidential source or information at stake, the identification of First Amendment interests is a more elusive task. True, some courts have stated in conclusory fashion that any distinction between subpoenas seeking confidential and non confidential materials "is irrelevant as to the chilling effect" that results when the materials are disclosed. [Citations omitted] But no illuminating examples or reasoning are produced to support the conclusion. We have been referred to no authoritative sources demonstrating or explaining how any chilling affect could result from the disclosure of statements made for publication without any expectation of confidentiality. See United States v. Liddy, 354 F. Supp. at 216 (execution of subpoena seeking such material "involves no restraint on what newspapers may publish or on the type of quality of information reporters may seek to acquire, nor does it threaten the vast bulk of confidential relationships between reporters and their sources")(quoting Branzburg v. Hayes, 408 U.S. 665, 691, 92 S.Ct. 2646, 2661 (1972)).

Id. at 1181 (emphasis supplied). After acknowledging as "legitimate" NBC's concerns relating to its production of the Fick interview (such as "the disadvantage . . . of appearing to be 'an investigative arm of the judicial system'" and the "burden on journalists' time and resources in responding" to such

subpoenas), the LaRouche Court balanced the importance of these interests against the interests promoted by disclosure of the outtakes:

> At stake on the defendants' side of the equation are their constitutional rights to a fair trial under the Fifth Amendment and to compulsory process and effective confrontation and cross-examination of adverse witnesses under the Sixth Amendment. No one or all of NBC's asserted First Amendment interests can be said to outweigh these very considerable interests of the defendants. Cf. Branzburg v. Hayes, 408 U.S. at 690-91, 92 S.Ct. at 2661-62 ("[p]ublic interest in law enforcement and in ensuring effective grand jury proceedings" outweighs asserted newsgathering interests of reporter refusing to testify and expose confidential sources to grand jury).

Id. at 1182 (emphasis supplied). As will be shown immediately below, the Rule 17(c) - First Amendment analysis central to production of the outtakes in LaRouche applies equally here, and, once applied, compels the same result.

A. Because There Is A Sufficient Likelihood That The Interview Contains Evidence Which Is Both Admissible And Relevant and Because The Interview Is, By Definition, Available From No Other Source, The Subpoena Fully Complies With Rule 17(c)

The circumstances restated above, regarding the Interview and the two portions actually broadcast, make it plain that there is far more than the required "sufficient likelihood" that the Interview contains relevant, admissible evidence: The previously-broadcast portions of the Interview (transcribed above) arguably compels one to conclude that the balance of the

Interview cuts to the heart of this case, that is, the guilt -- or innocence -- of Shay Jr. or Trenkler or both.[10] See United States v. Nixon, 418 U.S. 683, 700 (although Special Prosecutor could not, at stage of in camera review, fully describe contents of tapes sought, there existed "sufficient likelihood that each of the tapes contained conversations relevant to the offenses charged in the indictment"). As to Rule 17(c)'s requirement for "specificity", the videotaped Interview here is -- identical to the outtakes sought from NBC in LaRouche -- comprised of expression, demeanor and other "unique bits of evidence that are frozen at a particular place and time" and is thus "unavailable" from any other source. Larouche, supra, at 1180; see United States v. Cuthbertson, supra, 630 F.2d 139, 148. Accordingly, the demand made upon Channel 56 by way of the Subpoena -- now made by way of the instant Motion for Order -- was and is neither oppressive nor unreasonable and Channel 56's Motion to Quash the Subpoena on any grounds asserted under Rule 17(c) should be denied.

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[10] Recognizing the obvious importance of the entirety of the Interview to his client's case, Trenkler's attorney shared with the government's attorneys his intention to attempt to obtain a copy of the videotape from Channel 56.

B. Because The Public Interest In Effective Law Enforcement Outweighs Any First Amendment Concerns Implicated In Disclosure Of Material Evidence In A Criminal Case Given To A Reporter (1) By a Nonconfidential Source (2) In A Nonconfidential Setting, And (3) Without Any Legitimate Expectation Of Confidentiality, The Interview Should Be Produced For In Camera Review

Channel 56 does not -- and indeed cannot -- make any argument in its Motion to Quash that production of the Interview would serve to disclose the identity of any confidential sources or any information given in confidence. Clearly, given the site of the Interview and the number and identity of those present during its filming, neither Shay Jr. nor Marinella can make any legitimate claim to expectation of confidentiality as to the Interview. Accordingly, production of the Interview would in no way "jeopardize the ability of journalists and the media to gather information", and would therefore result in no "chilling affect" upon the press. See LaRouche, supra, at 1181.

In its Motion to Quash, Channel 56 did argue -- as the LaRouche Court acknowledged -- that the press has a "legitimate concern" of being perceived as an investigator of the government, should subpoenas for "outtakes, notes and other unused information, even if nonconfidential, become routine and casually, if not cavalierly, compelled." Id. at 1182.[11] This

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[11] In its Motion to Quash, Channel 56 advanced two additional arguments: (1) that the internal requirements underlying Justice Department approval of subpoenas to the press were not met in this matter; and (2) that the Interview was neither relevant nor central to this Court's ruling on review of Trenkler's detention order. Both arguments are unavailing on (continued...)

concern -- however legitimate -- should, as the following will demonstrate, nevertheless be subordinated to the unarguably weightier public interests at stake in this criminal case.

Although obviously different in kind from a criminal defendant's interest in presenting an effective defense to criminal charges, the degree of importance attached to the government's, and derivatively, the public's, interest in vigorous prosecution of a criminal case of this magnitude is nonetheless considerable. Instructive on the considerable weight to be afforded the government's interest in affective law enforcement, particularly when measured against any news reporter's claim of privilege, is the case of Karem v. Priest,

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[11](...continued)
grounds, respectively, of standing and mootness.

As to the first argument, Channel 56 is without standing to raise any argument predicated on internal Justice Department policy relating to issuance of subpoenas to the news media. As 28 C.F.R. Section 50.10, that section dealing with government subpoenas to the press, plainly provides:

> The principles set forth in this Section are not intended to create or recognize any legally enforceable right in any person.

Cf. U.S. Attorney Manual, Section 9-2.1 61(a)(internal Justice Department guidelines on issuance of grand jury subpoenas to attorneys for information relating to representation of clients set forth solely for internal guidance and may not be relied upon to create any rights enforceable by any party in any matter).

With respect to the latter, "no relevance" argument, the government decided not to press for enforcement of the Subpoena in connection with hearing on review of Trenkler's detention order; this argument is therefore moot.

744 F. Supp. 136 (W.D.Tex. 1990). Karem involved the shooting death of a San Antonio, Texas police officer. Two days following the shooting, two suspects -- Henry Hernandez and Henry's brother, Julian Hernandez -- surrendered to police. Id. at 137. Later that day, Karem, a reporter for a local television station, interviewed Henry -- then in jail -- by telephone, during which conversation Henry stated that he had fired the fatal shot while Julian sat in the policeman's car. Id. Both Henry and Julian were later indicted for capital murder. Id.

The prosecutor, having learned of this conversation, subpoenaed Karem to produce audio and video recordings as well as "any written, typed or tape recorded notes . . . relating to any conversations allegedly with Henry David Hernandez." Karem refused, was found in contempt and applied for federal habeas relief. Id.[12]

In that proceeding, Karem argued that he had produced all materials subject to the subpoena except for his written notes setting forth the names, addresses and telephone numbers of the confidential sources who aided him in obtaining the interview

[12] In her response to the habeas petition, the prosecutor urged that the State overcame any qualified reporter's privilege in these circumstances where it had "a compelling need to learn the identity of the confidential sources to determine: (1) the full extent of any admissions against interest made by the defendants and the defendants' credibility . . . [and] (3) the actual degree of culpability of each defendant . . . ." Id. at 138.

with Henry Hernandez. Id. at 138.[13] After acknowledging that "news gathering is entitled to some First Amendment protection", the court ruled that none of the circumstances potentially giving rise to protection against disclosure was present in that case. Id. at 142. More pertinent to our immediate purposes, the Karem court went on to hold as follows:

> Henry Hernandez' statements are a critical part of this case. If admissible, they will aid the State in its prosecution of Henry Hernandez and exonerate Julian Hernandez. . . . The State has a considerable interest in prosecuting the murder of one of its law enforcement officers. The need to assure that persons charged with such murder receive a fair trial through the benefit of their various constitutional rights, goes without saying. However, this interest could be no more substantial than it is a case such as this, where each defendant faces the death penalty, if convicted.
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> . . .
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> As a matter of law, the interests of the State in law enforcement and of the defendants to a fair trial outweigh Karem's

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[13] Both Henry and Julian moved to intervene, seeking disclosure of these materials.

Although Trenkler's attorney has, as noted, expressed an intention to seek the Interview, neither Shay Jr. nor Trenkler have, to date, filed any motion or, to the government's knowledge, taken any other step to that end. Nonetheless, one can readily envision how one or both defendants would have at least a late-awakened interest in acquiring a copy of the Interview, if for no reason other than to avoid surprise at trial. For example, if no party were to seek disclosure and if Channel 56 were to remain in sole possession of the Interview up to time of trial, one can easily see how Channel 56's airing of bits and pieces of the Interview throughout the trial -- timed to follow and likely structured so as to contrast daily trial testimony -- could negatively impact, at some point, all counsel's ability to chart his or her client's course.

interest in protecting his sources.

Id. (emphasis supplied).

Having described the government's interests in such a case as "considerable" and, coupled with the defendants' interests, ultimately deeming them superior to a reporter's claim of privilege -- even as regarded confidential information, the court refused Karem the relief sought, ruling that the reporter had no right to withhold the information sought. Id. at 142.

Simply put, production of the Interview will in no way threaten any confidential relationship or serve to restrain the media from publishing, or not publishing, any information it acquires. See LaRouche, supra, at 1181. Given the identity of its participants and its setting, nothing about the Interview was confidential or gave rise to any protectible expectation of confidentiality; accordingly, disclosure poses no obstacle to the media's ability to gather information and thus has no "chilling effect" on speech. Id. The government's pursuit of the Interview is undertaken in obvious good faith and certainly cannot be regarded as a routine matter. The administrative burden of production here is negligible.

The government's interests in obtaining evidence material to the pending criminal prosecution, on the other hand, are undeniably great, Branzburg v. Hayes, supra, 408 U.S. at 690-91; Karem v. Priest, supra, 744 F.Supp. at 142, and surely outweigh the lesser, primarily perception-based, concerns advanced by Channel 56. See LaRouche, supra, at 1183 (NBC's First Amendment

concerns -- which include no confidentiality factor -- deserving of only "very light weight" and present "no real likelihood of any serious appeal" on decision to disclose).

CONCLUSION

The government's request clearly satisfies the three-pronged requirements of Rule 17(c). Moreover, production of the Interview does little, if any, harm to any real or perceived First Amendment interest advanced by Channel 56 -- particularly where no confidential source or information is involved -- while advancing the government's, and thus the public's, clear and substantial interest in effective law enforcement. Branzburg v. Hayes, supra. Accordingly, the government respectfully requests that this Court order (proposed Order attached) that the Interview be produced for in camera review, and that the parties thereafter appear to be heard on the government's continuing demand that the Interview be disclosed to all parties for trial

and trial preparation purposes. See Larouche, supra, 841 F.2nd at 1183.[14]

Respectfully submitted

A. JOHN PAPPALARDO
United States Attorney

By: _____
PAUL V. KELLY
Assistant U.S. Attorney

_____
FRANK A. LIBBY, JR.
Assistant U.S. Attorney

CERTIFICATE OF SERVICE

Suffolk, ss. Boston, Massachusetts
January 28, 1993

I, FRANK A. LIBBY, JR., Assistant U.S. Attorney, do hereby certify that I have this day served, by first-class mail, postage prepaid, a copy of the foregoing Memorandum of Law in Support of Government's Motion for Order, to counsel of record.

_____
FRANK A. LIBBY, JR.
Assistant U.S. Attorney

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[14] In addressing the manner in which it envisioned subsequent proceedings would be had in LaRouche, the First Circuit stated that it would "rely on sensitive district court conduct of in camera reviews . . . ", id. at 1183, and in this regard, quoted with approval, the following comments made by the Second Circuit in United States v. Burke, 700 F.2nd 70 (1983):

> We encourage the courts to inspect potentially sensitive documents, especially in situations where, as here, the record reveals that the ... work papers were not sufficiently voluminous to render in camera review impracticable.

Id. at 78 n.9.