

THE STATE OF NEW HAMPSHIRE

STRAFFORD, SS.

SUPERIOR COURT

IN RE: FOSTER'S DAILY DEMOCRAT  
(STATE V. JOSHUA FLYNN)  
219-2017-CR-00162

STATE'S MOTION TO COMPEL NON-CONFIDENTIAL WORK-PRODUCT

NOW COMES the State of New Hampshire by and through the office of the Strafford County Attorney, and hereby requests this Honorable Court compel Foster's Daily Democrat (Foster's) to release all recordings, notes, memoranda, drafts, documents and any material memorializing its interview with the defendant, Joshua Flynn.

The following is stated in support of this motion:

- 1) Mr. Flynn is charged by indictment with, among other charges, aggravated felonious sexual assault of C.W. by forcing her at knife-point to engage in certain sexual acts involving penetration.
- 2) The State has been made aware by both Brian Early, a Foster's reporter, and Mr. Flynn that an interview has been conducted concerning Mr. Flynn's new and exculpatory claims relating to the sexual assault charges, to which he has previously confessed. To date, Foster's has not published any articles predicated on the interview/s. The State has requested copies of all materials generated by Foster's during the Flynn interview/s. Foster's has refused the request, and indicated that it would seek to quash any related subpoenas.
- 3) Part 1, article 22 of the New Hampshire Constitution affords only a qualified privilege for reporters to protect confidential sources in civil cases, and while the privilege does not "cease to exist" in criminal matters, it is "more tenuous." State v. Siel 122 NH 254, 259 (1982)(emphasis added). In a criminal case, a party "may overcome a press privilege to withhold a confidential source of news only when he shows (1) that he has attempted unsuccessfully to obtain the information by all reasonable alternatives; (2) that the information would not be irrelevant to his [case]; and (3) that, by a balance of the probabilities, there is a reasonable possibility that the information sought as evidence would affect the verdict in his case." Id.
- 4) The United States Supreme Court likewise has rejected a First Amendment claim of privilege for reporters concerning activity they had observed pursuant to a promise of confidentiality. In Branzburg v. Hayes, 408 U.S. 665, 667-79 (1972), the Court was "asked to create another [testimonial privilege] by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy." The majority opinion stated: "This we decline to do." Id. Justice Powell, concurring with the majority, explained that "[t]he asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct." Id. at 710.
- 5) Courts have extracted and formulated various tests intended to weigh the competing interests, including:

“(i) a test requiring a showing of ‘clear relevance,’ United States v. Cutler, 6 F.3d 67, 74 (2d Cir. 1993), (ii) one requiring that

The government must (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information,

Branzburg, 408 U.S. at 743 (Stewart, J., dissenting); or (iii) a test requiring a showing that the information sought is ‘highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources,’ In re Petroleum Prods. Antitrust Litig., 680 F.2d 5, 7 (2d Cir. 1982).”

The New York Times Co. v. Gonzales, 459 F.3d 160, 169-70 (2006).

- 6) At the outset, under the facts here, Mr. Flynn is not a confidential source: he disclosed his intention to conduct an interview with Foster’s both on recorded telephone conversations and in monitored emails; and, Foster’s reporter Brian Early disclosed to undersigned counsel both his intention to conduct an interview with Mr. Flynn, and then confirmed afterwards that he had done so. Moreover, both parties disclosed that the interview specifically concerned the sexual assaults at issue.
- 7) The cornerstone of even a qualified privilege is to protect confidential sources. “This is because disclosure of such confidential material would clearly jeopardize the ability of journalists and the media to gather information and, therefore, have a chilling effect on speech.” U.S. v. LaRouche, 841 F.2d 1176, 1181 (1988). Consequently, it is difficult to find “authoritative sources demonstrating or explaining how any chilling effect could result from the disclosure of statements made for publication without any expectation of confidentiality.” Id.; U.S. v. Smith, 135 F.3d 963, 970 (5<sup>th</sup> Cir. 1998)(“there is little reason to fear that on-the-record sources will avoid the press simply because the media might turn over non-confidential statements to the government” because “[p]resumably, on-the-record sources expect beforehand that the government, along with the rest of the public, will view their non-confidential statements when they are aired by the media”) (both cited with approval in State v. Gibson, 2017WL4182918 (NH 2017)).
- 8) Still, even assuming a tenuous qualified privilege for unpublished material from a non-confidential source, the material should be provided to the State using any established test, whether under the State or Federal Constitutions. First, under the adage, “it never hurts to ask,” undersigned counsel made repeated requests directly to Foster’s for the material, and it unequivocally refused to disclose. Arguably, the State is barred under the Fifth Amendment from compelling any direct disclosure from Mr. Flynn concerning his account of his prior statements to Foster’s. In sum, the State has no other avenues leading to this information.
- 9) Second, the information is clearly and highly relevant to the State’s case. While Mr. Flynn has previously confessed to the sexual assaults, his telephone and email conversations concerning the Foster’s interview indicate that he now intends to advance a new, exculpatory account of events. A defendant’s account of his defense is central to any case, and the State’s burden to thwart it is a primary task. Truly, it is difficult to conceive of a more essential and significant issue having a critical bearing on a criminal trial.
- 10) Finally, there is a reasonable possibility that obtaining the defendant’s factual claims of a defense will afford the State an opportunity to prepare and offer evidence showing such

claims to be demonstrably false. Therefore, by a balance of probabilities, in this case a reasonable possibility exists that by obtaining the information sought in advance of trial the verdict will be affected.

WHEREFORE, the State respectfully requests this Honorable Court:

- A) Compel Foster's Daily Democrat to provide the State with any and all materials related to its interview with Joshua Flynn, the defendant in the pending matter of State v. Joshua Flynn.

Respectfully submitted on this 29th day of January, 2018.

BY THE OFFICE OF THE STRAFFORD COUNTY ATTORNEY

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THE STATE OF NEW HAMPSHIRE  
STRAFFORD, SS  
January 29, 2018

I hereby certify that a copy of the foregoing has been, this date, served in hand to Foster's Daily Democrat.

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Joachim Barth  
Assistant County Attorney