

THE DAILY RECORD

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Trials&TRIBULATIONS

NY Shield Law expanded geographically by COA

New York's Shield Law, codified in § 79-h of the Civil Rights Law, provides an absolute privilege to a journalist from being forced to identify confidential sources who have provided information for a news story. This statute was the focus of the recent Court of Appeals' Decision issued on Dec. 10, in *Matter of Holmes v. Winter*, __ NY3d __, 2013 NY Slip Op 8194 (Dec. 10).

In a 4-3 decision, Judge Victoria A. Graffeo wrote for the majority and held that "an order from a New York court directing a reporter to appear in another state where, as here, there is a substantial likelihood that she will be compelled to identify sources who have been promised confidentiality would offend our strong public policy," *Id.*, at *13. Therefore, the court reversed the First Department's affirmance of the order granting Holmes' petition for a subpoena.

Background

This case arose out of the shooting massacre at a movie theater in Aurora, Colo., during a midnight showing of "Batman: The Dark Night Rises" on July 20, 2012, *Id.*, at *2. Twelve people were killed during the shooting and seventy others were wounded. The petitioner, James Holmes, was arrested at the scene soon after the violence ended. In view of the anticipated media attention, the Colorado state court presiding over the criminal charges, the District Court for the County of Arapahoe, promptly issued an order limiting pretrial publicity in the case by either side, including law enforcement.

Shortly thereafter, Colorado law enforcement officials executed a search warrant pursuant to which the Aurora Police Department seized a package that Holmes had sent to his psychiatrist before the shooting.

On July 25, 2012, FOXNews.com published an article written by reporter Jana Winter which detailed the contents of the seized package. The article was entitled: "Exclusive: Movie Massacre Suspect Sent Chilling Notebook to Psychiatrist Before Attack." According to the article, the reporter had two law enforcement

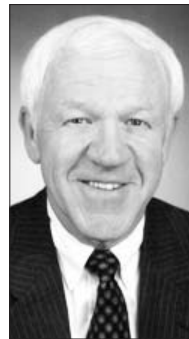
sources, one of whom reportedly told Winter that Holmes had mailed the notebook, "full of details" about how he was going to kill people, to a University of Colorado psychiatrist before the attack, *Matter of Holmes v. Winter*, 110 AD3d 134, 140 (1st Dept 2013 [Saxe, J., dissenting]). The article also claimed that the source described drawings and illustrations of the massacre, which were included in the materials sent to the psychiatrist.

Thereafter, Holmes moved in the District Court for an order enforcing compliance with the pretrial publicity order, citing the leak of information by the two unnamed law enforcement officials mentioned in Winter's article, *Holmes*, 2013 NY Slip Op 8194, at *2. The court conducted a hearing to determine whether sanctions would be imposed upon the law enforcement officials who had allegedly violated the pretrial publicity order by leaking confidential information.

The evidentiary hearing included testimony from 14 law enforcement officials who had either viewed the contents of the notebook or had conversations about the contents. None of the law enforcement witnesses admitted to providing information about the notebook's contents to the media.

Thereafter, in January 2013, petitioner moved the District Court to compel Fox News reporter Winter to testify and to "produce to the court her notes from her conversations with sources mentioned in her article," *Holmes*, 110 AD3d at 141 (Saxe, J., dissenting).

Petitioner Holmes' motion was made pursuant to Colorado's Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings, Colo. Rev. Stat. §16-9-201, et seq., *Holmes*, 2013 NY Slip Op 8194, at *2. Holmes argued that Winter was the only person who could identify the two law enforcement agents who had violated the pretrial publicity order by leaking the information and, thereafter, by committing perjury.



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The District Court granted Holmes' motion and issued a certificate compelling respondent to "spend three days in travel and testimony" in the criminal proceeding, *Id.*, at *3. The court further found that Winter had become a material and necessary witness in this case.

Proceedings before the New York courts

On March 7, Holmes commenced a proceeding in the New York State Supreme Court, New York County, pursuant to the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings, codified in New York at Section 640.10(2) of the Criminal Procedure Law, to obtain a subpoena ordering Winter to appear before the District Court of Arapahoe County as a material witness to give testimony regarding the alleged violation of the pretrial publicity order.

Supreme Court granted Holmes' request and ordered Winter to appear. The court's order was promptly appealed to the Appellate Division, First Department, and in a decision dated Aug. 20, the court in a 3-2 decision, affirmed, *Holmes*, 110 AD3d at 139. The Appellate Division rejected Winter's claim that New York's Shield Law prevented her from being ordered to testify in Colorado, and concluded that the issues of privilege and admissibility of her testimony should be determined by the Colorado District Court and not a New York Court, *Id.* at 137-138.

The court's decision relied heavily upon the Court of Appeals' decision in *Matter of Cody v. Capital Cities*, Am. Broadcasting, Inc., 82 NY2d 521 (1993). In that case, the Court of Appeals held that the privileged status of evidence is not a proper factor for consideration under CPL 640.10(2), but rather it should be determined by the court of the demanding state not the sending state, *Id.* at 530.

The Appellate Division majority concluded that, were it to resolve questions of privilege in determining whether or not to honor an out of state order for the issuance of a subpoena, "it would frustrate the purpose of the reciprocal statutory scheme," *Holmes*, 110 AD3d at 137. The majority concluded that "evidentiary questions, such as privilege, are best resolved in the State — and in the proceeding — in which the evidence is to be used," *Id.* at 137.

A two-Justice dissent in the Appellate Division permitted Holmes to appeal as of right to the New York Court of Appeals, and the case was argued in November 2013.

The case attracted nationwide attention not only due to the horrific nature of the crime, but also due to the court challenges to the journalistic privilege. Forty-two news organizations joined in submitting Amici Curiae briefs to the Court of Appeals. In the briefs submitted to the court, it was revealed that the Winter had received the information from her sources while in Colorado and

that the only connection to New York was the location of Winter's office where the article was written. In essence, the privileged communications took place in Colorado.

The Court of Appeals decision

The majority opinion traced the history of the Shield Law in New York, which was adopted in 1970, and New York's long-standing tradition of protecting freedom of the press. It pointed out that New York's Constitution contains a guarantee of free speech and free press that is even broader than that contained in the First Amendment of the Federal Constitution, *Holmes*, 2013 NY Slip Op 8194, at *5. Furthermore, the Shield Law grants an absolute privilege precluding reporters from being compelled to reveal their confidential sources, whereas the comparable Colorado law provides only a qualified privilege, *Id.*, at *10-11.

The court also observed that the New York public policy embodied in the Constitution and the Shield Law "provides a mantle of protection for those who gather and report the news — and their confidential sources — that has been recognized as the strongest in the nation," *Id.*, at *7. The court therefore concluded that, based on the New York Constitution, the Shield Law, and the court's precedent, no New York Court could compel Winter to reveal the identity of the sources that supplied the information to her in connection with her news article, *Id.*, at *8.

However, the court still had to reconcile its conclusion with its holding in *Cody*, which provided that privilege issues are to be decided by the Court demanding the appearance of the witness. The majority distinguished *Cody* on the facts. *Cody* involved an interview by a reporter in New York of a basketball player from North Carolina State University dealing with a point shaving scandal investigation, *Id.*, at *9. The grand jury investigation of the scandal in New Jersey dealt with the same type of Shield Law that exists in New York, *Id.*, at *11. The Court of Appeals concluded in *Cody* that New Jersey, not New York, should determine the privilege issues, *Id.*, at *10.

The Court of Appeals was clearly influenced by the fact that, in contrast with the New Jersey law at issue in *Cody*, the Colorado Court would not be bound to provide Winter with an absolute privilege since its statute did not extend that privilege to journalists. Furthermore, the court pointed out that, in *Cody*, the basketball player was interviewed by the reporter on the condition of anonymity, and had come forward on his own accord, *Id.*, at *12. The New Jersey authorities already knew the identity of the basketball player and were simply looking to obtain the video outtakes of the interview because the basketball player could recall everything he had said to the reporter.

Since the District Court in Colorado had issued the order for the purpose of requiring Winter to appear in Colorado to compel

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her to identify the individuals who supplied the information, it was clear that the protections of the New York Shield Law would be directly implicated, *Id.*, at *15-16. The Court of Appeals therefore reversed the Appellate Division's Order and dismissed Holmes' petition.

As expected, the news media welcomed the decision as a landmark ruling. Most would probably agree that the chief executive of Fox News, Roger Ailes, exaggerated the significance of the decision in his written statement issued following the decision, stating that the "protection of Jana Winter's confidential sources

was necessary for the survival of journalism and democracy as a whole."

Although the issue involved in *Holmes* is unique and may not reappear in the near future, it is also evident that this decision expands the scope of the Shield Law beyond the borders of New York and it can be used by a New York journalist to thwart an investigation in a state that does not have a Shield Law comparable to New York's.

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