**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS**

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| THE PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff,<br><br>v.<br><br>ANTHONY McKINNEY,<br><br>Defendant. | ) | No. 78 C 5267 |

**MOTION OF THIRD PARTIES NORTHWESTERN UNIVERSITY AND DAVID PROTESS TO QUASH AND FOR PROTECTIVE ORDER**

**INTRODUCTION**

This is a post-conviction proceeding brought by Anthony McKinney ("McKinney"). David Protess ("Protess") is a journalist and a journalism professor who heads the Innocence Project at Northwestern University's Medill School of Journalism ("University"). (Protess and the University will be referred to collectively as "Respondents"). As a journalist, Protess investigates post-conviction claims of innocence by prisoners, and he also teaches an investigative reporting class at the University in which student journalists do the same under his direction. Protess' investigations of innocence have resulted in two books and numerous articles in a variety of publications.

One of the cases Protess and the student journalists in the Innocence Project investigated over the course of three years was McKinney's. Among other things, this investigation directly led to a publication of a front-page article in the *Chicago Sun-Times* and a subsequent editorial. Maurice Possley, *The Fight & His Life*, CHI. SUN-TIMES, Nov. 20, 2008, at 1; *Alvarez Should Speed Justice for McKinney*, CHI. SUN-TIMES, Nov. 21, 2008, at 29. (The articles are attached to the Affidavit of Linda R. Friedlieb (hereafter "Friedlieb Aff.") as Exhibits

A and B.) The results of the investigation were also published by the Innocence Project on the Internet. (Friedlieb Aff., Ex. C.)

The State has served Protess and the University, respectively, with subpoenas seeking 11 categories of documents and Protess' testimony. (Friedlieb Aff., Exs. D-E.) The subpoenas are extremely broad, seeking virtually every conceivable record of Respondents' newsgathering activities on the McKinney case—from records of interviews of witnesses, to Protess' communications with the student journalists, to all receipts and other records regarding expenses, to class syllabi, to grading criteria and grades of individual students. Protess has given to McKinney's counsel, and Respondents understand McKinney's counsel has given to the State, documents regarding interviews with potential witnesses in the McKinney case. And Protess has offered to give the State copies of all audio and videotapes created as a result of the McKinney investigation. (*See* Friedlieb Aff, Ex F.) Unlike the rest of the materials sought, these are published materials that previously appeared on the Internet and in other publications and therefore Protess is willing to provide copies of them.

As to the balance of the records and testimony sought, the State's subpoenas should be quashed for several reasons. First, to collect the wide-ranging records requested would be overly burdensome, particularly where the responsive records bear little-to-no relevance to the central question of McKinney's post-conviction proceedings—that is whether McKinney's conviction should be overturned. For example, the grades of the student journalists have no relevance to the question of whether McKinney was wrongfully convicted. The evidence collected by the student journalists—whether that is interviews with witnesses or additional documents—speaks for itself. Second, to the extent records exist they are protected from disclosure by the newsgathering privileges afforded by the Illinois Reporter's Privilege Act, Ill.

Rev. Stat. Ch. 110, §§ 8-901, *et seq.*; the First Amendment; and the Illinois free speech and debate clause, Illinois Constitution, Article 1, § 4. *See, e.g., In re Special Grand Jury Investigation*, 104 Ill. 2d 419 (1984). The State has not pretended to comply with the strict mandates of the Illinois Reporter's Privilege Act. Third, to the extent the subpoena to Protess seeks his testimony, Protess is a "special witness" protected from testifying under Illinois law. The State also has not complied with the dictates of that doctrine. Finally, the student records sought are sought in violation of the heightened privacy rights protected by the federal Family Educational Rights and Privacy Act ("FERPA"). The State has proffered no justification to produce these records, including student grades, in violation of the students' privacy rights. Having turned over or offered to turn over documents regarding interviews with potential witnesses as well as audio and videotapes, the remainder of the State's request reflects little more than a fishing expedition designed to harass. For all of these reasons, Respondents request that this Court enter a protective order and quash the subpoenas.

## ARGUMENT

### I. THE SUBPOENAS ARE OVERLY BROAD, UNDULY BURDENSOME AND NOT REASONABLY CALCULATED TO LEAD TO ADMISSIBLE EVIDENCE

Supreme Court Rule 201(b)(1) limits discoverable material to that "relevant to the subject matter involved in the pending action." In other words, Illinois Supreme Court Rule 201 protects parties from discovery that is overly broad, irrelevant and unduly burdensome. "[T]he right to discovery is limited to disclosure of matters that will be relevant to the case at hand in order to protect against abuses and unfairness, and a court should deny a discovery request where there is insufficient evidence that the requested discovery is relevant or will lead to such evidence." *Leeson v. State Farm Mut. Auto. Ins. Co.*, 190 Ill. App. 3d 359, 366 (1st Dist. 1989)

(finding that the trial court "abused its discretion" in allowing discovery of 2,100 other medical claims when the question was whether the particular medical claims at issue were allowed). *See also TTX Co. v. Whitley*, 295 Ill. App. 3d 548, 557 (1st Dist. 1998) ("Discovery should be denied, however, when there is insufficient evidence that the requested discovery is relevant."); *Youle v. Ryan*, 349 Ill. App. 3d 377, 381 (4th Dist. 2004) ("question[ing] how hundreds of medical records of third-party patients could have any bearing on whether [an individual doctor] committed medical malpractice in this particular case or how such information would lead to relevant matters"). Further, the Court must balance the "needs of truth and excessive burden." *Leeson*, 190 Ill. App. 3d at 368 (finding that the trial court abused its discretion because the discovery requested was "oppressive," particularly in light of the lack of relevance of the records sought) (quoting *People ex rel. General Motors v. Bua*, 37 Ill. App. 2d 180, 193 (1967)).

In this case, the State has already been provided via McKinney's counsel with documents regarding interviews with potential witnesses, and Respondents have further agreed to provide the States with copies of all audio and videotapes created as a result of the McKinney investigation. The remainder of the documents and testimony sought amount to a fishing expedition, one that would require extensive and burdensome collection and review of documents that, as discussed *infra* are protected by the Illinois statutory journalist's privilege and the federal student privacy laws. Each of the subpoenas contains 11 categories of records. (Friedlieb Aff., Ex. D and E.) These contain such far-reaching requests as "all notes, memoranda, reports and summaries" by 11 named individuals and "any other journalism students, teachers, investigators or other individuals" unlimited by time or subject matter (Friedlieb Aff., Ex. D, Attachment, Category No. 1); "a copy of the grading criteria" (*id.*, Category No. 6); "a copy of the grade each student" (*id.*, Category No. 7); "a copy of all receipts

and accompanying paperwork for expenses incurred" (*id.*, Category No. 9); and "any electronic communication" regardless of creator or recipient and unlimited by time (*id.*, Category 11).

The vast majority of records sought by the State, including but not limited to students' grades and grading criteria, expense receipts submitted to the University, and even instructions provided by Protess to the student journalists have no direct relevance to the issue before this Court—that is, whether Mr. McKinney's conviction should be overturned based on the new evidence before the Court. Further, to collect, for example, the "electronic communications" would require digging into electronic mail from 2003 through 2005, the three years in which the investigation removed, and then reviewing that email to sort out materials that relate to the McKinney investigation from those that relate to other investigations or to no investigation at all. The same would be true for receipts and accompanying paperwork. Further, given that the State already has access to documents regarding interviews and audio and videotapes related to the investigation, any additional information garnered would be minimal, particularly when compared to the burden and cost for the Respondents. Leaving aside the journalistic privilege, special witness and student privacy issues discussed *infra,* a protective order should be granted based on the overly broad and unduly oppressive nature of the categories of documents requested, particularly in light of the materials already provided to the State. These documents bear little to no relevance to the central question before this Court—whether McKinney's conviction should be overturned.

## II. THE DOCUMENTS SOUGHT RELATE TO RESPONDENTS' NEWSGATHERING ACTIVITIES AND ARE PROTECTED BY THE ILLINOIS REPORTER'S PRIVILEGE ACT

### A. The Illinois Reporter's Privilege Act Broadly Protects First Amendment Interests, Including Access to Information and the Independence of the Press

The Illinois Reporter's Privilege Act was enacted to protect First Amendment interests in preserving both the press' ability to gather and disseminate information and its independence, and protects persons from being compelled "to disclose the source of any information obtained by a reporter" with very limited exceptions. 735 ILCS 5/8-901. As the Illinois Supreme Court explained in *In re Special Grand Jury Investigation*, "[t]he reporter's privilege has evolved from a common law recognition that the compelled disclosure of a reporter's sources could compromise the news media's first amendment right to freely gather and disseminate information." 104 Ill. 2d at 424. *See also People v. Pawlaczyk,* 189 Ill. 2d 177, 187 (2000) ("The purpose of the [reporter's] privilege is to assure reporters access to information, thereby encouraging a free press and a well-informed citizenry.").

Governor Richard B. Ogilvie spoke to its broad purpose when signing the Illinois Reporter's Privilege Act, explaining that the Act "is more than a declaration of fair play for newsman. It also assures a better informed public, for it allows reporters to seek the truth wherever it is to be found, without fear that their sources will be cut off by unnecessary disclosures." *In re Subpoena Duces Tecum to Arya*, 226 Ill. App. 3d 848, 852 (4th Dist. 1992) (quoting *Editor & Publisher,* October 10, 1971, [at] 14, col. 2). Illinois courts have acknowledged that the privilege safeguards several interests: to preserve "the autonomy of the press by allowing reporters to assure their sources of confidentiality, thereby permitting the public to receive complete, unfettered information"; to protect "anonymous sources from

retribution for revealing publicly valuable—though damaging or even damning—information"; and to allow "information to flow more freely from confidential, anonymous sources." *Id.* Keeping in mind the purposes of the Act, courts regularly reject attempts to limit the broad language of the Act and instead liberally apply its protection to "'preserve the autonomy of the press by allowing reporters to assure their sources of confidentiality, thereby permitting the public to receive complete, unfettered information.'" *See e.g., Cukier v. American Medical Association*, 259 Ill. App. 3d 159, 163 (1st Dist. 1994) (applying the privilege to a medical journal to prevent disclosure of information on the financial interest of a potential author discovered during the peer review process) (quoting *In re Subpoena Duces Tecum to Arya*, 226 Ill. App. 3d at 852); *People v. Degorski,* 34 Med. L. Rptr. 1954, 1959-60 (Cir. Ct. Cook Cty. 2005) (applying the privilege to the Better Government Association, a non-profit government watchdog group) (Friedlieb Aff., Ex. J);[1] *Desai v. Hersh*, 954 F.2d 1408, 1411-12 (7th Cir. 1992) (applying the Illinois statutory reporter's privilege to the author of the book *The Price of Power: Kissinger in the Nixon White House*).

Protecting the information collected by Protess and the student journalists in the Innocence Project from disclosure would not only encourage the free flow of information, but also would allow Protess and the Innocence Project to continue to serve the public by acting as an effective check on the criminal justice system. Since the inception of the Innocence Project, the information it has collected has led to the exoneration of 11 wrongfully convicted prisoners in Illinois, five of whom had been on Death Row. Ultimately, revelations made by the

[1] Respondents have provided the Court with copies of any unpublished decisions and/or decisions published in the Media Law Reporter as attachments to the Affidavit of Linda R. Friedlieb. Respondents have not provided copies of case law from the federal courts or other states, but would be happy to if the Court so desires.

Innocence Project and disseminated to the public about the inadequacies of the criminal justice system led Governor George H. Ryan to impose a moratorium on the death penalty. *See* George H. Ryan, Ill. Governor, Address on the Death Penalty at the University of Chicago Divinity School (June 3, 2002) (Friedlieb Aff., Ex. L at p. 5) (noting that the justice system in Illinois had been relying on the Innocence Project "to ensure that only the guilty are convicted and executed"). Quashing these subpoenas thus is consistent with the purpose of the Illinois Reporter's Privilege Act.

### B. David Protess and His Students Are Journalists Whose Work Is Protected by the Illinois Reporter's Privilege Act

The author of numerous published articles and four published books on journalism (including two books documenting his work as a journalist investigating wrongful convictions), Protess is assuredly a reporter whose work is protected by the Act. Protess has been a journalist since 1976, when he joined the Better Government Association as research director. (*See* Friedlieb Aff., Ex. G (Protess' CV).) In 1981, he joined the faculty of the University as a professor of investigative journalism. Also, while a professor, Protess served as a contributing editor and staff writer at *Chicago Lawyer*, a monthly magazine, from 1985 until 1990. In 1991, he began involving student journalists in his reporting on wrongful convictions, and in 1999, he founded the Innocence Project. During his years as a journalist, he has published articles in numerous publications, including the *Chicago Tribune, The National Law Journal,* the *Columbia Journalism Review*, and *The St. Louis-Dispatch.* He has also published four books on investigative journalism, two of which were direct results of investigations into wrongful convictions. Any suggestion that Protess is not a reporter protected by the Act would not pass the straight-face test.

The same is true for the student reporters with whom he works. The students enrolled in the investigative reporting class at the Medill School of Journalism are journalists. They conduct their investigations with the expectation that the results will be published in conjunction with a professional journalist and/or on the Internet, both of which occurred in the McKinney case. (Friedlieb Aff., Exs. A, C; *see also* Ex. H (collection of articles on investigations).) Further, they go on to become professional journalists. For example, Ari Berman, one of those student journalists who worked on the McKinney case, is now a contributing writer and investigative reporter for The Nation magazine. (Friedlieb Aff., Ex. I.)

The Act prevents all persons from being compelled "to disclose the source of any information obtained by a reporter except as provided in [the Reporter's Privilege Act]." 735 ILCS 5/8-901. It does not limit its protections to those journalists who are full-time employees of newspapers or magazines. Rather, the Act defines a "reporter" as "*any person* regularly engaged in the business of *collecting*, writing or editing news for publication through a news medium on a full-time or part-time basis; and includes any person who was a reporter at the time the information sought was procured or obtained." 735 ILCS 5/8-902 (emphases added). As at least one court has observed, "[i]t would be absurd to suggest the protections afforded by the Illinois Reporter's Privilege Act hinge not on the substance of a journalist's work, but upon whether or not a journalist enjoys the status of a salaried employee." *Degorski,* 34 Med. L. Rptr. at 1960 (Friedlieb Aff., Ex. J.).

To be protected by the privilege, a person or group "need not fit into preconceived category of journalism," need not "be regularly engaged with 'publication,'" and need not "regularly publish through its own news medium or a news medium controlled by others." *Id.* at 1955, 1960. In *Degorski,* the court considered whether the Act protected the Better Government

Association ("BGA"), a government watchdog group, and incidentally Protess' employer at the beginning of his journalism career from 1976 through 1981. Even though the BGA is not itself a traditional news medium, the court concluded that it was sufficient that the watchdog group published through "collaborative efforts with local and national news media" and "publishe[d] its own work on hard copy and via its website." *Id.* at 1960.

The work of Protess and the Innocence Project mirrors the newsgathering attributes of the Better Government Association: the materials they collect result in publication on their website as well as through "newspapers, newsletters, and television newscasts" and they "'[have] been instrumental in advancing government reforms in Illinois by using journalistic techniques.'" *Id.* at 1959-60 (quoting *Lyons v. Ryan*, 324 Ill. App. 3d 1094, 1098 (1st Dist. 2001)). Under Protess' direction, information collected by the Innocence Project has been published in a wide variety of media, including *The Chicago Sun-Times, The Chicago Tribune, The New York Times, The Washington Post, Newsweek,* and CBS News. (Friedlieb Aff., Ex. H.) As discussed previously, the investigation in the McKinney case resulted in both an article and an editorial in the *Chicago Sun-Times*. (Friedlieb Aff., Exs. A, B.) It cannot be disputed that the Illinois Reporter's Privilege Act covers both Protess and the student reporters who conducted the McKinney investigation.

### C. The Privilege Covers Notes, Memoranda, Reports and Summaries Created By David Protess and the Innocence Project.

The notes, memoranda, summaries, and communications (including email) created by Protess and the student journalists are source materials protected by the Act. Fulfilling the broad purposes of the Act, courts have regularly concluded that the privilege protects not just the names of sources but source materials and other information uncovered during the newsgathering

process. *See In re Subpoena Duces Tecum to Arya*, 226 Ill. App. 3d at 851-52 (applying the Act to source materials, including memoranda, notes, and recorded statements); *Degorski,* 34 Med. L. Rptr. at 1957-8 (Friedlieb Aff., Ex. J) (concluding that the Act protects source material for a report created by government watchdog, including "[a]ll written, audio or video tape materials, reports, handwritten or typed notes, used in the development" of the report); *Redmond v. Illinois,* 19 Med. L. Rptr. 1446, 1447 (Cir. Ct. Cook Cty. 1991) (Friedlieb Aff., Ex. K) ("case law really expands the definition of source to cover items...to include the information and any other research materials of the reporter or the media entity"). This construction recognizes that the Act was enacted not only to protect names of sources, but also to prevent the news media from becoming an arm of the state. *See In re Subpoena Duces Tecum to Arya*, 226 Ill. App. 3d at 861-2 (noting that the Illinois Reporter's Privilege Act aims to prevent reporters from being compelled "to become investigators for the State or anyone else").

Respondents' notes, memoranda, reports, summaries and communications are source materials that reflect information gathered during the investigation of the McKinney case for the purpose of publication. These materials (including those sought in, *inter alia*, Categories 1-6 and 8-11 of the subpoenas at issue) are protected by reporter's privilege and cannot be turned over to the State absent the limited exceptions embodied in the Act. But, as discussed *infra*, those exceptions do not apply here. By turning to Respondents without exhausting other sources, the State is illegitimately attempting to enlist Respondents as an arm of the state.

### D. The State's Subpoena Inappropriately Circumvents the Requirements of the Illinois Reporter's Privilege Act

As discussed above, Protess and the student journalists are precisely the types of individuals covered by the Illinois Reporter's Privilege Act, and the materials sought by the State

in this case are precisely the type of materials protected from disclosure except in limited circumstances. The statute contains specific requirements, including exhaustion and relevance requirements, that the State has not attempted to satisfy in this case. This is an independent reason why the subpoenas should be quashed.

In order to obtain materials despite the reporter's privilege, the State is required to apply "in writing to the circuit court...for an order divesting the [Respondents] named therein of such privilege and ordering [them] to disclose." 735 ILCS 5/8-903. Further, the State's petition was required to include "the specific information sought and its relevancy to the proceedings" and "a specific public interest which would be adversely affected if the factual information sought were not disclosed." 735 ILCS 5/8-904. No such application was made, let alone one that met this criteria. *See Cukier,* 259 Ill. App. 3d at 166 (explaining that the court was "compelled" to uphold the lower court's conclusion not to force a reporter to disclose information because no petition for divestiture was sought).

Further, even if the State had followed the statutory provisions and made such an application, the application could not be granted unless "all other available sources of information ha[d] been exhausted" and "disclosure of the information sought [was] essential to the protection of the public interest involved." 735 ILCS 5/8-907(2). *See also In re Special Grand Jury*, 104 Ill. 2d at 429 (divesture not granted because of insufficient proof of exhaustion); *In re Subpoena Duces Tecum to Arya*, 226 Ill. App. 3d at 862 (vacating a divesture order because of insufficiency in the record demonstrating exhaustion of all other available sources). No such demonstration of exhaustion has occurred in this case.

As the Illinois Supreme Court explained in *In re Special Grand Jury*, "the statute requires more than a showing of inconvenience to the investigator before a reporter can be

compelled to disclose his sources." *In re Special Grand Jury*, 104 Ill. 2d at 429. Rather, "the legislature intended divestiture of a reporter's privilege to be the last resort to get the sought-after information" and "did not intend to compel reporters to become investigators for the State or anyone else." *In re Subpoena Duces Tecum to Arya*, 226 Ill. App. 3d at 861-62. In this case, the State has turned to Protess and the student journalists not as a "last resort" but as a "first resort." The State's subpoenas should be quashed.

## III. PROTESS IS A SPECIAL WITNESS AND SHOULD NOT BE COMPELLED TO TESTIFY HERE

Illinois courts have recognized that journalists—like judges and prosecutors—are "special witnesses" who cannot be compelled to testify absent special circumstances. The "special witness" doctrine seeks to protect certain individuals, including judges, prosecutors, and journalists, from harassment via subpoena. *People v. Palacio*, 240 Ill. App. 3d 1078, 1094-1102 (4th Dist. 1993) ("[W]e now hold that reporters who have been subpoenaed by either side in a criminal case should similarly benefit from that doctrine to the same extent as judges and prosecutors. Indeed, based upon specific statutory protections the legislature has granted to reporters, they arguably have a better claim to the protections of the special witness doctrine than do prosecutors and judges."). As the court explained in *Palacio*, it is not necessary that the party calling the journalist have a "hidden agenda" in this case, but the outcome of the subpoena itself "as measured by the likely or potential effect upon [Protess] (and other local reporters who hear of this matter), is precisely the same: an implicit threat that if the reporter speaks or writes something about the [State] or case, the [State] will find 'some ground' to subpoena the reporter to force him to testify under oath on the witness stand." *Id.* at 1101. "Such an outcome is intolerable in a free society that depends on a vigorous, untrammeled press," and thus "courts

have a duty not to permit *their* process—which, after all, a subpoena is—to be abused." *Id.* at 1101-02. The "special witness" doctrine applies equally whether the State or the defendant (or, in this case, the petitioner) is calling the special witness. *See People v. Willis*, 349 Ill. App. 3d 1, 18 (1st Dist. 2004) ("[I]t is only fair that the same test be applied to determine the propriety of allowing such a witness to testify when that witness is called by the State or the defendant.").

Thus, to call a journalist as a witness, the State is required to meet the requirements of the "special witness" doctrine: "First, the party subpoenaing the reporter must specifically state the testimony the party expects to elicit from the reporter. Second, that party must specifically state why that testimony is not only relevant, but *necessary* to the party's case. Finally, that party must specifically state the efforts that party has made to secure the same evidence through alternative means." *Palacio*, 240 Ill. App. 3d at 1102. *See also Willis*, 349 Ill. App. 3d at 17 ("The party calling the witness must (1) state the testimony expected from the witness; (2) explain why that testimony is relevant and necessary to the party's case; and (3) describe the efforts made to obtain the same evidence from alternative sources."). The State has not met one, and certainly has not met all three, of these preconditions. Thus, the subpoena to Protess should be quashed to the extent it seeks his testimony.

## IV. THE SUBPOENAS SEEK RECORDS PROTECTED BY THE FEDERAL FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT WITHOUT JUSTIFICATION FOR VIOLATING STUDENTS' PRIVACY RIGHTS

Among the records sought by these subpoenas are certain records—including but not limited to grades and grading criteria, as set out in Categories 6 and 7 of the Attachment to the subpoenas—specific to individual student journalists at Northwestern University. To produce these records would be in violation of the heightened privacy interest recognized by and

codified in the Family Educational Rights and Privacy Act (FERPA). The State has not overcome the burdens embodied by the federal law.

FERPA protects the privacy interest of students in their educational records by conditioning the availability of federal funds to educational agencies and institutions on their compliance with the restrictions on disclosing student records set forth in FERPA and its executing regulations. 20 U.S.C § 1232g(b) (2006); *see also* 34 C.F.R §§ 99.1-99.61 (2008). FERPA applies to "those records, files, documents and other materials which—(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution." 20 U.S.C. § 1232g(a)(4)(A). Although FERPA permits the disclosure of student records pursuant to a subpoena after notice is provided to the student (or parent for those under the age of 18), courts at both the state and federal level have concluded that the interests FERPA seeks to protect create a heightened burden on the party seeking the records and requires a genuine need for the information that outweighs the privacy interest of the student. *See A.B. v. Clarke County School District*, No. 3:08-CV-041 (CDL), 2009 WL 902038, at *9 (M.D. Ga. March 30, 2009) (Friedlieb Aff., Ex. M) ("[i]n determining whether to order disclosure of protected education records, the courts generally require the party seeking disclosure to 'demonstrate a genuine need for the information that outweighs the privacy interest' of the student" [citation omitted]); *Ragusa v. Malverne Union Free School Dist.*, 549 F. Supp. 2d 288, 291-94 (E.D.N.Y. 2008) (same); *Rios v. Read*, 73 F.R.D. 589, 598-99 (E.D.N.Y 1997) (Friedlieb Aff., Ex. N) ("the Congressional policy expressed in [FERPA] places a significantly heavier burden on a party seeking access to student records to justify disclosure...[thus] the party seeking disclosure is required to demonstrate a genuine need for the information that outweighs the privacy interest of the students").

In cases where the court concluded the party seeking the information overcame that heightened burden, the information sought was essential to proving or disproving an element of a claim and was being sought from parties to the underlying litigation or was about students who were the subject of the underlying litigation. *See Rios,* 73 F.R.D at 598-99 (burden overcome in lawsuit against school alleging violations of the Fourteenth Amendment and Civil Rights Act); *Davids v. Cedar Falls Community Schools,* No. C-96-2071, 1998 WL 34112767, at *3 (N.D. Iowa Oct. 28, 1998) (Friedlieb Aff., Ex. O) (burden overcome in lawsuit alleging "that the school was engaged in a practice of disparate discipline of minority and non-minority students"); *Catrone v. Miles,* 160 P.3d 1204, 1214 (Ariz. Ct. App. 2007) (burden overcome for discovery of educational records of plaintiff's son, where plaintiff alleged that hospital's mal-practice injured that son). In other words, where courts have permitted student records to be produced, either the particular student was party to the lawsuit or there were allegations that the school had engaged in a pattern and practice of wrongdoing. That is not the situation here.

Neither Respondents nor their students are parties to the McKinney case. The State has failed to articulate any reason, let along make a sufficient showing, to demonstrate how the educational records of student journalists in the Innocence Project are relevant to the question before this Court—that is, whether Mr. McKinney's conviction should be overturned. Because the State has failed to demonstrate a genuine need for the student records that would overcome the heightened privacy interests at stake of the students involved as recognized by FERPA, Category Nos. 6 and 7 should be quashed from both subpoenas.[2]

[2] If, however, the Court requires production of these documents despite the student privacy rights involved, the University requests a period of time in which to provide notice to the students as required under FERPA. 20 U.S.C § 1232g.

## CONCLUSION

For all of the reasons set out above, Respondents request that this Court enter a protective order quashing both subpoenas.

Respectfully submitted,

Dated: August 13, 2009

By: _____
One of the Attorneys for
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## CERTIFICATE OF SERVICE

Linda R. Friedlieb, an attorney, hereby certifies that she caused a true and correct copy of the foregoing document and the accompanying Affidavit of Linda R. Friedlieb and supporting exhibits to be served upon all counsel of record by hand delivery as follows:

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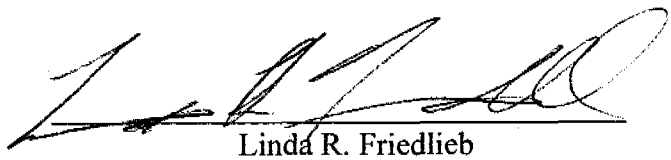
on this 13th day of August 2009.



Linda R. Friedlieb

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