

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 42

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THE PEOPLE OF THE STATE OF NEW YORK,

**DECISION AND ORDER**  
INDICTMENT 5544/00

-against-

MICHAEL FORDE and MARTIN DEVEREAUX,

DEFENDANT

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MAXWELL WILEY, J.:

American Broadcast Companies, Inc. ("ABC") moves pursuant to CPLR 2304 and CPL 240.50 to quash, in part, a subpoena issued to ABC on behalf of defendant Michael Forde. The subpoena demands all video or audio outtakes from a broadcast news report ("20/20") entitled, "Secrets of the Mob, Former Mob Insider Tells All," which aired on December 11, 2000. The subpoena also demands a copy of the broadcast, which ABC has produced.

ABC moves to quash the portion of the subpoena calling for the video and audio outtakes on the grounds that the outtakes are "unpublished news" protected from compelled disclosure by the newsgathering privilege codified in the New York Shield Law, N.Y. Civ. Rights Law §79-h. That law protects professional journalists and newscasters from compelled disclosure of all unpublished news secured in the course of newsgathering activities, whether or not the material was obtained under a promise of confidentiality. Nevertheless, a criminal defendant may obtain such non-confidential material if the defendant can make a "clear and specific showing" that the material demanded is:

- (1) highly material and relevant;
- (2) critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto; and
- (3) unobtainable from any alternate source.

Defendants do not dispute the applicability of the Shield Law to the material sought. Rather, defendants argue (1) that the Shield Law is unconstitutional on its face; and (2) that the subpoena meets the three-prong test to compel disclosure.

For the reasons set forth below, the motion to quash is granted. .

In providing for a privilege for unpublished news, the Legislature balanced the State's interest in the free flow of information against the rights of a criminal defendant. A criminal defendant can overcome the privilege and obtain necessary evidence if it is truly critical to his case, but professional journalists are protected from improper requests for information. A majority of states around the country have adopted such Reporter's Shield Laws beginning in the 1960s, and they have been recognized by at least three federal circuit courts of appeal. See *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1981); *United States v. Caporale*, 806 F.2d 1487, 1504 (11<sup>th</sup> Cir. 1986); *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9<sup>th</sup> Cir. 1993). Defendants have not directed the court to even a single case in which any court anywhere has ever found a similar qualified reporter's privilege to violate the Sixth Amendment, as defendant claims this statute does. Accordingly, this court declines to hold the shield law facially unconstitutional.

The question then remains whether defendants have met the three-prong test to overcome the privilege. Most tellingly, defendants do not even attempt to make a factual showing of meeting the second prong – critical and necessary. Instead, defendants argue that this prong should be ignored as a matter of law if the other two prongs are met. Essentially, defendants read *People v. Combest*, 4 NY3d 341 (2005), to have essentially rewritten the Shield Law, effectively writing out the second prong of the balancing test where a criminal defendant seeks non-confidential unpublished news. However, the *Combest* court held no such thing. Rather, the Court of Appeals in *Combest* held that the defendant had met the statute's three-prong test.


This Court holds that defendants have failed to demonstrate that the information sought by the subpoena is critical or necessary for the defense case in any respect. On the contrary, the defendants primary purpose in seeking the outtakes is the hope that they may possibly reveal something of value in cross-examining Sean Richard, who will be a witness in the trial. This is precisely the type of information repeatedly held to be protected by the Shield Law. In fact, a subpoena seeking these very

outtakes for similar, indeed more persuasive reasons, was quashed by Justice Atlas in *Matter of Subpoena Duces Tecum to American Broadcasting Cos., Inc.*, 189 Misc. 2d 805 (Sup. Ct. N.Y. Co. 2001).

Because the Court finds that defendants have failed to meet their burden on the second prong of the Shield Law balancing test, the Court need not address prongs one and three, nor whether the subpoena would be appropriately quashed in any event under the normal rules of discovery.

ABC's motion is hereby granted.

Dated: September, 2007  
New York, New York

  
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MAXWELL WILEY, J.S.C.

FILED SEP 19 2007

MAXWELL WILEY  
JUDGE