

Court Rejects Murder Defendant's Subpoena for Outtakes

North Carolina Shield Statute Protects TV Documentary Show

By Jonathan Buchan and Linda Steinman

Relying upon the state's journalist's shield statute, a North Carolina state trial court rejected a murder defendant's subpoena for the production of twenty hours of outtakes shot by the producers of *The First 48* television show in connection with its coverage of the investigation of a drug-related killing.

The court expressly rejected the defendant's contention that *The First 48*, and the A&E Television Network on which it is broadcast, did not qualify as "journalists" or "news media" under the North Carolina shield law. The court also denied the defendant's motion for voluntary discovery of that raw film footage directly from the Charlotte-Mecklenburg Police Department or from *The First 48* pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and North Carolina's criminal discovery statute, rejecting the defendant's contention that *The First 48* was acting on the government's behalf or as a prosecutorial agency.

Background

ITV Studios, Inc. is the producer of *The First 48*, a documentary series on police homicide investigations that has aired on the A&E television network since 2004. *The First 48* depicts various police detective units throughout the country as they investigate homicides. The series focuses primarily on the first forty-eight hours of an investigation – believed to be the most critical time period for solving a violent crime – and aims to provide a realistic portrayal of the investigative process. *The First 48*'s field producers accompany and film the police officers as they pursue their investigation.

The First 48 in early 2010 entered into a written agreement with the Charlotte-Mecklenburg Police Department ("CMPD") permitting *The First 48* to accompany

and film the CMPD for the purpose of creating episodes for the television series. The agreement provided that *The First 48* was the sole owner of its raw footage and related materials.

On August 22, 2010, *The First 48*'s field producers began covering the CMPD's investigation of the murder of Oscar Chavez, who had been stabbed that day in his car in what appeared to be a drug deal and robbery gone wrong. Detectives interviewed the 911 caller (an eyewitness who noted the license plate number of the vehicle allegedly transporting the perpetrators) and the car's owner, who implicated a young man named Jonathan Fitzgerald and his girlfriend. In police interviews videotaped by CMPD, Fitzgerald confessed to stabbing Chavez and was charged with first degree murder.

ITV filmed over 20 hours of footage related to the Chavez investigation. That raw footage was not provided to the CMPD, but was instead shipped to ITV's office in New York to be edited into a 22-minute episode. In accordance with its agreement with CMPD, *The First 48* permitted CMPD to review the "rough cut" of the planned episode of the Chavez investigation to "ensure factual accuracy." *The First 48* retained "absolute discretion" to determine the editorial content of each episode, subject to one restriction: the episodes could not contain any confidential investigatory, procedural, and/or operational information concerning CMPD which would not be available to the general public.

In October 2010, Fitzgerald's attorney filed a motion for voluntary discovery seeking to have CMPD and *The First 48* turn over all video footage and other notes and information related to the filming of the Chavez investigation, citing *Brady* and N.C.G.S. § 15A-90, the North Carolina statute

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Defendant failed to demonstrate that the substance of the information contained in the raw, unedited footage was not obtainable from other sources, including the police officers and detectives who were present during the events and from other witnesses to the crime and the crime scene.

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governing mandatory disclosure of law enforcement files to criminal defendants.

Defendant Fitzgerald alleged that CMPD and *The First 48* were required under *Brady* to turn over to him the raw footage because the producers had been “acting on the government’s behalf” in filming the investigation. In addition, Fitzgerald asserted that *The First 48* was a “prosecutorial agency” under the state statute because it had allegedly obtained information on behalf of CMPD in connection with the investigation of a crime. Fitzgerald also served a subpoena *duces tecum* on *The First 48* seeking all raw footage and notes related to the investigation.

The First 48 moved to intervene in the criminal proceeding for the limited purpose of opposing the motion for voluntary discovery and filed its objection to that motion. *The First 48* also filed its objection to the subpoena on several grounds, including the protection provided by the North Carolina journalist’s privilege statute, N.C.G.S. § 8-53.11. The District Attorney and CMPD both ultimately opposed the compelled disclosure of the material.

On January 28, 2011, the court held an evidentiary hearing and heard testimony from witnesses called by the defendant, including CMPD’s police chief, the lead homicide detective in the Chavez investigation, and several other police detectives and personnel who were involved in the Chavez investigation.

They were questioned at length regarding the substance of the agreement between *The First 48* and CMPD and the role of *The First 48*’s field producers in filming homicide investigations generally and specifically in the Chavez case. *The First 48*’s co-executive producer, Mike Sheridan, also testified.

The Court’s Ruling

The trial court ultimately rejected Fitzgerald’s contention that *The First 48* was required to produce its raw footage under *Brady* or under the North Carolina criminal discovery statute. The court found that *Brady* did not apply because the information sought was not in the possession of CMPD and because *The First 48* had not acted “on the government’s behalf” in its filming of the investigation. The court also found that the North Carolina statute did not apply because *The First 48* was not acting on the government’s behalf and was not a “prosecutorial agency” involved in the investigation of the crime. The court noted that the

agreement with CMPD permitted police to limit *The First 48*’s filming in order to protect the public safety or the security of the investigation, but found that these restrictions did not result in the field producers being under the CMPD’s supervision or control. The court also noted that the CMPD and the district attorney at no time had possession, custody, or control of the raw, unedited footage and that the CMPD had no legal right or authority to obtain *The First 48*’s raw, unedited footage.

The court also rejected defendant’s contention that *The First 48* and the A&E Television Network did not qualify as “journalists,” or as “news media” under the North Carolina privilege statute. Defendant argued that A&E’s focus was on entertainment, not news, pointing to shows such as “Dog the Bounty Hunter,” “Billy the Exterminator,” and “The Sopranos.”

The trial court held that *The First 48* did qualify for protection under the North Carolina shield statute. (*The First 48* presented evidence that A&E in fact broadcasts a wide variety of programming, including documentary films and drama series, as well as documentary programs such as *The First 48*.) The court also concluded that defendant had failed to demonstrate by the greater weight of the evidence that the information sought was essential to Fitzgerald’s defense.

The court’s April 15, 2011 Order noted specifically that the evidence presented revealed no specific information that would be contained in *The First 48*’s raw footage which would be essential to his defense: “There was nothing at the crime scene that was not thoroughly documented by CMPD’s own photos, sketches, and descriptions, and there was nothing which suggested that *First 48* had any greater access to evidence at the crime scene or at any other location than did the police.”

The court also concluded that the defendant failed to demonstrate that the substance of the information contained in the raw, unedited footage was not obtainable from other sources, including the police officers and detectives who were present during the events and from other witnesses to the crime and the crime scene. For those reasons, the court found that the shield statute protected *The First 48* from compelled production of the raw footage.

The First 48 and its parent company *ITV Studios, Inc.* were represented by *Linda Steinman and Elisa Miller of Davis Wright Tremaine LLP* and by *Jonathan Buchan and Curtis Griner of McGuireWoods LLP*. *Jonathan Fitzgerald* is represented by *Jeremy B. Smith of Smith and Roberts Law Firm, PLLC*.