VIRGINIA: IN THE CIRCUIT COURT OF ROCKINGHAM COUNTY

COMMONWEALTH OF VIRGINIA	)	
v.	)	
RUDOLPH GARY DEAN, JR.,	)	Case No. CR 12000521-00
Defendant.	)	

MOTION TO QUASH SUBPOENA

Pastor Cindy Carr, by counsel, respectfully requests the Court to quash the subpoena issued to her on September 18, 2012 by the Commonwealth. As set forth below, the materials requested are not relevant to the case, and the subpoena interferes with the First Amendment rights of Pastor Carr and others.

FACTS

Movant Cindy Carr is the pastor at River of Life Ministries, d/b/a The River Church, in Harrisonburg, Virginia. (Carr Aff. ¶ 2, attached hereto as **Exhibit A**.) The church believes that part of being a good Christian is standing up for justice and supporting victims of injustice in the community. Pastor Carr views this as part of her pastoral mission. (*Id.* ¶ 3.)

Defendant Rudolph Gary Dean, Jr., has long been active with The River Church. After his arrest, the church viewed it as their responsibility to support him however they could. Thus, shortly after his arrest, and again in August 2012, the church hosted fundraisers to help raise money for his legal defense. (*Id.* ¶ 4.) After the preliminary hearing on April 17, 2012, at which the alleged victim, Robert Crawford testified, Pastor Carr and others in her church became convinced that Mr. Dean had acted in self-defense and was being unjustly prosecuted. They

resolved to take further action in support of Mr. Dean. Again, they viewed such support as part of their religious mission. (*Id.* ¶ 5.)

On July 7, 2012, the church organized a petition drive to urge the Commonwealth's Attorney to dismiss the charges against Mr. Dean in light of what they considered to be clear evidence that he acted in self-defense. (*Id.* ¶ 6.) At trainings for volunteer petition circulators, some of the volunteers were concerned that they or the signers of the petitions might be subject to retaliation. Church officials told them that they would not actually submit the petitions unless it became necessary; i.e., if it appeared, shortly before the trial date, that no dismissal or plea agreement was forthcoming. (Carr Aff. ¶ 7; Gerding Aff. ¶ 3, attached hereto as **Exhibit B**.)

Indeed, a number of people supported Mr. Dean's cause but were reluctant to sign the petition due to fear of retaliation. Some of these people did sign the petition after they were assured that the signatures would be submitted only if necessary. Others were too fearful of retaliation to sign even with such assurances. (Gerding Aff. ¶ 4.)

The church and its volunteers are continuing to collect signatures. It is their intention to try to collect as many signatures as possible until such time, if any, that they deem it necessary to submit the petitions to the government. (Carr Aff. ¶ 8.) The subpoena challenged here seeks the signed petitions collected by the church and its volunteers.

ARGUMENT

I. THE PETITIONS ARE NOT RELEVANT

A subpoena in a criminal case must be "material to the proceedings." Rule 3A:12 (b). The petitions subpoenaed in this case have no bearing on whether the defendant committed malicious wounding or acted in self-defense. The subpoena should therefore be quashed.

The Commonwealth asserts that it wants the petitions in order to exclude signatories from the jury. But the petitioners can find no cases in Virginia – or any other state – authorizing a subpoena for such a purpose. In the few cases addressing such subpoenas, courts have held that they are improper, and that litigants should instead question jurors about their associations on *voir dire.* For example, in *Martin v. Khoury*, 843 S.W.2d 163 (Tex. App. 1992), a plaintiff subpoenaed the membership list of an organization called East Texans Against Lawsuit Abuse, Inc., contending that he needed it to identify potentially biased jurors. The court held that the subpoena was improper:

> The information sought here is not the type of information that is generally subject to discovery by subpoenaing the records of an organization. In jury selections, the potential jurors are often asked about whether they have ever been involved with certain occupations, organizations, medical treatments, and such other background information that the attorneys believe will help them in the jury selection process. . . . We know of no case where outside records concerning jurors were subpoenaed in order to ascertain this information. . . . Until a party has demonstrated that this information cannot be obtained by the voir dire of the jury panel, discovery should not be extended in order to acquire such information. Permitting counsel to obtain any material from any person, regardless of whether that person was a party or whether that information was relevant to the suit in progress, creates an open invitation to enter the realm of chaos.

843 S.W.2d at 166-67. *See also Reeves v. State*, 470 So.2d 1374 (Ala.Cr.App. 1985) (Trial court properly quashed subpoena seeking names of all local members of Mothers Against Drunk Driving, even though drunk driving defendant claimed the list was necessary in order to obtain an impartial jury. Defense counsel could have questioned the jurors in *voir dire* about their connection to the organization).

As in *Martin* and *Reeves*, the requested materials here are not relevant to the subject matter of the prosecution. Any information that the Commonwealth needs about potential jurors may be obtained through *voir dire*.

II. THE SUBPOENA VIOLATES THE FIRST AMENDMENT

A. Subpoenas that Burden First Amendment Rights Are Subject to Heightened Requirements of Relevance and Necessity

Subpoenas and court orders have the potential to greatly interfere with First Amendment rights. Under such circumstances, courts must carefully weigh the interests at stake, and should uphold a subpoena only when the government has demonstrated an overriding need for the subpoenaed documents that outweighs the First Amendment rights involved.

The seminal case is *NAACP v Alabama*, 357 U.S. 449 (1958), in which a state court ordered the NAACP to produce its membership list to the state Attorney General as part of an investigation into the organization's activities. The U.S. Supreme Court held that "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." 357 U.S. at 460. Moreover, "compelled disclosure of affiliation with groups engaged in advocacy may constitute a[n] effective [ ] restraint on freedom of association." *Id.* at 462. In the case of the NAACP, "compelled disclosure of [the organization's] membership is likely to affect adversely the ability of [the NAACP] and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure." *Id.* at 462-63. Finally, the Court held that the state had not shown sufficient justification for interfering with the First Amendment rights of the NAACP and its members. Although the demand for the membership list was purportedly for the purpose of determining whether the NAACP was conducting business in Alabama, the NAACP had already admitted that it was doing so, and had complied with all of

the state's other requests for production. Thus, Alabama had "fallen short of showing a controlling justification for the deterrent effect on the free enjoyment of the right to associate which disclosure of membership lists is likely to have." *Id.* at 466.

The U.S. Supreme Court later commented: "We long have recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest. Since *NAACP v. Alabama* we have required that the subordinating interests of the State must survive exacting scrutiny." *Buckley v. Valeo,* 424 U.S. 1, 64 (1976). Accordingly, lower courts, including the Supreme Court of Virginia, have consistently held that government demands for materials protected by the First Amendment must not be granted without a careful weighing of the state's interests against the chilling effects that forced production of such materials may cause.

For example, in *Brown v. Commonwealth*, 214 Va. 755, 757-58 (1974), the Supreme Court of Virginia upheld a trial court's determination that a reporter should not be compelled to disclose her confidential source in a criminal trial, even though it might infringe a defendant's right to impeach the credibility of the prosecution's witnesses. *Id*. The court recognized that the confidentiality of sources is an "important catalyst to the free flow of information guaranteed by the freedom of press clause of the First Amendment." *Id*. at 757. Although not an absolute right, the reporter's privilege should yield "only when the defendant's need is essential to a fair trial," and that whether a need is "essential" "must be determined from the facts and circumstances in each case." *Id*.; *see also Philip Morris Cos. v. American Broad. Cos.*, No. LX-816-3, 1995 WL 1055921, at *2 (Va. Cir. Ct. July 11, 1995) (recognizing that the reporter's privilege of confidentiality of information is related to the First Amendment and employing the balancing test articulated in *Branzburg v. Hayes*, 408 U.S. 665 (1972)).

The need for careful scrutiny of subpoenas and court orders that interfere with First Amendment rights extends beyond the journalistic privilege. In *Cusumano v. Microsoft Corp.*, 162 F.3d 708 (1st Cir. 1998), the First Circuit upheld the district court's refusal to compel production of research materials compiled by two academic investigators. "Mindful that First Amendment values are at stake" and recognizing that "compelling the disclosure of research materials denigrat[es] a fundamental First Amendment value," the First Circuit held that "when a subpoena seeks divulgement of confidential information compiled by a journalist or academic researcher in anticipation of publication, courts must apply a balancing test." *Id*. at 710, 716-17. Similarly, in *Dow Chem. Co. v. Allen*, 672 F.2d 1262, 1265-66 (7th Cir. 1982), the Seventh Circuit upheld a district court's refusal to enforce an administrative subpoena that sought to compel researchers from the University of Wisconsin to produce notes, working papers, and raw data relating to ongoing, incomplete studies. The Seventh Circuit stressed that "respondents' interest in academic freedom may properly figure into the legal calculation of whether forced disclosure would be reasonable." Id. at 1276-77.

Such heightened scrutiny has also been applied to subpoenas for information about individuals' reading habits. In *Lubin v. Agora, Inc.*, 882 A.2d 833, 842 (Md. 2005), the court refused to allow the state to subpoena a newsletter publisher's subscriber list because it failed to "establish a substantial relation between the information sought and an overriding and compelling State interest." *See also SEC v. Hirsch Org., Inc.*, No. M-18-304, 1982 WL 1343, at *2-3 (S.D.N.Y. Oct. 25, 1982) (citing First Amendment interests in denying enforcement of an investigative subpoena requesting a subscriber list); *In re Grand Jury Subpoena to Amazon.com Dated August 7, 2006*, 246 F.R.D. 570, 573 (W.D. Wis. 2007) (holding that courts must consider First Amendment concerns in determining whether to compel compliance with subpoena seeking

customer list). In the case of *In re Grand Jury Investigation of Possible Violation of 18 U.S.C. § 1461 et seq.*, 706 F.Supp.2d 11 (D.D.C. 2009), the court set aside a grand jury subpoena for the customer list of a purveyor of sexually explicit material suspected of being obscene. The court held that "the United States may only obtain the records if it demonstrates a compelling need for them and a sufficient nexus between the records and the grand jury's investigation," 706 F.Supp.2d at 18, and that the government failed to meet that burden.

In sum, in order to subpoena material protected by the First Amendment, the government must show more than bare relevance; it must show an overriding interest that outweighs the First Amendment interests involved.

B. The Subpoena Burdens the First Amendment Rights of Pastor Carr, the Petition Circulators, and the Petition Signatories

The petitions subpoenaed by the Commonwealth are precisely the sort of materials that the First Amendment protects. Organizing a petition drive, circulating petitions, and signing petitions urging certain action by the government is core political speech protected by the First Amendment.

> As a general matter, collecting petitions is a protected activity under the First Amendment. It involves an encounter in which the petitioner advocates a position, seeking to persuade the listener to sign on to the cause. In response, the signer expresses his support for the position expressed. The petition creates an environment that encourages speech of a kind central to the First Amendment's concern.

Walker v. Leonard, 325 F.3d 412, 418 (3rd Cir. 2003). *See also Chiu v. Plano Independent School Dist.*, 339 F.3d 273, 280 (5th Cir. 2003) (circulating petitions is protected speech); U.S. v. Christopher, 700 F.2d 1253, 1259 (9th Cir. 1983) (same); *Norfolk v. Cobo Hall Conference and Exhibition Center*, 543 F.Supp.2d 701, 707 (E.D. Mich. 2008) (same).

As in *NAACP v Alabama*, Pastor Carr and the other petition organizers sought to associate with their neighbors in order to promote a particular political view: that the charges

against the defendant should be dismissed. Signatories to the petition were assured that their names would not be released until and unless it became necessary – i.e., if it appeared that no dismissal or plea agreement would take place prior to trial. Premature disclosure of the signatories' names will chill potential supporters from participating in the church's ongoing petition drive.

Moreover, the First Amendment protects not only the content of speech, but the speaker's ability to control whether and when to speak. The U.S. Supreme Court has repeatedly held that the First Amendment protects the right *not* to speak. *Knox v. Service Employees Intern. Union, Local 1000*, 132 S.Ct. 2277 (2012); *Wooley v. Maynard*, 430 U.S. 705 (1977); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974*); Board of Education v. Barnette*, 319 U.S. 624 (1943). A corollary of that right is the ability to control the timing of one's own speech. For example, in *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), a book publisher sued a magazine for copyright infringement when the magazine excerpts from a soon-to-be-published book. The Court noted that "an author's right to choose when he will publish" is "deserving of protection" because "[t]he period encompassing the work's initiation, its preparation, and its grooming for public dissemination is a crucial one for any literary endeavor." 471 U.S. at 555. The Court concluded that the Copyright Act's protection of a writer's "right to control the first public distribution" of his work served important First Amendment interests. *Id.* at 559-60. *See also Dow Chemical Co. v. Allen*, 672 F.2d 1262, 1274 (7th Cir. 1982) (upholding a lower court's denial of subpoena for unpublished research findings based on the finding that "the risk of even inadvertent premature disclosure so far outweighed the probative value of and need for the information as to itself constitute an unreasonable burden on respondents.")

Just like the publishing company in *Harper & Row*, the petition organizers and signatories have a right to control the timing of their speech. They have made a strategic decision to withhold the petitions until shortly before trial, and to submit them only if a dismissal or plea agreement is not forthcoming. By forcing earlier disclosure of the petitions, the subpoena interferes with the speakers' right to determine how and when their speech is likely to be most effective.

C. The Commonwealth Cannot Justify the Burden on First Amendment Rights Imposed by the Subpoena.

As explained above, the Commonwealth must demonstrate an overriding interest in order to obtain materials protected by the First Amendment. It cannot do so. The Commonwealth asserts that it needs the petitions in order to eliminate jurors who have already formed a judgment about the case. But the Commonwealth can readily accomplish this without intruding on Pastor Carr's and her associates' First Amendment rights, by simply asking prospective jurors whether they have signed the petition, whether they have already formed an opinion about the case, and whether they can set aside that opinion and fairly judge the case on the evidence. There is no reason to believe that these standard *voir dire* questions will be ineffective in this case. There is no reason to compromise the First Amendment rights of Pastor Carr, the other petition organizers, and the signatories when this alternative is available. *See Martin*, 843 S.W.2d at 167.

CONCLUSION

For the foregoing reasons, Pastor Carr respectfully requests that the subpoena directed at her be quashed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this ___ day of October, 2012, I served a true and correct copy of the foregoing document by U.S. Mail, postage prepaid, to the following:

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