THE STATE OF NEW HAMPSHIRE

STRAFFORD, ss. SUPERIOR COURT
DOCKET NO. 219-2017-CR-00162

STATE OF NEW HAMPSHIRE

v.

JOSHUA FLYNN

IN RE: FOSTER'S DAILY DEMOCRAT

**OPPOSITION OF SEACOAST NEWSPAPERS, INC.
TO THE STATE OF NEW HAMPSHIRE'S MOTION
TO COMPEL NON-CONFIDENTIAL WORK-PRODUCT**

The Respondent Seacoast Newspapers, Inc., d/b/a Foster's Daily Democrat, (hereinafter "Seacoast Newspapers"), by and through counsel, hereby opposes the State's Motion to Compel Non-Confidential Work-Product. As grounds for this opposition Seacoast Newspapers states as follows:

1. Seacoast Newspapers is engaged in the business of publishing newspapers and other media in New Hampshire.
2. On June 15, 2017, Brian Early, (hereinafter "Early"), a newspaper reporter employed by Seacoast Newspapers conducted an interview with Joshua Flynn, the defendant in subject case.
3. At no time subsequent to that interview did Seacoast Newspapers or Early publish any information or materials related to that interview.
4. On January 29, 2018, the State of New Hampshire served Seacoast Newspapers with a Motion to Compel Non-Confidential Work-Product seeking "all recordings, notes, memoranda, drafts, documents and any material memorializing its interview with the defendant, Joshua Flynn".

ARGUMENT

Requiring a journalist to serve as an investigative arm of the state violates the Constitution of New Hampshire and the First Amendment to the Constitution of the United States of America. Part I Article 22 of the New Hampshire Constitution mandates inviolable preservation of the freedom of press. Courts have long recognized that a government that requires the press to produce to it unpublished materials degrades the autonomy and independence needed by the press to fulfill its role in educating and informing the citizenry.

As early as 1868 Professor Thomas Cooley wrote in his Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union, "The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." 2 Cooley's Constitutional Limitations, 8th ed., p. 886.

The qualified reporter's privilege recognized by the Supreme Court of New Hampshire, and in virtually all jurisdictions in this nation, applies in both civil and criminal cases, and protects both confidential and non-confidential materials obtained by journalists during newsgathering activities.

> "It is their independent status that often enables reporters to gain access, without a pledge of confidentiality, to meetings or places where a policeman or a politician would not be welcome. If perceived as an adjunct of the police or of the courts, journalists might well be shunned by persons who might otherwise give them information without a promise of confidentiality, barred from meetings which they would otherwise be free to attend and to describe, or even physically harassed if, for example,

> observed taking notes or photographs at a public rally". Schoen v. Schoen, 5 F. 3d 1289 (1993).

In Opinion of the Justices, 117 N.H. 386, 373 A.2d 644, 2 Media L. Rptr. 2083 (1977), the Supreme Court of New Hampshire articulated the Constitutional underpinning of the reporters' privilege quite clearly:

> "[p]art I, article 22 [of the New Hampshire Constitution] provides that 'liberty of the press' is 'essential to the security of freedom in a state' and ought, therefore, 'to be inviolably preserved.' Our constitution quite consciously ties a free press to a free state, for effective self-government cannot succeed unless the people have access to an unimpeded and uncensored flow of reporting. News gathering is an integral part of the process." *Id.* at 389.

In outlining the general principles underlying the journalist's privilege, the Second Circuit in the case of Von Bulow v. Von Bulow, 811 F. 2d 136, 1987 U.S. App. Lexis 2048 (1987), said that "the relationship between the journalist and his source may be confidential or non-confidential for purposes of the privilege" and "unpublished resource material likewise may be protected." 811 F.2d at 142. The Court detailed its reasoning:

> Other federal courts have held that the privilege can be invoked to shield disclosure of nonconfidential sources and nonconfidential information. *E.g., United States v. Blanton*, 534 F. Supp. 295, 296-97 (S.D. Fla. 1982), *aff'd*, 730 F.2d 1425 (11th Cir. 1984) (information sought was "*gathered, developed or received* by [reporter] in his professional *newsgathering* capacity" and nonconfidentiality of source of information was "irrelevant to chilling effect") (emphasis added); *Loadholtz v. Fields*, 389 F. Supp. 1299, 1300, 1303 (M.D. Fla. 1975) (regarding materials developed by reporter *in preparation of newspaper article*, nonconfidentiality of

> source was "utterly irrelevant to 'chilling effect' on flow of information to press and public").
>
> Journalists who seek to guard information that has not been published likewise have been accorded the protective shroud. "Like the compelled disclosure of confidential sources, [the compelled production of a reporter's resource materials] may substantially undercut the public policy favoring the free flow of information to the public that is the foundation of the privilege." *United States v. Cuthbertson*, 630 F.2d 139, 147 (3 Cir. 1980), *cert. denied*, 454 U.S. 1056, 70 L. Ed. 2d 594, 102 S. Ct. 604 (1981) (documents subpoenaed were resource materials pertaining to *preparation of CBS investigative report*). *See also United States v. Burke*, 700 F.2d 70, 76-78 (2 Cir.), *cert. denied*, 464 U.S. 816, 78 L. Ed. 2d 85, 104 S. Ct. 72 (1983) (documents sought were *prepared* by reporter *in connection with news story*).

When addressing these issues the Court of Appeals for the First Circuit, in the case of United States v. La Rouche Campaign, 841 F. 2d 1176 (1st Cir. 1988), set forth four justifications for shielding the press from having to respond to subpoenas relating to non-confidential unpublished materials.

> The four interests named are the threat of administrative and judicial intrusion into the newsgathering and editorial process; the disadvantage of a journalist appearing to be an investigative arm of the judicial system or a research tool of government or of a private party; the disincentive to compile and preserve non-broadcast material; and the burden on journalists' time and resources in responding to subpoenas.

The state in this case bears the burden of establishing a compelling interest sufficient to overcome the reporters' privilege. In 1982, in the case of State v. Siel, 122 N.H. 254 (1982), the Supreme Court of New Hampshire laid out the test

to be employed when a party seeks to overcome the reporters' privilege regarding confidential sources. Although in the Siel case it was a criminal defendant seeking to overcome the privilege and the reporters' materials had been published, the guidelines remain instructive:

> (1) that the party has attempted unsuccessfully to obtain the information by all reasonable alternatives;
>
> (2) that the information would not be irrelevant to the defense; 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.

This test has been adopted by the majority of jurisdictions, see e.g. Shoen v. Shoen 5 F. 3d 1289 (1993), 1993 U.S. App. Lexis 24685, United States v. Cuthberson, 630 F. 2d 139 (3d Cir. 1980), and Miller v. Mecklenburg County, 602 F. Supp. 675 (W.D.N.C. 1985).

In this case the State has no knowledge relating to the contents, if any, of the materials it seeks to obtain. The State's claim that it has "no other avenues" to obtaining information about the defendant's defense completely ignores the dictates of Rule 12 of the New Hampshire Rules of Criminal Procedure mandating discovery for the prosecution including "copies of or access to (i) all books, papers, documents, photographs, tangible objects, buildings or places which are intended for use by the defendant as evidence at the trial or hearing" and "a list of the names of the witnesses the defendant anticipates calling at the trial or hearing. Contemporaneously with the furnishing of such witness list, the defendant shall provide the State with all statements of witnesses the defendant anticipates calling at the trial or hearing. Notwithstanding the preceding sentence, this rule does not

require the defendant to provide the State with copies of or access to statements of the defendant.

A fishing expedition by the government of unpublished materials obtained in newsgathering activities by a journalist is not an interest that outweighs the right of freedom of the press guaranteed by the New Hampshire Constitution and by the First Amendment. For the reasons stated above Seacoast Newspapers now prays that the State's Motion to Compel Non-Confidential Work-Product be denied and for such other and further relief as the Court deems just.

SEACOAST NEWSPAPERS REQUESTS THE OPPORTUNITY TO PRESENT ORAL ARGUMENT IN SUPPORT OF THIS OPPOSITION.

RESPECTFULLY SUBMITTED,
SEACOAST NEWSPAPERS, INC.,
BY ITS ATTORNEY,

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CERTIFICATE OF SERVICE

I, Gregory V. Sullivan, do hereby certify that a copy of the foregoing opposition was served on all parties by mailing same to Joachim Barth, Assistant County Attorney, at 259 County Farm Road, Suite 201, Dover, NH, 03820, and to Joshua Flynn c/o the Strafford County House of Corrections, 266 County Farm Road, Dover, NH, 03820.

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Gregory V. Sullivan