No. 13-_____

In the

Supreme Court of the United States

JAMES HOLMES,

Petitioner,

-v.-

JANA WINTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A defendant in a death penalty case in Colorado sought the issuance of a subpoena in New York pursuant to the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings (the "Uniform Act") of a journalist found in New York so that evidence critical to his case could be obtained. After the Colorado court certified that the journalist's testimony was "material and necessary" to the criminal case, and the New York trial level and intermediate appellate courts agreed, the subpoena was denied by the highest court in New York on public policy grounds.

The Questions Presented, IN A PENDING CAPITAL CASE, are:

1. Given the agreement among the States to uniformly apply the provisions of the Uniform Act, which has been Congressionally approved pursuant to the Compact Clause, may a signatory state, for local public policy reasons, unilaterally exempt a class of witnesses from being subpoenaed to a sister state?

2. Does the refusal of a signatory state, on local public policy grounds, to enforce the Uniform Act violate an out-of-state capital defendant's right to Compulsory Process under the Sixth and Fourteenth Amendments?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Constitutional Provisions

Rules

Other Sources

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

1. *Matter of Holmes v. Winter*, 22 N.Y.3d 300 (N.Y. 2013)

2. *Matter of Holmes v. Winter*, 110 A.D.3d 134 (1st Dept. 2013), *rev'd*, 22 N.Y.3d 300 (N.Y. 2013)

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

James Holmes petitions this Court for a writ of certiorari to review the judgment and opinion of the Court of Appeals of the State of New York, filed December 10, 2013.

OPINION AND ORDERS BELOW

On December 10, 2013, the New York Court of Appeals rendered a published opinion that, for the first time in New York or any state, specifically excluded journalists from being subpoenaed to appear in a sister-state criminal proceeding based on its view that public policy demanded it "because New York is the media capital of the country if not the world" (App. 23). The Court of Appeals thereby dismissed James Holmes' petition, which had been filed pursuant to the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, and approved by the trial court in Colorado, for a subpoena directing Fox News reporter Jana Winter to appear and give evidence in Aurora, Colorado in relation to a death penalty case pending against Mr. Holmes.

JURISDICTION

The New York Court of Appeals entered its decision on December 10, 2013. The 90-day period for filing this Petition expires on March 10, 2014. *See* Supreme Court Rules 13 and 30.1. This Court's jurisdiction to review the Court of Appeals' decision is invoked under 28 U.S.C. § 1257(a).[1]

While the capital murder case against Mr. Holmes continues, the separable and distinct issue raised in New York is final. "The Supreme Court considers as final for its jurisdictional purposes a state court judgment that conclusively disposes of a matter distinct from the subject matter of the litigation and affecting only the parties to the particular controversy." Stephen M. Shapiro et al, *Supreme Court Practice* 159 (Bloomberg BNA, 10th ed. 2013) (citing *Clark v. Willard*, 292 U.S. 112, 117-19 (1934)).

[1] That decision fully and finally addressed the application of the Uniform Act to journalists found in New York and is therefore not subject to "further review or correction in any other state tribunal" and was "the final word of the court." *Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551 (1945).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

Section 10, clause 3, of Article I of the Constitution of the United States provides:

> No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . . .

The Sixth Amendment to the United States Constitution guarantees that:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . .

Title 4, Section 112 of the United States Code, known as the Crime Control Consent Act of 1934, provides:

> (a) The consent of Congress is hereby given to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts.

New York Criminal Procedure Law, Section 640.10, which adopts and enacts the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, provides, in pertinent part:

> *2. Subpoenaing witness in this state to testify in another state.* If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in this state certifies under the seal of such court that there is a criminal prosecution pending in such court, or that a grand jury investigation has commenced or is about to commence, that a person being within this state is a material witness in such prosecution, or grand jury investigation, and that his presence will be required for a specified number of days, upon presentation of such certificate to a justice of the supreme court or a county judge in the county in which such person is, such justice or judge shall fix a time and place for a hearing, and shall make an order directing the witness to appear at a time and place certain for the hearing.

If at such hearing the justice or judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution or a grand jury investigation in the other state, and that the laws of the state in which the prosecution is pending, or grand jury investigation has commenced or is about to commence, will give to him protection from arrest and the service of civil and criminal process, he shall issue a subpoena, with a copy of the certificate attached, directing the witness to attend and testify in the court where the prosecution is pending, or where a grand jury investigation has commenced or is about to commence at a time and place specified in the subpoena.

In any such hearing the certificate shall be prima facie evidence of all the facts stated therein.

* * *

5. Uniformity of interpretation. This section shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it.

New York Civil Rights Law, Section 79-h, provides, in relevant part:

> [N]o professional journalist or newscaster presently or having previously been employed or otherwise associated with any newspaper, magazine, news agency, press association, wire service, radio or television transmission station or network or other professional medium of communicating news or information to the public shall be adjudged in contempt by any court in connection with any civil or criminal proceeding, or by the legislature or other body having contempt powers, nor shall a grand jury seek to have a journalist or newscaster held in contempt by any court, legislature or other body having contempt powers for refusing or failing to disclose any news obtained or received in confidence or the identity of the source. . . .

The citations to all of the constitutional and statutory provisions involved in this case are listed below, and their pertinent text is set out in the Appendix, pursuant to Supreme Court Rule 14.1(f):

U.S. Const. art. I, § 10, cl. 3;

U.S. Const. amends. I, IV, V, VI, VIII, IX, X and XIV;

Colo. Const. art. II, §§ 3, 6, 7, 10, 11, 16, 18, 20, 23, 25, and 28;

4 U.S.C. § 112 (a);

N.Y. Crim. Proc. Law § 640.10; and

N.Y. Civil Rights Law § 79-h.

STATEMENT OF THE CASE

This petition seeks review of a 4-3 decision of New York's highest court. The decision declared New York as the "media capital of the country if not the world" (App. 23).[2] It therefore dismissed a petition seeking the issuance of a subpoena pursuant to the Uniform Act to Secure the Attendance of Witnesses Without a State in Criminal Proceedings (the "Uniform Act"), for a witness now located in New York, to testify in a capital murder case in Colorado concerning a "critical piece of evidence" (App. 86). The Colorado Court specifically found that the testimony from the witness -- a journalist for Fox News -- was "material and necessary" to the pending proceeding in Colorado (App. 4). The Appellate Division of the Supreme Court of New York for the First Judicial Department had affirmed the Trial Court's issuance of a subpoena for the journalist to testify in Colorado. However, in a highly publicized decision, the New York Court of Appeals created an unprecedented public policy exception designed to accommodate New York's Journalist Shield Law, N.Y. Civ. Rights Law § 79-h (App. 23-24).

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[2] References to "App. _" refer to pages in the Appendix to this Petition for a Writ of Certiorari. References to "R._" refer to pages in the Record on Appeal in the New York Court of Appeals proceeding.

James Holmes' initial submissions in New York in this case were premised on the grounds of the Due Process Clause, the Right to a Fair Trial by an Impartial Jury, the Rights to Counsel, Equal Protection, Confrontation, and Compulsory Process, the Rights to Remain Silent and to Appeal, and the Right to be Free from Cruel and Unusual Punishment, pursuant to the Federal and Colorado Constitutions generally, and specifically, the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth and Fourteenth Amendments to the United States Constitution, and Article II, sections 3, 6, 7, 10, 11, 16, 18, 20, 23, 25 and 28 of the Colorado Constitution (R. 75).

In addition, central to Mr. Holmes' arguments throughout the New York proceedings was that a defendant's constitutional Right to Compulsory Process, guaranteed by the Sixth Amendment and made applicable to the states through the Fourteenth Amendment's Due Process Clause, would be rendered impotent without the mechanism of *uniform* enforcement of the Uniform Act: "the interest at stake in the requesting state is indeed central to the government's state and federal constitutional mandate to guarantee a criminal defendant's right to compulsory process."[3]

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[3] Brief for Petitioner-Respondent at 21, 26, *Matter of Holmes v. Winter*, 22 N.Y.3d 300 (N.Y. 2013) (No. APL-2013-00239).

The Colorado Criminal Proceeding

Mr. Holmes stands accused of 166 felony counts, including 24 counts of first degree murder, arising out of the shooting at a movie theatre in Aurora, Colorado, during a midnight showing of Batman, The Dark Knight Rises, on July 20, 2012 (App. 42). The criminal case, styled *People of the State of Colorado vs. James Holmes,* No. 2012CR1522, was being heard by Chief Judge William Blair Sylvester of the Colorado Court (R. 64).

Given the high profile of this case, on July 23, 2013, Judge Sylvester issued a gag order limiting pretrial publicity by either side, including law enforcement (the "Order") (App. 42). Among other restrictions, the Order precluded law enforcement from providing the media with any information that would have "a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter" (R. 46). The Order related to, among other things, "the identity or nature of physical evidence expected to be presented" (R. 46).

That same day, a search warrant was executed by which the Aurora police seized a package containing a notebook that Mr. Holmes had mailed to his psychiatrist at the University of Colorado prior to the shootings (App. 2). Mr. Holmes filed a Motion for Immediate Protective Order, a Motion for Immediate Production and Protection of Privileged Material, and

a Motion for Compliance with Order Limiting Pre-Trial Publicity (R. 64-65; the motions are located at R. 308, 313, 317).

Judge Sylvester granted all three defense motions on July 25, 2012, specifically precluding any party, including law enforcement, from revealing any information concerning the discovery of the notebook and its contents (R. 64-65). That same day, FoxNews.com published an article written by Jana Winter, while in Colorado, entitled "EXCLUSIVE: Movie Massacre Suspect Sent Chilling Notebook to Psychiatrist Before Attack" (App. 2). Ms. Winter's article contained a description of the contents of the notebook, which she specifically attributed to information obtained from "law enforcement sources" (App. 2-3).

It is undisputed that Ms. Winter was aware of the pretrial publicity order because in her "exclusive" article, she stated that the Denver Division of the FBI, the Arapahoe County District Attorney and the Aurora Police "could not comment due to the gag order" (R. 79). No other journalist attributed information regarding the contents of the notebook directly to law enforcement sources (R. 394, 422, 433, 437, 462). It is likewise conceded that Ms. Winter was present in Colorado when the disclosures were

made to her and when she reported her "exclusive" story.[4]

After Ms. Winter's article was published, Mr. Holmes immediately moved the Colorado Court for an order enforcing compliance with the pretrial publicity order, citing the leak of protected information by the unnamed law enforcement officials mentioned in Ms. Winter's article (App. 43). Mr. Holmes then filed a Motion for Immediate Production of All Discovery Pertaining to Improper Disclosure of Privileged Material, which was granted. In response, Mr. Holmes' defense team received over 16,000 pages of discovery (R. 53).

Review of the discovery led Mr. Holmes to file a Motion for Sanctions for Violating [the Colorado] Court's Order Limiting Pretrial Publicity by Leaking Privileged and Confidential Information to the Media and Request for Evidentiary Hearing (the "Motion for Sanctions"), on October 2, 2012 (App. 44; R. 52-54). Mr. Holmes' Motion for Sanctions argued that the leak not only violated the Colorado Court's initial pretrial publicity order, but also "seriously jeopardized Mr. Holmes' constitutional rights to a fair trial, to a fair and impartial jury and to due process as protected by the Fifth, Sixth, and

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[4] Brief for Respondent-Appellant, at 41, *Matter of Holmes v. Winter*, 22 N.Y.3d 300 (N.Y. 2013) (No. APL-2013-00239); *see also* (App. 30).

Fourteenth Amendments to the United States Constitution" and Article II of the Colorado Constitution (R. 53).

On December 10, 2012, the Colorado Court held an evidentiary hearing on Mr. Holmes' Motion for Sanctions, and conducted a detailed examination of the circumstances leading up to the violation of the pretrial publicity orders (App. 44). Fourteen law enforcement officers testified at that hearing and affidavits from six other witnesses were received in evidence (App. 80). The testimony revealed that only a handful of officers saw or heard information about the contents of the notebook in question. Nonetheless, every witness denied providing information or knowing who might have provided information to the media in defiance of the pretrial publicity orders barring such conduct (App. 80).

The Petition Pursuant to the Uniform Act

Unable to establish which law enforcement officers violated the Colorado Court's pretrial publicity orders, Mr. Holmes moved for a certificate pursuant to the Uniform Act to compel Ms. Winter, who was then in New York, to appear before the Colorado Court in connection with Mr. Holmes' Motion for Sanctions and to testify concerning the identity of her two unnamed law enforcement sources (App. 44-45).

Importantly, on March 23, 2013, Judge Carlos Samour, who is currently handling the capital case in Colorado, ruled that Ms. Winter's testimony is highly relevant to his inquiry because the contents of the notebook and the manner in which it was obtained

> may well prove to be *a critical piece of evidence* in this case. . . . Of course, the more significant any admissible contents of the notebook are, the more significant the credibility of one or more of the [detectives who denied releasing the notebook] is likely to be at trial.

(App. 86) (emphasis added).

On January 18, 2013, the Colorado Court granted Mr. Holmes' Motion for a Certificate to Compel Attendance of Jana Winter, an Out of State Witness from New York and Production of Her Notes. The Colorado Court issued the requested Certificate pursuant to the Uniform Act, compelling Ms. Winter to spend three days in travel and to provide testimony before the court (App. 44).[5] The Certificate

[5] Securing a subpoena under the Uniform Act requires a two-step procedure. First, the interested party must obtain a certificate under court seal from the court where the proceeding is pending, certifying that (1) there is a criminal case pending before a court of record in the state, (2) the witness is a material and necessary witness in that prosecution, and (3) the witness'

explained that "counsel has used all available means to determine which law enforcement agent may have violated the [pretrial publicity order]. As none of these efforts have revealed the source of the information in Jana Winter's article, Jana Winter has become a material and necessary witness in this case" (App. 45). The Colorado Court ordered that "[t]he potential violation of this Court's orders is a serious issue . . . that has implicated the Defendant's constitutional rights to a fair trial, to a fair and impartial jury, and to due process" (App. 45). Additionally, Judge Sylvester certified that "perjury in the first degree may be implicated" given the testimony provided by law enforcement officials denying any involvement in the leak (R. 66).

After receipt of the Certificate, Mr. Holmes proceeded with the second step of the procedure dictated by the Uniform Act: He instituted a special proceeding in the Supreme Court of New York, New York County, Criminal Term (Hon. Larry Stephen, J.S.C.) (the "Trial Court") (App. 45). By Order to Show Cause, Holmes moved the Trial Court for the issuance of a subpoena, pursuant to New York's

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presence will be required for a certain number of days. Second, once the certificate is issued, a proceeding must be commenced in the courts of the county of the state in which the witness is present, requesting a subpoena compelling the witness' testimony and/or production of documents in the requesting court. In the sister-state proceeding, the certificate shall be *prima facie* evidence of all facts stated therein.

enactment of the Uniform Act -- N.Y. CPL § 640.10 -- compelling Ms. Winter to appear before the Colorado Court as a material witness to give testimony concerning the intentional violation of the pretrial publicity order (App. 45).

Mr. Holmes' application for an Order to Show Cause was premised on the federal protections delineated *supra* at pages 8 through 9. Ms. Winter opposed the initial Order to Show Cause filed at the trial level (R. 359-847). Ms. Winter's opposition papers argued that the Trial Court should not issue a subpoena pursuant to the Uniform Act because (1) Ms. Winter's testimony is neither material nor necessary to the investigation, prosecution or defense of Mr. Holmes, (2) Ms. Winter would suffer undue hardship if ordered to appear before the Colorado Court and (3) issuance of the subpoena would contravene a strong public policy of the State of New York.

Ms. Winter argued that the public policy of the State of New York, as embodied in New York's Journalist Shield Law (which by its terms does *not* preclude the issuance of a subpoena),[6] militated

[6] New York's Shield Law does *not* prohibit the issuance of a subpoena to a journalist to appear in a New York court. Rather, it merely establishes that a journalist may not be held in contempt in a New York court for refusing to divulge a confidential source. *See* N.Y. Civ. Rights Law § 79-h (App. 100-101).

against the compelled disclosure of journalists' confidential sources and, therefore, Ms. Winter should not be compelled to travel to Colorado to give testimony. In other words, Ms. Winter argued that any journalist who happens to be found in New York, unlike any other citizen, is exempt from appearing in the courts of sister states pursuant to the Uniform Act.

On March 7, 2013, Judge Stephen presided over a formal hearing (App. 54-69). After review of all the submitted evidence, Judge Stephen issued an *ore tenus* ruling granting Mr. Holmes' motion for a Subpoena *Duces Tecum* and *Ad Testificandum* (App. 63). The Trial Court directed Ms. Winter to appear, with her notes, on April 1, 2013 in the Colorado Court (App. 72-73). Judge Stephen concluded that "it is clear that Ms. Winter's testimony is material and necessary to resolve the issue regarding the alleged violation of Judge Sylvester's protective order, which bans law enforcement officials from leaking any information about the case that might be prejudicial to the defendant, Mr. Holmes" (App. 62). Judge Stephen specifically stated that "I do not think that this issue implicates the New York Shield Law," and reasoned that the issue of privilege should be resolved by the Colorado Court, as the requesting state under the Uniform Act (App. 63).[7]

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[7] The Trial Court also ruled that Ms. Winter's appearance in Colorado would not constitute a hardship on the basis of the

Ms. Winter moved for various stays of the Trial Court's order pending an appeal, which were all denied (App. 64-65). As a result, Ms. Winter complied with the Subpoena, and appeared in Colorado on three occasions, during which she asserted her claim of privilege. Pending the New York courts' resolution of her appeal, she was not required to testify.

The Appellate Division's Decision

In the New York Appellate Division, Mr. Holmes continued to raise the same federal constitutional claims that he presented to Judge Sylvester in the Colorado Court and to Judge Stephen in the New York Trial Court -- that the leak of the notebook "seriously jeopardized his constitutional rights to a fair trial, to a fair and impartial jury and to due process."[8] He relied on *New York v. O'Neill*, 359 U.S. 1, 5, 8-9 (1959), for the proposition that Ms. Winter's obligation to appear to give testimony in a case trumps any interest she may have in maintaining the confidentiality of her law enforcement sources.[9]

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various fears alleged by Ms. Winter (App. 63).

[8] Brief for Petitioner-Respondent, at 6-7, *Matter of Holmes v. Winter*, 110 A.D.3d 134 (1st Dept 2013), *rev'd*, 22 N.Y.3d 300 (N.Y. 2013) (No. 10542N) [hereinafter App. Division Brief for Petitioner-Respondent].

[9] *Id.* at 13

Mr. Holmes likewise relied on this Court's holding in *Branzburg v. Hayes*, 408 U.S. 665, 708 (1972), for the proposition that neither the constitutional Right to Freedom of the Press nor any other constitutional provision protects a reporter from testifying in a grand jury proceeding regarding information received in confidence related to criminal activity the reporter has observed and written about.[10] He argued that he has a constitutional right to produce witnesses by compulsory process, citing to the Sixth and Fourteenth Amendments to the United States Constitution, and Sections 16 and 25 of Article II of the Colorado Constitution.[11] Mr. Holmes urged that it would clearly not be within any interest of the public for those same sacrosanct documents to be used to protect a journalist from divulging highly sensitive and judicially protected information that could jeopardize the right of a criminally accused in a capital case.[12]

Finally, Mr. Holmes pressed the point that disregard for the fundamental rights of compulsory process and due process informs each citizen's understanding of the presumption of innocence and

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[10] *Id.*

[11] *Id.*

[12] *Id.* at 20.

his or her ability to employ this cornerstone of American jurisprudence.[13]

Ms. Winter also relied on Federal authority to support her position. For instance, she argued that the Full Faith and Credit Clause, embodied in Article IV, Section 1 of the United States Constitution, does not require a state to apply another state's law in violation of its own legitimate public policy, even where the other state's law is controlling in the courts of the state of its enactment.[14] Ms. Winter's public policy argument likewise relied on *Baker v. F&F Inv.*, 470 F.2d 778, 783 (2d Cir. 1972), for the proposition that the "deterrent effect [of] such disclosure [of confidential sources…] threatens freedom of press and the public's need to be informed" and "thereby undermines values which traditionally have been protected by federal courts applying federal public policy."[15] She asserted that since the First Amendment is implicated, the courts should construe the terms contained in CPL § 640.10 even more narrowly to avoid the constitutional

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[13] *Id.* at 20.

[14] Brief for Respondent-Appellant at 26, *Matter of Holmes v. Winter*, 110 A.D.3d 134 (1st Dept 2013), *rev'd*, 22 N.Y.3d 300 (N.Y. 2013) (No. 10542N) [hereinafter App. Division Brief for Respondent-Appellant].

[15] *Id.* at 30-31.

problems that would result from a broad application of the statute to compel her testimony.[16]

Ms. Winter also relied on this Court's holding in *Skilling v. United States*, 130 S. Ct. 2896, 2915 (2010), for the remarkable proposition that Ms. Winter's testimony was not relevant to Mr. Holmes' fair trial rights because it cannot be concluded that "juror exposure to . . . news accounts of the crime . . . alone presumptively deprives the defendant of due process."[17]

Finally, Ms. Winter rested her argument on this Court's holding *In re Roche*, 448 U.S. 1312, 1316 (1980), which involved a single Justice's granting of a stay of a finding of contempt pending a full hearing for a journalist in Massachusetts.[18] She did not, however, cite the result of that hearing, reported at *In re Roche*, 381 Mass. 624, 634-35 (Mass. 1980), which held that the disclosure of the sources of the journalist's information would be required where, as here, they were sought in order for a defendant to discover the prior inconsistent statements of witnesses against him.

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[16] *Id.* at 41.

[17] *Id.* at 44.

[18] *Id.* at 50.

In a 3-2 decision, the New York Appellate Division affirmed the Trial Court's order issuing the Subpoena (App. 34-41). The majority held that under the Uniform Act, the only issues to be resolved by New York were whether Mr. Holmes established that Ms. Winter was a material and necessary witness to the Colorado proceeding, and whether compelling Ms. Winter to testify would result in undue hardship to her (App. 36). The Appellate Division held that issues relating to privilege and admissibility of evidence were "irrelevant for this determination" (App. 37).

The majority relied on the New York Court of Appeals' decision in *Matter of Codey (Capital Cities, Am. Broadcasting Co.)*, 82 N.Y.2d 521 (N.Y. 1993), reasoning that it would be inefficient and inconsistent with the reciprocal scheme of the Uniform Act for the sending state to entertain issues relating to the privileged nature of the testimony sought (App. 38). If the court were to resolve questions of privilege under the lens of public policy, "it would frustrate the purpose of the reciprocal statutory scheme" (App. 38). Accordingly, the majority rejected Ms. Winter's argument that New York's strong public policy against the compelled disclosure of journalists' confidential sources precluded the issuance of the Subpoena, and affirmed the Trial Court's order directing Ms. Winter to appear before the Colorado Court (App. 38-39).

The two-justice dissent acknowledged the general rule that evidentiary questions such as privilege and admissibility should not be resolved by the sending state in considering an application pursuant to the Uniform Act. However, the dissent believed that New York's significant public policy of protecting the confidential sources of its journalists creates an exemption to the Uniform Act's requirement that states must produce witnesses in other states, even where the requesting state has found the witness' testimony to be "material and necessary" to a pending criminal proceeding (App. 52).

The Court of Appeals' Decision

Mr. Holmes continued to press his Federal claims throughout the proceedings in New York. For example, his Brief reflects the apt guidance of *New York v. O'Neill*, 359 U.S. 1, 5 (1959), that *all* citizens have the obligation to appear to testify, and that of *Branzburg v. Hayes*, 408 U.S. 665,708 (1972), for the proposition that there is nothing in the constitutional Right to Freedom of the Press nor any other constitutional provision that protects a reporter from testifying. He argued that "a criminally accused holds a constitutional right to produce witnesses, by compulsory process through the authority of the state or federal government if necessary," citing the Sixth and Fourteenth Amendments to the United States

Constitution and Sections 16 and 25 of Article II of the Colorado Constitution.[19]

Mr. Holmes also relied on this Court's decisions in *Washington v. Texas*, 388 U.S. 14, 17-19 (1967), and *Chambers v. Mississippi*, 410 U.S. 284 (1973), and argued that the fundamental constitutional right of defendants accorded to them by the Sixth Amendment would be rendered meaningless without the uniform application of the Uniform Act, and that no state procedural rule and no abstract unarticulated claim of public policy may operate to deprive a defendant of his constitutional Right to Due Process.[20]

The New York Court of Appeals reversed the Appellate Division and the Trial Court decisions in a closely divided 4-3 decision. The Court of Appeals concluded that since New York was "the media capital of the country if not the world" (App. 23), there existed a public policy against the compelled disclosure of a New York journalist's confidential sources in any court, under any circumstances. The Court of Appeals held that in New York, the protection of the anonymity of confidential sources is a "core -- if not *the* central -- concern underlying New York's Privilege . . . , there is no principle more fundamental or well-established than the right of a reporter to refuse to divulge a confidential source"

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[19] Brief for Petitioner-Respondent, *supra* note 3 at 9.

[20] *Id.* at 21.

(App. 22). Thus, in a ruling which eviscerated the "uniform" part of the Uniform Act, the Court of Appeals permitted, for the first time, an exception not previously recognized, and held that a New York court should consider and apply New York's Journalist Shield Law in relation to an application for a subpoena compelling a journalist to appear as a witness in a sister-state to give testimony (App. 26).

The three dissenting Justices of the Court of Appeals took issue with the majority's decision, which held, "in substance, that a New York reporter takes the protection of New York's Shield Law with her when she travels—presumably, anywhere in the world" (App. 31). The dissent believed that this case presented a conflict of laws issue that should have been resolved pursuant to Restatement (Second) of Conflict of Laws § 139 (App. 31). Section 139 provides that whether a particular communication is privileged should be decided either by the "law of the forum" or the "law of the state which has the most significant relationship with the communication" (App. 31). The dissent concluded that because Colorado is both the forum and the state with the most significant relationship, Colorado law should apply (App. 31-32).

REASONS FOR GRANTING THE WRIT

I. *Particularly in a Capital Case, the Uniform Act Must Be Applied Uniformly Among the States.*

This highly publicized capital case provides the Court with the proper platform to resolve recurring questions regarding the proper application of the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings. The Uniform Act has been enacted by every state to provide a uniform mechanism -- across the nation -- and statutory authority by which both the prosecution and criminal defendants in one state could secure the attendance of material and necessary witnesses who are out of state.

The *uniform* application of the Uniform Act is essential to the functioning of the criminal justice system throughout the United States. Every state is a party to the Uniform Act and therefore, pursuant to the Crime Control Consent Act of 1934, its ultimate interpretation is, and must be, a matter of federal law so that no signatory state can unilaterally abrogate the reach of criminal law.

This petition presents the Court with a compelling need to vindicate the rights of the states to obtain material testimony in criminal cases. Without action by this Court, no state can be assured that any other state will abide by the Uniform Act. If

an individual state can self-define the sort of citizens who may or may not be within the reach of the Uniform Act, the *uniform* character of the Uniform Act is destroyed. In that sad event, the opportunity for both the prosecution and the defense to compel the attendance of witnesses at criminal proceedings will become a vestige of a long treasured but now abandoned fundamental concept of due process, and the Compact Clause of the Constitution will have been nullified.

This Court has held that citizens compelled to appear to give testimony pursuant to the Uniform Act may not hide behind alleged constitutional protections in order to eschew their obligation to give testimony in criminal matters. *O'Neill*, 359 U.S. at 7-8 (one's obligation to give testimony in a case trumps one's constitutional right to freedom of travel between states). "The primary purpose of [the Uniform Act] is not eleemosynary. It serves a self-protective function for each of the enacting States . . . . This is not a merely altruistic, disinterested enactment." *Id.* at 9. Without the Uniform Act, no state could count on being able to compel material and necessary witnesses to appear for criminal cases. "A citizen cannot shirk his duty, *no matter how inconvenienced thereby*, to testify in criminal proceedings and grand jury investigations in a State where he is found." *Id.* at 11 (emphasis added).

The Uniform Act itself, as adopted by the State of New York, requires its *uniform* interpretation in every signatory state. It explicitly provides that it "shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it." N.Y. Crim. Proc. Law § 640.10(5) (App. 99).

The Uniform Act was originally designed to vindicate the states' interest in prosecuting offenders. But, it also serves to protect criminal defendants' Fourteenth Amendment Right to Due Process, as well as the Sixth Amendment Right to Compulsory Process made applicable to the states through the Due Process Clause of the Fourteenth Amendment. *See Washington v. Texas*, 388 U.S. 14, 17-19 (1967).

Yet, in this case, without legislatively withdrawing from the Uniform Act, New York has created its own class of persons who are exempted from its reach. New York has now declared its independent primary fealty to the "free speech" rights of journalists and thereby attempts to ignore the unequivocal command of the Uniform Act. To accomplish this novel departure from the clear mandate of the Uniform Act, the New York Court of Appeals relies on a state law, N.Y. Civil Rights Law § 79-h.

However, that statute merely provides that New York courts may not hold a journalist in

contempt for failing to divulge a confidential source. N.Y. Civ. Rights Law § 79-h (App. 100-101). As a consequence, this Court is being asked to consider whether a state's own perception of public policy in favor of the press could be used, in a death penalty case, as a blunt instrument to emasculate the requirements of the Sixth Amendment.

The uniform application of the Uniform Act is a matter of paramount importance to the proper functioning of the states' criminal justice systems. Because its interpretation is a matter of federal law, this Court is the final arbiter of its meaning. No state which is a party to the Uniform Act may lawfully deprive another state of a witness whose testimony is material and necessary because of its interest in protecting a privilege of the witness. According to the plain meaning of the Uniform Act, such disputes are to be resolved in the receiving state where the proceeding is held. But, any dispute regarding the proper construction of the Uniform Act -- when it conflicts with public policy concerns -- should be resolved by this Court to provide stability in this important area of the law.

Legal Effect of Interstate Compacts

Congress enacted legislation authorizing interstate compacts to facilitate criminal prosecutions nationwide. The Crime Control Consent Act of 1934 provides, in pertinent part:

> The consent of Congress is hereby given to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies . . . . 4 U.S.C. § 112 (a) (App. 97-98).

The Crime Control Act was enacted pursuant to the authority provided by the Compact Clause of the United States Constitution, Article I, § 10, cl. 3, which provides: "No State shall, without the Consent of the Congress, . . . enter into any Agreement or Compact with another State . . . ." U.S. Const. art I, § 10, cl. 3 (App. 92).

This Court has found a similar statute, the Interstate Agreement on Detainers Act (the "Detainer Agreement"), to be a congressionally sanctioned interstate compact within Article I, § 10 of the Constitution, "the interpretation of which presents a question of federal law." *Cuyler v. Adams*, 449 U.S. 433, 442 (1981). "[C]ongressional consent transforms an interstate compact . . . into a law of the United States." *Id.* at 438. "[C]ongressional consent to an interstate compact gives it the status of a federal statute. This is an apt and proper way to indicate that a compact has all the dignity of an Act of Congress." *Alabama v. North Carolina*, 560 U.S.

330, 358 (2010) (Kennedy, J., concurring) (citations omitted).

Whenever, by the agreement of the states concerned and with the consent of Congress, an interstate compact comes into operation, it has the same effect as a treaty between sovereign powers. For example, boundaries established by such compacts become binding upon *all* citizens of the signatory states and are conclusive as to their rights. *Poole v. Fleeger's Lessee*, 36 U.S. (11 Pet.) 185, 209 (1837); *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 725 (1838). Private rights may be affected by such agreements without a judicial determination of existing rights as in the equitable apportionment of the water of an interstate stream. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 104, 106 (1938).

Valid interstate compacts that have been approved by Congress are within the protection of the Compact Clause. *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 39-40 (1823); *Virginia v. West Virginia*, 246 U.S. 565 (1918). *See also Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 566 (1852); *Olin v. Kitzmiller*, 259 U.S. 260 (1922). A "sue and be sued" provision therein operates as a waiver of immunity from suit in federal courts otherwise afforded by the Eleventh Amendment. *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959).

This Court, in the exercise of its original jurisdiction, may enforce interstate compacts following principles of general contract law. *Texas v. New Mexico*, 482 U.S. 124, 128 (1987). If, as in the case of the Uniform Act, the compact makes no provision for resolving impasse, then the Court may exercise its jurisdiction to do so. In doing so, however, the Court should not rewrite the compact by issuing new rules; rather, the Court should attempt to apply the compact to the extent that its provisions govern the controversy. *Texas v. New Mexico*, 462 U.S. 554 (1983). In this case, the Uniform Act appears clear and concise. However, as has been amply demonstrated by New York, without this Court's guidance, states remain free to limit the reach of the Uniform Act in order to protect the favored citizens of one signatory state to the detriment of the citizens of sister states. This case presents an opportunity for this Court to clearly and finally establish that the Uniform Act applies to all citizens without exceptions based on one state's public policy concerns.

A state may not read itself out of a compact which it has ratified and to which Congress has consented by pleading that under the state's constitution as interpreted by the highest state court it had lacked power to enter into such an agreement and was without power to meet certain obligations there under. The final construction of the state constitution in such a case rests with this Court. *Dyer v. Sims*, 341 U.S. 22, 28 (1951). Likewise, there

is no authority for a state's highest court to *ipso facto* decide, as has occurred in this case, that a judicially determined public policy of its state trumps the clear language of the Uniform Act.

The Uniform Act is just as much a compact for cooperative effort and mutual assistance in the prevention of crime and enforcement of the states' respective criminal laws and policies as is the Detainer Agreement. At least one other similar interstate compact, the Interstate Compact for Adult Offender Supervision, has been found to be, in effect, a federal law. *See M.F. v. State Exec. Dep't Division of Parole*, 640 F.3d 491, 495 n. 5 (2d Cir. 2011) (stating that "the Compact has become federal law by reason of congressional action").

The New York Court of Appeals has decided an important question of federal law in a way that conflicts with the decision of this Court in *O'Neill* and other decisions in its wake. This conflict should be settled by this Court or it will not be settled at all. *See* Supreme Court Rule 10(b) and (c).

Lest there be any doubt that the testimony sought in this matter is central to the underlying capital case, we might well reflect on the words of Judge Carlos A. Samour, who is currently presiding over Mr. Holmes' capital case before the Colorado Court. On April 8, 2013, Judge Samour ruled that Ms. Winter's testimony is highly relevant to his

inquiry because the contents of the notebook and the manner in which it was obtained

> may well prove to be *a critical piece of evidence* in this case. . . . Of course, the more significant any admissible contents of the notebook are, the more significant the credibility of one or more of the [law enforcement officials who denied releasing information regarding the notebook] is likely to be at trial.

(App. 86).

In any case, but certainly more so in a death penalty case, the credibility of witnesses central to the prosecution and the defense are of the utmost importance.[21] Accordingly, the requested writ of certiorari should be granted.

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[21] Judge Samour's more dire fears, as related at page 11 of his Order, have been realized in the Colorado proceeding in as much as Mr. Holmes has entered a plea of Not Guilty by Reason of Insanity. Therefore, the notebook about which Ms. Winter reported from Colorado, will be admitted in the trial.

II. *Review is Urgently Needed to Resolve Whether the Right to Compulsory Process in a Death Penalty Case, as Guaranteed Through the Uniform Act, Can be Unilaterally Limited by a State's Protection of Its Favored Citizens.*

Without the Uniform Act, and its nation-wide enactment, a criminal defendant's Right to Compulsory Process would ring hollow -- limited, as it would be, by the geographical reach of a state's subpoena powers. By enacting the Uniform Act, and mandating its uniform application and enforcement, however, the states have actively committed to insuring the guarantees of the Sixth Amendment Right to Compulsory Process.[22]

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[22] Even the New York Court of Appeals, in *People v. Carter*, 37 N.Y.2d 234, 239-40 (N.Y. 1975), has explained the importance of the Uniform Act in effecting compulsory process, by holding that:

> While the Sixth Amendment to the United States Constitution, obligatory on the States through the due process clause of the Fourteenth Amendment, mandates that the accused has the right to present his own witnesses to establish a defense, including the right to compel their attendance if necessary (*Jenkins v. McKeithen*, 395 U.S. 411, 429; *Washington v. Texas*, 388 U.S. 14, 18-19), this right is subject to the limitation that no State, without being party to a compact (*see New York v. O'Neill*, 359 U.S. 1), has the power to compel the attendance of witnesses who are beyond the

Now, however, New York has established an unprecedented exception to its obligation to comply with the Uniform Act. It has refused to issue a subpoena for a journalist to testify in a Colorado capital murder case, based solely on New York's heralded role as the "media capital of the country if not the world" and its alleged public policy in favor of the absolute protection of journalists' confidential sources (App. 23-24).

As it stands, there are *no* exceptions in the Uniform Act for *any* category of witnesses. *See* CPL § 640.10 (App. 98-99). However, if New York, as the self-proclaimed "media capital of the country," or any state, for any self-interested reason, is permitted to exclude an entire class of citizens from the reach of the Uniform Act, the slippery slope of exceptions to uniformity is entered and Compulsory Process under the Sixth Amendment becomes a dim memory.

As articulated by this Court, "the obvious policy and necessity . . . to preserve harmony between States, and order and law within their respective borders" is what underlies the reciprocal machinery

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> limits of the State (*Minder v. Georgia*, 183 U.S. 559, 562; *see State v. Smith*, 87 NJ Super 98). It was to fill this gap, so that there would be extraterritorial impact in compelling attendance of witnesses, that the Legislature enacted CPL 640.10 [the Uniform Act].

of the Uniform Act. *New York v. O'Neill*, 359 U.S. 1, 5 (1959). This Court's intervention is needed to resolve a mounting tension and dispute between the courts of Colorado and New York that threatens to erode one of the most important tools for the effective exercise of compulsory process in criminal proceedings.

The opinion of New York's highest court raises an unresolved Compulsory Process issue that calls out for a decision by this Court: Whether a state's invocation of public policy, specifically a public policy focused on the notion of the absolute inviolability of journalists' confidential sources, which operates to deny an out-of-state defendant's application for a witness subpoena that is otherwise permitted by law, violates the defendant's Sixth Amendment Right to Compulsory Process.

Here, the rules of the forum state govern questions of inadmissibility due to privilege. *See generally* Restatement (Second) of Conflict of Laws § 139. In fact, the information Ms. Winter obtained from confidential sources in Colorado was accomplished *not* while she sat at her desk in New York; rather, as she freely admitted, Ms. Winter was *in Colorado when she collected that confidential information.*[23] Colorado has a compelling interest in the control of its own criminal proceedings, including the interest in effecting the fair prosecution of its

[23] *See* Brief for Respondent-Appellant, *supra* note 3, at 42-43.

criminal defendants. While New York may well have a strong public policy in favor of protecting journalists' confidential sources *in New York courts*, this Court has the opportunity to explain that such a public policy cannot be wielded as a weapon to destroy a defendant's Sixth Amendment Right to Compulsory Process, especially in an out-of-state capital murder case. The interests at stake in this case are central to Colorado's and every state's federal and state constitutional mandate to guarantee a criminal defendant's right to compulsory process.

The Sixth Amendment Right to Compulsory Process "is in plain terms the right to present a defense," and is a "fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14, 19 (1967). As this Court advised, "our cases establish, at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt." *Taylor v. Illinois*, 484 U.S. 400, 408 (1988). While a defendant's Sixth Amendment rights to confrontation and compulsory process are not without limits, these rights may overcome evidentiary privileges and other admissibility roadblocks:

> Whether rooted directly in the Due Process Clause of the Fourteenth

> Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. This right is abridged by evidence rules that infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve.

Holmes v. South Carolina, 547 U.S. 319, 319-20 (2006).[24]

For example, in *Washington v. Texas*, 388 U.S. 14 (1967), this Court found a violation of the Right to Compulsory Process when the defendant was arbitrarily deprived of "testimony [that] would have been *relevant* and *material*, and . . . *vital* to the

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[24] *See also Taylor*, 484 U.S. at 408-09 (holding that the Compulsory Process clause may be violated by imposition of discovery sanction that entirely excludes testimony of material defense witness); *United States v. Nixon*, 418 U.S. 683, 709 (1974) (suggesting that the Compulsory Process clause may require the production of evidence covered by Presidential privilege); *Davis v. Alaska*, 415 U.S. 308 (1973) (holding that Confrontation Clause overcame privilege for juvenile records); *Chambers v. Mississippi*, 410 U.S. 284 (1973) (holding that Confrontation Clause overcame state "voucher" rule); *Roviaro v. United States*, 353 U.S. 53 (1957) (holding that right to present a complete defense overcame informer's privilege).

defense." 388 U.S. at 16 (emphasis added). The case in *Washington* concerned a Texas rule, formerly in wide acceptance under the common law and in federal courts that held accomplices incompetent to testify for one another, although the state was free to use the testimony of an accomplice against the accused. The Court was tasked with determining whether the Texas accomplice rule was violative of the defendant's Right to Compulsory Process.

The Court first held that the Sixth Amendment is applicable to the states, and then found the Texas accomplice rule invalid because it

> arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense.

Id. at 23. The Texas rule was considered arbitrary, the Court said, because it prevented "whole categories of defense witnesses from testifying on the basis of a priori categories that presume them unworthy of belief." *Id.* at 22. Furthermore, the witness' testimony "would have been relevant and material, and . . . vital to the defense." *Id.* at 16.

In this case, Mr. Holmes has established, via the Certificate of the Colorado Court, which was confirmed by the New York trial level court, that Ms. Winter "has become a material and necessary witness" to his case, and that issues requiring her testimony "implicated [Mr. Holmes'] constitutional rights to a fair trial, to a fair and impartial jury, and to due process." (App. 45). Just like the Texas accomplice rule, New York's exception for journalists is arbitrary and violative of Mr. Holmes' Right to Compulsory Process. New York's new journalist exception to the Uniform Act precludes subpoenas for an entire class of defense witnesses on the basis of an *a priori* classification, without regard to the materiality or necessity of such testimony. Such a rule undermines every defendant's Right to Compulsory Process. *See United States v. Valenzuela-Bernal,* 458 U.S. 858, 867 (1982).

Importantly, in *United States v. Nixon*, 418 U.S. 683 (U.S. 1974), this Court explained that

> [t]he very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed

> either by the prosecution or by the defense.

Id. at 709. There is no better example of an instance in which the integrity of the criminal judicial system calls out for the enforcement of a defendant's Sixth Amendment Right to Compulsory Process than this one, in which a whole class of citizens has *a priori* been designated as immune from compulsory process.

Judge Samour in the Colorado Court has explained that perjury in the first degree may be implicated with respect to the law enforcement officials who leaked the contents of the notebook described in Ms. Winter's article. He correctly stated that "the more significant any admissible contents of the notebook are, the more significant the credibility of one or more of the [law enforcement officials who denied releasing the notebook] is likely to be at trial" (App. 86). Despite a formal inquiry by the Colorado Court, however, all of the law enforcement officials with access to the notebook have denied any involvement in the leak (App. 80). Since Mr. Holmes has asserted a plea of Not Guilty by Reason of Insanity, the contents of the notebook will be admitted at his trial. Thus, the only way for Mr. Holmes to discover the identity of the corrupt law enforcement officials, in order to use this critical information in his defense and at his sentencing, is through the testimony of Ms. Winter.

New York's rule denying Mr. Holmes the opportunity to subpoena Ms. Winter impairs the administration of justice in the State of Colorado, and helps to delegitimize the criminal justice system in a criminal case in which New York holds no legitimate state interest.

The question of whether a state's public policy favoring an absolute privilege for journalists should preclude the issuance of a witness subpoena to testify in an out-of-state criminal proceeding cannot be answered in a vacuum. "It is elementary, of course, that a trial court may not ignore the fundamental character of the defendant's right to offer the testimony of witnesses in his favor." *Taylor v. Illinois*, 484 U.S. 400, 414-15 (1988). While "the mere invocation of that right cannot automatically and invariably outweigh countervailing public interests. . . .the interest in the fair and efficient administration of justice, and the potential prejudice to the truth-determining function of the trial process must also weigh in the balance." *Id.* The balancing test demanded in *Taylor* is exactly what an *a priori*, wholesale exclusion of a class of witnesses unconstitutionally avoids. Is this balancing test not even more starkly important in a death penalty case?

There is no justification for a rule that permits a state to apply its public policy extraterritorially, in order to deny an accused the opportunity to present a material witness in an out-of-state capital murder

case. As a policy matter, permitting such a rule to persist sends the clear and unequivocal message to all the states that they are free to exclude their most favored citizens from the reach of interstate subpoenas. That cannot comport with the intent of the Compulsory Process Clause.

The Court should grant this Petition for a Writ of Certiorari, and address whether a state's application of its own public policy in favor of the absolute protection of journalists' sources in order to preclude the issuance of a subpoena for a journalist to testify in an out-of-state criminal proceeding violates an accused's Sixth Amendment Right to Compulsory Process in a death penalty case.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted this 6th day of March, 2014.

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APPENDIX

INDEX TO APPENDICES

APPENDIX A

This opinion is uncorrected and subject to revision before publication in the New York Report.

No. 245
In the Matter of James Holmes
Respondent,
v.
Jana Winter,
Appellant,

Christopher T. Handman, for appellant.
Daniel N. Arshack, for respondent.
Reporter's Committee for the Freedom of the Press et al., amici curiae.

GRAFFEO, J.:

New York's Shield Law provides an absolute privilege that prevents a journalist from being compelled to identify confidential sources who provided information for a news story. In this case, the issue is whether it would violate New York public policy for a New York court to issue a subpoena directing a New York reporter to appear at a judicial proceeding in another state where there is a substantial likelihood that she will be directed to

disclose the names of confidential sources or face being held in contempt of court.

Petitioner James Holmes is charged with multiple counts of murder, among other offenses, arising from a mass shooting at a midnight screening of a "Batman" movie at an Aurora, Colorado movie theater. Twelve people were killed during the incident and 70 others were wounded. Holmes was arrested at the scene soon after the violence ended. Anticipating that the shootings would generate widespread media attention, the state court presiding over the criminal charges -- the District Court for the County of Arapahoe -- immediately issued an order limiting pretrial publicity in the case by either side, including law enforcement.

On July 23, 2012, while executing a search warrant, the police took possession of a notebook that Holmes had mailed to a psychiatrist at the University of Colorado before the shootings. Holmes asserted that the notebook, which apparently contained incriminating content, would be inadmissible at trial because it constituted a privileged communication between a patient and a psychiatrist. Two days later, the District Court issued a second order addressing pretrial publicity, precluding any party, including the police, from revealing information concerning the discovery of the notebook or its contents. That same day, respondent Jana Winter -- a New York-based investigative reporter employed by Fox News -- published an online article entitled: "Exclusive: Movie Massacre Suspect Sent Chilling Notebook to Psychiatrist Before Attack." In the article, Winter described the

contents of the notebook and indicated that she learned about it from two unidentified law enforcement sources. Other news outlets also published stories revealing the existence of the notebook.

In September 2012, Holmes filed a motion for sanctions in the District Court, alleging that law enforcement had violated the pretrial publicity orders by speaking to Winter and maintaining that their actions undermined his right to a fair and impartial jury. The District Court then conducted a hearing to investigate the leak. Holmes called 14 police officers who had come in contact with the notebook or had learned about it prior to the publication of the Winter article. All the officers testified that they had not leaked the information to Winter and did not know who had.

After the hearing, Holmes sought a certificate under Colorado's version of the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings (*Colo Rev Stat § 16-9-203*) -- the first step in the two-part process for compelling an out-of-state witness, such as Winter, to testify or otherwise provide evidence in Colorado. Holmes explained that he sought Winter's testimony and any notes she had created in relation to the article because she "appears to be the only witness that can provide the court with the name of the law enforcement agents that leaked privileged information." In January 2013, the District Court issued the requested certificate, finding that there was no other witness "that could provide the names of the law enforcement agents who may have

provided information to Jana Winter" and that potential violation of the pretrial publicity order was a serious matter. The court also noted that Winter's article had described her sources as two law enforcement officers and, since all of the officers who dealt with the notebook had denied having spoken to Winter, the crime of perjury in the first degree "may be implicated." Thus, the Colorado court found Winter to be a "material and necessary" witness in the sanction proceeding and therefore requested that she spend three days in travel and testimony in the District Court at a specified date and time.

Since Winter works and lives in New York, Holmes then commenced this proceeding in New York Supreme Court pursuant to *CPL 640.10(2)*, New York's codification of the reciprocal Uniform Act to Secure Attendance of Witnesses from Without the State in Criminal Cases, seeking the issuance of a subpoena compelling Winter to testify and provide evidence in Colorado. Anticipating that Winter would invoke the New York Shield Law, Holmes relied on our decision in *Matter of Codey (Capital Cities, Am. Broadasting Co.) (82 NY2d 521, 626 N.E.2d 636, 605 N.Y.S.2d 661 [1993])* for the proposition that any issue relating to a claim of privilege could not be decided by a New York court when New York is the "sending state" under *CPL 640.10(2)*. Instead, Holmes maintained that privilege issues should be addressed exclusively by the Colorado court, the "demanding state," upon Winter's appearance there.

Winter opposed the subpoena application, disputing that her testimony was "material and necessary" in the Colorado case given that she was

only one of a group of reporters that published articles referencing Holmes' notebook. She also argued that requiring her to testify and reveal her sources in Colorado would constitute an "undue hardship" under *CPL 640.10* because such disclosure would severely compromise her ability to function as an investigative reporter and pursue her chosen livelihood. This contention was supported by the affidavit of an expert witness who explained the importance of confidential sources to investigative journalism and opined that revelation of sources could end Winter's career.

Winter further argued that the identity of her sources is absolutely privileged under New York's Shield Law. Given the nature of the testimony sought by the District Court and the fact that Colorado provides significantly less protection to journalists in this regard, Winter asserted that it would violate public policy for a New York court to issue a subpoena directing her to appear in Colorado for the purpose of divulging privileged confidential sources. She noted that *Codey* suggested that privilege issues may be considered, even when New York is the "sending state," if issuance of a subpoena would violate a strong public policy -- which she maintained was the situation here.

Supreme Court granted Holmes' application and issued a subpoena directing Winter to appear in Colorado, holding that she was a material and necessary witness and that compliance with the subpoena posed no undue hardship because Holmes' defense team would pay her expenses and she was to remain in Colorado for no longer than three days.

The court reasoned that the other issues Winter had raised, including her claim of privilege, were beyond the scope of a subpoena application under *CPL 640.10(2)* and should be resolved by the District Court in Colorado.[1]

The Appellate Division affirmed in a divided decision (*110 AD3d 134, 970 N.Y.S.2d 766*). The majority adopted Supreme Court's view that the only issues to be resolved by a New York court in its capacity as a "sending state" under *CPL 640.10(2)* is whether Holmes established that Winter was a material and necessary witness in the Colorado proceeding and whether compelling her to testify would result in undue hardship. As to the latter, the majority viewed the concept narrowly as encompassing only "familial, monetary, or job-related hardships" pertaining to the time, expense and inconvenience associated with the trip to the other jurisdiction -- which did not include any consequences flowing from the testimony the witness would be required to give. Relying on *Codey*, the

[1] After Supreme Court issued the subpoena, Winter complied under protest, appearing in Colorado on three occasions in which she asserted that the information sought was privileged under the New York and Colorado Shield Laws. Colorado has deferred resolution of Winter's privilege claim pending disposition of several other related issues. At this juncture, her case continues to present a live controversy since an order of this Court reversing the Appellate Division and dismissing Holmes's *CPL 640.10(2)* application will result in nullification of the subpoena, meaning that Winter will have no continuing legal obligation to return to Colorado and give further testimony -- regardless of Colorado's resolution of the privilege issue.

majority reasoned that it would be inefficient and inconsistent with the reciprocal scheme for the "sending state" to entertain issues relating to admissibility and privilege of the testimony sought. Thus, the majority declined to entertain Winter's Shield Law argument, although it noted that the record did not establish "with absolute certainty" that the Colorado District Court would require her to disclose the identity of confidential sources.

A two-justice dissent concluded that the subpoena application should have been denied. Although recognizing the general rule that issues relating to admissibility and privilege are not entertained by the "sending state" in the *CPL 640.10(2)* context, the dissent maintained that language in a footnote in *Codey* supported recognition of an exception in cases where the prospective witness makes a compelling claim that issuance of the subpoena would violate a strong public policy of this state. On the merits, the dissent determined that Winter should be able to claim the protections of the New York Shield Law to avoid issuance of the subpoena because Colorado's Shield Law contains significantly less protection in relation to confidential sources and there was a substantial possibility -- indeed, a near certainty -- that the District Court would require Winter to disclose her sources or be held in contempt. Finally, even absent consideration of the privilege issue, the dissent found that Winter had established "undue hardship" under the statute because she demonstrated, through uncontradicted evidence, that issuance of the subpoena would put her in an impossible situation: she would be forced to choose between incarceration

(if she refused to divulge the information) or loss of her livelihood (if she provided the information sought by the Colorado court).

Winter appeals as of right on the two-Justice dissent at the Appellate Division (*CPLR 5601[a]*). In this Court, she continues to argue that issuance of the subpoena under the circumstances presented here is antithetical to New York's well-established public policy in favor of protecting the anonymity of confidential sources, as embodied in the New York Constitution and the New York Shield Law. We therefore begin by examining that public policy.

Article I, § 8 and the New York Shield Law

New York has a long tradition, with roots dating back to the colonial era, of providing the utmost protection of freedom of the press. Our recognition of the importance of safeguarding those who provide information as part of the newsgathering function can be traced to the case of "John Peter Zenger who . . . was prosecuted for publishing articles critical of the New York colonial Governor after he refused to disclose his source" (*Matter of Beach v Shanley, 62 NY2d 241, 255, 465 N.E.2d 304, 476 N.Y.S.2d 765 [1984]* [Wachtler concurrence]). A jury comprised of colonial New Yorkers refused to convict Zenger -- an action widely viewed as one of the first instances when the connection between the protection of anonymous sources and the maintenance of a free press was recognized in the new world. In acknowledging the critical role that the press would play in our democratic society, New York became a hospitable

environment for journalists and other purveyors of the written word, leading the burgeoning publishing industry to establish a home in our state during the early years of our nation's history.

Article I, § 8 of the New York Constitution -- our guarantee of free speech and a free press -- was adopted in 1831, before the *First Amendment* was rendered applicable to the states (*O'Neill v Oakgrove Constr., 71 NY2d 521, 529, 523 N.E.2d 277, 528 N.Y.S.2d 1 [1988]).* The drafters chose not to model our provision after the *First Amendment*, deciding instead to adopt more expansive language:

> "Every citizen may freely speak, write and publish his or her sentiments on all subjects . . . and no law shall be passed to restrain or abridge the liberty of speech or of the press" (*NY Const, art I, § 8*).

This was in keeping with "the consistent tradition in this State of providing the broadest possible protection to 'the sensitive role of gathering and disseminating news of public events'" (*O'Neill, 71 NY2d at 529*, quoting *Beach, 62 NY2d at 256*).

In furtherance of this historical tradition, the Legislature adopted the Shield Law in 1970. Among other protections, the statute grants an absolute privilege precluding reporters from being compelled to reveal the identity of confidential sources:

> "Notwithstanding the provisions of any general or specific law to the

> contrary, no professional journalist or newscaster . . . shall be adjudged in contempt by any court in connection with any civil or criminal proceeding . . . for refusing or failing to disclose any news obtained or received in confidence or the identity of the source of any such news coming into such person's possession in the course of gathering or obtaining news for publication" (*Civil Rights Law § 79-h[b]*; L 1970, ch 615, as amended by L 1975, ch 316; L 1981, ch 468 §§ 1 to 30; L 1990 ch 33, § 1).

Information subject to the privilege is "inadmissible in any action or proceeding or hearing before any agency" (*Civil Rights Law § 79-h[d]*). The Shield Law therefore prohibits a New York court from forcing a reporter to reveal a confidential source, both by preventing such a directive from being enforced through the court's contempt power and by rendering any evidence that is covered by the provision inadmissible.

Another subsection of the statute largely codified our decision in *O'Neill v Oakgrove Constr.* (*supra, 71 NY2d 521*), which recognized that Article I, *§ 8* provides reporters with a "qualified exemption" against compelled disclosure of "nonconfidential news" -- information that was not received in confidence -- unless the party seeking disclosure establishes 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" (*Civil Rights Law § 79-h[c]*; added L 1990, ch 33, § 2).

It is clear from the legislative history of these provisions that the Legislature believed that such protections were essential to maintenance of our free and democratic society. Prior to the adoption of the first statute in 1970, lawmakers considered affidavits prepared by several luminaries of the profession -- including Walter Cronkite, Eric Severeid and Mike Wallace -- emphasizing the critical importance of protecting the anonymity of confidential sources in order to assure a continued flow of information to reporters and, thus, to the public (*see* Bill Jacket, L 1970, ch 615, at 66-76)[2]. The views expressed by

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[2] The affidavits were prepared in connection with a motion to quash a subpoena in a case that was pending when the Shield Law was under consideration by the Legislature and which involved an investigative reporter from the New York Times who was subpoenaed by a Federal Grand Jury in California to testify concerning knowledge he obtained about the Black Panther organization. Two lower courts held that the *First Amendment* protected the reporter from being compelled to reveal his sources or disclose information provided to him in confidence, differing only on whether the reporter could avoid appearing at the Grand Jury altogether (*Caldwell v United States, 434 F2d 1081 [9th Cir 1970]* [reporter could not be compelled to appear at Grand Jury], *vacating 311 F Supp 358 [ND Cal 1970]*[although required to appear at Grand Jury, reporter was entitled to protective order precluding questioning concerning confidential sources or information]). However, deciding the case with *Branzburg v Hayes (408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626* the United States Supreme Court disagreed, holding that the reporter could not rely on the *First Amendment* to avoid appearing and giving evidence in response to a Grand Jury subpoena.

these reporters were echoed by Governor Nelson Rockefeller in his memorandum approving the legislation. There he emphasized that "[t]he threat to a news[person] of being charged with contempt and being imprisoned for failing to disclose his [or her] information or . . . sources can significantly reduce his [or her] ability to gather vital information" (Governor's Approval Mem, Bill Jacket, L 1970, ch 615, at 91). The Governor described freedom of the press as "one of the foundations upon which our form of government is based," concluding that "[a] representative democracy, such as ours, cannot exist unless there is a free press both willing and able to keep the public informed of all the news" (*id*.). Moreover, it is evident from the approval memorandum that he and the Legislature intended the statute to provide the highest level of protection in the nation: "This 'Freedom of Information Bill for Newsmen' will make New York State -- the Nation's principal center of news gathering and dissemination -- the only state that clearly protects the public's right to know" (*id*.).

This articulated legislative purpose to protect against incursions on press freedom was repeatedly reaffirmed in the years after the original Shield Law was enacted when the statute was amended several times in an effort to strengthen its provisions, often in response to judicial decisions that the Legislature viewed as affording inadequate protections to reporters. For example, in 1981 the Legislature passed amendments intended to "correct loopholes and fill gaps in the existing statute," indicating this was necessary because "[c]ase history makes it abundantly clear that the courts have been all too

often disinclined to follow the letter or even the spirit of the existing law" (*Beach, supra, 62 NY2d at 250*, quoting Assembly Sponsor's Mem, Bill Jacket, L 1981, ch 468, at 4).

As a result, New York public policy as embodied in the Constitution and our current statutory scheme 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. And safeguarding the anonymity of those who provide information in confidence is perhaps the core principle of New York's journalistic privilege, as is evident from our colonial tradition, the constitutional text and the legislative history of the Shield Law.

This is reflected in our decision in *Matter of Beach v Shanley (id.)*, which involved a controversy between a television reporter and a Grand Jury that was investigating the unauthorized disclosure of a sealed report issued by a prior Grand Jury. In exchange for an express promise to keep his identity secret, a source apparently told the reporter that the earlier Grand Jury had recommended the removal of the local Sheriff in connection with an investigation into the illegal retention and sale of guns. When this information was revealed in a news broadcast, the second Grand Jury was convened to determine whether the contents of the sealed report had been disclosed to the reporter by a grand juror, public official or other public employee in violation of *Penal Law § 215.70* -- conduct that constitutes a class E felony. Subpoenas were issued to the reporter

seeking his testimony and notes on the source of the news report.

After reviewing the history of the Shield Law and considering its language, we reversed the order of the Appellate Division, which had directed the reporter's appearance at the Grand Jury, and ordered that the subpoenas should have been quashed. We explained:

> "The inescapable conclusion is that the Shield Law provides a broad protection to journalists without any qualifying language. It does not distinguish between criminal and civil matters, nor does it except situations where the reporter observes a criminal act ... Although this may thwart a grand jury investigation, the statute permits a reporter to retain his or her information, even when the act of divulging the information was itself criminal conduct. Even if one were to be in disagreement with the wisdom of the policy underlying *section 79-h* and no matter how heinous the crime under investigation, the courts are not free to ignore the mandate of the Legislature and substitute a policy of their own" (*Beach, 62 NY2d at 251-252* [internal quotation marks and citations omitted]).

Beach was decided on purely statutory grounds under the doctrine of constitutional avoidance,

although then-Judge Wachtler noted in a concurrence that the protection of confidential sources was "essential to the type of freedom of expression traditionally expected in this State and should be recognized as a right guaranteed by the State Constitution" (*id. at 256* [Wachtler concurrence]). In *O'Neil*, we later confirmed that *Article I, § 8* also encompasses a journalist's privilege as part of the guarantee of free speech and a free press.

It is therefore evident based on the New York Constitution, the Shield Law and our precedent that a New York court could not compel Winter to reveal the identity of the sources that supplied information to her in relation to her online news article about Holmes' notebook. Holmes does not argue otherwise but relies on our decision in *Matter of Codey (Capital Cities, Am. Broadcasting Corp.)* (*supra, 82 NY2d 521*) for the proposition that, when New York functions as the "sending state" in relation to a *CPL 640.10(2)* application, issues concerning testimonial privilege -- including the applicability of the absolute privilege afforded by the Shield Law -- simply cannot be considered by a New York court. We next address this issue.

CPL 640.10 and Codey

CPL 640.10(2) is New York's codification of the Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings, which has been adopted by all 50 states. The Uniform Act creates a two-step procedure for compelling the appearance of a witness located in another

jurisdiction. First, the relevant court in the demanding state -- the jurisdiction that seeks the witness's testimony -- must issue a "certificate" finding "that there is a criminal prosecution pending in such court . . ., that a person being within this state is a material witness in such prosecution . . . and that his [or her] presence will be required for a specified number of days" (*CPL 640.10[2]*). Next, if the witness whose testimony is sought is present in New York, meaning New York is the "sending state," the certificate is presented to a Supreme Court Justice or a County Court Judge in the county where the witness is located and that court conducts a hearing to determine whether to issue a subpoena directing the witness to appear in the demanding state. A subpoena is appropriate, however, only if the New York court determines "that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution . . . , and that the laws of the [demanding] state "will give to him [or her] protection from arrest and the service of civil and criminal process" (*CPL 640.10[2]*). The latter clause prevents the witness from being subjected to arrest for any unrelated outstanding warrant or from being served with process while answering the subpoena -- but it has not been interpreted as protecting the witness from being held in contempt for failing to give testimony in the demanding state.

In *Codey*, a New York news organization was subpoenaed by a New Jersey Grand Jury that was investigating illegal point shaving and gambling activities associated with collegiate basketball. The

news organization had previously broadcast a story that contained brief excerpts of an interview with an unidentified player who was disguised in the report to preserve his anonymity and who provided information relevant to the investigation. The player later revealed his identity to the Grand Jury and decided to cooperate in the investigation but he could not recall everything that he had said during the 30-minute videotaped interview with the reporter, only a small portion of which had been aired during the broadcast. Thus, the Grand Jury sought to obtain videotaped out-takes of the interview and the reporter's notes. Invoking *CPL 640.10(2)* in an effort to secure the attendance of the New York reporter at its proceedings in New Jersey, the New Jersey Grand Jury obtained the requisite certificate and commenced a proceeding in the New York county where the news organization was based requesting issuance of a subpoena. In response, the broadcaster contended that the material sought was privileged under the New Jersey Shield Law, maintaining that New Jersey grants an absolute privilege protecting information of the type sought there.

Supreme Court issued the subpoena, without deciding the privilege issue. But the Appellate Division reversed, reasoning that New York -- which was functioning as the sending state -- must resolve the reporter's claim that the information sought was privileged in the demanding state because, if the claim had merit, the evidence would be inadmissible in the demanding state and therefore could not be material or necessary to the criminal investigation.
The Appellate Division then analyzed New Jersey's Shield Law, concluding that the requested

information was protected by an absolute privilege, similar to the privilege granted under New York's Shield Law.

On appeal, we reversed and directed that the subpoena should be reinstated, holding that the Appellate Division had erred in considering the news organization's claim that the information was privileged under New Jersey law. We determined that the inquiry conducted by the sending state to determine whether the information sought is "material and necessary" within the meaning of *CPL 640.10(2)* is limited and does not encompass the concepts of admissibility, disclosability or privilege. Indicating that "[i]t would be inefficient and inconsistent with the over-all purpose and design of this reciprocal statutory scheme to permit the sending State's courts to resolve questions of privilege on a *CPL 640.10(2)* application," (*Codey, 82 NY2d at 529*) we 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 530*). We explained that

> "[i]n view of the sensitivity of privilege issues to local policy concerns and particularized legal rules, it would make little sense to construe *CPL 640.10(2)* as authorizing the courts of this State to determine questions of privilege that arise out of the law of another jurisdiction and which relate to specific criminal proceedings pending in that other jurisdiction" (*id.*).

In *Codey*, we articulated the general rule that a claim that the evidence sought will be inadmissible in the demanding state based on the applicability of a privilege is simply not a proper basis for a sending state, such as New York, to deny the subpoena request under the Uniform Act. In this case, the Appellate Division majority understandably relied on this proposition when denying Winter relief. However, we also clarified in *Codey* that "[o]ur holding should not be construed as foreclosing the possibility that in some future case a strong public policy of this State, even one embodied in an evidentiary privilege, might justify the refusal of relief under *CPL 640.10* even if the 'material and necessary' test set forth in the statute is satisfied" (*id. at 530, n 3*). Winter argues that this is such a "future case" and we agree.

We begin with the observation that this case is distinguishable from *Codey* in several critical respects. Here, Winter relies on the journalist's privilege embodied in the New York Shield Law. In *Codey*, the news organization argued that the reporter's testimony, along with the video out-takes and notes, were privileged under the law of New Jersey which, like New York, offers substantial protection to reporters in relation to unpublished materials. This distinction is significant for two reasons. First, since the reporter in *Codey* was relying on another state's law, it made sense that the other state should resolve any issue that arose concerning the applicability of the privilege. We emphasized this in the decision when we noted that privilege issues raise "local policy concerns," which

militated against a New York court "determin[ing] questions of privilege that arise out of the law of another jurisdiction" (*Codey, 82 NY2d at 530*).

Second, because there was no claimed disparity between the protection afforded in the demanding state and that provided in New York in relation to the information sought, no comparable public policy issue was presented in *Codey*. There the reporter did not argue that he needed the protection of the New York courts because New Jersey would resolve the privilege issue in a manner offensive to a strong public policy of this State -- he contended just the opposite, asserting that New York should decline to issue the subpoena because the videotaped out-takes were privileged under New Jersey law. In contrast, here Winter makes a compelling argument that the promise of confidentiality she provided to her sources will not be honored by the Colorado courts. Colorado offered no privilege to reporters until 1990 and its current Shield Law grants only qualified, as opposed to absolute, protection -- even in relation to the identity of sources of confidential news[3]. Essentially, the Colorado courts employ a

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[3] Under Colorado law, the qualified privilege protecting the identity of confidential sources can be abrogated if the party seeking the information can prove, by a preponderance of the evidence, that (1) "the news information is directly relevant to a substantial issue involved in the proceeding," (2) "the news information cannot be obtained by any other reasonable means," and (3) "a strong interest of the party seeking to subpoena the newsperson outweighs the interests under the *first amendment to the United States constitution* of such newsperson in not responding to a subpoena and of the general public in receiving news information" (*Colo Rev Stat § 13-90-119[3]*). As Winter points out, when issuing the certificate, the Colorado court also

balancing test to determine whether a reporter can be required to reveal an anonymous source -- a procedure in stark contrast to the absolute privilege cloaking that information in New York.

This brings us to perhaps the most important factual distinction between this case and *Codey*. In *Codey*, the New Jersey Grand Jury did not subpoena the reporter for the purpose of compelling him to reveal the identity of a confidential source. The basketball player who had been interviewed on condition of anonymity had come forward of his own accord and New Jersey authorities already knew who he was -- they sought to obtain the video out-takes from the interview because he could not recall everything he had said to the reporter. To be sure, nonpublished material such as this receives significant protection in New York (and apparently also in New Jersey), even when the source is known. But we cannot ignore the obvious distinction between the material sought in *Codey* and the testimony at issue here.

It is clear from the certificate issued by the District Court in this case that the only purpose of requiring Winter to appear in Colorado is to compel her to reveal the identities of the individuals who supplied the information she reported in the news story -- information obtained in exchange for a promise of confidentiality. Disclosure of this

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essentially concluded that the first two prongs are met here -- it found that Winter's testimony was probative of the issue to be resolved (who leaked the information) and that the information sought could not be secured by any other means.

information will enable the District Court to determine the origin of the leaks, presumably so that the individuals involved can be sanctioned for violation of the nondisclosure order and perhaps even prosecuted for perjury. This is a valid objective in light of the apparent breach of the District Court's pretrial "gag" order. But this predictable chain of events is precisely the harm sought to be avoided under our Shield Law for it is fear of reprisal of this type that closes mouths, causing news sources to dry up and inhibiting the future investigative efforts of reporters. The District Court is understandably troubled by the violation of the restrictions it imposed on pretrial disclosure, but the New York Shield Law "permits a reporter to retain his or her information, even when the act of divulging the information was itself criminal conduct" (*Beach, 62 NY2d at 252*).

As we have explained, protection of the anonymity of confidential sources is a core -- if not *the* central -- concern underlying New York's journalist privilege, with roots that can be traced back to the inception of the press in New York. Although there are uncertainties concerning the application of the outer reaches of our statute, particularly the scope of the qualified privilege for nonconfidential news which must be determined on a case-by-case basis (*see e.g. People v Combest, 4 NY3d 341, 828 N.E.2d 583, 795 N.Y.S.2d 481 [2005]* [criminal defendant met his burden under Shield Law to compel production of nonconfidential videotapes of defendant's interrogation by police made by documentary film crew]), there is no principle more fundamental or well-established than

the right of a reporter to refuse to divulge a confidential source. And that concern is directly implicated here given that the only purpose for Winter's testimony is to ascertain who leaked theinformation regarding the discovery of the notebook. Indeed, absent that information, there is no material or necessary testimony Winter could offer in connection with the Colorado proceeding.

Moreover, as a New York reporter, Winter was aware of -- and was entitled to rely on -- the absolute protection embodied in our Shield Law when she made the promises of confidentiality that she now seeks to honor. Given that this is the case, and in light of the significant disparity between New York and Colorado law, she was entitled to have the Shield Law issue adjudicated in New York before the subpoena was issued, even though it relates to testimony sought in the courts of another state. We therefore conclude 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 -- a common law, statutory and constitutional tradition that has played a significant role in this State becoming the media capital of the country if not the world.

Permitting a New York court to consider the privilege issue raised here in the context of a *CPL 640.10(2)* proceeding will not, as Holmes suggests, have the effect of expanding the territorial effect of New York law beyond our borders -- and this is true even if we assume that Winter was in Colorado when

she spoke with her confidential sources. The outcome of this case does not (and should not) turn on whether Winter received the information while she was in Colorado or obtained it over the telephone or via computer while sitting in her New York office. A rule predicated on where a New York reporter was located when she learned of an anonymous tip would lead to arbitrary results and would ignore several practical realities, including the widespread use of cutting-edge communication technology to facilitate the newsgathering process and the global nature of today's news market (it is now possible for a journalist based in New York to cover a California story while on assignment in Singapore through the use of e-mail, text messaging and the like). New York journalists should not have to consult the law in the jurisdiction where a source is located or where a story "breaks" (assuming either is ascertainable) in order to determine whether they can issue a binding promise of confidentiality.

The dissent apparently views this case as presenting a conflict of laws issue and would resolve it pursuant to *Restatement [Second] of Conflict of Laws § 139*. Under that provision -- which we have never applied -- if there is a disparity between the laws in two states such that a communication is privileged in one but not the other, the general rule is that the privilege will not be honored by the court of the "forum" state (the court where the evidence is sought to be admitted)[4]. We cited the Restatement in

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[4] Subsection 1 directs that evidence that was not privileged in the state "which has the most significant relationship with the communication will be admitted," even if the evidence would be privileged in the "forum" state -- the jurisdiction where the

Codey in support of the proposition that in most instances privilege issues should be resolved in the courts of the demanding jurisdiction (*Codey, 82 NY2d at 530*) -- a view that we do not retreat from today. But we certainly did not apply the Restatement analysis, which affords significance to the location where the communication occurred, among other factors[5]. We need not decide whether *section 139* reflects a policy that should be adopted in New York in other contexts -- plainly, New York law governs here since we are applying New York statutory and decisional law (*CPL 640.10[2]* and *Codey*) to determine whether a New York court should issue a subpoena. It is enough to note that the provision was clearly not designed to resolve controversies involving journalist shield laws (a type of privilege not mentioned in the commentary), nor does it supply

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judicial proceeding is underway -- unless to do so would violate a strong public policy of the forum state. Likewise, under subsection 2, evidence that is privileged in the state "which has the most significant relationship with the communication" but that is not privileged in the forum jurisdiction should also be admitted "unless there is some special reason why the forum policy favoring admission should not be given effect." The Restatement therefore reflects a policy favoring the admissibility of privileged testimony in the event of a conflict.

[5] If we had, we would surely have mentioned in *Codey* that the videotaped interview between the North Carolina State University basketball player and the New York reporter occurred at a hotel in Albany, New York -- a fact that the dissent would apparently view as important if not dispositive, even though the law of the forum state always governs under the Restatement.

a workable rule that would be consistent with New York public policy[6].

And lest there be any confusion, we reiterate that the issue we confront is whether a New York court should issue a subpoena compelling a New York journalist to appear as a witness in another state to give testimony when such a result is inconsistent with the core protection of our Shield Law. Thus, the narrow exception we recognize today, which permits a New York court to consider and apply New York's journalist's privilege in relation to issuance of its own process -- a subpoena -- in a

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[6] Although the inquiry is not dispositive under the Restatement because the law of the forum state is paramount, *section 139* suggests that the focus should be on the "state which has the most significant relationship with the communication," noting in comment e that this "will usually be the state where the communication took place" unless there was a "prior relationship between the parties to the communication" in which case "the state of most significant relationship will be that where the relationship was centered" (*Restatement [Second] of Conflict of Laws § 139, Comment e*). But there is also an exception to this exception, because the latter rule will not apply if "the state where the communication took place has substantial contacts with the parties and the transaction" (*id.*) In order to navigate this complicated test, the court would have to know the identity of both parties to the communication, the nature and scope of their prior relationship (if any), and the location of the conversation (which raises its own problems, as noted above, since they may not have been in the same place). In a case such as this involving an attempt to discover the identity of a confidential source, the standard would be impossible to apply because most of the information needed to apply the test would be the very same information the reporter seeks to protect as privileged under the Shield Law.

narrow subset of cases, is not tantamount to giving a New York law extraterritorial effect.

This is not the first time that we have relied on the Shield Law to recognize an exception to the typical rules governing subpoenas. In *Beach* we held that a Grand Jury subpoena should have been quashed where the only testimony sought was the identity of a broadcast reporter's confidential source. This deviated from the general rule governing subpoenas ad testificandum, which is that a claim of privilege cannot be asserted until the witness appears before the requisite tribunal and is presented with a question that implicates protected information. We declined to apply that rule in *Beach* because "the entire focus of the Grand Jury's inquiry would be on the identity of [the reporter's] confidential source," reasoning that no legitimate purpose would be served by requiring the witness to go through the formality of appearing before the Grand Jury only to refuse to answer questions concerning the information sought (*Beach, 62 NY2d at 250-251*). Compelling a reporter to appear in court to respond to a subpoena that seeks information that is clearly cloaked with an absolute privilege can itself be viewed as a significant incursion into the press autonomy recognized in *Article I, § 8* and the Shield Law. Our approach was consistent with the reality that "[t]he nature of the press function makes it a more likely target for subpoenas which, in turn, will generate cost and diversion in time and attention from journalistic pursuits" (*O'Neill, 71 NY2d at 5f33* [Bellacosa concurrence] ["Journalists should be spending their time in newsrooms, not in courtrooms

as participants in the litigation process"]). The same concerns inform our decision in this case.

Application of a limited public policy exception in these unusual circumstances should not upset the *Codey* rule, which we reaffirm: absent a threatened violation of an extremely strong and clear public policy of this State such as is present here, New York courts adjudicating *CPL 640.10(2)* applications should decline to resolve admissibility issues, including privilege claims, so that they can be decided in the demanding state. Because the exception will rarely be applicable, we do not anticipate that today's holding will be interpreted as an erosion of the doctrine of comity or as otherwise significantly impairing the procedure for securing the attendance of out-of-state witnesses. To obtain relief, a party seeking to avoid issuance of a subpoena under *CPL 640.10(2)* will have to establish that a strong public policy is implicated and that there is a substantial likelihood that an order compelling the witness's appearance and testimony in the other jurisdiction would directly offend that policy. Even in Shield Law cases similar to this one, this standard will be difficult to meet since many jurisdictions offer comparable protections in relation to the identity of confidential sources[7]; when the demanding state falls

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[7] For example, it appears that at least 16 states have adopted privilege statutes that provide absolute protection to a reporter's confidential sources: Alabama, Arizona, California, Delaware, District of Columbia, Indiana, Kentucky, Maryland, Montana, Nebraska, Nevada, New York, Ohio, Oklahoma, Oregon, Pennsylvania (*see* The Committee on Communications and Media Law, New York City Bar Association, "The Federal Common Law of Journalists' Privilege: A Position Paper," The

into this category, the privilege issue could be deferred for resolution by the other jurisdiction under *Codey* without offending New York's public policy. Moreover, before the exception may be invoked, the record must indicate that the prospective witness reasonably relied on the protections afforded under New York law when engaged in the conduct that gave rise to the subpoena request. The standard we set today is high and will, we suspect, seldom be met. Here, however, where there is a substantial likelihood that a New York reporter will be compelled to divulge the identity of a confidential source (or face a contempt sanction) if required to appear in the other jurisdiction -- a result that would offend the core protection of the Shield Law, a New York public policy of the highest order-- all of these hurdles have been cleared. We therefore conclude that the subpoena application should have been denied.

Record, Vol 60, Issue 1, 214-235, at 228 [2005]). Several others provide strong -- though not absolute -- protection, adopting standards that preclude a reporter from being required to divulge a source except in very limited circumstances. For example, in Arkansas revelation of a source cannot be compelled absent proof that "the article was written, published, or broadcast in bad faith, with malice, and not in the interest of the public welfare" (*Ark Code Ann § 16-85-510*). West Virginia recently enacted a provision precluding a reporter from being required to divulge the identity of a source (without his or her consent) "unless such testimony or information is necessary to prevent imminent death, serious bodily injury or unjust incarceration" (*W Va Code § 57-3-10[b][1]*). Although we may lead the states in relation to the scope of our journalist privilege, New York is not alone in its recognition of the need to protect sources.

In light of our resolution of the privilege issue, we have no occasion to address Winter's alternative argument that her statutory claim of undue hardship afforded a separate basis for relief.

Accordingly, the order of the Appellate Division should be reversed, without costs, and the petition dismissed.

Matter of James Holmes v. Jana Winter
No. 245

SMITH, J. (dissenting):

I agree with the majority that New York's Shield Law reflects a strong public policy of the state to protect confidential sources, and that that policy would justify, in a proper case, a refusal to issue a subpoena under the Uniform Act to Secure Attendance of Witnesses from Without the State in Criminal Cases. I do not think this is a proper case, however, because the allegedly privileged communications took place wholly in Colorado, and the New York Shield Law does not apply to them.

While the record does not say where Jana Winter was when she spoke to her Colorado law enforcement sources, her brief in this Court concedes that she was in Colorado. (Even without that concession, we would not assume otherwise from a

silent record; it is Winter's burden to establish the existence of a privilege.) The majority holds the Colorado location of the communications to be irrelevant, apparently on the ground that Winter's office is located in New York. The majority is holding, in substance, that a New York reporter takes the protection of New York's Shield Law with her when she travels -- presumably, anywhere in the world. This seems to me an excessive expansion of New York's jurisdiction, one that is unlikely to be honored by other states or countries or to attain the predictability that the majority says is its goal.

According to the Restatement (Second) of Conflict of Laws (Restatement), the question of whether a particular communication is privileged should be decided either by the "law of the forum" or the "law of the state which has the most significant relationship with the communication" (*Restatement, § 139*). Here, under the Restatement rule, there is no conflict to resolve, because Colorado is both the forum -- i.e., the location of the proceeding in which a party seeks to offer an allegedly privileged communication in evidence -- and the state with the most significant relationship. A comment to the Restatement says that, "[t]he state which has the most significant relationship with a communication will usually be the state where the communication took place" (*Restatement, § 139, comment e*), and I see no reason why this case should be an exception.

I am therefore unpersuaded by the majority's claim that Winter "was entitled to rely on" the absolute protection of the New York Shield Law (majority op at 23). Another Restatement comment (*§*

139, comment c) says that "if [the parties to the communication] relied on any law at all, they would have relied on the local law of the state of most significant relationship." Winter chose to leave New York, fly to Colorado, and have conversations in Colorado with her sources. She and her sources could reasonably expect the question of whether their communications were privileged to be governed by Colorado law, just as it would be if Winter were a New York lawyer who had flown out to meet a Colorado client, or a wife who went to Colorado to talk to her husband.

The majority makes the superficially appealing argument that New York journalists and their sources cannot safely assume that their conversations will be confidential unless the New York Shield Law follows the journalist everywhere (majority op at 24-25). It is true that the universal application of New York law would enhance certainty -- but that is a result that New York courts do not have the power to achieve. The majority says: "New York journalists should not have to consult the law in the jurisdiction where a source is located . . . in order to determine whether they can issue a binding promise of confidentiality" (*id.*) -- but they will always have to do that, despite today's decision, because they cannot be assured that New York courts will decide every case. If Winter had been subpoenaed when she was in Colorado -- or if she were to be subpoenaed at some later date, when she travels to Colorado again -- no New York court would be involved, and if a Colorado court chose to enforce the subpoena she would have to choose between disclosing her sources and committing contempt.

There is nothing the New York courts can do about that.

The simple fact that no one jurisdiction can rule the world is the reason conflict of laws rules exist. The majority's choice to ignore those rules in this case seems to me unjustified, and unlikely to produce either harmony among judicial systems or predictable results in cases that involve a claim of journalist-source privilege.

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Order reversed, without costs, and petition dismissed. Opinion by Judge Graffeo. Chief Judge Lippman and Judges Rivera and Abdus-Salaam concur. Judge Smith dissents and votes to affirm in an opinion in which Judge Pigott concurs. Judge Read dissents and votes to affirm for the reasons stated in the opinion by Justice Darcel D. Clark at the Appellate Division (*110 AD3d 134, 970 N.Y.S.2d 766*).

Decided December 10, 2013

APPENDIX B

SUPREME COURT, APPELLATE DIVISION,
FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Rolando T. Acosta
David B. Saxe
Helen E. Freedman
Darcel D. Clark, JJ.
10542N
Index 3003713

In re James Holmes,
Petitioner-Respondent,

-against-

Jana Winter,
Respondent-Appellant.

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The Reporters Committee for Freedom of
the Press plus 42 News Organizations,
Amici Curiae.

Respondent appeals from the order of the Supreme Court, New York County (Larry Stephen, J.), entered on or about March 7, 2013, which compelled her to testify before the District

Court of Arapahoe County, Colorado, in a criminal proceeding against petitioner.

Hogan Lovells US LLP, Washington, DC (Christopher T. Handman of the bars of the District of Columbia and the State of Maryland, admitted pro hac vice, of counsel), and Hogan Lovells US LLP, New York (Dori Ann Hanswirth, Theresa M. House, Nathaniel S. Boyer and Benjamin A. Fleming of counsel), for appellant.

Arshack, Hajek & Lehrman, PLLC, New York (Daniel N. Arshack of counsel), for respondent.

Levine Sullivan Koch & Schulz, LLP, New York (Katherine M. Bolger of counsel), for amici curiae.

Clark, J.

In this appeal, the question presented is whether the Supreme Court erred in its determination to enforce a subpoena under the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases (CPL 640.10) when the witness's testimony potentially involves the assertion of privilege provided by Civil Rights Law § 79-h (b). We find that the Supreme Court acted properly in directing respondent to appear in the Colorado District Court. Accordingly, the inquiry into admissibility and privilege remains the province of the demanding state rather than the sending state.

As a threshold matter, we find that this appeal is not rendered moot by the fact that respondent appeared in the Colorado District Court because it "presents an issue of substantial public interest that is likely to recur and evade review" (*Branic Intl. Realty Corp. v. Pitt*, 106 AD3d 178, 182 [1st Dept 2013]; *see Coleman v. Daines*, 19 NY3d 1087, 1090 [2012]; *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

As to the merits, the Supreme Court properly directed respondent to testify in the criminal proceeding against petitioner. When seeking to compel a witness to testify in a criminal proceeding in another state, a petitioner bears the burden of securing a certificate from the out-of-state judge, presenting that certificate to a New York judge, showing that the witness's testimony is "material and necessary," and showing that such compulsion would not cause undue hardship to the witness (CPL 640.10 [2]; *Matter of Tran v. Kwok Bun Lee,* 29 AD3d 88, 92 [1st Dept 2006];*State of New Jersey v Bardoff*, 92 AD2d 890 [2d Dept 1983]). Petitioner furnished the court with a certificate issued, pursuant to the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases (CPL 640.10), by the Arapahoe County District Court Judge, and demonstrated that respondent's testimony was "material and necessary" (*Tran*, 29 AD3d at 92; CPL 640.10 [2]), and that she would not suffer undue hardship because petitioner would pay the costs of her travel and accommodations (*see Tran*, 29 AD3d at 93-94).

Respondent's reliance upon Civil Rights Law § 79-h (b) is unavailing. The narrow issue before the Supreme Court was whether respondent should be compelled to testify, and privilege and admissibility are irrelevant for this determination (*see Matter of Codey [Capital Cities, Am. Broadcasting Corp.]*, 82 NY2d 521, 528-530 [1993]; *Matter of Magrino*, 226 AD2d 218 [1st Dept 1996]). Respondent is entitled to assert whatever privileges she deems appropriate before the Colorado District Court. Compelling respondent to testify is distinguishable from compelling her to divulge the identity of her sources.

In *Matter of Codey (Capital Cities, Am. Broadcasting Corp.)* (82 NY2d 521 [1993]), the Court of Appeals held that the "privileged status of . . . evidence is not a proper factor for consideration under CPL 640.10 (2)" (*id.* at 524). Notwithstanding the holding in *Matter of Codey*, the dissent asserts that there are countervailing public policy implications that favor protecting the identity of an investigative reporter's confidential sources. In addition, the dissent reasons that an "undue hardship" is presented when an investigative reporter relies upon confidential sources for her livelihood and is compelled to divulge the identity of her sources.

The dissent's position conflates the separate and distinct concept of "privilege" with public policy and undue hardship. Privilege "pertains to the disclosability and admissibility of otherwise probative and useful evidence" (*id.* at 529). An undue hardship may pertain to "any familial, monetary, or

job-related hardships" that result from being compelled to appear (*Tran*, 29 AD3d at 93). Nevertheless, undue hardship does not involve an analysis of the potential consequences if respondent exercises privilege in the demanding state. Again, the assertion of privilege remains irrelevant to the determination of whether a respondent should be compelled to testify pursuant to the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases (*see Matter of Codey*, 82 NY2d at 528-530; *Matter of Magrino*, 226 AD2d 218). Thus, if this Court were to resolve questions of privilege under the lens of public policy or undue hardship, it would frustrate the purpose of the reciprocal statutory scheme (*id*.).

The Court in *Matter of Codey* held that "[i]t would be inefficient and inconsistent with the overall purpose and design of this reciprocal statutory scheme to permit the sending State's courts to resolve questions of privilege on a CPL 640.10 (2) application" (*Matter of Codey*, 82 NY2d at 529). "Further, 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 530).

We note that New York's Shield Law (Civil Rights Law § 79-h [b]) continues to represent a strong public policy and the long history of vigilantly safeguarding freedom of the press (*see O'Neill v Oakgrove Constr.*, 71 NY2d 521, 528-529 [1988]; *Matter of Knight-Ridder Broadcasting v Greenberg*, 70 NY2d 151, 155-157 [1987]). The dissent argues that respondent's appearance was

ordered to identify law enforcement personnel, which requires the disclosure of her confidential sources. However, the facts presented on this record do not establish with absolute certainty that the Colorado District Court will require the disclosure of confidential sources. As such, it calls into question whether this matter truly embodies a conflict between evidence privileged under New York law and evidence that is unprotected in the demanding state. It is not certain that respondent will forfeit privilege protections under the law of the demanding state. Given this uncertainty, we do not find countervailing public policy concerns that justify "the refusal of relief under CPL 640.10 even if the 'material and necessary' test set forth in the statute is satisfied" (*Matter of Codey*, 82 NY2d at 530 n 3). Moreover, even if respondent asserts privilege under the New York Shield Law, privilege is irrelevant to this Court's determination since admissibility and privilege remain within the purview of the demanding state rather than the sending state (*id.* at 530).

We find that the Supreme Court improperly sealed the record. "Generally, this Court has been reluctant to allow the sealing of court records, even where both sides to the litigation have asked for such sealing" *(Gryphon, Dom, VI, LLC v APP Intl. Fin. Co., B.V.,* 28 AD3d 322, 324 [1st Dept 2006] [citations omitted]; *see Liapakis v Sullivan*, 290 AD2d 393, 394 [1st Dept 2002]; *Matter of Hofmann*, 284 AD2d 92 [1st Dept 2001]; *Matter of Brownstone*, 191 AD2d 167, 168 [1st Dept 1993]). This Court has consistently held that "[t]he presumption of the

benefit of public access to court proceedings takes precedence, and sealing of court papers is permitted only to serve compelling objectives, such as when the need for secrecy outweighs the public's right to access" *Matter of East 51st St. Crane Collaps Litig.,* 106 AD3d 473, 474 [1st Dept 2013] [internal quotation marks omitted]; *Applehead Pictures LLC v. Perelman*, 191-192 [1st Dept 2010]). The requisite court rule, Uniform Rules for Trial Courts (22 NYCRR) § 216.1 (a), states as follows: "Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof." Here, the court did not specify the grounds for sealing the record, nor did it issue a "finding of good cause." Accordingly, in keeping with the strong public interest of openness in court proceedings, we direct that the record be unsealed (*see Schulte Roth & Zobel, LLP v. Kassover*, 502 [1st Dept 2011], *lv denied* 17 NY3d 702 [2011]; *Gryphon Dom. VI, LLC*, 28 AD3d at 323-326).

Respondent's references to matters dehors the record have not been considered (*see Vick v Albert 47 AD3d 482*, 484 [1st Dept 2008], *lv denied* 10 NY3d 707 [2008]), with the exception of her reference to Colorado's official court documents, judicial notice of which is appropriate *(see Assured Guar. [UK] Ltd. V J.P. Morgan Inv. Mgt. Inc.,* 80 AD3d 293, 303 [1st Dept 2010], *affd* 18 NY3d 341 [2011]).

Accordingly, the order of the Supreme Court, New York County (Larry Stephen, J.), entered on or

about March 7, 2013, which compelled respondent to testify before the District Court of Arapahoe County, Colorado, in a criminal proceeding against petitioner, should be affirmed, without costs. The Clerk is directed to unseal the record.

Saxe, J. (dissenting). The motion court was wrong to grant the CPL 640.10 petition and issue a subpoena requiring respondent to appear before the Arapahoe County District Court in Colorado. New York's public policy, as reflected in this state's Shield Law (Civil Rights Law § 79-h [b]), is violated when a court of this state directs a reporter to appear in another state, where the purpose of requiring her appearance is to obtain from her the identity of her confidential sources, and where there is a substantial possibility that the demanding court will issue such a directive. I therefore dissent from this Court's affirmance of that order.

Petitioner James Holmes is currently being charged in the District Court of Arapahoe County, Colorado, with 166 felony charges, including 24 counts of first degree murder (*see People v Holmes*, Dist Ct, Arapahoe County, CO, case No. 2012-CR-1522), arising out of the shooting massacre at a movie theater in Aurora, Colorado, during a midnight showing of Batman, The Dark Knight Rises, on July 20, 2012. Petitioner obtained from the District Court, on July 23, 2012, an order limiting pretrial publicity, which directed the parties and law enforcement officials to refrain from disseminating any information that would have a substantial likelihood of prejudicing the criminal proceeding. That same

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

On July 25, 2012, FoxNews.com published an article, written by respondent Jana Winter, revealing details about 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 them reportedly told her that petitioner mailed a notebook " 'full of details about how he was going to kill people' to a University of Colorado psychiatrist before the attack." That source reportedly said that "[t]here were drawings of what he was going to do in it—drawings and illustrations of the massacre." The article also reported that the spiral-bound notebook had drawings of "gun-wielding stick figures blowing away other stick figures." Both of respondent's sources reportedly indicated that the intended recipient of Holmes's notebook was a professor who treated patients at a psychiatric outpatient facility.

Later that same day, July 25, 2012, petitioner moved 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 respondent's article. The District Court granted petitioner's motion, directed the District Attorney and law enforcement agencies to immediately comply with the pretrial publicity order, and, again, prohibited them

from disseminating information. The District Court also granted petitioner's motion to seal the package, and directed the prosecution to destroy any copies.

On October 2, 2012, petitioner moved the District Court for sanctions to be imposed upon Colorado law enforcement officials for violating the pretrial publicity order "by leaking privileged and confidential information to the media concerning the contents of a package that [petitioner] sent to his treating psychiatrist." The District Court conducted an evidentiary hearing to determine petitioner's motion for sanctions, at which 14 law enforcement officials testified that they either partially viewed the contents of the notebook inside the package that petitioner sent to his psychiatrist, or they heard conversations about its contents. None of the law enforcement witnesses admitted to providing information about the notebook's contents to the media.

On January 17, 2013, petitioner moved the District Court for a certificate to compel respondent to testify and "produce to the Court her notes from her conversations with sources mentioned in her article," pursuant to Colorado's enactment of the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings (Colo Rev Stat § 16-9-201 *et seq*.). Petitioner argued that respondent was the only person who could identify the two law enforcement agents who violated the pretrial publicity order by leaking information about the notebook's contents to the media, and, thereafter, committed perjury by denying as much. On January

18, 2013, the District Court granted petitioner's motion and issued a certificate compelling respondent "to spend [three] days in travel and testimony in" the criminal proceeding. The certificate explained that petitioner's "counsel has used all available means to determine which law enforcement agent may have violated [the pretrial publicity order]. As none of these efforts have revealed the source of the information in [respondent]'s article, [respondent] has become a material and necessary witness in this case." The court also reasoned that the alleged violation of the pretrial publicity order "is a serious issue" because the information about "the package contents has received significant public attention that has implicated [petitioner]'s constitutional rights to a fair trial, to a fair and impartial jury, and to due process."

Petitioner then proceeded with the second part of the procedure dictated by the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings: he commenced this special proceeding pursuant to CPL 640.10 (2) seeking a subpoena ordering respondent to appear before the District Court of Arapahoe County, Colorado, "as a material witness to give testimony concerning the intentional violation of [the pretrial publicity order]" and "to produce to that court, her notes from her conversations with the two law enforcement sources mentioned in her article." The motion court, rejecting as irrelevant respondent's claim that the information sought from her was privileged, granted the petition.

I do not dispute the propriety of the Arapahoe County District Court's issuance of the necessary certificate pursuant to the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases, because its task was limited to finding that respondent's testimony was "material and necessary" to petitioner's defense in the criminal prosecution against him (*see* CPL 640.10 [2]). However, the determination in this state required the motion court to not only confirm the materiality and necessity of the requested evidence, but also to determine that respondent would not suffer "undue hardship" (*id.*). The motion court's analysis on that point was based entirely on issues of travel costs and accommodations; it did not consider respondent's assertion that she relies upon confidential sources for her livelihood, and that her sources would not speak to her if she divulged their identities. This aspect of her argument was treated as part and parcel of the privilege issue, which, the motion court found, was not within its purview to consider, citing *Matter of Codey (Capital Cities, Am. Broadcasting Corp.)*(82 NY2d 521 [1993]).

Similarly, the majority regards the issue before this Court as limited to materiality, relevance, and the hardship of the trip, and asserts that privilege is irrelevant for this determination, relying on *Matter of Codey* (*id.*). It reasons that respondent is entitled to assert the privileges provided by the Shield Law when she appears before the Colorado District Court, and distinguishes compelling respondent to testify from compelling her to divulge the identity of her sources. This approach ignores

both the practical reality of respondent's position, and the importance of our state's public policy in favor of protecting the identity of investigative reporters' confidential sources.

It should be acknowledged at the outset that the central reason respondent's presence was sought, and was ordered, was to identify the law enforcement personnel who disclosed the notebook and its contents to respondent—that is, respondent's confidential sources. This fact is crucial here, and it creates a crucial distinction with *Matter of Codey*.

Importantly, in *Matter of Codey*, the evidence sought through CPL 640.10 (2) was *not* the identity of a confidential source. The respondent's news stories considered there concerned an alleged point-shaving scheme, which were based on information gleaned from confidential sources; the broadcast included excerpts of an interview with an unidentified player whose anonymity was preserved in the broadcast. However, that unidentified player then agreed to come forward and to cooperate with the Mercer County, New Jersey, grand jury investigation. The player acknowledged that he had been interviewed by respondent's reporter, but said he was unable to recall all of the information that he had related during the 30-minute videotaped exchange. Accordingly, the New Jersey grand jury sought the videotaped outtakes and reporter's interview notes, which became the subject of the special proceeding in this state (82 NY2d at 524). There is no indication in the decision that the Mercer County grand jury was seeking information revealing

the identities of any other confidential sources for the respondent's news stories, beyond the athlete whose identity they knew.

Despite the apparently definitive statements by the Court of Appeals in *Matter of Codey* that "the privileged status of the evidence is not a proper factor for consideration under CPL 640.10 (2)" (82 NY2d at 524), that "the Appellate Division's decision to consider the privileged nature of the evidence sought in the New Jersey proceeding was error" (*id.* at 528), and that nothing in the language of CPL 640.10 (2) justified an inquiry into whether the evidence sought might be privileged (*id.* at 528-530), the Court, importantly, then made a point of announcing that it was *not* then deciding the question of whether, in another case, "a strong public policy of this State, even one embodied in an evidentiary privilege, might justify the refusal of relief under CPL 640.10 even if the 'material and necessary' test set forth in the statute is satisfied" (*id.* at 530 n 3). It is this pronouncement that the majority ignores and which forms the basis of our disagreement.

The provisions of New York's Shield Law (Civil Rights Law § 79-h [b]) reflect just such a strong public policy. The provision is entitled "Exemption of professional journalists and newscasters from contempt," and it specifically creates an "[a]bsolute protection" for "the identity of the source" of any published news (*id.*). The Court of Appeals recognized the paramount importance of the protection of journalists' confidential sources in *Matter of Knight-Ridder Broadcasting v*

Greenberg (70 NY2d 151, 155-156 [1987]), explaining that the legislature's grant of absolute protection reflected a determination of public policy of this state.

In a case with many similarities to the matter before us, *Matter of Beach v Shanley* (62 NY2d 241 [1984]), a grand jury was seeking to determine whether the contents of a sealed report had been disclosed to the reporter by a grand juror or a public official or public employee in violation of Penal Law § 215.70 (*id.* at 247). The Court of Appeals quashed the grand jury subpoena that sought the testimony of the reporter as to the identity of the person who had leaked a grand jury report, explaining that New York's Shield Law "precludes any body from having a reporter held in contempt, fined, or imprisoned for refusing to disclose news or the identity of a source, regardless of whether the information is highly relevant to a governmental inquiry" (*id.* at 251). New York's Shield Law applied to protect the identity of reporters' confidential sources, "even when the act of divulging the information [to the reporter] was itself criminal conduct" (*id.* at 252).

A comparable situation is presented here. In both cases, the focus of the inquiry for which the reporter's testimony was material and necessary was the identity of a person who leaked confidential information. The Court of Appeals' reliance on the important public policy behind the absolute privilege that covers the identity of confidential sources is as applicable here as it was in *Beach*, and the majority

fails to mention, let alone distinguish, this applicable precedent.

The majority says respondent may only raise the claim of journalists' privilege and the protection of confidential sources in the Colorado District Court. However, unlike New York, Colorado does not recognize an absolute privilege for journalists' confidential sources. Rather, its statute provides only for a qualified privilege (*see* Colo Rev Stat § 13-90-119). A journalist's privilege in Colorado may be overcome if the person requesting information can prove the following by a preponderance of the evidence:

> "(a) That the news information is directly relevant to a substantial issue involved in the proceedings; (b) That the news information cannot be obtained by any other reasonable means; and (c) That a strong interest of the party seeking to subpoena the newsperson outweighs the interests under the [F]irst [A]mendment to the United States [C]onstitution of such newsperson in not responding to a subpoena and of the general public in receiving news information" (§ 13-90-119 [3]).

So, although respondent may be entitled to raise the claim of privilege when she appears before the Colorado District Court, pursuant to the subpoena being affirmed by this Court, that court is

extremely unlikely to allow her to protect her confidential sources. The applicable standard under the Colorado statute is limited, and the Colorado District Court has already determined, when it granted petitioner's motion for a certificate to compel respondent to testify, *that it considers respondent's identification of her confidential sources to be important, relevant and necessary for the protection of petitioner's constitutional trial rights*. Having already determined this, the Colorado court is unlikely to conclude that what it views as petitioner's strong interest in protecting his constitutional rights is outweighed by respondent's interests "under the [F]irst [A]mendment to the United States [C]onstitution . . . in not responding to a subpoena and of the general public in receiving news information" (Colo Rev Stat § 13-90-119 [3] [c]).

In emphasizing that the facts presented "do not establish with absolute certainty that the Colorado District Court will require the disclosure of confidential sources," the majority fails to acknowledge the *near* certainty that the Colorado court will reject respondent's privilege claim and compel her to provide the identities of her confidential sources, leaving her to face either a contempt order and incarceration, or the loss of her reputation as a journalist. At that point, it will be too late for this Court to address whether respondent is protected by our Shield Law.

The majority also asserts that "[c]ompelling respondent to testify is distinguishable from compelling her to divulge the identity of her sources."

While that assertion may be true in general, the distinction is not applicable here. The *only* information petitioner seeks from respondent, the *only* reason she has been compelled to appear and testify, is so that she can disclose the identities of her confidential informants.

I conclude that New York's expressed public policy in favor of providing absolute protection for reporters, so that they are not required to disclose the identity of their sources, is paramount here, and requires the rejection of petitioner's application. Even if we assume that there might be some situations in which that protection should be permitted to give way to a petitioner's right to a fair trial, this is not such a case. The identity of respondent's confidential sources is likely to be irrelevant to petitioner's defense at trial, because given the number of police department employees who knew about petitioner's notebook, it is quite likely that respondent's sources are not the ones the prosecutor will call to testify regarding the notebook. Even if a confidential source turned out to be a prosecution witness, and petitioner could use that individual's violation of the court's gag order to impeach his or her credibility, impeachment of a witness regarding the notebook and its contents is at best a secondary issue in the murder prosecution. The public policy of protecting a reporter's confidential sources and preventing her from being held in contempt and jailed for failure to disclose the information, should not be ignored merely so that petitioner is provided with grounds for impeaching the credibility of two individuals who might be called to testify regarding a secondary piece

of evidence, particularly since the contents of the notebook speak for themselves.

This is exactly the type of case contemplated by the third footnote in *Matter of Codey*, where "a strong public policy of this State, . . . embodied in an evidentiary privilege, . . . justif[ies] the refusal of relief under CPL 640.10 even [though] the 'material and necessary' test set forth in the statute is satisfied" (82 NY2d at 530 n 3). Public policy requires the denial of petitioner's application for a subpoena.

I must add that, in my view, respondent also established that undue hardship would result by requiring her testimony in the Colorado matter, which provides an additional justification for denying petitioner's application. Respondent asserts, without challenge, that she relies upon confidential sources for her livelihood, and that her sources would not speak to her if she divulged the identity of a confidential source. The hardship to respondent if she is compelled to testify is far more than three days of travel, a hotel stay, and missing work; it is nothing short of undermining her career, the very means of her livelihood. Nothing in CPL 640.10 (2) limits the concept of "undue hardship" to the unpleasantness or cost of travel; here, the probable result of incarceration or the loss of her livelihood is far more of a "hardship" than those minor considerations.

Mazzarelli, J.P., and Freedman, J., concur with Clark, J.; Acosta and Saxe, JJ., dissent in a separate opinion by Saxe, J.

Order, Supreme Court, New York County, entered on or about March 7, 2013, affirmed, without costs. The Clerk is directed to unseal the record.

APPENDIX C

1

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: Part 1
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IN THE MATTER OF THE APPLICATION OF JAMES HOLMES, A DEFENDANT IN THE STATE OF COLORADO FOR A SUBPEONA DIRECTING JANA WINTER TO APPEAR IN ARAPAHOE COUNTY, COLORADO, AS A MATERIAL WITNESS TO GIVE TESTIMONY CONCERNING THE INTENTIONAL VIOLATION OF ARAPAHOE COUNTY JUDGE SYLVESTER'S ORDER LIMITING PRETRIAL PUBLICITY BY LEAKING PRIVILEGED AND CONFIDENTIAL INFORMATION.

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****SEALED MINUTES****

111 Centre Street
New York, New York 10013
March 7, 2013

B E F O R E HONORABLE LARRY STEPHEN, JUSTICE SUPREME COURT.

A P P E A R A N C E S :

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BY: DANIEL N. ARSHACK, ESQ.
Attorney for Petitioner
(JAMES HOLMES)

OFFICE OF THE STATE OF COLORADO PUBLIC DEFENDER
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BY: DORI ANN HANSWIRTH, ESQ. & THERESA M. HOUSE, ESQS.
Attorney for Respondent
(JANA WINTER)

MAUREEN POSTEL
SENIOR COURT REPORTER

Proceedings

THE COURT: Part 1 is now in session, calling an add on to the Part 1 calendar, Calendar Number 8 in the matter of Jana Winter, W-I-N-T-E-R, J-A-N-A, order to show cause for material witness under SCID-30037 of the year 2013.

All parties come forward, make your appearances.

MR. ARSHACK: Good morning, Daniel Arshack, A-R-S-H-A-C-K, on behalf of Mr. Holmes. I have with me Rebekka Higgs, who is an attorney from Colorado. I'm going to ask the Judge permission for her to sit with me if that's acceptable to your Honor?

THE COURT: Yes.

MS. HANSWIRTH: Dori Hanswirth for the respondent, Jana Winter, with me is Theresa House from my firm, good morning.

THE COURT: So the Court has reviewed the submissions, the voluminous submissions, submitted by both sides, including the December 10 hearing minutes in the Colorado matter concerning leaks by law enforcement officials.

Does either side have anything to add to the written submission, because I don't want to rehash --

MS. HANSWIRTH: Yes, your Honor, we have – yesterday evening we received a reply --

THE COURT: From Mr. Holmes --

Proceedings

MS. HANSWORTH: -- from Mr. Holmes' counsel. And last night we prepared a document to further rebut the – on the issue of necessity, and the extent to which the December 10th hearing did or did not, actually, result in making Ms. Winter a necessary witness, because as your Honor knows we submit that it doesn't. So we'd like to hand up an exhibit that does further rebut some of the statements made in the reply

THE COURT: The exhibit is just on a rebuttal?

MS. HANSWIRTH: It's a chart showing references to the December 10th hearing disputing some of the material factual assertions that were in the reply that we received late yesterday afternoon. So we just ask that this be included in the record, your Honor.

The last Exhibit to my affirmation was FF. don't know if you want to make this Respondent's Exhibit GG.

THE COURT: All right, we can make it GG.

MS. HANSWIRTH: Thank you, your Honor.

(Whereupon, the above-mentioned documents are deemed marked as Respondent's Exhibit GG in Evidence.)

MR. ARSHACK: Your Honor, may I say one thing before we go forward?

THE COURT: Go ahead.

MR. ARSHACK: I know that Ms. Winter's counsel

in response to our papers reference the hearing minutes that you said that you reviewed the December 10th hearing minutes. I'd like them to be part of the record.

THE COURT: They are. Everything that's been submitted is part of the record.

MR. ARSHACK: Wonderful. If it's necessary, and I have them available, I have a certification from the Court Reporter in Colorado that the minutes that you have are true and correct. If you want to deem them correct I'm fine with that. I'm, also, happy to hand up this certificate if you'd like.

THE COURT: All right, you can hand it up.

MR. ARSHACK: And that relates – what I'm handing up, Judge, to save some trees, in the final page of the December 10th hearing, page 184, that has the certificate on it. Likewise, we have referenced in the certificate issued by Judge Sylvester in Colorado referenced to a variety of documents that he reviewed, that is Judge Sylvester references in his certificate a variety of documents that he reviewed in coming to the conclusion that he does -- you don't have all of those documents?

I do. And I have them certified as correct and accurate records by the state of Colorado. I'm happy to pass those up as well just to make them part of the

complete record.

MS. HANSWIRTH: Mr. Arshack, please describe what these documents are. We haven't seen them.

MR. ARSHACK: Yes.

(Whereupon, the attorneys are conferring with each other.)

THE COURT: You're handing up those documents?

MR. ARSHACK: I am.

Judge, as I said, these are, virtually -- all these documents are things that you've seen already. The only difference is that these have the official seal of the State of Colorado that they have been certified as correct.

THE COURT: You have something, Ms. Hanswirth?

MS. HANSWIRTH: All I wanted to say, your Honor, I would suggest that these separately be given some exhibit numbers so we all know what we're talking about, or maybe just one exhibit number in a bundle?

THE COURT: How many documents are we talking about?

MR. ARSHACK: If I can just read into the record what I'm handing up. I'm handling up – all of these documents are sealed with the seal of the Clerk of the Court of Arrapahoe County. One is motion to limit the trial publicity identified as D-2. The next one is the

proposed order attached to that motion.

THE COURT: I'm assuming – I think we have all that already, right?

MR. ARSHACK: Just without the seal on it. And I just wouldn't want an issue to be made of that. We have a motion for immediate protective order identified as DB, a motion for immediate production and protection of privileged material identified as D-9, the motion for compliance with order limiting pretrial publicity identified as D-10, a motion for sanctions identified as D-17, a motion for certificate to compel the attendance of Jana Winter identified as D-26, and the certificate of Judge Sylvester from Colorado, also, indentified as D-26.

And you're correct, Judge, that you've seen each of those documents previously just without that nice stamp in the upper right hand corner.

THE COURT: So these will be made part of the record.

As a preliminary matter let's deal with the issue of calling of witnesses. The defense, Ms Winter, I guess, you call it the respondent, has suggested that the Court must hear witnesses, including witnesses, the lawyers for Mr. Holmes, as well as law enforcement officials from the State of Colorado. The Court indicated in an e-mail several days ago that the Court would not require lawyers for Mr. Holmes to testify, and that's the Court's ruling. I don't think it's at all necessary or appropriate. Also, the Court will not require law enforcement officials from

Colorado to testify in that the Court has already reviewed testimony from various law enforcement officials who testified in Colorado on December 10th.

Now, it does not mean that I'm going to preclude either side from calling any witnesses. I'm just not requiring any witnesses to testify to this hearing. I think we have more than enough in the record with the submissions submitted by both sides to decide this issue.

I will not preclude – Ms. Hanswirth, I will not preclude you from calling witnesses for Ms. Winter, but I'm not going to require Mr. Holmes' lawyer or law enforcement official from Colorado to testify.

MS. HANSWIRTH: Thank you, your Honor.

We have submitted affidavits from Ms. Winter and from professor Feldstein and an affirmation from myself with many exhibits. And although we would continue to reserve our objection to the ruling that we are precluded from seeking testimony from persons within Colorado, that is an issue, I suppose, we would save for another day if and when it becomes necessary. So we are believed to have argument or have your Honor decide these on the papers that have been submitted right now.

THE COURT: Anything, Mr. Arshack?

MR. ARSHACK: Nothing, Judge, thank you.

THE COURT: All right, based on the voluminous submissions by both sides that this Court has reviewed all exhibits that have been presented to

the Court, and will become part of the record. The Court's decision is that the petitioner has met its burden by showing a prima facia case that Ms. Winter is a material and necessary witness in Colorado. The Court has reviewed the verification by Judge Sylvester, which details his findings based on the facts the publication of the article, the hearing in Colorado on December 10, and on the submissions made by the parties in Colorado. It is clear that Ms. Winter's testimony is material and necessary to resolve the issues regarding the alleged violation of Judge Sylvester's protective order, which bands law enforcement officials from leaking any information about the case that might be prejudicial to the defendant, Mr. Holmes. The burden is met by petitioner.

Also, the court finds that Ms. Winter's appearance in Colorado would not be an undue hardship. The defense of Mr. Holmes' defense team has agreed to pay all expenses. The Court is only requiring Ms. Winter to appear for three days, and the court finds that her appearance there would not been an undue hardship, including issues about public policy as well as her fear, which I don't credit that she's under any sort of threat from Mr. Holmes or his followers, whoever they may be.

Many of the issues raised by the defense regarding the privilege or whether the notebook that was seized by the police were privileged, is an issue for the Colorado Court -- or the timing of the

protective order or whether the defendant was, actually, prejudiced by the publication of the article; those are all issues for the Colorado Court, and not for this Court.

This Court only has to decide, based on the submissions, and her certification by the Colorado judge, that Ms. Winter is a material and a necessary witness, and the Court does not find that she is for the purposes of the Colorado's court inquiries. The Court does not find that her appearance there will be an undue hardship. Therefore, the Court will grant petitioner's motion and will sign a subpoena requiring Ms. Winter to appear in Colorado on the dates specified.

MR. ARSHACK: Thank you, Judge.

MS. HANSWIRTH: Your Honor, may we ask for an interim stay pending time to ask the 1st Dep't for a stay pending appeal, a stay of this ruling? Also, I would just like to ask because your Honor is, specifically, deciding that the public policy of the State of New York that's embodied in the New York Journalist Shield Law is not a sufficient justification to deny this petitioner.

THE COURT: Yeah, I do not think that this issue implicates the New York State Shield Law. I don't think there is a public policy implication here. So this is an issue for the Colorado courts to decide, not this New York Court.

MS. HANSWIRTH: So I would ask that your Honor would issue an interim stay pending our being able to ask the Appellate Division for a full stay

pending appeal.

MR. ARSHACK: Your Honor, I oppose that application.

THE COURT: How long are you asking us to stay?

MS. HANSWIRTH: The procedure would be that we would need an appealable order from this Court. So a written order that would have to be entered, and then we can go to the 1st Dep't, and make a motion for an interim stay prior to a motion for full stay pending appeal. My understanding of the process is that we would assemble our full motion for a stay pending appeal, we would take that to the Appellate Division, and at that time we'd make a request for an interim stay while the Appellate Division can decide the motion. My understanding is typically those motions would result in a briefing schedule that it would take a few weeks. So it seems to me that once we move in the Appellate Division for a stay pending appeal it's unlikely that the 1st Dep't would rule on the stay pending appeal before the date that Ms. Winter is supposed to go to Colorado.

So what I'm asking you for, and I'm sorry if I'm making this long, I would ask that we would - - today is Thursday -- I would ask that the Court would give us to -- until Wednesday, next week, to file our motion for stay pending appeal in the Appellate Division. So I would ask that six days of an interim, your Honor.

MR. ARSHACK: Under those circumstances there's no need for an interim stay. The subpoena

that you ruled that you are going to sign requires her appearance, Ms. Winter's appearance, in Colorado on April 1. So between today and April 1 Ms. Winter is free to appeal anything she wants to with no need for a stay.

Also, I would say, as well, of course, Judge Sylvester has -- in Colorado has started the hearing, and is waiting for her appearance on April 1 to continue to that hearing. So if the -- this application for a stay is unnecessary, and if Ms. Winter's counsel elects to request a stay from a different judge in a different jurisdiction then she's, certainly free and able to do that.

THE COURT: Right, I agree with that.

You can still go to the 1st Dep't and apply for a stay pending an appeal. So the request for a stay is denied.

MS. HANSWIRTH: Thank you, your Honor.

MR. ARSHACK: As far as an appealable order the rules permit the transcript of this

THE COURT: I think you order the transcript and that will constitute my ruling --

MR. ARSHACK: I'm sorry for interrupting, Judge, I'm certain that your able Court Reporter can - - you do want to do the minutes? If she wants them by tomorrow, so that there won't be any time lost.

Will it be your intention to sign our order to show cause attached as Exhibit E?.

Your Honor, the rules under CPLR -- under 64.10 require us to make available to Ms. Winter -- who, frankly, I expected to be here today -- her

transportation expenses and accommodation expenses for her time in Colorado. We have those available with us today.

THE COURT: You have what, I'm sorry?

MR. ARSHACK: I'd ask that Ms. Winter's counsel acknowledge receipt of this subpoena on behalf of Ms. Winter today so that we don't have to go through the exercise again of trying to serve her with the subpoena inasmuch as her counsel is here today.

MS. HANSWIRTH: Your Honor, we're not authorized to accept process on behalf of Ms. Winter. If your Honor makes a ruling in that regard, obviously, we would respect it. But I cannot --

THE COURT: Obviously, you're here on her behalf, on her own behalf of Fox, representing her so I will deem the subpoena served.

MR. ARSHACK: Thank you, your Honor.

MS. HANSWIRTH: May I ask --

THE COURT: I'm going to seal --

MS. HANSWIRTH: -- her address be redacted --

THE COURT: I'm going to seal these records anyway.

MS. HANSWIRTH: Thank you, your Honor.

THE COURT: Both sides can have copies of whatever is here, but in terms of the general public this is going to be sealed pending the outcome of this --

MS. HANSWIRTH: Does that mean that counsel -- does that restrict counsel from discussing

the matter outside:

THE COURT: Where would you discuss it at?

MS. HANSWRITH: I don't know, other media organizations might express some interest.

THE COURT: Well, they're not going to get access to this file.

MS. HANSWIRTH: Okay

The court: So I've signed -- do you need a copy?

MR. ARSHACK: If you could sign it and have your Clerk stamp it, I will bring it to the Clerk's office for copying, and I'm sure Ms. Winter's counsel will want a copy as well from the Clerk's office.

MS. HANSWIRTH: Your Honor

THE COURT: Yes, ma'am.

MS. HANSWRITH: -- in the subpoena that Mr. Arshack is asking you to sign there are - - she's, also, asked to bring notes, and the judge's certificate in Colorado did not require the bringing of notes. So we would ask that that paragraph be stricken from the subpoena. That's not part of the - -

THE COURT: What about that, Mr. Arshack -

MR. ARSHACK: Well, right, he doesn't describe anything that she needed to bring, but he simply didn't describe it. It doesn't mean that he precluded our asking for it. We have asked for it. It's, certainly, relevant and necessary.

Let's imagine, Judge, that she shows up in Colorado and says I don't remember, but her notes include the information that are -- that's relevant. That's why we always ask for notes and testimony.

MS. HANSWIRTH: Your Honor, I believe that the motion that Mr. Holmes made in Colorado requested notes and that Judge Sylvester, specifically, did not include notes in the certificate. And I can show you where in the record that is, if you give me a moment.

THE COURT: You mean you're talking about the hearing?

MS. HANSWIRTH: Yeah, in other words, Holmes' attorney asked to be included in the certificate, a request or a demand that Ms. Winter, also, produce notes. And the judge' s certificate did not include that, and I think that we can all conclude from that, that he did not intend for Ms. Winter to have to bring notes.

MR. ARSHACK: I would never assume that a judge meant something by a lack of action. I would expect that if Judge Sylvester was precluding that request he would have said so. And I can't imagine that there's any prejudice to anybody, including the requirement that somebody went and produced her notes at the same time as she produced herself for testimony in Colorado. If there's some prejudice that Ms. Winter's counsel can suggest I'm happy to address that as well. But I can't --

THE COURT: I agree with you, I don't see any prejudice with request -- I mean, it's going to be, obviously, up to Judge Sylvester to decide whether she, actually, has to testify, which based on the submissions of Ms. Hanswirth, I think it's

questionable whether it will ever come to that. She should bring her notes, and then let the Colorado Court decide what they want to do with those notes.

MS. HANSWIRTH: Respectfully, your Honor, that's beyond the scope of the certificate, and that is not proper.

THE COURT: Well, okay, it may be that this Court's ruling -- you're going to appeal anyway. So let the Appellate Court decide it.

MR. ARSHACK: Thank you.

MS. HANSWIRTH: Thank you.

(Whereupon, the proceedings were adjourned.)

I, Maureen Postel, Senior Court Reporter, certify the foregoing to be a true and accurate transcript to the best of my skill and ability.

MAUREEN POSTEL
SENIOR COURT REPORT

Maureen Postel
Senior Court Reporter

Notice of Entry of the Decision, dated March 13, 2013

SUPREME COURT OF THE STATE OF
NEW YORK
CRIMINAL TERM, NEW YORK COUNTY,
----------X
IN THE MATTER OF
THE APPLICATION
OF JAMES HOLMES,
A DEFENDANT IN
THE STATE OF
COLORADO FOR
A SUBPOENA
DIRECTING **JANA**
WINTER TO
APPEAR IN ARAPAHOE
COUNTY COLORADO,
AS A MATERIAL
WITNESS TO GIVE
TESTIMONY
CONCERNING THE
INTENTIONAL VIOLATION
OF ARAPAHOE COUNTY
JUDGE, JUDGE SYLVESTER'S
ORDER LIMITING PRETRIAL
PRUBLICITY BY LEAKING
PRIVILEGED AND CONFIDENTIAL
INFORMATION
----------X

RECEIVED
Case No. 30037/13
Part 1
(Stephen, J.)
MAR 14 2013
SUPREME COURT
CRIMINAL TERM
NEW YORK COUNTY
CORRESPONDENCE/MOTION
SUPPORT UNIT

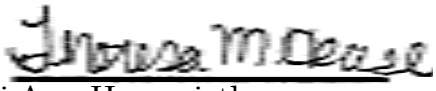
NOTICE OF
ENTRY

PLEASE TAKE NOTICE that the within is a true and correct copy of the Decision of Honorable Judge Larry Stephen, which was so-ordered on March 13, 2013, and duly entered in the Office of the Clerk of the County of New York on March 13, 2013.

Dated: New York, New York
March 13, 2013

Respectfully Submitted,

HOGAN LOVELLS US LLP

By: 

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Attorneys for Respondent Jana Winter

APPENDIX D

Signed Subpoena
(Certified), dated March 7, 2013

NEW YORK STATE SUPREME COURT
CRIMINAL TERM, NEW YORK COUNTY,

----------X

IN THE MATTER OF THE APPLICATION OF JAMES HOLMES, A DEFENDANT IN THE STATE OF COLORADO FOR A SUBPOENA DIRECTING **JANA WINTER** TO APPEAR IN ARAPAHOE COUNTY COLORADO, AS A MATERIAL WITNESS TO GIVE TESTIMONY CONCERNING THE INTENTIONAL VIOLATION OF ARAPAHOE COUNTY JUDGE, JUDGE SYLVESTER'S ORDER LIMITING PRETRIAL PRUBLICITY BY LEAKING PRIVILEGED AND CONFIDENTIAL INFORMATION

SUPOENA DUCES TECUM and **AD TESTIFICANDUM**

MAR 07 2013
DATE
I hereby certify that the foregoing paper is a true copy of the original thereof, filed in my office.
County Clerk and Clerk of the Supreme Court New York County
OFFICIAL USE

----------X

TO:
Jana Winter

YOU ARE COMMANDED to appear in Division 22 in the District Court of Arapahoe County, State of Colorado, on April 1, 2013 at 8:45 a.m., or soon thereafter as the motion hearing commences, to attend and testify as a witness n the criminal proceedings brought by the People of the State of Colorado vs. James Holmes, in Arapahoe County District Court, Colorado, Case Number 2012CR1522.

The court finds that the witness is necessary and material in the motion hearing of the foregoing criminal proceedings. The presence of the witness to testify is required on the aforementioned date and time and said proceedings will not cause undue hardship on the witness. Furthermore, Colorado law gives the witness protection from arrest and the service of civil and criminal process in connection with matters which arose before her entry into Colorado under this Subpoena.

Mr. James Holmes has presented the necessary Certificate pursuant to NY CPL § 640.10(2). The court has thus held a hearing on this matter and Ms. Jana Winter is hereby commanded to appear at the above date, time and place, and is instructed to bring:

1. The notes from her conversation with the law enforcement personnel who provided her with the information which formed the basis for her article dated July 25, 2012 which is attached hereto and incorporated herein by reference which leak to her was in violation of The District Court of Arapahoe County's Court Order limiting pretrial publicity.

Your failure to comply with this subpoena is punishable as a contempt of court and shall make you liable to the person on whose behalf this subpoena was issued for a penalty not exceeding fifty dollars and damages sustained by reason of your failure to comply.

Dated: New York, New York

Justice, Supreme Court

MAR 07 2013

I hereby certify that the foregoing paper is a true copy of the original thereof, filed in my office.

County Clerk and Clerk of the Supreme Court New York County
OFFICIAL USE

APPENDIX E

REDACTED

DISTRICT COURT OF ARAPAHOE COUNTY, STATE OF COLORADO 7325 S. POTOMAC ST. CENTENNIAL, COLORADO 80112	▲COURT USE ONLY▲
People of the State of Colorado **v.** **James Eagan Holmes, Defendant**	Case No. **12CR1522** Division: **26**
ORDER REGARDING JANA WINTER'S SECOND RIPENESS CONTENTION RAISED IN SUPPORT OF HER MOTION TO QUASH SUBPOENA AND FOR PROTECTIVE ORDER (c-26(A))	

INTRODUCTION

The defendant is charged with shooting, and killing or injuring, numerous people inside an Aurora movie theatre during the early morning hours of July 20, 2012. On October 2, he filed a motion for sanctions. In connection with that motion, he served a subpoenaed *duces tecum* and *ad testificandum* on Jana Winter, an investigative journalist employed by

FoxNews.com in New York. The matter is before the Court on the motion filed by Winter, pursuant to the Colorado newsperson's privilege, § 13-90-119, C.R.S. (2012), to quash the subpoena and for a protective order ("motion to quash"). The defendant opposes the motion. The People take no position on it.

During a hearing held on April 1, Winter advanced two ripeness challenges related to the statutory requirements the defendant must satisfy to overcome her newsperson's privilege: (1) she argued that the defendant has not yet exhausted all reasonably available sources that might provide the news information he seeks from her; and (2) she asserted that until the Court determines whether the contents of a notebook seized by law enforcement on July 23 are admissible, the Court will be unable to assess whether the credibility of the witnesses who testified at a December 10 hearing will be a "substantial issue" at trial. At the end of the hearing, the Court sustained the first challenge and granted the defendant leave to present additional evidence on that issue on April 10; the Court did not address the second challenge. For the reasons articulated in this Order, the Court now also agrees with Winter's second ripeness contention.

Accordingly, the Court defers ruling on the merits of Winter's motion to quash and the defendant's motion for sanctions until the Court determines whether the contents of the notebook seized on July 23 are admissible. The Court notes that the notebook's admissibility depends on whether it is protected by the physician-patient privilege or the psychotherapist-patient privilege, an issue that

was previously deferred by agreement of the parties until the defendant decides whether he will attempt to enter a not guilty by reason of insanity plea or to introduce expert evidence of his mental condition.

Considering the significant First Amendment interests of Winter and the general public, the Court must proceed with caution and only upon a complete record. As the Colorado Supreme Court stated in *Gordon v. Boyles*, 9 P.3d 1106, 1121 (Colo. 2000), a trial court may compel a newsperson to disclose confidential information "only as a last resort when necessary to promote the effective administration of justice."

The hearing scheduled for April 10 shall remain set, as the defendant intends to present additional evidence on the ripeness objection raised by Winter and sustained by the Court at the April 1 hearing. Because Winter is entitled to question any witness called by the defendant at the April 10 hearing, and because the Court continued her subpoena until April 10, her presence at that hearing is still required.

BACKGROUND

The defendant's motion for sanctions alleges that law enforcement violated the Court's July 23 Order limiting pretrial publicity ("July 23 Order") by leaking privileged and confidential information to Winter. The motion is based on an "exclusive" report published by Winter on July 25 which included information purportedly provided to her on or about July 24 by two "law enforcement source[s]" about the

contents of a notebook found by the University of Colorado at Denver Police Department ("UCD-PD") around noon on July 23 in a mailroom of the University of Colorado's Anschutz Medical Campus ("CU-Medical"). The notebook was mailed by the defendant to Dr. Lynne Fenton, the medical director of the Student Mental Health Service at CU-Medical, on July 19, just hours before the crimes charged. Dr. Fenton testified on August 30 that she had seen the defendant as a patient on June 11, 2012, while he was a student at CU-Medical.

Pursuant to a search warrant, the notebook was seized by the Aurora Police Department ("APD") at about 9:10 p.m. on July 23. After the defendant was charged, the Court ordered the notebook delivered to it. The parties thereafter submitted multiple pleadings related to the contents of the notebook, including the defendant's D-9 motion, which requested that the notebook not be disclosed to the People and remain in the Court's custody for safekeeping.

On August 30, the Court held a hotly-contested hearing to address whether the contents of the notebook are protected by the physician-patient privilege, *see* § 13-90-107(1)(d), C.R.S. (2012), or the psychotherapist-patient privilege, *see* § 13-90-107(1)(g), C.R.S. (2012). The defendant argued that the notebook is protected under the latter privilege; the People countered that the former, not the latter, privilege applies, but the notebook does not fall within the scope of that privilege.

Because the hearing could not be completed on August 30, a second hearing was scheduled on September 20. However, on September 20, the People advised the Court that they had reassessed their position on the litigation over the notebook:

> We are aware…based on statements [defense counsel] made in open court…that they [are] assessing…mental illness or mental health issues…related to the defendant. And we have come to the conclusion, then, that there is a high degree of likelihood that whatever privilege exists in this notebook will end up being waived by the defendant pursuant to Colorado Revised Statutes [§ 16-8-103.6(2)(a)], which says that a privilege is waived if the defendant places his mental condition at issue [by pleading not guilty by reason of insanity or by seeking to introduce expert evidence of his mental condition.]

9/20/13 Tr. at pgs 21-22. Although the defendant did not express a position on the People's interpretation of § 16-8-103.6(2)(a), he did not object to the proposed course of action. Accordingly, the Court deferred ruling on the privilege issue.[1]

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[1] On March 12, over the defendant's objection, the Court entered a not guilty plea on his behalf. Under Colorado law, the defense of insanity may be raised after the arraignment if the Court permits the defendant to do so "for good cause shown."

On December 10, the Court held a hearing on the defendant's motion for sanctions. The defendant presented six affidavits and testimony from fourteen law enforcement agents, all of whom denied speaking to the media about the notebook or knowing anyone who had done so.

Two law enforcement agents, Chief Douglas Abraham of the UCD-PD and Detective Alton Reed of the APD, admitted during the December 10 hearing that they learned of some of the contents of the notebook as Detective Reed thumbed through it before it was placed into evidence. Officer Jason McDonald of the APD was present as the notebook was thumbed through. However, he testified that all he could tell is that the pages had words written on them; they were not blank. He further stated that he heard a conversation about the contents of the notebook in Chief Abraham's presence immediately after Detective Reed leafed through it.[2]

See Crim. P. 11(3)(1); § 16-8-103(1.5)(a) C.R.S. (2012). Likewise, if the defendant fails to provide at arraignment the required notice of his intent to present expert testimony regarding his mental condition, he must show good cause as to why he should be allowed to give such notice at a later date. *See* § 16-8-107(3)(b); *People v. Flippo*, 159 P.3d 100, 106 (Colo. 2007).

[2] Commanders James Myrsiades and Stephen Smidt of the UCD-PD were also present as Detective Reed flipped through the notebook. However, Commander Myrsiades testified that he could only see "letter" on the pages of the notebook and could not make out any words, and Commander Smidt testified that he could not see the contents of the notebook.

Chief Abraham and Officer McDonald both testified that they had not talked to anyone about the contents of the notebook. Detective Reed did not indicate whether he had shared his knowledge of the contents of the notebook with anyone. Nor was he asked if such communications had taken place.[3]

In light of the evidence presented at the December 10 hearing, the defendant subsequently served a subpoena *duces tecum* and *ad testificandum* on Winter in New York, compelling her to appear before this Court on April 1 and to disclose, both through testimony and her notes, the identity of the two law enforcement sources referenced in her July 25 report. Relying on § 13-90-119, Winter moved to quash the subpoena.

Section 13-90-119 codifies the newsperson's privilege in Colorado. Subsection (3) of the statute makes the privilege qualified, not absolute. The privilege may be pierced if the person seeking the news information can demonstrate by a preponderance of the evidence: (1) that the news information is directly relevant to a substantial issue involved in the proceeding; (2) that the news information cannot be obtained by any other reasonable means; and (3) that a strong interest of the party seeking the news information outweighs the interests under the First Amendment to the United States constitution of the newsperson in not

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[3] Sergeant Matthew Fyles testified that as he prepared the affidavit in support of the search warrant for the notebook, he spoke to Detective Reed on the phone about the notebook.

disclosing her confidential sources and the general public in receiving news information.

The Court heard oral arguments on Winter's motion on April 1. In addressing the first statutory requirement, the defendant maintained that the identity of the law enforcement sources is relevant to two substantive issues in the proceedings; (1) the alleged violation of the July 23 Order limiting pretrial publicity, including any prejudice resulting therefrom and any sanctions that might be warranted;[4] and (2) the credibility at trial of one or more of the witnesses who testified on December 10.[5] The defendant further averred that these substantive issues, in turn, affect his constitutional right to a fair

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[4] Winter maintains that in order to prove that law enforcement violated the July 23 Order, the defendant has to establish that his rights were prejudiced. *See* 4/1/13 Tr. at pgs. 40, 43, and 47. *See also* Motion to Quash at pg. 22. Winter misreads the July 23 Order. The Order made law enforcement officers "subject to the same restrictions" applicable to attorneys, and, with some exceptions not pertinent here, attorneys were prohibited from making "an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication…." Thus, while the defendant asserts that he suffered prejudice as a result of the alleged violation of the July 23 Order and that such prejudice should be considered by the Court in its § 13-90-119 (3) analysis, he is not required to prove he was prejudiced to establish a violation of the Order.

[5] The defendant did not raise the credibility issue in his response to Winter's motion to quash. However, Chief Judge Sylvester mentioned it in the January 18 Certificate he issued to compel Winter, an out-of-state witness, to appear before this Court with her relevant notes. More importantly, without objection, the defendant advanced the credibility argument at the April 1 hearing.

trial, which outweighs any First Amendment interests of Winter and the general public. Finally, the defendant argued that he has exhausted all reasonably available sources that might provide the information he seeks from Winter.

As relevant here, Winter asserted that the matter is prematurely before the Court and not ripe for ruling because: (1) the defendant has not yet exhausted all reasonably available sources that might provide the information requested; (2) whether the credibility of any of the witnesses who testified on December 10 will be a "substantial issue" at trial hinges on the admissibility of the contents of the notebook, a question which the Court has not yet resolved. Based on the concerns expressed by the Court during oral argument related to the first challenge, the defendant presented additional testimony from Sergeant Fyles, who had previously testified on December 10. On April 1, Sergeant Fyles testified that what he learned about the notebook when he spoke with Detective Reed on the phone is that it has an unknown number of pages and unknown writing. The Sergeant added that neither Detective Reed nor anyone else has ever shared information with him about the actual contents of the notebook.

At the end of the April 1 hearing, the Court agreed with Winter that the defendant has not yet exhausted all reasonably available means to obtain the identity of the law enforcement sources quoted in the July 25 report. More specifically, the Court explained that the defendant failed to ask Detective Reed during the December 10 hearing whether he

had shared his knowledge of the contents of the notebook with anyone between July 23, when he examined the notebook, and July 25, when Winter's report was published.[6] Accordingly, the Court deferred ruling on Winter's motion and scheduled another hearing on April 10. Without objection, and pursuant to § 16-9-203(2), C.R.S. (2012), the Court continued Winter's subpoena until April 10.

The Court did not address Winter's ripeness challenge to the defendant's credibility contention at the April 1 hearing. The Court does so now.

ANALYSIS

After giving Winter's motion to quash further consideration, and having conducted an additional review of the record and the applicable legal authorities, the Court agrees with Winter that the defendant's credibility assertion is not ripe for ruling. For the reasons set forth in this Order, the Court concludes that it would be imprudent to resolve Winter's motion to quash, and by extension the defendant's motion for sanctions, before the Court determines whether the contents of the notebook are privileged. Since, by agreement of the parties, that issue has been tabled until the defendant decides whether he wishes to attempt to enter a not guilty by

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[6] A the Court explained, if Detective Reed told other officers about the contents of the notebook, those officers could be the law enforcement sources referenced in the July 25 article. Indeed, according to Winter and Professor Mark Feldstein of the University of Maryland, it is not uncommon for an investigative journalist to rely on confidential sources who have second hand knowledge of the information they provide.

reason of insanity plea or to introduce expert evidence of his mental condition, the Court cannot address the merits of Winter's motion to quash or the defendant's motion for sanctions at this time.

As indicated, the defendant argues that the identity of the law enforcement sources is relevant to two substantial issues: (1) the alleged violation of the July 23 Order, including the prejudice resulting therefrom and any sanctions that might be warranted; and (2) the credibility at trial of one or more of the witnesses who testified on December 10. The former relates to the anticipated proceeding at trial. "Proceeding." As broadly defined by §13-90-119(1)(e), includes "any…criminal…hearing, trial, or other process for obtaining information conducted by, before, or under the authority of any judicial body of the state of Colorado." Thus, both of the issues on which the defendant relies are involved in a "proceeding" in this case.[7]

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[7] At the April 1 hearing, Winter posited that "proceeding," as used in § 13-90-119(3), must be interpreted as referring only to a "trial" or the statute s subject to abuse. According to Winter, any party seeking news information could schedule a hearing on that issue in order to satisfy the requirement that the news information requested must be directly relevant to a substantive issue in the proceeding. Winter's construction of "proceeding" flies in the face of the term's statutory definition. Moreover, her concern ignores the fact that a party seeking news information must show that his interest is "strong" and outweighs the First Amendment interests of the newsperson and the general public. For example, here, while the identity of the law enforcement sources is indisputably relevant to a substantial issue in the proceeding on the defendant's motion for sanctions, the defendant must nevertheless show that his interest in finding out who violated the July 23 Order is so

The Court only addresses the credibility issue in this Order. Since the Court agrees with Winter's ripeness challenge with respect to that issue, the Court does not address the merits of the defendant's contention that the alleged violation of the July 23 Order justifies piercing Winter's newsperson's privilege.

If the notebook is not privileged and is ruled admissible, it may well prove to be a critical piece of evidence in the case. Even if, and perhaps especially if, the defendant is allowed to enter a not guilty by reason of insanity plea or to introduce expert evidence of his mental condition, the notebook, if admissible, may play a significant role in the case. Of course, the more significant any admissible contents of the notebook are, the more significant the credibility of one or more of the December 10 witnesses is likely to be at trial.

On the other hand, if the Court concludes that the notebook is privileged and inadmissible, it is difficult to discern why the credibility of one or more of the December 10 witnesses would be of importance. Indeed, those witnesses may not even testify at trial. The agents employed by the UCD-PD, the FBI, and the Adams County Sheriff's Office who testified on December 10 may have had limited or no participation in other aspects of the investigation of this case. The APD agents who testified on December 10 may have done their work on the case, but the record before the Court is barren

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"strong" that it outweighs the significant First Amendment interests of Winter and the general public.

in this regard. Even if these witnesses were involved in other areas of the investigation, it will be awkward, and possibly contraindicated, for the defendant to attempt to impeach their credibility with their December 10 testimony if the content of the notebook are not admitted is not evidence and the jury is not allowed to hear about them.

Under these circumstances, the Court concludes that he credibility contention raised by the defendant in attempting to satisfy the first and third requirements in section 13-90-119(3) is not ripe for ruling. The doctrine of ripeness requires that a controversy between the parties is "sufficiently immediate and real so as to warrant adjudication." *Mental Mgmt. West., Inc. v. State*, 251 P.3d 1164, 1174 (Colo. App. 2010) (quotations marks and citations omitted). "Courts 'will not consider uncertain or contingent future matters because the injury is speculative and may never occur.'" *Id.* (quoting *Jessee v. Farmers Ins. Exch.*, 147 P.2d 56, 59 (Colo. 2006)). In deciding ripeness, the Court must look "to the hardship of the parties of withholding court consideration and the fitness of the issues for judicial decision." *Stell v. Boulder Cnty. Dep't of Soc. Servs.*, 92 P.3d 910, 914-15 (Colo. 2004). In order for an issue to be "fit," there must be "an adequate record to permit effective review." *Id*. At 915.

At this time, the Court can only speculate about whether the notebook will ever be introduced at trial, and, if so, whether its contents will be of

substantial value to the parties.[8] The notebook may or may not be introduced, and its contents may or may not be of significance. Given these uncertainties, the record is inadequate to allow the Court to assess whether the credibility of one or more of the December 10 witnesses will be "a substantial issue" at trial. The record is equally deficient to afford the Court an adequate opportunity to determine whether the defendant's interest in challenging the credibility of one or more of the December 10 witnesses is "a strong interest" that outweighs the interests under the First Amendment of Winter in not disclosing her confidential sources and the general public in receiving news information.[9]

Moreover, deferment of the issue will result in little hardship to the parties. This Order will not delay the case, as the motions hearings and trial dates will be unaffected by it.

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[8] The Court is aware of the contents of Winter's July 25 report, However, it is difficult to assess the significance of the notebook from that report. Furthermore, as the People observed on April 1, without reviewing the notebook, the Court is unable to determine the accuracy of the July 25 report.

[9] The determination regarding the admissibility of the notebook may also affect the defendant's assertion that the alleged violation of the July 23 Order is sufficient to overcome Winter's newsperson's privilege. This is so because the defendant has urged the Court to consider that what was allegedly leaked to Winter was confidential and privileged information and that Winter's July 25 report will prevent him from obtaining a fair trial.

The Court realizes that the defendant is understandably eager to have Winter's motion to quash and his motion for sanctions resolved.[10] The Court is just as eager. However, the Court is not comfortable proceeding on an incomplete record. As soon as the record is adequate, the Court will move forward on both motions.

The Court also recognizes that Winter will suffer some hardship as a result of her motion being deferred yet again because she will likely be ordered to return for a third hearing. But she repeatedly sought to continue her subpoena in the four letters that preceded her motion to quash. The only difference between those requests and this deferment is that the Court is requiring her to appear in person so that her subpoena may be continued. In any event, the Court will do its utmost to ensure that Winter only has to appear for one additional hearing after April 10.[11]

---

[10] Before the April 1 hearing, Winter moved four times to continue her appearance before this Court until her appeal in New York challenging the subpoena issued by a New York court is resolved. *See* March 18, 19, 26, and 28 Letters to Chief Judge Sylvester. The defendant objected to any continuance of the proceedings.

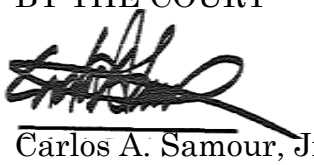
[11] The Court considered granting Winter's motion to quash instead of deferring it. However, the Court concludes that the interests of justice and judicial economy are best served by deferment. First, the Court is applying the ripeness doctrine to a motion, not the entire case. Second, the motion simply seeks to quash a witness's subpoena. Third, other aspects of the motion to quash appear to be ripe for ruling. Fourth, the parties and Winter all agree that the Court has the authority, pursuant to § 16-9-203(2), to continue Winter's subpoena.

CONCLUSION

For all the foregoing reasons, the Court agrees with Winter's second ripeness contention. The defendant's credibility argument is not ripe for ruling. Therefore, Winter's motion to quash and the defendant's motion for sanctions are both deferred until the Court determines the admissibility of the notebook. The April 10 hearing remains set and Winter's presence at that hearing continues to be required.

Dated this 8th day of April of 2013.

BY THE COURT



Carlos A. Samour, Jr.
District Court Judge

Lastly, if Winter's subpoena were quashed, substantial additional time and expense would likely be necessary to re-subpoena her.

CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2013, a true and correct copy of **Order regarding Jana Winter's second ripeness contention raised in support of her motion to quash subpoena and for protective order (C-26(a))** was served upon the following parties of record.

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(via email)

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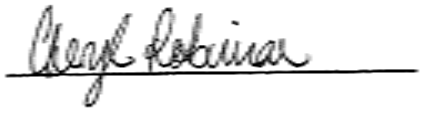

APPENDIX F

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

The Compact Clause of the United States Constitution provides: "No State shall, without the Consent of the Congress, . . . enter into any Agreement or Compact with another State . . . ." U.S. Const. Art I, § 10, cl. 3.

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon

> probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides, in relevant part: "No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."

The Sixth Amendment to the United States Constitution guarantees that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Ninth Amendment to the United States Constitution provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

The Fourteenth Amendment of the United States Constitution provides: "No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The pertinent sections of Article II of the Colorado Constitution provide as follows:

> Sec. 3. *Inalienable rights.* All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness
>
> Sec. 6. *Equality of justice*. Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character;

and right and justice should be administered without sale, denial or delay.

Sec. 7. *Security of person and property--searches--seizures--warrants*. The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place or seize any person or things shall issue without describing the place to be searched, or the person or thing to be seized, as near as may be, nor without probable cause, supported by oath or affirmation reduced to writing.

Sec. 10. *Freedom of speech and press*. No law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact.

Sec. 11. *Ex post facto laws*. No ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges,

franchises or immunities, shall be passed by the general assembly.

Sec. 16. *Criminal prosecutions -- rights of defendant.* In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.

Sec. 18. *Crimes; evidence against one's self; jeopardy.* No person shall be compelled to testify against himself in a criminal case nor shall any person be twice put in jeopardy for the same offense. If the jury disagree, or if the judgment be arrested after the verdict, or if the judgment be reversed for error in law, the accused shall not be deemed to have been in jeopardy.

Sec. 20. *Excessive bail, fines or punishment*. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

> Sec. 23. *Trial by jury—grand jury.* The right of trial by jury shall remain inviolate in criminal cases; but a jury in civil cases in all courts, or in criminal cases in courts not of record, may consist of less than twelve persons, as may be prescribed by law. Hereafter a grand jury shall consist of twelve persons, any nine of whom concurring may find an indictment; provided, the general assembly may change, regulate or abolish the grand jury system; and provided, further, the right of any person to serve on any jury shall not be denied or abridged on account of sex, and the general assembly may provide by law for the exemption from jury service of persons or classes of persons.
>
> Sec. 25. *Due process of law*. No person shall be deprived of life, liberty or property, without due process of law.
>
> Sec. 28. *Rights reserved not disparaged.* The enumeration in this constitution of certain rights shall not be construed to deny, impair or disparage others retained by the people.

The Crime Control Consent Act of 1934 provides, in pertinent part:

> The consent of Congress is hereby given to any two or more States to enter into

> agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies . . . . 4 U.S.C. § 112 (a)

New York Criminal Procedure Law, Section 640.10 provides, in pertinent part:

> 2. Subpoenaing witness in this state to testify in another state. If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in this state certifies under the seal of such court that there is a criminal prosecution pending in such court, or that a grand jury investigation has commenced or is about to commence, that a person being within this state is a material witness in such prosecution, or grand jury investigation, and that his presence will be required for a specified number of days, upon presentation of such certificate to a justice of the supreme court or a county judge in the county in which such person is, such justice or judge shall fix a time and place for a hearing, and shall make an order directing the witness to appear at a time and place certain for the hearing.

If at such hearing the justice or judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution or a grand jury investigation in the other state, and that the laws of the state in which the prosecution is pending, or grand jury investigation has commenced or is about to commence, will give to him protection from arrest and the service of civil and criminal process, he shall issue a subpoena, with a copy of the certificate attached, directing the witness to attend and testify in the court where the prosecution is pending, or where a grand jury investigation has commenced or is about to commence at a time and place specified in the subpoena.

In any such hearing the certificate shall be prima facie evidence of all the facts stated therein.

* * *

5. Uniformity of interpretation. This section shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it.

New York Civil Rights Law, Section 79-h provides, in pertinent part:

> (b) Exemption of professional journalists and newscasters from contempt: Absolute protection for confidential news. Notwithstanding the provisions of any general or specific law to the contrary, no professional journalist or newscaster presently or having previously been employed or otherwise associated with any newspaper, magazine, news agency, press association, wire service, radio or television transmission station or network or other professional medium of communicating news or information to the public shall be adjudged in contempt by any court in connection with any civil or criminal proceeding, or by the legislature or other body having contempt powers, nor shall a grand jury seek to have a journalist or newscaster held in contempt by any court, legislature or other body having contempt powers for refusing or failing to disclose any news obtained or received in confidence or the identity of the source of any such news coming into such person's possession in the course of gathering or obtaining news for publication or to be published in a newspaper, magazine, or for broadcast

by a radio or television transmission station or network or for public dissemination by any other professional medium or agency which has as one of its main functions the dissemination of news to the public, by which such person is professionally employed or otherwise associated in a news gathering capacity notwithstanding that the material or identity of a source of such material or related material gathered by a person described above performing a function described above is or is not highly relevant to a particular inquiry of government and notwithstanding that the information was not solicited by the journalist or newscaster prior to disclosure to such person.