IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff, v. DAVID MARCH, Defendant.	)	Case No.: 2017-CR-9700 Judge Domenica A. Stephenson

BRIEF OF *AMICI CURIAE*
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
AND 19 MEDIA ORGANIZATIONS IN SUPPORT OF
REPORTER JAMIE KALVEN'S MOTION TO QUASH SUBPOENA

INTRODUCTION

This case concerns whether journalist Jamie Kalven[1] should be compelled to disclose information about his newsgathering activity and sources from his 2015 reporting on the shooting of Laquan McDonald. The defendant, former Chicago police detective David March, is now facing charges for allegedly conspiring to obstruct justice in the investigation of a fellow officer, Jason Van Dyke, who shot and killed McDonald. March has subpoenaed Kalven's testimony. *See* Kalven Motion to Quash, filed Nov. 20, 2018. The Reporters Committee for Freedom of the Press and 19 additional media organizations[2] (collectively, "*amici*") submit this brief as *amici curiae* in support of Kalven's motion to quash the subpoena.

Kalven's article, "Sixteen Shots," revealed: an autopsy report that showed McDonald was shot 16 times throughout his body; an unnamed witness' account that McDonald had been "shying away" from police when they started shooting; and confirmation from an unnamed source that a police dashboard-camera video existed documenting the incident. Jamie Kalven, *Sixteen Shots*, Slate Magazine, Feb. 10, 2015, https://perma.cc/X5BN-KQQ6. Kalven's reporting contradicted the official narrative of the shooting—that McDonald had lunged at the police with a knife—and ultimately forced Chicago city officials to release the video, which showed McDonald being shot repeatedly as he walked away from the officers. Julie Bosman, *Journalist Who Told Laquan McDonald's Story Faces Fight Over Sources*, N.Y. Times, Nov.

---

[1] Craig Futterman, a professor at the University of Chicago Law School, has also been subpoenaed. *See* Motion to Quash, filed Nov. 20, 2018. Given *amici*'s interest in supporting journalists and advocating for press freedoms, this brief will focus on Kalven's subpoena.

[2] These media organizations are the American Society of Journalists and Authors, American Society of News Editors, The Associated Press, Associated Press Media Editors, Association of Alternative Newsmedia, BuzzFeed, Chicago Tribune Company LLC, Dow Jones & Company, Inc., First Look Media Works, Inc., Gannett Co., Inc., Illinois Broadcasters Association, Illinois Press Association, News Media Alliance, Online News Association, Radio Television Digital News Association, The Slate Group, Society of Professional Journalists, Sun-Times Media, LLC and Univision Communications Inc. Some of these organizations and the Reporters Committee have also intervened in this case to gain access to sealed court filings and related relief.

26, 2017, https://www.nytimes.com/2017/11/26/us/chicago-police-shooting-journalist-laquan-mcdonald.html?_r=0.

During his criminal prosecution last year, Van Dyke also sought to compel Kalven's testimony, but the presiding judge in that case granted Kalven's motion to quash, pointing to, among other things, the Illinois Reporter's Privilege Act, 735 ILCS 5/8-901, *et seq.* (the "Act"). *See* Kalven Motion to Quash, Ex. A (Order at 4, filed Dec. 13, 2017) ("Kalven's source of information is protected by the Reporter's Privilege.").

Compelling Kalven's testimony would violate the Act, which was adopted to protect precisely the type of newsgathering activity and reporter-source communications at issue in this case—those that shed light on matters of critical public importance, such as how police shootings of civilians are investigated and resolved. Divesting a reporter of these protections is appropriate only under extraordinary circumstances, where "all other available sources of information have been exhausted" and "disclosure of the information sought is essential to the protection of the public interest involved." 735 ILCS 5/8-907(2). Although the specific reasons that March asserts for compelling Kalven's testimony remain unclear, he must satisfy a stringent standard for overcoming the privilege, which protects the vital flow of information to the public. For all the reasons set forth herein and in Kalven's motion to quash, this Court should grant Kalven's motion and quash the subpoena.[3]

[3] Although not addressed in this brief, Kalven's motion demonstrates that the special witness doctrine also protects him from compelled disclosure of the information sought.

ARGUMENT

I. The Illinois Reporter's Privilege Act broadly protects confidential and non-confidential sources and newsgathering activities, providing a vital safeguard to the free flow of information to the public.

Illinois has long recognized the need to provide strong protections for free speech and an unfettered press. This principle is reflected in the Illinois reporter's privilege, which "evolved from a common law recognition that the compelled disclosure of a reporter's sources could compromise the news media's first amendment right to freely gather and disseminate information." *In re Special Grand Jury Investigation*, 104 Ill. 2d 419, 424 (1984) (internal citations omitted). In 1971, Illinois codified this principle in the Act, which conferred "a *presumptive privilege* on the newsgathering functions of reporters and the media." Samuel Fifer & Gregory R. Naron, *Illinois*, *in* REPORTER'S PRIVILEGE COMPENDIUM, https://www.rcfp.org/illinois-privilege-compendium/i-introduction-history-background; *In re Arya*, 226 Ill. App. 3d 848, 852 (1992). In the subsequent decades, a national consensus on this issue has emerged, as nearly every other state has adopted some form of protection for reporters' communications with sources. *See, e.g.*, RCFP Reporters Privilege Map, https://www.rcfp.org/browse-media-law-resources/guides/reporters-privilege/shield-laws (showing that every state except Wyoming and Hawaii has either adopted a shield law or court-recognized privilege).

The Act broadly forbids courts from compelling "any person to disclose the source of any information"—confidential or not[4]—"obtained by a reporter," except where no other law prevents the disclosure, "all other available sources of information have been exhausted," and (in

[4] *Salamone v. Hollinger Int'l, Inc.*, 347 Ill. App. 3d 837, 842 (1st Dist. 2004) (citing *People v. Slover*, 323 Ill. App. 3d 620, 623 (4th Dist. 2001)).

non-libel cases like this) such disclosure is "essential" to protect the public interest. 735 ILCS 5/8-901, 907. The statute defines "source" as "the person or *means* from or through which the news or information was obtained." *Id.* at 5/8-902(c) (emphasis added). By adopting an expansive definition of "source," the Illinois legislature sought "[t]o further the public interest in a free press," protecting "not only *identities* of sources," but also the *means* by which journalists gather the news. *Kelley v. Lempesis*, No. 13-cv-4922, 2015 WL 4910952, at *2 (N.D. Ill. Aug. 17, 2015) (quoting 735 ILCS 5/8-902(c)); *Slover*, 323 Ill. App. 3d at 624 (noting that the legislature could have—*but did not*—"limit the scope of section 8–901 of the Code by inserting either 'the name of' or 'the identity of' before 'the source of any information'"). "Means" is defined as "something useful or helpful to a desired end." *Slover*, 323 Ill. App. 3d at 624 (quoting Merriam Webster's Collegiate Dictionary 720 (10th ed.1998)). The Act thus shields journalists from being compelled to reveal the means used "to collect newsworthy information." *Id.* (finding unpublished photographs to be "source" of information protected under Act); *see also Simon v. Northwestern Univ.*, 321 F.R.D. 328, 332, 45 Media L. Rep. 1961 (N.D. Ill. 2017) ("audio and visual data, notes, drafts, and transcribed interviews gathered by" filmmakers in creation of documentary were "the source from which [documentary] was created" and covered by Act); *Smith v. Advocate Health Care Network*, 33 Med. L. Rptr. 1752, 1753 (Cir. Ct. Cook Cty. Sept. 10, 2004) (emphasizing that "[t]he reporter's privilege applies not only to the identity of a news source, but to the physical means by which the news is preserved"); *Redmond v. Illinois*, 19 Med. L. Rptr. 1446, 1447 (Cir. Ct. Cook Cty. Sept. 5, 1991) (noting that "the case law really expands the definition of source to cover items beyond just the name . . . to include the information and any other research materials of the reporter or the media entity"). (Copies of cases from Media Law Reporter are attached as Ex. 1.)

Relatedly, Illinois courts have long recognized that the Act protects all sources, whether they are confidential or not. *See supra* n.4. "[T]he definition of 'source' makes no distinction between confidential and nonconfidential 'person or means from or through which the news or information was obtained.'" *See People v. Silverstein*, 89 Ill. App. 3d 1039, 1043 (Ill. App. Ct. 1st Dist. 1980), *rev'd on other grounds*, 87 Ill. 2d 167 (1981) ("The compelled production of a reporter's resource materials is equally as invidious as the compelled disclosure of his confidential informants.") (quoting *Gulliver's Periodicals, Ltd. v. Chas. Levy Circulating Co.*, 455 F. Supp. 1197, 1204 (N.D. Ill. 1978)); *Kelley*, 2015 WL 4910952 (same; quashing subpoena for broadcaster's video outtakes); *Slover*, 323 Ill. App. 3d at 624 (subpoenaed photographs were privileged because Act "protects even nonconfidential sources").

The subpoenaing party has the burden of satisfying the rigorous test set forth above. *In re Arya*, 226 Ill. App. at 862. By placing this burden on the subpoenaing party, the legislature ensured that compelled disclosure would occur only as a "last resort" and under extraordinary circumstances. *Id.* at 862. The legislature adopted this high standard to protect the "'paramount public interest'" in maintaining "'a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters, an interest which has always been a principal concern of the First Amendment.'" *Silverstein*, 89 Ill. App. 3d at 1043 (quoting *Baker v. F&F Inv.*, 470 F.2d 778, 782 (2d Cir. 1972)). The Act aims to "preserve the autonomy of the press by allowing reporters to assure their sources of confidentiality, thereby permitting the public to receive complete, unfettered information." *In re Arya*, 226 Ill. App. at 852 (citing *Zerilli v. Smith*, 656 F.2d 705, 710–11 (D.C. Cir. 1981)).

Protection of reporters' newsgathering activity and reporter-source communications serves the health of our democracy by ensuring that citizens have access to information needed

"to make informed political, social, and economic choices." *Zerilli*, 656 F.2d at 711. The ability to foster and maintain relationships with sources is crucial to effective reporting, since reporters often rely on sources to publish news stories that inform the public of sensitive and important issues. As former Illinois Governor Richard Ogilvie explained upon signing the Act into law, the reporter's privilege promotes a "better informed public, for it allows reporters to seek the truth wherever it is to be found, without fear that their sources of information will be cut off by unnecessary disclosures." *In re Arya*, 226 Ill. App. at 852 (internal citations omitted).

The dangers of compelled disclosure of a reporter's source information loom especially large in criminal cases. Such compelled disclosure could result in a party using the news media as an investigative tool in a criminal case, undermining the media's autonomy and contravening legislative intent. *See id.* at 861. The news media's reports on criminal activities are an important source of information for the public about crime and government response to crime. Sources who believe that reporters are working as an investigative arm of the government or a defendant in a criminal case will be less likely to come forward with truthful information about government misconduct, leading to a loss of public knowledge about these critical issues. Thus, the presumption against compelled disclosure of source information is heightened in criminal cases, like this, where the "important social interests" underlying the privilege are "particularly compelling," and journalists should be "encouraged to investigate and expose evidence of criminal wrongdoing." *United States v. Lopez*, No. 86 CR 513, 1987 WL 26051, at *1 (N.D. Ill. Nov. 30, 1987) (citing *United States v. Burke*, 700 F.2d 70, 77 (3d Cir. 1983)).

II. The strict requirements of the Act are not overcome by speculative arguments.

Defendant March has apparently "refused repeated attempts" by Kalven to discuss the substance of what relevant, non-privileged testimony he seeks. *See* Motion to Quash at 1.

Further, since March has not yet filed an opposition to Kalven's motion, *amici* have little insight, beyond informal communications with March's attorney, into why March may believe that the reporter's privilege does not apply or has been overcome in this case.

Regardless of March's specific arguments, he must meet his burden of showing that the stringent standards of the Act have been satisfied before the reporter's privilege may be overcome. Mere speculation does not establish exhaustion or need or justify the extreme, "last resort" remedy of compelling the disclosure of a journalist's sources. *See People v. Childers*, 94 Ill. App. 3d 104, 112 (3d Dist. 1981) (affirming denial of application to divest reporter of source protections where "other sources not only were available to defendant but it is difficult to perceive what public interest might be involved"); *see also* Fifer & Naron, *supra* (collecting cases showing that Illinois courts have "consistently upheld" the powerful interests embodied in the Act and rejected frivolous attempts to compel disclosure of sources).

III. The public policy of the Act weighs decisively in favor of quashing March's subpoena.

In addition, the public interest in protecting a journalist's sources is particularly compelling in this case. Kalven's reporting exposed misconduct by the Chicago Police Department and an official cover-up that led to a public accounting and an investigation by the U.S. Department of Justice. He has won numerous awards for this article and others. *See, e.g.*, *About Jamie Kalven*, Invisible Institute, https://invisible.institute/jamie-kalven/; Michael Miner, *Jamie Kalven wins Polk Award for his coverage of Laquan McDonald*, Chicago Reader, Feb. 15, 2016, https://www.chicagoreader.com/Bleader/archives/2016/02/15/jamie-kalven-wins-polk-award-for-his-coverage-of-laquan-mcdonald. As *The New York Times* reported, "[i]f not for the reporting of Jamie Kalven, an independent journalist in Chicago, the world might never have known the name Laquan McDonald, a black teenager who was shot 16 times by a police officer

as he walked down a street holding a folding knife." Bosman, *supra*. Kalven's article "forced the case out of obscurity in the Police Department and at City Hall and into public view." Bosman, *supra*. The subsequent investigation into McDonald's death "upended Chicago," resulting in nightly demonstrations in the city, the firing of the police superintendent and the head of the Independent Police Review Authority, the state's attorney's loss of her re-election bid, calls for the mayor to resign, and a U.S. Department of Justice investigation into possible civil rights abuses. Bosman, *supra*.

This story illustrates precisely why source protections are necessary. Without them, the public may have never known how McDonald died, depriving it of the opportunity to hold the government and law enforcement accountable. Upholding Kalven's privilege to protect his sources and newsgathering activity serves the vital goals of the Act and will encourage people to continue to reveal government misconduct to reporters. Without this privilege, Kalven faces potential contempt of court or other sanctions, including incarceration. Raising the specter of such harsh penalties for reporters in Illinois, simply for engaging in constitutionally protected newsgathering activity, would set a dangerous precedent. The Court should not countenance such a result.

CONCLUSION

For these reasons, the Court should grant Kalven's motion to quash the subpoena.

Dated: November 26, 2018

Respectfully submitted,

Brendan J. Healey

Brendan J. Healey
Mandell Menkes LLC
One North Franklin, Suite 3600
Chicago, IL 60606
T. 312.251.1006
F. 312.759.2189

Counsel for the Reporters Committee for Freedom of the Press

Bruce D. Brown
Katie Townsend
Caitlin Vogus
Sarah Matthews
Reporters Committee for Freedom of the Press
1156 15th St. NW, Suite 1020
Washington, D.C. 20005
T. 202.795.9300
F. 202.795.9310
Of counsel

Additional counsel for amici are listed below

Kevin M. Goldberg
Fletcher, Heald & Hildreth, PLC
1300 N. 17th St., 11th Floor
Arlington, VA 22209
Counsel for American Society of News Editors

Karen Kaiser
General Counsel
The Associated Press
450 W. 33rd Street
New York, NY 10001

Kevin M. Goldberg
Fletcher, Heald & Hildreth, PLC
1300 N. 17th St., 11th Floor
Arlington, VA 22209
Counsel for Association of Alternative Newsmedia

Nabiha Syed
Vice President, Associate General Counsel
BuzzFeed
111 East 18th Street, 13th Floor
New York, NY 10003

Karen H. Flax
VP/Deputy General Counsel
Chicago Tribune
160 North Stetson Avenue
Chicago, Illinois 60601

Jason P. Conti
Jacob P. Goldstein
Dow Jones & Company, Inc.
1211 Avenue of the Americas
New York, NY 10036
Counsel for Dow Jones & Company, Inc.

David Bralow
First Look Media Works, Inc.
18th Floor
114 Fifth Avenue
New York, NY 10011

Barbara W. Wall
Senior Vice President & Chief Legal Officer
Gannett Co., Inc.
7950 Jones Branch Drive
McLean, VA 22107
(703)854-6951

Kurt Wimmer
Covington & Burling LLP
850 10th Street NW
Washington, DC 20001
Counsel for the News Media Alliance

Laura R. Handman
Alison Schary
Davis Wright Tremaine LLP
1919 Pennsylvania Avenue, NW
Suite 800
Washington, DC 20006
Thomas R. Burke
Davis Wright Tremaine LLP
Suite 800
500 Montgomery Street
San Francisco, CA 94111
Counsel for Online News Association

Kathleen A. Kirby
Wiley Rein LLP
1776 K St., NW
Washington, DC 20006
Counsel for Radio Television Digital News Association

Bruce W. Sanford
Mark I. Bailen
Baker & Hostetler LLP
1050 Connecticut Ave., NW
Suite 1100
Washington, DC 20036
Counsel for Society of Professional Journalists

Lan Nguyen
Head of Litigation
Univision Communications Inc.
605 Third Avenue, 12th Floor
New York, NY 10158
(212) 455-5248
lnguyen@univision.net

EXHIBIT 1

soned that "[j]ust as the inability to distinguish domestic from foreign materials justifies a ban on both, the impossibility of determining whether an image is 'actual' or 'virtual' warrants a prohibition of both." *Id.* at 1115.

All four circuits upholding the constitutionality of the CPPA found *Ferber* helpful, rather than harmful, to the government's position. In *Hilton*, the court noted that *Ferber* carved out an entire category of speech as unprotected by the First Amendment — i.e., child pornography. 167 F.3d at 69. "The *Ferber* Court did not establish a single one-size-fits-all constitutional definition of child pornography . . . but provided general guiding principles." *Id.* The First Circuit further noted that *Ferber* did give "greater leeway" to legislatures to regulate sexual depictions of children. *Id.* at 70; *see also Acheson*, 195 F.3d at 650 (citing same quote). Thus, the *Hilton* court found: "Relying on *Ferber*'s discussion of the importance of protecting children from sexual exploitation, [Hilton and amici] argue that the Supreme Court has strictly limited regulation of child pornography to images manufactured with the use of live children. But we find no firm basis for this overly restrictive reading of precedent." 167 F.3d at 72.

The Fourth and Eleventh Circuits focused on the evolution of child pornography since the *Ferber* decision. In *Mento*, the court found:

> *Ferber* necessarily dealt only with depictions of actual children, long before virtual pornography became an issue. Viewed in the proper context, *Ferber* in no way stands for the proposition that permissible governmental interests in the realm of child pornography would be forever restricted to the harm suffered by identifiable children participating in its production.

231 F.3d at 919. Similarly, the *Fox* court concluded that "*Ferber* and *Osborne*, decided long before the specter of 'virtual' child pornography appeared, in no way limit the government's interests in the area of child pornography to the prevention of only the harm suffered by the actual children who participate in the production of pornography." 248 F.3d at 402.

Thus, "reasonable minds" could and *did* differ about the impact of *Ferber* on the CPPA before the Supreme Court deemed it unconstitutional. Only hindsight can support the district court's assessment that *Ferber* inevitably sounded the death knell of the CPPA.

III. CONCLUSION

The district court's finding that the government's defense of the CPPA was not substantially justified is REVERSED, and the award of attorneys' fees under the EAJA is VACATED.

Smith v. Advocate Health Care Network

Illinois Circuit Court
Cook County

OPHELIA SMITH, et al. v. ADVOCATE HEALTH CARE NETWORK, et al.

No. 01 L 11814

September 10, 2004

NEWSGATHERING

[1] Forced disclosure of information — Disclosure of sources — In civil actions (§ 60.0303)

Forced disclosure of information — Disclosure of unpublished information — In civil actions (§ 60.1003)

Forced disclosure of information — Statutory privilege ("shield" laws) (§ 60.25)

Defendant hospital failed to demonstrate that videotaped outtakes of nonparty television station's interview with medical malpractice plaintiff should be treated differently from unpublished photographs, which in *People v. Slover*, 323 Ill.App.3d 620, 29 Med.L.Rptr. 2340 (2001), were found to be protected source of information within plain meaning of Illinois Reporter's Privilege Act, 735 Ill. Comp. Stat. 5/8-901.

[2] Forced disclosure of information — Disclosure of sources — In civil actions (§ 60.0303)

Forced disclosure of information — Disclosure of unpublished information — In civil actions (§ 60.1003)

Forced disclosure of information — Disclosure of unpublished information —

Contempt; sanctions (§ 60.1007)

Forced disclosure of information — Statutory privilege ("shield" laws) (§ 60.25)

Videotaped outtakes of nonparty television station's interview with plaintiff in medical malpractice case against hospital are privileged under Illinois Reporter's Privilege Act, 735 Ill. Comp. Stat. 5/8-901, even though they are relevant to litigation and other available sources of information have been exhausted, since disclosure is not essential to protect identifiable public interest in resolving litigation, promoting accurate reporting, or preventing perjury, and under facts of case, it appears that if plaintiff lied, she lied to television camera, and not under oath.

Medical malpractice action against hospital defendants. On defendant's motion to hold nonparty television station in contempt for failure to comply with subpoena, or, in the alternative, to divest station of reporter's privilege.

Denied.

Larry R. Rogers Jr., of Power Rogers & Smith, Chicago, Ill., for plaintiffs.

Susan M. Wilda and Mary N. Nielsen, of Hall Prangle & Schoonveld, Chicago, for subpoenaing defendant.

Jay Ward Brown, of Levine Sullivan Koch & Schulz, Washington, D.C., for nonparty CBS Broadcasting Inc., d/b/a WBBM-TV.

Lawrence, J.:

Michael Reese Healthcare Corp. (the Hospital) is a defendant in a medical malpractice action brought by Ophelia Smith. CBS Broadcasting, Inc. is the owner and operator of a Chicago television station, WBBM-TV.

Prior to her discovery deposition, Ms. Smith was interviewed by Pam Zekman of WBBM-TV. A portion of the interview was broadcast on March 3, 2004 as part of a report on hospital laboratory errors. The Plaintiff was videotaped at her home and at her attorney's office, although only the segment taped at her attorney's office contained audio. The court assumes, as do the Hospital and CBS, that the Plaintiff discussed the advice she received from her health care providers before surgery and that some of the audio portion of the interview consisted of outtakes which were not broadcast.

On March 4, 2004, the Hospital subpoenaed the videotape of the interview. After an exchange of correspondence, CBS produced the broadcast portion but declined to produce the outtakes, asserting that the outtakes were privileged under the Illinois Reporter's Privilege Act. In response, the Hospital has moved to hold CBS in contempt for failure to comply with the subpoena or, in the alternative, to divest CBS of its privilege claim as provided for in the Act.

The Illinois Reporter's Privilege Act.

The Act is part of the evidence section of the Illinois Code of Civil Procedure. It is found at 735 ILCS 5/8-901 et seq. Sec. 901 declares: "No court may compel any person to disclose the source of any information obtained by a reporter except as provided in [secs. 903-907] of this Act. Sec. 902(c) defines "source" as "... the person or means from or through which the news or information was obtained."

The reporter's privilege is qualified, not absolute. Secs. 903-907 of the Act create a procedure to compel disclosure over the reporter's objections if the party seeking privileged information pleads and proves certain allegations and the court makes certain specific findings. The applicant must allege what specific information is sought and why it is relevant and what specific public interest would be adversely affected if the information were not disclosed (Sec. 904). The court must find that the information does not disclose any matter whose secrecy is mandated by state or federal law (such as grand jury proceedings), that all other available sources of information have been exhausted, and that disclosure is "essential to the protection of the public interest involved" (Sec. 907).

The reporter's privilege applies not only to the identity of a news source, but to the physical means by which the news is preserved. In *People v. Slover*, 323 Ill.App.3d 620, 753 N.E.2d 554 [29 Med.L.Rptr. 2340] (2001), the Appellate Court reversed a finding of contempt based on a newspaper's refusal to turn over unpublished photographs of a crime scene. In finding that the photographs themselves were a "source," the court observed, 323 Ill.App.3d at 624:

> "When a reporter obtains news or information by means of photography, the photograph is a 'source' of information within the plain meaning of section 8-901 as defined in section 8-902(c). By defining 'source' to include a 'means,' the legislature clearly intended the privilege to protect more than simply the names and identities of witnesses, informants and other persons providing news to a reporter."

See also *In re Arya*, 226 Ill.App.3d 848, 589 N.E.2d 832, 840 [19 Med.L.Rptr. 2079] (1992).

[1] No reason exists to treat the videotaped outtakes in this case differently from the unpublished photographs in *Slover*, and the Hospital's reply memorandum (at p. 2) concedes as much. Accordingly, there is no merit in the Hospital's petition for rule, and its access to the outtakes must depend on the success or failure of its motion to divest the reporter's privilege.

Divestiture.

Reporters in Illinois enjoy a qualified privilege of confidentiality subject to divestiture under the procedures contained in the Reporter's Privilege Act. *People v. Pawlaczyk*, 189 Ill.2d 177, 724 N.E.2d 901 [28 Med.L.Rptr. 1385] (2000). CBS asserts that the Hospital is not entitled to divest the privilege, because it has not shown that the outtakes are relevant to the malpractice suit, it has not shown the disclosure is essential to the protection of an identifiable public interest and it has not exhausted other sources of information.

[2] The court is satisfied that the outtakes are relevant. Assuming that Ms. Smith talked about the same subjects as were discussed in the broadcast portion of her interview, the outtakes undoubtedly contained statements by her about advice she received from her doctors before surgery. A fact is relevant if it "... tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Pawlaczyk, supra*, 189 Ill.2d at 193. This is a very low threshold which the Hospital's allegations have met.

The court is also satisfied that, under the circumstances of this case, that other available sources of information have been exhausted. If the only persons present at the interview besides Ms. Zekman and WBBM-TV technicians were Ms. Smith, her family and her attorney, it is obvious that the information, if available at all, would have to come from the reporter.

However, the court is not convinced that disclosure is essential to protect any identifiable public interest. In this connection, it is helpful to examine the *Pawlaczyk* case, on which the Hospital primarily relies.

In *Pawlaczyk*, two city officials in Belleville, Illinois were sued by a former police chief, who alleged that they told reporters a lie about him—that he was a suspect in a sexual assault. The officials insisted that they had not talked to the reporters in their depositions in the libel case. The police chief was exonerated, and, at the request of the States Attorney of St. Clair County, a special prosecutor was appointed to convene a grand jury to determine if there was probable cause to indict the officials for perjury during their depositions in the libel case. Several witnesses told the grand jury that the officials had talked to the press, but the reporters refused to confirm or deny it.

The special prosecutor moved to divest the reporters of their privilege, using the procedures in the Act, and the trial court allowed the motion. On appeal, the Illinois Supreme Court affirmed the trial court. Its decision quoted the decision of the United States Supreme Court in *Branzburg v. Hayes*, 408 U.S. 665, 707-708 [1 Med.L.Rptr. 2617] (1972):

> "The investigation of crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen, and it appears to us that calling reporters to give testimony in the manner and for the reasons that other citizens are called bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification.

The hospital advances three purported public interests which, it claims, disclosure in this case is essential to protect: resolving litigation, promoting accurate reporting and preventing perjury. How disclosure of the outtakes will help resolve this complicated medical malpractice suit involving other plaintiffs and other defendants is not explained. Nor is how disclosure will promote reportorial accuracy. The court declines to speculate.

The only tenable basis for disclosure is prevention of perjury. However, Ms. Smith's deposition testimony was more favorable to

the Hospital than her unsworn television interview. Under oath, she admitted that she had been warned by her surgeon that, if a malignant tumor were found, removal would entail excision of surrounding tissue, muscle and bone, whereas, during the interview, she claimed to be shocked when this happened. (Hospital's Reply Memo, at p. 4-5). The public importance of disclosure of the outtakes does not consist merely in exposing discrepancies between her two accounts, but in proving that she lied under oath. It certainly appears that, if she lied at all, it was for the TV camera.

Unlike *Pawlaczyk*, there are no witnesses who have attested that Ms. Smith lied at her deposition. Unlike *Pawlaczyk*, disclosure would not further a grand jury investigation or help to punish a crime. Merely exposing potentially embarrassing discrepancies in a plaintiff's recollection for the benefit of private litigant is not a public purpose, compelling or otherwise, which warrants protection by this court.

ORDER

The motions for rule to show cause and for divestiture are denied.

Doe v. New York University

New York Supreme Court
New York County

JANE DOE 1 and JANE DOE 2 v. NEW YORK UNIVERSITY

Index No. 109457-2004

December 16, 2004

REGULATION OF MEDIA CONTENT

[1] **Prior restraints — Privacy restraints (§ 5.20)**

Prior restraints — Judicial review — Standing (§ 5.3002)

Student media regulation — In general (§ 22.01)

NEWSGATHERING

Restraints on access to information — Privacy (§ 50.15)

University student newspaper may intervene in negligence action against university, brought by plaintiffs, who were allegedly sexually assaulted as result of university's failure to secure premises, since plaintiffs have identified newspaper in their supporting papers as organization that prompted filing of their motion to proceed anonymously, to seal all court records that contain their names, to permanently enjoin university or its affiliates from publishing their names, and to grant permanent injunction to protect their identities, since it thus is undisputed that scope of plaintiffs' application to enjoin university as defendant includes newspaper, and since newspaper is not already party to action, even though university pays its expenses, provides it free office space on university premises, and permits its website to contain university's abbreviation, since these factors, suggesting agency relationship, are insufficient to overcome university's lack of control over newspaper.

REGULATION OF MEDIA CONTENT

[2] **Prior restraints — Privacy restraints (§ 5.20)**

Privacy — Constitutional privilege to publish (§ 13.14)

Student media regulation — In general (§ 22.01)

NEWSGATHERING

Restraints on access to information — Privacy (§ 50.15)

Plaintiffs, who were allegedly sexually assaulted as result of university's failure to secure premises, failed to overcome presumption of openness in their attempt to prevent student newspaper from publishing their lawfully obtained names, since N.Y. Civ. Rights Law § 50-b, which protects identities of victims of sexual offenses, applies only to disclosure by public officials or employees, since plaintiffs failed to demonstrate that news reporting exception to Section 50 does not apply in cases in which news agency is defendant, since embarrassment, damages to reputation, and general desire for privacy do not constitute good cause to seal court records, and since plaintiffs' names are already matter of public record, in light of fact that they filed action using their true names.

Cologne v. Westfarms Associates, 192 Conn. 48, 57, 58. The New York Court of Appeals in *Immuno Ag v. Moore-Jankowski*, 77 N.Y. 2d 235, 567 N. E. 2d 1270, 1277, 1278 [18 Med.L.Rptr. 1625] (1991) construed a provision in the New York Constitution to provide greater protections than the minimum guarantees of the U.S. Constitution.[1] Although the courts of this state can look to the constitutions of other states in order to interpret the Connecticut Constitution, reliance on other state constitutional precedent is not a substitute for independent analysis of our own constitutional language, history, tradition and policy. *State v. Perez*, 218 Conn. 714, 724. That task is more appropriate for our Supreme Court and will not be undertaken here because of the prior conclusion based on state law and federal constitutional law that the statement in question here is not actionable. Moreover, while *Cologne v. Westfarms Associates*, supra, involved a somewhat different issue, the court failed to construe Article 1, Section 4 as providing greater rights than the First Amendment.

The motion for summary judgment is granted.

REDMOND v. ILLINOIS

Illinois Circuit Court
Cook County

CARL REDMOND v. THE PEOPLE OF THE STATE OF ILLINOIS, No. 88 CR 18481, September 5, 1991

[1] Article 1, Section 8 of the New York Constitution was adopted in 1821 and has remained unchanged since then. It is similar to the provision in the Connecticut Constitution of 1818 which has been carried over into the 1965 Constitution. Connecticut's 1818 Constitution is similar to the Mississippi Constitution of 1817. The freedom of speech provisions are also similar to the state constitutional provisions of other states besides New York. *Cologne v. Westfarms Associates*, supra, 60.

NEWSGATHERING

Forced disclosure of information—Disclosure of unpublished information—In criminal actions (§60.1005)

Forced disclosure of information—Statutory privilege ("shield" laws) (§60.25)

Subpoena, filed by criminal defendant seeking newspaper reporter's testimony and notes as to telephone conversation which defendant initiated with reporter, is quashed pursuant to Illinois Reporter's Privilege Act, since reporter's First Amendment interests outweigh minor inconvenience that lack of this information would cause defendant, and since defendant has also failed to show that there are no other sources for such information.

Criminal defendant, following his conviction for murder, filed post-trial motions asserting that he was not effectively represented at trial and that the insanity defense was not adequately put forward by his attorney. Defendant seeks to subpoena testimony and notes from newspaper reporter regarding telephone conversation between reporter and defendant that occurred 12 days after murder had been committed. On reporter's motion to quash pursuant to Illinois Reporter's Privilege Act.

Motion granted in bench ruling.

Carl Redmond, petitioner, pro se.

Carol Anne Been, of Sonnenschein Nath & Rosenthal, Chicago, for reporter.

Transcript of Court's Ruling

Corboy, J.:

THE COURT: I think the first thing we have to decide, legally, is whether the statute even applies to this somewhat unique situation. If you read the statute, interestingly, I think it was originally drafted to deal with a specific problem that had become almost epidemic, and that was the problem of news reporters knowing more about the crimes than the police and the police, or the defense wanting to get the information from the police, from the reporters. So what they really wanted was not the information, but the source of the information, so the statute use the word source.

However, the case law really expands the definition of source to cover items beyond just the name, perhaps an address of the provider of the information, but to include the information and any other research materials of the reporter or the media entity. So I do think that the statute, the Reporter's Privilege Statute does apply here even though everybody knows that the source of the information is Mr. Redmond.

I do believe that given how Mr. Redmond has set out his request, that it would cover his request.

The second thing I want to address is that we have not completely complied with some of the procedural requirements of the statute and for that, I thank Ms. Been for not objecting on those procedural grounds. Frankly, it would slow everything up and I think it's more important to get to the heart of this hearing. And none of this was in writing, and I appreciate everybody's flexibility here since we are dealing with a pro se environment.

So let's get to the heart of the issue. There are, under the statute, three, as Ms. Been indicated, three areas of analyses. The first is what is it that you want and would it be relevant to this hearing. There was no request for this information prior to the trial. I am going to assume that part of your argument is going to be that Mr. Loeb should have made this request.

THE DEFENDANT: Yes, your Honor.

THE COURT: And I will deal with that when I rule on the motion for new trial.

So, assuming that I am dealing with this on two levels; one, should this have been, would this have made a difference at the trial, and would it be admissible here on this motion for new trial? They are really two different questions. So I'm really going to treat it as if I was doing this pre-trial as well as post-trial.

In terms of relevancy, the defense here was PCP intoxication, involuntary intoxication of such a type and significance, or magnitude rather, that it would eliminate or ameliorate the defendant's state of mind in that he did not knowingly commit these acts.

Therefore, any information at or near the time of the offense that would provide us any insight into the defendant's state of mind would certainly be relevant.

My first reaction to this was, well, this is a prior consistent statement. However, I think it falls into the exception and the reason it is, at least in regards to that information about the trance-like state and the contents of the trance, including the drill sergeant, there were suggestions at the trial that that, perhaps that information was fabricated by the defendant later on during his examination by the doctors, that that information was not put forth early at a time closer to the crime. So I think that it would fit into the exception that would formally bar a prior consistent statement from being heard at a trial. So I think it is relevant.

I think any time you have a state of mind defense, statements by the defendant are relevant, particularly when they are at or near the time and when we're dealing, as we were in this situation, Ms. Been, with statements made to doctors some year and a half later, twelve days is pretty close. I do think it's relevant.

The second and third grounds I really can't analyze separately because I think they, I really have to understand them together. One is, would the defendant be deprived of a fair trial, what does the statute call it, specific public interest, the public interest, of course, is that the defendant get a fair trial versus the necessity of breaching this particular privilege. Reporters are not like other people. If you were to call up another person and tell them something, they would not be protected. Reporters are protected. They are protected for a lot of reasons. Everybody knows that they are. They have to do with the First Amendment. The chilling effect that would be placed on a reporter if he or she knew by having this conversation and reporting this conversation the reporter would thereby put himself or herself in a position of perhaps being called as a witness some time in the future, having their notes breached, having their notes made public, having other sources of information other than the conversation made public and so that is why the statute protects reporters in the way that is different than non-reporters.

In this instance, while I think the evidence is relevant, I think that the protection of the First Amendment protection for the statutory protection of the reporter and the public's right to know, which is, of course protected by this statute and by the Constitution, far outweighs any minor inconvenience that the lack of this information would provide to the defendant in perfecting his defense.

I do take into consideration, and I think it's important to understand that I take into consideration, the fact that this defendant initiated these conversations. If I am to accept as true the article written by Mr. Houston, the defendant called the reporter a minimum of four times on the date in question when he had the conversation, that it was the defendant who was attempting to create a forum for his information, and as such, not only are you a source, in other words I'm not saying that you would have to testify, because you have an absolute right to remain silent, I did not consider it and would never allow anyone else to consider your silence. However, you know what you said, you know what the information is. You don't need Mr. Houston to know what the information is. And therefore, to breach his privilege would be unnecessary to protect your fair trial rights.

Specifically on the issue of the two cigarettes, though, I will say that I think that Mr. Houston's information would be irrelevant because anything that you said to him about the two cigarettes and that he reported about the two cigarettes certainly was not admissible at trial, never would be under any circumstances and therefore, anything he has to say on that subject would be irrelevant. But as to the other grounds, I think it's relevant. However, I believe that you have failed to establish that the only way to obtain this information would be to subpoena the notes and or the person of Mr. Houston for the purpose of this hearing.

Accordingly, the motion to suppress the subpoena will be sustained.