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SHIELD LAW - The Qualified Privilege of Newscasters & Journalists in Non-Confidential News - Court of Appeals of New York - People v. Combest, 828 N.E.2d 583 (N.Y. 2005)

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RECENT CASE

SHIELD LAW—THE QUALIFIED PRIVILEGE OF NEWSCASTERS & JOURNALISTS IN NON-CONFIDENTIAL NEWS— COURT OF APPEALS OF NEW YORK— PEOPLE V. COMBEST, 828 N.E.2d 583 (N.Y. 2005)

A news organization "may not be compelled by threat of contempt"[1] to disclose its nonconfidential news materials unless the party can make "a clear and specific showing" that the materials are "critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto."[2] This is the second prong of section 79-h(c) of the New York Civil Rights Law [hereinafter Shield Law] whose "critical or necessary" standard has recently been eroded by the New York Court of Appeals' decision in *People v. Combest*. In *Combest*, the journalistic privilege was set aside "on the basis of a party's assertions, without verifying that those assertions are

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[1] 828 N.E.2d at 591 (Smith, J., dissenting).

[2] N.Y. CIV. RIGHTS LAW § 79-h(c) (McKinney 2005), states that a news organization may not be required

> to disclose any unpublished news obtained or prepared by a journalist or newscaster in the course of gathering or obtaining news . . . or the source of any such news, where such news was not obtained or received in confidence, unless the party seeking such news has made a clear and specific showing that the news: (i) is highly material and relevant; (ii) is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto; and (iii) is not obtainable from any alternative source. A court shall order disclosure only of such portion, or portions, of the news sought as to which the above-described showing has been made and shall support such order with clear and specific findings made after a hearing.

correct."[3] The court's decision leaves open the issue of how the courts should decide whether the moving party has made the required showing to satisfy the "critical or necessary" element of the Shield Law.

The Shield Law "affords journalists and newscasters a qualified privilege in nonconfidential news."[4] To overcome this journalistic privilege, a litigant must satisfy a three-part test with a "clear and specific showing" that the news resources are highly material and relevant, critical and necessary to a claim or defense, and cannot be obtained from any other source.[5] The Shield Law is a codification[6] of the three prong test set forth by the court in 1988 in *O'Neill v. Oakgrove Construction, Inc.*[7] Because *O'Neill* was a civil case, the *O'Neill* court did not find it necessary to explore "the different factors present in criminal cases."[8] The New York State Legislature, however, in its codification of *O'Neill* in 1990 made it clear that the Shield Law applies to both civil and criminal cases.[9]

Id.

[3] *Combest*, 828 N.E.2d at 591 (Smith, J., dissenting).

[4] *Id.* at 585 (majority opinion).

[5] *Id.* at 586.

[6] *Id.* (citing 1990 N.Y. Sess. Laws Ch. 33 § 2 (McKinney)).

[7] 523 N.E.2d 277 (N.Y. 1988).

> Article I, § 8 of the New York State Constitution and . . . the First Amendment of the Federal Constitution as well, provide a reporter's privilege which extends to confidential and nonconfidential materials and which, albeit qualified, is triggered where the material sought for disclosure . . . was prepared or collected in the course of newsgathering.

Id. at 277-78. See U.S. CONST. amend. I, which states in pertinent part: "Congress shall make no law . . . abridging the freedom . . . of the press. . . ."; N.Y. CONST. art. I, § 8, stating in pertinent part: "[N]o law shall be passed to restrain or abridge the liberty of . . . the press."

[8] *Id.* at 281 n.2.

[9] *Combest*, 828 N.E.2d at 586 (citing 1990 N.Y. Sess. Laws Ch. 33 § 2 (McKinney)).

On April 16, 2000, gunfire was exchanged between two groups of young men.[10] Christopher Hernandez, a fifteen year old bystander, was shot and killed with a bullet from defendant James Combest's gun.[11] Two days later, detectives from the Brooklyn North Homicide Task Force arrested Combest at his home.[12] The detectives were accompanied by a crew from Hybrid Films Inc., whose subject for a Court TV documentary was the Brooklyn North Homicide Task Force.[13] Police permitted Hybrid Films to film Combest's arrest and interrogation, "during which he gave oral and written statements confessing to his participation in the shootout, but attempting to explain his actions as justified by self defense."[14] The prosecution also video-taped a statement Combest gave to an assistant district attorney, where Combest claimed that "he and his friends had been forced to return fire after being shot at by a drug dealer and his associate."[15] Combest was indicted for murder and other related charges.[16] Before trial, Combest served a subpoena on Hybrid Films for the production of the tapes Hybrid Films filmed during his interrogation.[17] Claiming that the defendant did not satisfy the requirements of the Shield Law, Hybrid Films moved to quash the

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[10] *Id.* at 584.

[11] *Id.* at 584; *id.* at 590 (Smith, J., dissenting).

[12] *Id.* at 584 (majority opinion).

[13] *Id.* The purpose of the documentary was to "present a behind-the-scenes look at the inner workings of the Task Force" through the capture of the daily activities of the Task Force detectives, focusing on "discovery, investigation, and resolution of a case." *Id.*

[14] *Combest*, 828 N.E.2d at 584. This interrogation was filmed only by Hybrid Films. *Id.*

[15] *Id.* at 584-85.

[16] *Id.* at 585.

[17] *Id.* The "episode involving the defendant was not used in the series." *Id.* at 585 n.1.

subpoena.[18] Without deciding the application of the Shield Law and over Hybrid Films' objection, the Brooklyn Supreme Court ordered Hybrid Films to produce the tapes, under seal, for an in camera review.[19] The Appellate Division, Second Department, characterized any audio and video tapes that are not broadcast as "outtakes."[20] The court stated that if necessary, the defendant would have an opportunity at trial "to make the required showing under the Shield Law."[21] The defendant would then have use of the outtakes, but the court would first view the outtakes in camera to "determine the existence of any relevant material and to redact any irrelevant material."[22]

The criminal action was then transferred to a different justice, who denied Hybrid Films' motion to quash and directed Hybrid Films to give the tapes "to the parties in the criminal action, without [an in camera] review, and without a showing by Combest that the three-pronged test set forth in [the Shield Law] had been satisfied."[23] Neither the Appellate Division nor the Court of Appeals articulated a reason for the transfer to a different justice.[24] Hybrid Films then obtained a stay of the Supreme Court's order from the Appellate Division, Second Department, which held that the trial court's decision was "premature" and directed the court to hold the tapes

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[18] *Id.* at 585.

[19] *In re* Hybrid Films, Inc., v. Combest, 721 N.Y.S.2d 795, 795 (App. Div. 2d Dep't 2001).

[20] *Id.*

[21] *Combest*, 828 N.E.2d at 585.

[22] *Id.*

[23] *In re Hybrid Films*, 721 N.Y.S.2d at 795.

[24] *Id. See also Combest*, 828 N.E.2d at 585.

until trial, where the defendant would have the opportunity at a hearing to make the necessary showing of the Shield Law's three prong test.[25]

At trial, a hearing was held on Hybrid Film's motion to quash.[26] The trial court found that the defendant did not meet his burden under the Shield Law and granted Hybrid Films' motion to quash.[27] As a result, the defendant's statements to police were the only evidence connecting him to the crime. The jury acquitted the defendant of murder, but convicted him of manslaughter in the first degree and criminal possession of a weapon in the second degree.[28] The Appellate Division affirmed, holding that granting Hybrid Films' motion to quash was proper because the defendant did not meet the three-prong test of the Shield Law.[29]

The Court of Appeals reversed and remanded for a new trial.[30] The court found that the defendant did meet his burden under

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[25] *Combest*, 828 N.E.2d at 585; *In re Hybrid Films*, 721 N.Y.S.2d at 795-96 ("If Combest satisfies the three-pronged test, the Supreme Court shall then review the outtakes in camera and redact any irrelevant material therein prior to release." (citing People v. Korkala, 472 N.Y.S.2d 310, 314-15 (App. Div. 1st Dep't. 1984))).

[26] *Combest*, 828 N.E.2d at 585.

[27] *Id.* "Concluding that defendant had not met his burden under the Shield Law, the court granted Hybrid's motion." *Id.*

[28] *Id.* The jury did not see the subpoenaed tapes. *Id.*

[29] *Id.* at 585-86; People v. Combest, 767 N.Y.S.2d 271, 271-72 (App. Div. 2d Dep't. 2003).

[30] *Combest*, 828 N.E.2d at 590. The court did not note the absence of Hybrid Films as a party to the appeal taken by defendant Combest. Hybrid Films was served with the subpoena by Combest. *In re Hybrid Films*, 721 N.Y.S.2d at 795. Hybrid Films then moved to quash the subpoena. *Id.* After the trial, and after the court denied Hybrid Films' motion to quash the subpoena, Hybrid Films became the appellant when the matter was considered by the Appellate Division, Second Department. *Id.* Hybrid Films' argument on appeal was that defendant Combest did not meet his statutory burden under the Shield Law where journalistic privilege can be overcome by a criminal defendant by showing that the three prongs of the Shield Law are met. *Id.*; *see supra* note 3. Even though Hybrid Films was the holder of the journalistic privilege, they were absent from the Court of Appeals decision. In fact, Hybrid Films moved to intervene and reargue, "contending that it had no notice of the

the Shield Law[31] and therefore the lower court erred by not reviewing the Hybrid Films tape in camera.[32] The first prong of the Shield Law requires a "clear and specific showing" that the materials are highly material and relevant.[33] The court agreed with the defendant's argument that the Hybrid Films tapes would show that the statements he made to police were involuntary.[34] He asserted that the tapes would have shown the "various ruses undertaken by the interrogating detective in an attempt to induce him to confess,"[35] including physical intimidation,[36] and visibility of the interrogating detective's

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appeal, in whose outcome it asserts that it had a direct interest." People v. Combest, 831 N.E.2d 407 (N.Y. 2005). The court, however, denied the motion to intervene and dismissed the motion for reargument, holding that the "Criminal Procedure Law provides no mechanism for a nonparty to intervene or be joined in a criminal case." *Id.* at 407, 408. Because Hybrid Films was not a party to the criminal trial of defendant Combest, but only involved in pre-trial disclosure, Hybrid Films is a nonparty and a "nonparty wishing to supplement the arguments made to a court on an issue of law may seek leave to appear as amicus curiae." *Id.* at 407. The court then noted that the Court of Appeals published the issues to be considered in *Combest* in the New York Law Journal "together with a solicitation for amici." *Id.*; *see Cases Filed with the Court of Appeals,* N.Y.L.J. May 13, 2004, at 3. Furthermore, all of Hybrid Films' "arguments respecting the journalistic privilege [were] advanced by the People," and all affidavits and memoranda were contained in the original file in possession by the court, thus Hybrid Films had notice of the appeal and was adequately represented by counsel. *Combest*, 831 N.E.2d at 407-08.

[31] *Combest*, 828 N.E.2d at 587.

[32] *Id.* at 589 n.4 ("[W]hile a court is not always required to review subpoenaed material in camera in order to determine in the first instance whether the requisite showing has been made, in this case it would have been the better practice to do so. A court in a criminal case should also be mindful that 'omissions, contrasts and even contradictions, vital perhaps, for discrediting a witness, are certainly not as apparent to the impartial presiding judge as to single-minded counsel for the accused.' " (citing People v. Rosario, 173 N.E.2d 881, 883 (N.Y. 1961))); *see also id.* at 590 (Smith, J., dissenting).

[33] *See supra* note 3.

[34] *Combest*, 828 N.E.2d at 588.

[35] *Id.* ("[D]efendant . . . maintained that the detective had assured him that if he cooperated, he would be charged only with gun possession, whereas if he did not, he would be prosecuted for murder and subject to the death penalty (which the detective testified he knew to be untrue because of defendant's age) . . . [and] in exchange for his cooperation that he was offered probation.").

[36] *Id.* "[T]he tapes would show the extent to which he would have felt physically intimidated by the detective's close proximity to him." *Id.*

holstered gun.[37] The court found the first prong was satisfied because it was "beyond dispute that a defendant's own statements to police are highly material and relevant to a criminal prosecution . . . [and] such statements are always discoverable, even when the People do not intend to offer them at trial."[38] Thus, the relevancy requirement of the Shield Law was met.

The second prong of the Shield Law requires a showing that the news materials are critical or necessary to a claim of defense.[39] The court found that because the defendant's statements on the Hybrid Films tapes could establish intangibles such as displays of fear, upset, suggestibility, and protestation, which are necessary to the determination of whether the statement was voluntary, the necessity requirement of the Shield Law was satisfied.[40] The court reasoned that a jury's assessment of the "voluntariness of defendant's statements may . . . involve more than an analysis of the words spoken to and by him . . . [and] only the tapes could establish those

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[37] *Id.* "[T]he tapes would demonstrate the visibility of the detective's holstered gun, inasmuch as the detective could not recall whether his gun was in view during the interrogation." *Id.*

[38] *Id.* at 587 (citing N.Y. CRIM. PROC. LAW §§ 240.20, 710.30(1)(a) (McKinney 2005)). Furthermore, in dissent Justice Smith agreed that a "defendant's recorded statement about his alleged crime will almost always, if not always, be 'highly material and relevant' at a criminal trial." *Id.* at 591 (Smith, J., dissenting).

[39] *See supra* note 3.

[40] *Combest*, 828 N.E.2d at 588. In addition to the voluntariness defense, the defendant also argued that the Hybrid Films tapes would "help to establish his justification defense, as well as to negate the elements of intent and recklessness essential to the intentional and depraved indifference murder counts with which he was charged." *Id.* Interestingly, the court merely stated a "number of ways in which the tapes would help" the defendant, but did not rule on this issue, presumably because the defendant's voluntariness argument satisfied the second prong of the Shield Law. *Id.* The court noted the tapes would show that the defendant's car was not to be used as a getaway vehicle at the time of the shooting, that the defendant was unaware his friend was armed, that he warned people to get to safety when the shooting started, and that he did not see Hernandez until he was hit. *Id.*

intangibles that might properly be considered."[41] Also, the defendant was "entitled to present evidence, if he could, that he had been coerced into making a statement through a variety of techniques employed during the earlier interrogation period, which occurred behind closed doors and before the People's cameras began to roll."[42] Therefore, the tapes were necessary to show intangible aspects of the interrogation – for example, "earlier displays of fear, upset, suggestibility, protestation . . . would not [be] memorialized, but his eventual, dispassionate (and therefore seemingly truthful and accurate) account would [be]" if the defendant only had access to the prosecutor's tape and not the tape made by Hybrid Films.[43]

The third prong of the Shield Law requires that the news materials cannot be obtained from any other source.[44] The court found this element was satisfied because it was undisputed that Hybrid Films' "tapes constituted the only depictions of his interrogation by the police."[45] In addition, the court specifically noted the defendant's assertion that "only after he had been prepared to give a calm and coherent statement was the prosecutor's camera turned on."[46] Only the Hybrid Films tapes could establish these

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[41] *Id.* at 589; *see also id.* at 587. ("[V]oluntariness of a defendant's statement is highly material and relevant when put in issue by the defense . . . [furthermore] when a motion to suppress a statement as involuntarily made has been litigated and denied, a defendant is not precluded 'from attempting to establish at a trial that evidence introduced by the people of a pre-trial statement made by him should be disregarded by the jury or other trier of the facts on the ground that such statement was involuntarily made.' " (citing N.Y. CRIM. PROC. LAW § 710.70 (McKinney 2005))).

[42] *Combest*, 828 N.E.2d at 588; *see* N.Y. CRIM. PROC. LAW § 710.70 (McKinney 2005).

[43] *Id.* The Hybrid Films tapes showing the early interrogation of the defendant are "all relevant to the determination whether the statement ultimately given was voluntary." *Id.*

[44] *See supra* note 3.

[45] *Combest*, 828 N.E.2d at 587.

[46] *Id.* at 588.

intangibles for a jury to assess the voluntariness of the defendant's statements, and thus, satisfying the exclusivity requirement of the Shield Law.[47] After establishing that the defendant met his burden under the Shield Law, the court did not find it necessary to decide what standard was constitutionally required for the media to retain its nonconfidential materials in order to overcome a criminal defendant's right to obtain such evidence.[48]

The defendant argued further that when the police invited Hybrid Films to film the interrogation, an agency relationship was created between the police and Hybrid Films thus entitling him to copies of his own statements.[49] The court agreed that the police allowed Hybrid Films to "perform what was in fact a police function" by memorializing the interrogation and confession which could not have been done absent an agreement with the police.[50] In additon, the court stated that if the police had made or had a copy of the tapes, "they would plainly have had to provide them to defendant."[51] The court noted further an "increasing number of jurisdictions are now mandating that police questioning of arrestees be recorded, and that a resolution calling for all law enforcement agencies to videotape in their entirety the custodial interrogations of crime suspects has

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[47] *Id.* at 589. "[V]oluntariness of defendant's statements may . . . involve more than an analysis of the words spoken to and by him." *Id.*

[48] *Id.* at 587. "Because in this case we conclude that defendant met his burden under the Shield Law, we need not decide what standard is constitutionally required in order to overcome a criminal defendant's substantial right to obtain relevant evidence." *Id.*

[49] *Id.* at 589.

[50] *Combest*, 828 N.E.2d at 589. The court expressed its concern about the possibility of the police "immuniz[ing] themselves from their obligation to provide defendants with copies of their own statements simply by letting a news organization – invited into the room by police – operate the cameras." *Id.*

[51] *Id.*

recently been adopted by the New York State and American Bar Associations."[52] Despite the performance of a police function by Hybrid Films and the growing trend to require the questioning of suspects be recorded, the court held that because the Shield Law was satisfied in this case, it "need not decide whether the indicia of state involvement in this case rise to the level at which private conduct is transformed into state action."[53]

Because the court rested its decision on procedural grounds, the court found it unnecessary to decide the constitutionality of the Shield Law itself.[54] The *Combest* court noted that *O'Neill*[55] made it clear that when a court is "faced with a litigant's request for information in the possession of the media, competing interests must be balanced."[56] With confidential materials, the media has a legitimate interest in preserving "their ability to find sources willing to provide information [that may] soon evaporate if their guarantees of confidentiality will not be honored."[57] With nonconfidential materials in "a criminal case, [the] defendant's interest in

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[52] *Id.* at 589 n.5.

[53] *Id.* at 589 (citing People v. Ray, 480 N.E.2d 1065, 1067 (N.Y. 1985)).

[54] *Combest*, 828 N.E.2d at 587.

[55] *O'Neill*, 523 N.E.2d at 281 n.3 ("[P]rotection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by the First Amendment. Article I, § 8 of the Constitution assures, in affirmative terms, the right of our citizens to '*freely speak, write and publish*' and prohibits the use of official authority which acts to '*restrain or abridge* the liberty of speech or of the press.' ").

[56] *Combest*, 828 N.E.2d at 586 (citing *O'Neill*, 523 N.E.2d at 281, which concluded, "[t]hus, in deciding whether to order disclosure of [materials] prepared or obtained in the course of newsgathering, a court would consider the extent, if any, that press activities will be affected and, if so, whether such is justified by the interest to be served."); *see also* N.Y. CONST. art. I, § 8, stating in pertinent part: "Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."

[57] *Id.* at 586.

nonconfidential material weighs heavy."[58] The defendant argued that the Shield Law is unconstitutional as applied to criminal cases because "a criminal defendant is entitled to obtain nonconfidential material possessed by a news organization even when he or she cannot meet the three-pronged showing required by the statute."[59] The defendant asserted that his "fair trial rights," namely "due process rights to a fair trial, presentation of a defense, compulsory process and confrontation"[60] are not easily overcome, especially when balanced against "a reporter's privilege in nonconfidential materials."[61] In other words, because the interest in guaranteeing confidentiality is not present in nonconfidential materials, the defendant's interests in fair trial rights carry more weight.

Despite articulating a balancing test where a defendant's fair trial rights are weighed against the media's interest in nonconfidential news gathering,[62] the court stopped short in its analysis of the balancing test by not stating when the media's interest in nonconfidential materials may outweigh a criminal defendant's interest in fair trial rights.[63] Additionally, since the defendant met his

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[58] *Id.*

[59] *Id.* at 586 ("[Combest] maintains that his due process rights to a fair trial, presentation of a defense, compulsory process and confrontation entitled him to obtain the nonconfidential videotapes of his own statements that were recorded by Hybrid.").

[60] *Id.* at 586.

[61] *Combest*, 828 N.E.2d at 587.

[62] *Id.* at 586.

[63] In footnote 3 of *Combest*, the court cited several cases from the Circuit Courts that have split over the issue of when a criminal defendant is entitled to nonconfidential news materials. *Combest*, 828 N.E.2d at 587 n.3. In *United States v. LaRouche Campaign*, the First Circuit noted the weight given to the criminal defendant's interest in nonconfidential news materials when balanced against legitimate concerns of the news media. *LaRouche*, 841 F.2d 1176, 1181-82 (1st Cir. 1988).

The Fourth Circuit in *In re Shain* stated that "the absence of a claim of

confidentiality and the lack of vindictiveness" led the court to hold that

> the incidental burden on the freedom of the press . . . does not require the invalidation of the subpoenas issued to the reporters, and absent evidence of governmental harassment or bad faith, the reporters have no privilege different from that of any other citizen not to testify about knowledge relevant to a criminal prosecution.

In re Shain, 978 F.2d 850, at 852-53 (4th Cir. 1992).

In *United States v. Smith*, the Fifth Circuit found little support of the news media's arguments that, absent a qualified privilege, the news media would be an arm of the government driving sources away, be overwhelmed by discovery requests impairing their ability to provide information to the public, force some materials to be destroyed or prevent reporting on matters in fear of involvement in criminal litigation when weighed against the interests of the government in effective law enforcement. *Smith*, 135 F.3d 963, 969-70 (5th Cir. 1998). Because defendant Smith did not join the government's appeal and the government cannot assert a defendant's Sixth Amendment rights vicariously, the court was limited to considering the interests of the government. *Smith*, 135 F.3d at 970 n.3 (citing United States v. Fortna, 796 F.2d 724, 732 (5th Cir. 1986)). Additionally, the "Sixth, Seventh and Ninth Circuits have gone further, refusing to recognize the existence of any journalist's privilege in the context of a criminal case." *Combest*, 828 N.E.2d at 587 n.3 (citing *In re* Grand Jury Proceedings (Storer), 810 F.2d 580 (6th Cir. 1987)); McKevitt v. Pallasch, 339 F.3d 530 (7th Cir. 2003); *In re* Grand Jury Proceedings (Scarce), 5 F.3d 397 (9th Cir. 1993)). In *Storer*, when Stone, a reporter, refused to comply with a subpoena to produce tapes of gang members during a murder investigation, the Sixth Circuit balanced the competing interests of the freedom of the press against the public's interest in effective law enforcement where all citizens are obligated to give relevant testimony, the Sixth Circuit was unconvinced that there was a qualified testimonial privilege for the news media. *Storer*, 810 F.2d at 581, 586.

In *McKevitt*, the Seventh Circuit found that the federal interest in cooperating in criminal proceedings defeated a reporter's privilege argument because "the information in the reporter's possession does not come from a confidential source, [and] it is difficult to see what possible bearing the First Amendment could have on the question of compelled disclosure" especially when the source is known and does not object to disclosure of the materials. *McKevitt*, 339 F.3d at 532-33.

The Ninth Circuit in *Scarce*, noting that the defendant, Scarce, a Ph.D. student who gathered information for a book mistakenly characterized Supreme Court's holding in *Branzburg v. Hayes* as a plurality opinion, when in fact it was a majority opinion that controlled the circumstances of *Scarce*. *Scarce*, 5 F.3d at 400 (citing Branzburg v. Hayes, 408 U.S. 655, 655 (1972). The Ninth Circuit refused to recognize a "scholar's privilege" in newsgathering, and followed *Branzburg* which held

> Until now the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do. Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process. On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but

procedural burden under the Shield Law, the court held that an inquiry into which "standard is constitutionally required in order to overcome a criminal defendant's substantial right to obtain relevant evidence" is unnecessary.[64]

Justice Smith in dissent agreed with the majority that once the Shield Law test was met, the constitutionality of the Shield Law test as applied to criminal cases was correctly left alone, but disagreed as to what the constitutional question would be had the Shield Law not been met by the defendant.[65] The majority stated that the constitutional question required the balancing of the "important 'competing interests' of free press and fair trial."[66] Justice Smith disagreed, arguing that the court should examine "whether the balance the Legislature struck in the Shield Law is within the limits set by the State and Federal Constitutions."[67] Justice Smith therefore "would hold the Shield Law valid if it complies with the

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> uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.

Id. at 401 (citing *Branzburg,* 408 U.S. at 689-91).

Finally, the Second Circuit in *Gonzales v. National Broadcasting Co.* held that "a reporter's privilege in nonconfidential material will be overcome in a civil case by a showing that the material is 'of likely relevance to a significant issue in the case, and [is] not reasonably obtainable from other available sources.' " *Gonzales v. National Broadcasting Co.*, 194 F.3d 29, 36 (2d Cir. 1999). *Gonzales* provided a standard for civil cases lower "than that required by the Shield Law," and even though it did not provide a standard for deciding a criminal case, *Gonzalez* speculated that "even less of a showing would be required" in a criminal case. *Combest*, 828 N.E.2d at 587 n.3 (citing *Gonzales*, 194 F.3d at 34 n.3).

[64] *Combest*, 828 N.E.2d at 587.

[65] *Id.* at 591 (Smith, J., dissenting).

[66] *Combest*, 828 N.E.2d at 591 (Smith, J., dissenting); *id.* at 586 (citing *O'Neill*, 523 N.E.2d at 281).

[67] *Id.*

[constitutional] limitations . . . and invalid if it does not."[68]

According to the dissent the relevancy requirement of the Shield Law would be controlled by *Crane v. Kentucky*,[69] where the Supreme Court held that the "circumstances surrounding the taking of a confession can be highly relevant" to legal and factual inquiries, and the "exclusion of . . . exculpatory evidence deprives a defendant of the basic right" protected by the Sixth Amendment.[70] Since the relevancy requirement of the Shield Law can be satisfied by a showing that the defendant simply made a recorded statement to police about the alleged crime[71] which is "highly material and relevant to a criminal prosecution,"[72] the mere fact that Combest made a recorded statement to police regarding the shooting would invoke Sixth Amendment protection under *Crane*.

The necessity requirement of the Shield Law would be controlled by *Chambers v. Mississippi*,[73] where the Court held that testimony which contains "persuasive assurances of trustworthiness" is critical to a defense claim, the "constitutional rights directly affecting the ascertainment of guilt are implicated," and the state's refusal to allow the testimony denies a defendant "a trial in accord with traditional and fundamental standards of due process."[74] According to the majority, the tapes would show interrogation techniques used by the police, and Combest's reactions to the tapes

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[68] *Id.*

[69] Crane v. Kentucky, 476 U.S. 683 (1986)

[70] *Id.* at 688, 690-91; *see* U.S. CONST. amend. VI.

[71] *Combest*, 828 N.E.2d at 587; *id.* at 591 (Smith, J., dissenting).

[72] *Id.*

[73] 410 U.S. 284 (1973).

would determine whether his statements were voluntary.[75] When a defendant argues that the defendant's own statements to police were involuntary, the court should determine via an in camera review of the news materials whether an involuntariness defense has significant evidentiary support in those news materials rather than accepting on blind faith a defendant's conclusory assertions to satisfy *Chambers*. The dissent therefore correctly argues that absent a viewing of the tapes, the court could not determine whether there exists any persuasive assurances of trustworthiness critical to Combest's voluntariness defense that falls within the constitutional limitations set by *Chambers*.

Lastly, the exclusivity requirement of the Shield Law would be governed by *People v. Robinson*,[76] where the New York Court of Appeals held that grand jury testimony containing the testimony of the only other person with knowledge of events in question was the only reliable source of relevant and material testimony to the defense, compelling its disclosure.[77] To fall within the scope of *Robinson*, therefore, a defendant, after satisfying the relevancy requirement, must show that the news materials in the possession of the media constitutes the only source that contains the circumstances surrounding the taking of the defendant's confession. In this case, the Hybrid Films tapes clearly meet this standard.[78]

The main division in the court between Justice Smith's

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[74] *Id.* at 302.
[75] *Combest*, 828 N.E.2d at 588.
[76] People v. Robinson, 679 N.E.2d 1055 (N.Y. 1997).
[77] *Robinson*, 679 N.E.2d at 1057.
[78] *See supra* note 45.

dissent and the majority is whether the "critical or necessary" element of the Shield Law had been met.[79] The majority found that because the defendant's statements on the Hybrid Films tapes could establish intangible aspects critical to Combest's voluntary defense, the necessity requirement of the Shield Law was satisfied.[80] "Critical or necessary," according to Justice Smith, should not mean the moving party "show that the evidence he seeks is likely to be decisive in the case," only that "the evidence is favorable to the party seeking it in some significant way."[81] Justice Smith could not "see how anyone can conclude, without examining the tapes, that they are 'critical or necessary' to the maintenance of defendant's defense or proof of an issue material to it."[82] He reasoned that the tapes might show that the interrogation was not particularly coercive and that the difference in the statements he first gave to detectives and the statements he later gave to the prosecutor were insignificant; and thus, "the second element of the statutory test is not met."[83]

Justice Smith argued that the court should not find an essential element of the Shield Law satisfied by mere party

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[79] *Id.* at 591 (Smith, J., dissenting).

[80] *Combest*, 828 N.E.2d at 588. In addition to the voluntariness defense, the defendant also argued that the Hybrid Films tapes would "help to establish his justification defense, as well as to negate the elements of intent and recklessness essential to the intentional and depraved indifference murder counts with which he was charged." *Id.* Interestingly, the court merely stated a "number of ways in which the tapes would help" the defendant, but did not rule on this issue, presumably because the defendant's voluntariness argument satisfied the second prong of the Shield Law. *Id.* The court noted the tapes would show that the defendant's car was not to be used as a getaway vehicle at the time of the shooting, that the defendant was unaware his friend was armed, that he warned people to get to safety when the shooting started, and that he did not see Hernandez until he was hit. *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.*

assertions.[84] Furthermore, Justice Smith believed that even if the tapes show exactly what Combest asserts they do, the tapes "fall well short of proving either that his confession was involuntary or that his killing of Hector Rodriguez was justified."[85] Justice Smith points out that because the "defendant had moved before trial to suppress [his] statements" made to the police and prosecutor to support his justification defense, the defendant effectively argued that he was coerced into making statements that proved his innocence.[86] To enforce the subpoena, the defendant argued that "the tapes could give substantial support to either or both of the contradictory themes of his defense."[87] Because of this contradiction, Justice Smith thought it essential for the trial court to review the tapes in camera; he could not understand how any court could find that the defendant either met or did not meet the Shield Law requirements without first viewing the tapes.[88]

Because the court decided the case on procedural grounds, it

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[84] Combest, 828 N.E.2d at 591 (Smith, J., dissenting) ("The majority finds the "critical or necessary" branch of the statutory test to have been met based on its recital of what the defendant contended that the tapes would show. I see nothing in the statute that would justify setting aside the privilege on the basis of a party's assertions, without verifying that those assertions are correct.").

[85] *Id.* at 591. (Smith, J., dissenting). It is important to note that Combest was on trial for the murder of Christopher Hernandez, not Hector Rodriguez. *Id.* at 590. While this may be an error in reporting, news sources have stated the deceased was Christopher Hernandez. John Caher, *Court Allows Defendant to Tap Film Crew's Tapes; No Strict Shield Law Standard for Criminal Cases Set*, N.Y.L.J., Feb. 23, 2005, at 1; Matt Smith, *State's Top Court Says Defendant has Right to Film Crew's Tapes*, AP ALERT NEW YORK, Feb. 22, 2005; Jim Dwyer, *We Need Panel to Probe Bad Raps*, DAILY NEWS, Dec. 19, 2000, at 8. The Supreme Court, Appellate Division also indicated the deceased was Christopher Hernandez. *In re Hybrid Films*, 721 N.Y.S.2d at 795.

[86] *Combest*, 828 N.E.2d at 590 (Smith, J., dissenting).

[87] *Id.* "[T]he tapes might contain descriptions of the incident at issue that made defendant's defense of justification significantly more convincing; or they might show that he was coerced by the police." *Id.*

[88] *Id.*

properly deemed it unnecessary to evaluate any applicable state or federal constitutional issue. The court found that the defendant satisfied the three part test in the Shield Law in response to Hybrid Films' motion to quash the subpoena, not in response to any argument put forth by the defendant. In fact, the defendant argued that the Shield Law was unconstitutional, his confession was involuntary, and his use of self-defense was justified. The court did express concern with the "troubling practice of the police partnering with the media to make a television show depicting custodial interrogations," and the defendant argued that there was a possible agency relationship between the media and the police; yet, the court did not address any consequences of an agency relationship further because the defendant was entitled to the tapes by statute, and additional inquiry was unnecessary.[89]

The action taken by the majority does give us some guidance. The court declared that it is "better practice" to view subpoenaed material in camera because the criminal court "should also be mindful that 'omissions, contrasts and even contradictions, vital perhaps, for discrediting a witness, are certainly not as apparent to the impartial presiding judge as to single-minded counsel for the accused.' "[90] Because the Court of Appeals accepted the defendant's mere assertions as to the contents of the tapes without a finding by

[89] *Combest*, 828 N.E.2d at 589 (citing *Ray*, 480 N.E.2d at 1067). Had the court examined the agency issue further, it would have changed the outcome of the case little because, firstly, the court ordered the tapes produced without the existence of an agency relationship. Secondly, had the court found an agency relationship to exist between Hybrid Films and the police, the court would have ordered the production of the tapes because an agency relationship would have equated Hybrid Films' filming of the interrogation and confession to the police. *See supra* note 49.

the trial court, and stated that it is merely "better practice" and not mandatory to review the tapes in camera,[91] the court eroded the "critical or necessary" standard where the party requesting disclosure of nonconfidential news materials now need only assert, and not clearly and specifically show the significance of, what the materials in question might show to satisfy the Shield Law.

The dissent was correct in its determination that the "critical or necessary" component was not satisfied since the defendant failed to make "a clear and specific showing" that the materials satisfy this element of the Shield Law.[92] Here, the defendant stated that the tapes "would" show interrogation tactics, coercion, physical intimidation, justified self-defense, and earlier displays of emotion.[93] What the tapes "would" show does necessarily not rise to the level of "a clear and specific showing" of what the tapes will or do show. The dissent was correct in its criticism of the majority when the majority found the "critical or necessary" requirement of the Shield Law satisfied solely on the defendant's subjective assertions of what the tapes "would" show.

The court held that the "defendant met his burden under [the Shield Law] *as a matter of law*,"[94] and reversed and remanded for a new trial.[95] This holding does not require an in camera review of the tapes, rather the majority advocates a loose guideline as the "better

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[90] *Combest*, 828 N.E.2d at 589 n.4 (quoting *Rosario*, 173 N.E.2d at 883).
[91] *Id.* at 589 n.4.
[92] *See supra* note 3.
[93] *Combest*, 828 N.E.2d at 588.
[94] *Id.* (emphasis added).
[95] *Id.* at 590.

practice" for the trial court conducting the new trial to possibly conduct such a review.[96] The absence of an in camera review was the very point which the court unanimously agreed was reversible error.[97] Accepting a defendant's subjective, and arguably biased, assertions as to what nonconfidential materials show, without firsthand verification of those assertions, regardless of whether sufficient language of certainty is used, is an erosion of "a clear and specific showing that the [materials are] . . . critical or necessary to the maintenance of a party's claim, defense, or proof of an issue material thereto."[98] The defendant must make this showing to overcome the qualified privilege afforded to nonconfidential news material protected by the Shield Law, article I section 8 of the New York State Constitution, and the First Amendment of the United States Constitution.[99]

Despite the absence of a rigid standard, at the very least, *Combest* stated that the balancing test in *O'Neill* (where the court will weigh the interest of the media's interest in nonconfidential materials against the defendant's fair trial rights) applies to a criminal cases through the Shield Law.[100] Since, in this case, it was unnecessary to evaluate the constitutional issues surrounding the criminal defendant, thus, the court did not provide any guidance as to exactly how and in

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[96] *Id.* at 589 n.4.

[97] *Id.* at 589 n.4; *id.* at 590 (Smith, J., dissenting).

[98] *See supra* note 3.

[99] *O'Neill*, 523 N.E.2d at 277-78.

[100] Combest, 828 N.E.2d at 586. "As made clear in *O'Neill*, when faced with a litigant's request for information in the possession of the media, competing interests must be balanced. In a criminal case, defendant's interest in nonconfidential material weighs heavy." (citing *O'Neill*, 523 N.E.2d at 281).

what circumstances the news media's interest in nonconfidential materials can outweigh the criminal defendant's interest in fair trial rights. The footnote cases cited by the majority seem to favor disclosure regardless of whether the exact requirements of the Shield Law are met, since mere evidentiary allegations were sufficient to the requirements of the Shield Law. The New York Court of Appeals should have required that a trial court, when confronted with a motion to produce nonconfidential news materials under the Shield Law, must conduct an in camera review to determine whether the materials satisfy the "critical or necessary" requirement of the Shield Law. In other words, to satisfy "critical or necessary" a court should not base its decision on what a party alleges news materials not in their possession "would" reveal, but determine for itself what in fact those materials do reveal.

Albert V. Messina, Jr.