

Florida Court Applies Privilege To ABC News Outtakes In Murder-For-Hire Case

By Charles D. Tobin

A Florida state court will not let the defendant in a murder-for-hire case subpoena outtakes of an ABC News *20/20* investigation that closely followed detectives' behind-the-scenes work. Order Denying Defendant's Motion for Subpoena Duces Tecum, *State v. Luongo*, Case No. 14-13813F10A (Fla. 17th Cir. Ct. June 11, 2015). This is a significant application of the reporter's privilege in the context of a subpoena issued by a criminal defendant.

Background

Jacqueline Luongo was already in jail awaiting trial for allegedly murdering a Ft. Lauderdale woman, stashing her body in a bedroom closet, and trying to cash checks made out to the victim. If the charges were proved she could possibly face the death penalty. The prosecution's key witness in the murder case is Luongo's former roommate, Maria Calderon. A jail informant tipped off police that Luongo allegedly sought to engage a contract killer to eliminate Calderon before the murder trial.

After that tip, ABC News *20/20* followed months of work by the Broward County Sheriff's Office as they planned a sting operation. Journalists had unprecedented access as: an undercover police officer responded to Luongo's solicitation by meeting with her in prison; detectives then staged and photographed a fake murder scene in the Everglades, where Calderon pretended that she had been killed; and the detective returned to the jail to show Luongo the photos. The sheriff's office provided jail recordings of Luongo's solicitation of the undercover officer to *20/20*.

Luongo was indicted, in addition to the murder charge she faced, on a new murder-solicitation charge. ABC aired the story on January 9, 2015.

In the ensuing prosecution, Luongo's public defender applied to the court for a subpoena to ABC for all of *20/20*'s "unedited video footage and final production version" of the



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story. In court papers, defense counsel argued that they wanted the footage for potential impeachment, “to show interest, motive and bias of the state's witnesses.”

ABC filed a motion to quash citing the three-part test under Florida’s statutory shield law, Fla. Stat. § 90.5015, and the First Amendment. The privilege in Florida requires the party seeking materials to make a “clear and specific showing” that: (a) the information is relevant and material to unresolved issues; (b) the information cannot be obtained from alternative sources; and (c) a compelling interest exists for requiring disclosure.

ABC argued that Luongo – who, under Florida’s criminal procedure needs court permission to issue subpoenas – had not yet even sought subpoenas for the state’s witnesses, including the alleged victim of the plot, the detective who masqueraded as a hitman, or any of the other law enforcement officers. ABC further argued that, with no testimony in the record, the “interest, motive and bias” of witnesses was not even a relevant or unresolved issue in the case.

The court held a hearing on February 12, 2015. When defense counsel at the hearing pressed for *in camera* review of the footage, the judge asked for briefing on that issue. He also asked for a list of evidence the prosecution had already turned over to defendant.

In its supplemental brief, ABC argued that for *in camera* review of material arguably covered by any legal privilege, the party seeking the material must make at least a preliminary showing that it can overcome the privilege claim. ABC also argued that, especially given the shield law requirement for a “clear and specific showing,” the court should deny *in camera* review where the defense had produced no supportive evidence at all.

Luongo’s public defender applied to the court for a subpoena to ABC for all of 20/20’s “unedited video footage and final production version” of the story.

Circuit Court Decision

In his five-page order on June 11, 2015, Circuit Judge Martin J. Bidwell agreed with the statutory and First Amendment argument. He held that, as an initial matter, the investigation coverage was a “newsworthy event” and therefore covered by privilege. He observed that in the context of a criminal prosecution, defendant’s Fifth and Sixth Amendment rights are balanced against the First Amendment protection of the press, but also noted that the Florida Supreme Court emphasized “the strong responsibility of the courts to protect the rights of a free press.”

The judge rejected the defense’s effort to invoke an exception to the statute for “physical evidence, eyewitness observations, or visual or audio recordings of crimes.” That exemption was inapposite, the judge held, because “video recordings of interviews of the participants in the case are not physical evidence of a crime or visual or audio recordings of a crime.” He

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further noted that law enforcement officers had already provided the defense with all recordings they made of the crime, defined as “the alleged act of the defendant actually soliciting assistance from undercover officers to murder the witness.”

As to potential impeachment material, the court found that Luongo had not established the information unavailable from alternative sources, such as depositions, and that her compelling need for the material “is entirely speculative.”

The court concluded: “When the claim of need is so speculative and the witnesses have not even been deposed, the privilege protects ABC from disclosure.”

