

BARBARA JONES RULES PROJECT VERITAS WAS NOT ENGAGED IN JOURNALISM WHEN BROKERING ASHLEY BIDEN'S STOLEN DIARY

After 16 months, Barbara Jones has submitted her Special Master report in the Project Veritas investigation to Judge Analisa Torres.

See this post for background.

She found 1,021 documents on James O'Keefe, Eric Cochran, and Spencer Meads' phones that were responsive to the warrants in the case. Of those:

- She reviewed 17 for crime-fraud exception and after asking for submissions on 14 of them (which I noted here), she found that 10 were excepted
- She found 61 documents that Project Veritas successfully argued were not related to the search warrant

By my math, that leaves 953 files she recommends be turned over to investigators.

Much of the decision builds off the guilty pleas that Miles Kerlander and Aimee Harris entered into last August. Having already identified PV's sources and established a crime had been committed, many of the questions regarding journalistic equities were far more limited.

Jones never mentioned that this case arose – and the first warrants against journalists obtained

– under the Trump Administration. Though she does scoff at PV’s claims of malice.

Perhaps the most significant part of this ruling pertains to how she applies *Bartnicki*, which protects the publication of illegally obtained materials that the journalist had no role in obtaining. Not only does she except the case of PV, who are subjects of the investigation, but she seems to distinguish between investigative protection and criminal protection.

First, Petitioners’ heavy reliance on *Bartnicki v. Vopper*, 532 U.S. 514 (2001), is misplaced. *Bartnicki* addressed the narrow question of whether civil liability may be imposed on a publisher who obtained information in a lawful manner but from a source who obtained it unlawfully, a question that the Supreme Court answered in the negative. See *id.* at 528, 533–35. Here, the question is whether the Government may receive documents responsive to valid search warrants. *Bartnicki* does not speak to this issue, nor does it provide general principles applicable to my review.

Petitioners repeatedly argue that they are like the publisher in *Bartnicki* and that their actions fall “within *Bartnicki*’s protection.” James O’Keefe and Project Veritas’s Brief on First Amendment and Journalistic Privileges 19, Apr. 1, 2022 (“PV Br.”). Petitioners argue that *Bartnicki* renders the crimes under investigation here—including interstate transportation of stolen property and possession of stolen goods—“non-crimes.”⁴ *Id.* But *Bartnicki* addresses liability for publication of unlawfully obtained information (there, by a source) and does not “protect” unlawful acquisition of information. It does not suggest that people are free to commit unlawful acts simply because they

are journalists. In fact, Bartnicki explicitly left open the question whether the government may punish not only a publisher's "unlawful acquisition" of information but "the ensuing publication as well." 532 U.S. at 528 (addressing only punishment of publication of materials obtained by a publisher lawfully but by a source unlawfully). Bartnicki certainly does not foreclose a government investigation of unlawful acts in acquiring material or excuse unlawful conduct by a journalist. See also *Branzburg v. Hayes*, 408 U.S. 665, 691 (1972) ("It would be frivolous to assert . . . that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws.").⁵ Nor does Bartnicki's holding restrict the evidence that the Government may receive under the standards set forth above.

4 To the extent Petitioners assert "no credible claim that Project Veritas reporters stole the diary or anything else," PV Br. 19, the crimes listed in the search warrant include conspiracy to transport stolen property across state lines, interstate transportation of stolen property, and possession of stolen goods.

5 Even if Bartnicki was applicable to this review, that decision was made based on a factual record that clearly established the publisher had nothing to do with the wrongdoing and received the materials in a lawful manner. Petitioners' roles are currently under investigation.

The judge in this case will now decide whether to accept this report. But the case against James O'Keefe and others would still take some time for resolution.

In another case where a search warrant originally appeared abusive but turned out to be tied to something beyond journalism, NPR reports on how Rolling Stone protected James Meek in its story breaking the story of the search targeting him in child sexual abuse material case.