IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Respondent,	)	
	)	
-vs-	)	**No. 78 C 5267**
	)	
ANTHONY MCKINNEY	)	
	)	
Petitioner.	)	

THE PEOPLE'S REQUEST TO DENY THE THIRD PARTY MOTION TO QUASH

NOW COMES, the People of the State of Illinois, by their Attorney, Anita Alvarez, and her Assistants: Celeste Stack, Christine Cook, Darren O'Brien, and state as follows:

I. INTRODUCTION

There simply are no exemptions that allow a university ["school"] to investigate a murder case and then *withhold "new "information it generated* at the resulting post-conviction hearing. The law imposes a duty on *all* citizens to reveal relevant information in criminal matters. Nothing in the motion to quash even remotely justifies noncompliance with the subpoenas already authorized by this Honorable Court.

Should professors and students reinvestigating a crime via an innocence project be allowed to withhold selected materials during the hearing on the issue of innocence? The answer is, of course: "No." This is a truth seeking process. *Both sides are entitled to justice and fairness.* Common sense and principles of fairness, as well as case law and statutory authority confirm this position.

This Honorable Court should require a full and accurate portrayal of all the alleged new evidence. The school should not be able to withhold evidence simply because it feels it is burdensome where their website boasts that nine teams of students spent three years investigating this case. Certainly, if the case were worth that much time and effort, the school would wish the Court to consider *all the materials*. Certainly, justice requires an objective review of all evidence, not simply the evidence the school now feels is supportive of their version of events.

The memorandum of law below demonstrates that the materials generated in the school's investigation as well as other relevant documents must at least be *tendered* in order to have an accurate assessment of witnesses' credibility and other essential issues. The defense may always object at the hearing or move *in limine* to block evidence. The People must be allowed to examine the school's materials in their entirety.

This is especially true as the People's investigation uncovered credibility issues and/or inconsistencies with the potential "new" defense witnesses. During the informal investigation conducted at the request of the defense, the People were limited to the materials voluntarily tendered by the defense. **Nearly every witness interviewed by the People described multiple interviews by student teams.** The People have not received notes from these multiple interviews, even though a team of students was duly recording the conversations for class.

The People have sought these materials informally without success. Instead, they have been given brief affidavits usually accompanied by a single recording of a single conversation. The People should be allowed to discover materials documenting numerous

interviews of numerous witnesses and this Honorable Court should be given a full overview of these interviews as well-at least for the witnesses who are to testify.

Petitioner here has the burden of proof here and there is *no* presumption of innocence as he has been convicted and has lost his direct appeal. He is not in the same posture as he was prior to trial. He has no *right* to ask to overturn his conviction. He must present newly discovered evidence that is material and credible to meet his burden .

The rules of post-conviction discovery apply here. Discovery is governed by this Honorable Court's discretion upon a showing of good cause as the circuit court has inherent authority to order discovery based upon good cause in the context of post-conviction proceedings. People ex rel. Daley v. Fitzgerald, 123 Ill. 2d 175, 183, 526 N.E.2d 131 (1988). In deciding whether to grant discovery, courts may consider "the scope of the discovery sought, the length of time between the conviction and the post-conviction proceeding, the burden [of granting the discovery] ***, and the availability of the desired evidence through other sources." Daley, 123 Ill. 2d at 183-84.

Also, there are analogous cases demonstrating that materials generated in such an investigation *cannot* be withheld. It is fundamental that the truth-seeking nature of the justice system must prevail against attempts to withhold evidence. Thus, an investigation conducted by a journalism school is subject to the same scrutiny and disclosure principles as any other criminal investigation.

II. NATURE AND STATUS OF CASE

Now that petitioner has chosen to present his claim in a court of law, he must abide by the rules of law. Petitioner has the burden of demonstrating his is actually innocent *via* evidence that is newly discovered, previously unobtainable, material, and

not merely cumulative. People v. Collier, 387 Ill.App.3d 630, 900 N.E.2d 396 (2008), app.denied 2009 Ill. Lexis May 28, 2009. He has filed a post-conviction petition relying upon the investigation and interviews conducted by undergraduate journalism students. Attorneys at the law school for the same institution, Northwestern, represent petitioner.

The People were asked to review the results of this investigation by petitioner's attorneys. The People agreed and interviewed a number of witnesses and conducted their own investigation. The People did not agree that exonerating evidence exists but did agree that enough evidence to warrant a court hearing had been presented. The People recommended a petition be filed and stated that they would ask the assigned Court to docket the petition and conduct a hearing as factual issues exist.[1]

When the petition was filed, an article was published in the Sun-Times by another journalist/professor from the school-apparently working freelance. Other than the article and the editorial accompanying it, no other, independent press has been generated.

The People filed a response which answered some of the allegations, thus requiring a hearing, but moving to dismiss other allegations as being unsupportive or inadmissible. This Honorable Court held that petitioner could present evidence and the Court would rule on the People's various objections at the time the evidence was submitted at hearing.

Meanwhile, the parties had been informally exchanging discovery. Requests for materials from the journalism school were not resolved and a motion to issue subpoenas was made and granted. Eventually, the school hired counsel and this briefing schedule was devised. Acknowledging the gravity of an actual innocence claim

[1] The People's response is included as an exhibit.

in a natural life case, the People do not dispute that fundamental fairness justified an evidentiary hearing on defendant's post-conviction petition.

The People's position in this Honorable Court is that defendant failed to substantiate his claims with new, material, non-cumulative and credible evidence. The parties have been exchanging discovery, however, the school has chosen to object and moves to quash the subpoenas issued. Where, as here, the circuit court is to hold an evidentiary hearing on a post conviction innocence petition, the court is required to consider new evidence and weigh the credibility of witnesses. People v. Johnson, 206 Ill. 2d 348, 357-60, 794 N.E.2d 294_(2002). To do so, all the materials requested from the school should be tendered. If, at the hearing, defense counsel wishes to object based upon relevancy, this Honorable Court can consider the arguments. If the materials are withheld, the People will be denied their right to a full and fair disclosure and will be unable to present all relevant circumstances to assist this Court in its ultimate determination.

The People maintain that the materials fall far short of the substance necessary to support an innocence claim due to a lack of credibility, availability at trial, inadmissibility and/or irrelevance. [See, People's Response to Petition] Our supreme court has therefore recognized the right of post conviction petitioners to assert a claim of actual innocence based on newly discovered evidence. People v. Washington, 171 Ill. 2d 475, 489, 665 N.E.2d 1330 (1996). To win relief under that theory, the evidence adduced by the defendant must first be "newly discovered." That means it must be evidence that was not available at defendant's original trial and that the defendant could not have discovered sooner through diligence. The evidence must also be material and non-

cumulative. In addition, it must be of such conclusive character that it would probably change the result on retrial. People v.Barrow, 195 Ill. 2d 506, 540-41, 749 N.E.2d 892 (2001).

II. THE REQUEST IS REASONABLE, NOT BURDENSOME, AND WELL WITHIN THE PARAMETERS OF RELEVANCY.

Important policy considerations must be considered. When a private institution conducts an extensive investigation into criminal matters, what are the rights and responsibilities generated? Our justice system is based upon investigation by law enforcement. Strict ethical and disclosure guidelines apply to government investigations.

What rules apply to the school here? Full disclosure of all investigatory materials must be mandated. In fact, without full disclosure, the potential for great abuse will increase as private entities conduct their own investigations. By requiring all documentation to be turned over for review, minimal safeguards are at least in place.[2]

There is no doubt that the People only received a tiny portion of the materials generated by **nine teams of students over three years**. The investigation was extensive and lengthy. This fact, however, does not justify allowing the school to parcel out selected documents and subvert the discovery process. The People requested **and this Court granted** the issuance of subpoenas to the school. The materials are relevant to many issues including the credibility of the "new" witnesses.

For example, the People do not have all the names of the nine teams of students who investigated the case over a period of three years. Virtually all the witnesses were interviewed multiple times. Some interviews recorded, some were not, but all the

[2] As this is a unique situation of first impression, in that a private institution possesses the bulk of discovery, it is an opportunity to establish a liberal disclosure policy with reasonable boundaries.

students recorded information in their binders. The People have only received an affidavit and usually one version of each witness' interviews.

The school basically contends that the scope of the request is too broad and burdensome. This entire section conveniently ignores the extensive nature of the investigation conducted by its own students. Given the circumstances of this case and the school's unique status **as the investigating body**, the requests are reasonable.

In general, when determining whether a defendant's request for a pretrial subpoena is justified, Illinois courts will consider whether, *inter alia*, the defendant's application is made in good faith and whether it is intended as a general fishing expedition. People v. Shukovsky, 128 Ill. 2d 210, 225, 131 Ill. Dec. 69, 538 N.E.2d 444 (1988). The same concern applies when a circuit court is faced with a challenge to the use of a subpoena in post-conviction proceedings. People v. Enis, 194 Ill. 2d 361,743 N.E.2d 1 (2000) People v. Hickey, 204 Ill.2d 585, 792 N.E.2d 232 (2001). Below, the People set out good faith bases for their requests, which also show that there is no improper fishing expedition.

The People are at a disadvantage because they do not have knowledge or access to many important protocols used by the school. They can only use good faith based upon their limited knowledge to envision what materials are generated and whether they hold or may lead to relevant discovery. Given the unusual circumstances here: an extensive investigation has been conducted involving dozens of interviews over the course of years; the subpoenas as drafted are very reasonable.

Further, given the size and nature of the school, it is clear that it has the capability and resources to gather and tender the materials requested. As stated in the Objection,

Protess publishes books and articles based upon his investigations. Surely, the materials are organized and accessible for these purposes.

Many witness interviews have not been tendered. For most witnesses, an affidavit has been received and some tapes of witnesses were received as well. These materials were given to the People to conduct an investigation. During that investigation it was discovered that virtually every witness was interviewed multiple times, most likely by different teams.

Students on the teams were required to document their work and keep binders or journals recording activities and interviews. Students hoping to attain a good grade in class *by documenting all their hard work on the case.* Surely, the student binders contain relevant material where their purpose is to document this investigation.

. Also, an investigator usually accompanied the students. It is not known whether an investigator was present at every interview, nor is it known if the investigator kept a separate file or what documents he generated. While an investigator affidavit has been tendered it omits all these details. Clearly, the investigator played an important role as being the experienced adult overseeing the students. However, the investigator, has not turned over any of his materials, nor any reports or notes.

The People *do not know* how voluminous the materials are. They do not know how many times each witness was interviewed and how many versions were recorded by the unknown number of attendees. The People do not know what type of information was recorded in the binders. This is *precisely* the problem and why we are requesting full discovery.

The People admit that they are also not well- informed on how the class is structured. The People are very interested in these matters. For this reason, the syllabus and grading criteria [administrative materials normally readily available to students], is requested. For example, if students are told that they will get an "A+" if they get exculpatory evidence, surely this would go to bias and interest. How does one rate "success" or superior academic performance when the class is a criminal investigation?

Certainly, there may be different observations that are relevant as recorded by the different team members. What if a student is not convinced that a witness is credible? Would this be recorded somewhere? What if a witness confided in one student only, and not the others. How would this be documented?

Course materials given to students should shed light on extremely important policy and ethical considerations. What if the students uncovered inculpatory new evidence? What is the school's policy? What would a student do? Did the students find incriminating evidence in their investigation? With nine teams of students avidly collecting information, certainly the guidelines they follow are as important as the records they generated. The same is true for the investigators assigned to the case.

The school claims it is difficult to search the emails, but the school **does not state** that it is impossible. In fact, most institutions of higher learning are very advanced in these areas and the regulation of their email systems. Nor are we told that the emails do not exist. Imagine if the People had emails containing information about a criminal investigation but withheld it because it was inconvenient to look for the emails.

Virtually, all email systems have search functions. The titles of emails can be searched, as can the body of the missive itself. The "inconvenient" argument does not

fly when petitioner is claiming that the school uncovered evidence of his innocence. Surely, the issue is important enough for the school to look through the emails and other electronic documents.

As far as expense records and receipts, the request is relevant to bias interest and motive. The People's interviews with witnesses led to some discussions of what expenses were incurred when interviewing witnesses. The issue of monies expended will be relevant at the hearing on a number of bases. The People routinely tender information about witness expenses to the defense. Certainly, if the defense wanted records showing witness and investigator expenditures their request would be granted. Certainly, the school keeps these items for its own expense logs.

The school, however, does not even offer a reason why expense information should not be tendered. Instead, a brief one sentence comment is made after complaining about electronic mail searches being burden some. The school simply states that receipts and accompanying paperwork is burdensome and is not relevant. This is insufficient to quash the subpoena.

The school simplistically states that the issue before this Court is whether the "conviction should be overturned due to new evidence..." as if this somehow renders all the school's documentation irrelevant. The school generated the "new" evidence. The *credibility* of the new evidence and the proponents of the new evidence is extremely relevant and is, in fact, the central issue. Also, the evidence must be material, not cumulative, and not available at trial. People v. Washington, 171 Ill. 2d 475, 489, 665 N.E.2d 1330 (1996). Petitioner has the burden of meeting all these elements.

Here, the claim of actual innocence is predicated on a handful of assertions all directly controlled by credibility considerations. The decision by an eyewitness to the murder to recant incriminating testimony he had given at defendant's original trial is one factor. The recantation occurred nearly 30 years after the defendant was tried and convicted. The recanting witness had a number of contacts with the teams but documents of those other interviews have not been tendered.

Also, students took a statement from Tony Drakes claiming he was present at the murder but that defendant was not. The People's interview of Drakes has raised many issues. The defense should be aware of the issues as Drakes recanted to *their* investigators who later followed up on the school's interviews.

Further, a group of witnesses claim to have been in a bar, decades ago, and overheard Drakes tell Mike McKinney [defendant's brother] that defendant was not at the crime scene while the parties were together in a decades ago. All these witnesses were interviewed multiple times. Also, there are may be other witness interviews that have not been tendered.

While there are no cases on point, a federal case arising out of an exoneration and subsequent malicious prosecution suit is analogous and instructive. [3]

In Wilson v. O'Brien, 2009 U.S. Dist. LEXIS 22967, March 20, 2009 Maurice Possley, a reporter and coincidentally, professor of investigative journalism for the school here, moved to quash a subpoena to take his deposition in the civil suit. Possley had spoken to a victim, being the first to tell her that the federal court had granted a new trial in her case. After speaking to Possley, the victim recanted, convinced her trial

[3] The school cites to cases wherein hundreds or thousands of medical files were requested. They are not remotely instructive.

identification was mistaken as another man had committed a series of similar crimes at the same time that she was attacked.

Possley made numerous arguments but the federal court held that there was no state or federal privilege for non confidential information and rejected all related arguments. Possley then claimed that the subpoena was unreasonable and imposed an undue burden on him. At p. 26. In rejecting this claim, the federal court stated:

> [Defendants] in this case have "suggest[ed][a] basis for believing that there are statements other than those they already have." [internal citations omitted]. Defendants do not know the exact statements that Siler made to Possley and assert that Possley even denies one statement Defendants claim she made. Furthermore, Possley was the first individual to inform Siler of Plaintiff's exoneration. In response, Siler apparently **recanted her identification testimony,** which had helped convict Plaintiff of attempted murder. These same facts also distinguish this case from Hobley, where the court found that the subpoenaed information might have been relevant to Plaintiff's case. Possley's deposition will be relevant; indeed, it "may be fodder for cross-examination [of Siler or Possley] **or lead to other admissible evidence."** Contrary to Possley's argument, Defendants have shown that the information Possley possesses is more than "merely relevant" to this case. Possley's interviews with Siler, **and Siler's subsequent reactions to Possley's statements, are crucial to this case....** For similar reasons, this Court cannot impose limits on the deposition, as Possley suggests it should. Because this Court does not know where the information revealed in the deposition will lead, it cannot limit the deposition to particular subjects or issues. [pp. 26-29]

Wilson soundly rejects motions to quash based upon vague claims of unreasonableness and undue burden when exploring the knowledge of a key witness or investigator. Also, the fact that the deposition would lead to as yet unknown information solely in the possession of the journalist was a reason not to quash. In other words, the fact that the discovery requested could lead to relevant material, that the opposing party **had no other means to obtain, was key**.

This is a truth-seeking process that cannot be undermined by fact that the investigation was extensive or because investigators were students and private

investigators who serve as adjunct faculty. If the school's logic was followed, any time an investigation was extensive, the *party performing it* could arbitrarily decide to tender an abbreviated version of all the materials actually generated. Or consider if it was the People's investigation that was extensive and voluminous, would it be reasonable for the People to arbitrarily pare down the materials to tender to the defense? With such important issues at stake, full disclosure is necessary.

IV. THERE IS NO PRIVILEGE AS NO CONFIDENTIAL SOURCE IS BEING PROTECTED HERE. THEREFORE, ILLINOIS REPORTER'S PRIVILEGE IS WHOLLY INAPPLICABLE AND ALSO CONTAINS HAS AN EXCEPTION AGAINST WITHOLDING INFORMATION IN CRIMINAL CASES.

A cursory reading of the Illinois statute [["Act"]conferring a limited reporter's privilege reveals that it does not allow reporters withhold *information* in criminal cases-it applies to protecting *confidential sources*. In fact, there is no privilege, in any state or federal jurisdiction that remotely supports withholding discovery here. Minimal review of applicable law clearly demonstrates that the materials must be produced.

Despite the state of the law, the school first offers up a few paragraphs citing references to a reporter's protection of **confidential sources**. There are no "Deep Throats" here. That is, the school is not protecting an anonymous source from identification or exposure. There are no secret witnesses, whistleblowers, or good fellas here.

None of the quotes and sound bites has even the *remotest* relevance here. Yet, the repetitive comments concerning confidential sources that go on for almost two pages. They are tantamount to a lack of good faith and an insult to the People and this Honorable Court.[S.Ct. Rule 137] The cases cited are inapplicable on their face. [Mtn.

Quash at pp. 6-7] The objective of the reporter's privilege is 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. (Smith v. Zerilli (D.C. Cir. 1981), 656 F.2d 705, 710-11.)

The first element of the statute is not met: there are no confidential sources being jeopardized by disclosure here. 735 ILCS 5/8-904 (West 1998). In order not to waive any future claim, the People will go through the steps of the statute even though it is not applicable to an investigation conducted for the purpose of bringing the present litigation. The school's theory appears to be that they are "protecting" the information collected by Protess and his student journalists...from disclosure... [to] encourage the free flow of information, but also allow [them] to continue to serve the public by acting as an effective check on the criminal justice system." [p.7]

The argument continues by listing past accomplishments in exposing problems in the justice system and then concludes: "Quashing these subpoenas is consistent with the purpose of [Illinois Reporter's] Act." [p.8] With all due respect, the leaps in "logic" are quite daring. Apparently, in order to provide this "public" service, the school should be able to "protect information" thereby ensuring it's "free flow."

It is hard to avoid the inference that the school would prefer not to open up their investigative or teaching practices to courtroom scrutiny. The rules of discovery, however, are the foundation of the justice system. Our truth seeking process uses the adversarial system, which is designed to expose both sides to scrutiny in order to determine credibility of evidence. That is the goal of the People's discovery request here.

The bottom line is that the school believes the Act allows them to disregard the subpoena and only tender what they feel is necessary. Applying the Act's analysis shows this is false. Again, there are no sources being protected and disclosure of evidence in a post-conviction innocence hearing is a compelling interest requiring divestiture. People v. Pawlaczyk, 189 Ill. 2d 177, 187-8, 724 N.E.2d 901 (2000).

A reporter may be divested of the privilege by the successful completion of a multi-step process delineated in the Act. 735 ILCS 5/8-903 through 8-907 (West 1998). Now that the school has invoked the Act, claiming confidential sources, the People ask to complete the steps in the Act.

As the party seeking divestiture of the privilege, the People must identify, in pertinent part, the specific information sought, its "relevancy to the proceedings," and that a specific public interest would be adversely affected if the factual information sought were not disclosed. 735 ILCS 5/8-904 (West 1998). The People must also prove, by a preponderance of the evidence (735 ILCS 5/8-905 (West 1998); In re Arya, 226 Ill. App. 3d at 854), that no state or federal secrets are compromised by disclosure of the information requested, that all other available sources of information have been exhausted and that disclosure of the information is essential to the protection of the public interest involved. 735 ILCS 5/8-907 (West 1998). Further, the Act directs that, in granting or denying the application for divestiture, the circuit court shall consider the nature of the proceedings, the merits of the claim or defense, the adequacy of remedies otherwise available, if any, the relevancy of the source, and whether alternative means of proof are available. 735 ILCS 5/8-906 (West 1998).

For the sake of expediency, the People ask to adopt their arguments in the preceding relevancy section and ask that they be considered here. Again, the school conducted a three year investigation with nine teams of students conducting multiple interviews of numerous witnesses. There are approximately 20 witnesses to be called at the hearing, most were first interviewed by the school, a few are students themselves who took key statements. Clearly, the materials are relevant to the credibility and other issues at the hearing.

Also, it must be noted again that there are no confidential sources being jeopardized by disclosure here. 735 ILCS 5/8-904 (West 1998).
If the factual information sought is not disclosed. The truth seeking process will be adversely affected. Petitioner has the burden of showing new material evidence exists, the Courts must be able to hear all relevant evidence when making such an important determination.

The People have proven, by a preponderance of the evidence (735 ILCS 5/8-905 (West 1998) that no state or federal secrets are compromised by disclosure of the information requested. Also, it must be noted that there are no confidential sources at issue here.

The most important element is readily and obviously met here. The element is: that all other available sources of information have been exhausted and that disclosure of the information is essential to the protection of the public interest involved. 735 ILCS 5/8-907 (West 1998). The school is the sole possessor of the requested material. The People have spoken to the witnesses , tried to pin them down about who interviewed them before and what was said but it is impossible. Witnesses did not remember names

dates or specifics or their previous interviews. As to the binders and other materials, again, the school is the sole source.

The People have asked some former students for course materials but have not received any and most importantly, the People do not have the names of the students on the nine teams of journalism students, nor are they aware if other, unknown investigators were present with the students.

It seems in contravention of the statute's true purpose [protection of anonymous sources], to allow the school to self-serving, piecemeal disclosure in such an important matter. The school purposefully undertook a very serious investigation and devoted extensive time and resources to it. Now, the school wishes to prevail before this Honorable Court, but does not wish to provide full disclosure of its investigation. **Again, both sides are entitled to fair access to the Courts**. If the People were to adopt a similar position in litigation, they would surely be chastised.

Finally, the Act directs that, in granting or denying the application for divestiture, the circuit court shall consider the nature of the proceedings, the merits of the claim or defense, the adequacy of remedies otherwise available, if any, the relevancy of the source, and whether alternative means of proof are available. 735 ILCS 5/8-906 (West 1998). In an innocence hearing, where the "new" evidence was generated by a lengthy investigation by the school, the People have a right to disclosure of the relevant evidence. There are no other remedies available, no other sources for the information, and no alternative means.

By advocating that an innocent man has been convicted, the school should be especially sensitive to the fact that the proceedings should be open. The justice system

is not served by hiding information relevant to the case and to the manner in which the investigation was conducted or by attempting to bar any review of whether potential witnesses may have bias or interests affecting their credibility. The school should be confident in the results of its investigation.

A. Since The Act Has Been Invoked, It Should Be Noted That There Is A Strong Argument That The School Was Not Acting As a Reporter And Should Not Even Entitled To Invoke The Act.

The school expends quite a bit of effort justifying the protection of a "reporter" within the Act's definition. Apparently, this is in anticipation of the position that Protess and his students are not reporters under the Act. It would appear from Protess' own resume that this is true. Protess has not actively engaged in newsgathering for many years.

In fact, it appears that Protess is primarily a teacher. The school does not attempt to argue that students are reporters. Instead, they refer to a former student now employed by a magazine. [p. 9] Also, the school quotes extensively from a non-precedential *circuit court* ruling finding that the Better Government Association was protected under the Act.

Unfortunately, for the school, the definition of a reporter from the act appears to exclude Protess and his students. A reporter must be in the business of regularly collecting, writing, or editing news for publication *via* a news medium. The BGA passed muster because it published via collaborative efforts with other news media. [Mtn. Quash 9-10]

The People maintain that here, the school acted as an investigative agency, as opposed to a news gathering agency intent on publishing the news. Again, the

protection of confidential sources is not a relevant consideration here and it is the priary intent of the Act. Thus, the fact that the school's activity in this matter does not fit the definition of reporters protected by the Act, simply bolsters the People's previous argument that the Act is inapplicable here.

The school argues it should be exempt from the scrutiny of this Honorable Court and the justice system, yet it should be deemed an purveyor of its inadequacies to the public. Again, there is no news-gathering activity with a confidential source to protect. Also, the only article on this case was written by another professor of investigative journalism [Maurice Possley] from the same school. The article was timed to coincide with the filing of the petition by the school's law school attorneys, years after the school finished its investigation.

It is clear that the school should not be allowed to invoke the Act here. While its program and its goals are admirable and perform a valued function, this investigation is not protected by the Act. In any event, even if the Act applies, it does not protect the school from complying with the truth seeking device of discovery. It is abundantly clear that there is no privilege, nor any related justification for withholding the materials.

B. As There Is No Confidential Source To Protect, There Are No "Source Materials" That May Be Withheld.

The school creates a truly contorted interpretation of the facts and law. First, a conclusory and specious position: every single item they have produced is "source material." Second: "source materials" are "protected" under the Act. First, there is no confidential source here, no anonymous "Deep Throat" that needs protecting-thus negating the application of the Act; second, even applying the Act, results in divestiture

of the materials as they are not protected; third, the school is not eligible under the Act as they are not acting as reporters.

A whole new theory of overreaching protection: "source materials" shows the great lengths taken here to defeat open discovery. This is part of the truth seeking process that the school seeks to avoid. Illogically, this concept is being floated where there is not even a "source" in existence.

Who is the confidential source? How did a criminal investigation by nine different teams become "source materials". Referring to their Innocence Project investigation as a "news gathering" function, the school contorts two *circuit court* rulings for the latest argument. Both cases involve situations where a newsgathering *reporter* was *protecting the identity of a confidential source.*

Here, an investigation was done to uncover evidence of innocence. Selected materials have been tendered. The evidence is to be explored in an "innocence" hearing, which presumably is the goal of this program. The school cites In re Arya, which summarized:

> In Illinois, reporters have a statutory, qualified privilege that protects the anonymity of their sources, whether confidential or nonconfidential. (Ill. Rev. Stat. 1989, ch. 110, par. 8-901.) However, a court is statutorily authorized to order the reporter's privilege divested when the petitioner seeking divestiture (in a nonlibel case like this) proves that (1) no other law prevents it, (2) all other available sources have been exhausted, and (3) the information obtained by the reporter is essential to protect the public interest involved. At 852-853.

Arya involved a reporter who possessed materials showing who committed a murder. The State did not adequately show that it exhausted all other resources and the case was remanded. *Arya* does not stand for the proposition that you can withhold documents that are not related to a confidential source.

C. The People Maintain That The School Is Not Protected By the Act Here, However, the Foregoing Analysis Shows That The People Easily Meet The Act's Elements.

As argued in previous sections, the school is not protected by the Act. The litigation of the innocence claim based upon the school's investigation and is being conducted at the behest of the school's sister agency. Even applying the Act, it is clear that the materials requested should be produced. The People are willing to participate in a hearing under the Act if this Honorable Court so desires. In fact, in order to avoid any issue on appeal, the People will gladly address the same elements of the Act in a hearing with oral argument.

Perhaps, at the argument on the applicability of the Act, the People will inadvertently gather some of the information that they have been requesting. It is disingenuous for the school to proclaim on its website that it spent three years using nine teams to investigate a case and then attest in a court of law that the materials generated are from a confidential source. In Branzburg v.Hayes, 408 U.S. 665, the Court weighed in on the special treatment given to the press when competing with the interests of criminal justice system. Although acknowledging that gathering news enjoys some First Amendment protection, the Court held that the Constitution does not "confer a license on either the reporter or his news sources to violate valid criminal laws. ... Neither is immune, on First Amendment grounds, from testifying against the other, before the grand jury or at a criminal trial."

In summary, the school has played upon a common misconception that reporters have a First Amendment right to withhold information. This is absolutely incorrect. In Branzburg v.Hayes, 408 U.S. 665, 92 S. Ct. 2646 (1972), this notion was specifically

rejected. . Moreover, the Court opinion in *Brazenburg* makes clear that the interest of the press in maintaining the confidentiality of sources is not absolute.

The argument that the First Amendment provides journalists special protection against subpoenas with respect to information from **non-confidential** sources has been wholly rejected . See, McKevitt, 339 F.3d at 533. Additionally, the Seventh Circuit has noted in *dicta* that generally "[t]here isn't even a reporter's privilege in federal cases." United States Dept. of Educ.. v. National CollegiateAthletic Ass'n, 481 F.3d 936, 938 (7th Cir.2007). The *McKevitt* Court instructed "rather than speaking of privilege, courts should simply make sure that a subpoena duces tecum directed to the media, *like any other subpoena duces tecum, is reasonable in the circumstances* . . . ."at 533.

The whole presentation on this issue lacks credibility and begs the question of whether the school should have appointed itself to "serve the public by acting as an effective check on the criminal justice system."

V. THE PEOPLE WILL CALL PROTESS TO TESTIFY AS A WITNESS IF HE HAS RELEVANT TESTIMONY TO GIVE AT THE INNOCENCE HEARING.

Based upon the limited materials received by the People so far, Protess does not appear to be a witness to the innocence hearing. If his testimony should become relevant, the People will certainly make this Honorable Court and Protess aware of that fact and take appropriate action. The inference that Protess will be subpoenaed to harass him or satisfy a "hidden agenda" is not worthy of recognition or response.

V. THE FERPA STATUTE IS NOT CONTROLLING OR EVEN APPLICABLE NOR DOES IT PROHIBIT THIS DISCOVERY AS THE STUDENTS ARE WITNESSES IN A CRIMINAL PROCEEDING AND SUBJECT TO COURT ORDERS AND SUBPOENAS.

The People have requested that they receive the grades of the students who investigated this case. Other than the grades, the People are not seeking any information from their school files or records. Again, the People have not requested "student records" or personal "files", only grades of those who chose this case. Clearly, the students were motivated by grades. This goes to their possible bias, interest, or motive.

The FERPA statute is inapplicable. The school file is not being sought. Also, the statute was not designed to thwart discovery in legal matters. FERPA requires school administrators handle student information properly **or risk losing federal funding**.

Not only is FERPA inapplicable, it is easily circumvented when there is a legitimate court order of subpoena for relevant information. Specifically, FERPA [20 USCS @ 1232g] does not bar disclosure of school records **where a court order or subpoena is issued for them.**

This is an exception within the statute itself. The statute expressly recognizes that disclosure may be made in response to subpoena *duces tecum* or other judicial order. State v Birdsall (1977, App) 116 Ariz 196, 568 P2d 1094. The statute also allows disclosure for valid law enforcement purposes under 20USCS @1232g(b)(1)(C)(ii) of Family Educational Rights and Privacy Act, 20 USCS

Many valid, common sense exceptions exist such as where public interest in greater access to information bearing on justice, personal safety and crime prevention issues that outweigh students' privacy interests. The argument is patently without merit.

VII. SUMMARY

Numerous interviews have been conducted with witnesses that the defense will probably call at the hearing. Most witnesses recalled sitting for three to four interviews by students. Yet, the People have received only a small collection of affidavits, some of which are supplemented by video taped interviews.

By their own admission, the investigation by the students at both schools was extensive and generated voluminous materials over the course of five years. Nine teams of college journalism students conducted a three-year investigation. Former Medill students described generating voluminous materials. Their witnesses were subjected to multiple interviews recorded by students and investigators. The case was then referred to the law school and another lengthy investigation of the case ensued utilizing investigators.

The central issue at the hearing will be the credibility of the assertions contained in the witnesses' affidavits. Without a full and accurate accounting of the interviews leading up to the affidavits, and the other materials detailing the totality of the circumstances, the People will be unduly prejudiced.

The interests of justice are not served if materials are arbitrarily withheld to give a litigant an advantage. Both sides are entitled to a fair hearing after full disclosure.

This is a truth seeking process wherein the petitioner bears the burden of demonstrating his innocence through credible testimony. To withhold voluminous materials from the truth seeking process is truly ironic behavior given the school's mission of justice. The reaction of the school is also especially troubling, given their self-described position as "watchdog" of the justice system.

WHEREFORE, The People respectfully submit that this Honorable Court properly allowed the subpoenas to issue to Protess and the school and that compliance should be enforced. Further, the People maintain there is no statutory privilege and the People stand ready to argue, conduct a hearing, or provide any other information this Honorable Court wishes in order to conclusively demonstrate that no special privileges allow the school to shirk their responsibility to disclose relevant materials currently being withheld.

Respectfully submitted,

Celeste Stack

Darren O'Brien

Christine Cook

For the People

773 869 7628

300 (3-81) Form Crim Div. No. 66

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS)
vs.)
) NO. 78C5267
ANTHONY McKINNEY)

SUBPOENA-SUBPOENA DUCES TECUM

The People of the State of Illinois to all Peace Officers in the State-
GREETING:

WE COMMAND THAT YOU SUMMON:

Mr. David Protess
c/o Medill School of Journalism
Northwestern University
1845 Sheridan Road
Evanston, Illinois 60208

to appear to testify before the Honorable Judge Cannon on April 15, 2009 in Room 604, Circuit Court, 26th Street and California Avenue, Chicago, Illinois at 9:00 A.M.

YOU ARE COMMANDED to bring the following: All of the items requested on Attachment 1 in your possession or control.

COPIES ALONG WITH A COPY OF THIS SUBPOENA MAILED TO THE COURT PRIOR TO THE COURT DATE, **WILL SUFFICE IN LIEU OF PERSONAL APPEARANCE.**

YOUR FAILURE TO APPEAR IN RESPONSE TO THIS SUBPOENA WILL SUBJECT YOU TO PUNISHMENT FOR CONTEMPT OF THIS COURT.

WITNESS: April 2, 2009

Darathy Brown
Clerk of the Court

Atty No.
Name Assistant State's Attorney
Darren O'Brien
Attorney for The People of the State of Illinois
Address 2650 South California Avenue Room 12B10
City Chicago, Illinois 60608
Telephone (773)869-4188

SERVICE:
I served this Subpoena by handing a copy to . . . . . .
on . . . . . , 2009
Signed and sworn to before me
. . . . . 2009. . . . . .
NOTARY PUBLIC

NOT VALID FOR SERVICE ON NEWS MEDIA WITHOUT ORDER OF COURT
DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY

ATTACHMENT 1 FOR SUBPOENA FOR DAVID PROTESS, MEDILL SCHOOL OF JOURNALISM, SERGIO SERRITELLA, AND TACTICAL SOLUTIONS GROUP PEOPLE OF THE STATE OF ILLINOIS VS. ANTHONY McKINNEY

1. All notes, memoranda, reports and summaries created by Sarah Forte, Evan Benn, Sam Weiner, Laura Brown, Max Brett, Celina Montoya Tiffany Hopkins Jacqueline Schmelnieck, Zack Firdel, Kelly Nolan, Maridel Reyes and any other journalism students, teachers, investigators or other individuals employed by the Northwestern Journalism school or who worked on the Anthony McKinney case.
2. All binders with contents submitted by any journalism student who worked on the Anthony McKinney case.
3. Any notes, memoranda created by David Protess as a result of the Anthony McKinney case.
4. A copy of all instructions provided by David Protess to the students who worked on the Anthony McKinney case.
5. A copy of the syllabus provided by David Protess to the students working on the McKinney case
6. A copy of the grading criteria used or provided to any student working on the Anthony McKinney case.
7. A copy of the grade each student who worked on the Anthony McKinney case received each quarter they worked on the case.
8. A copy of all audio and videotapes created as a result of the Anthony McKinney case.
9. A copy of all receipts and accompanying paperwork for expenses incurred by students, investigators or anyone else working on the Anthony McKinney case.
10. All records for reimbursements or payments to any witnesses, students, investigators, or anyone else working on the Anthony McKinney case.
11. Any electronic communications created as a result the Anthony McKinney investigation.

300 (3-81) Form Crim Div. No. 66

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS)
vs.)
) NO. 78C5267
ANTHONY McKINNEY)

SUBPOENA-SUBPOENA DUCES TECUM

The People of the State of Illinois to all Peace Officers in the State-
GREETING:

WE COMMAND THAT YOU SUMMON:

Keeper of Records
c/o Medill School of Journalism
Northwestern University
1845 Sheridan Road
Evanston, Illinois 60208

to appear to testify before the Honorable Judge **Cannon** on June 11, 2009 in Room 604, Circuit Court, 26th Street and California Avenue, Chicago, Illinois at 9:00 A.M.

YOU ARE COMMANDED to bring the following: All of the items requested on Attachment 1 in your possession or control.

XEROX COPIES ALONG WITH A COPY OF THIS SUBPOENA MAILED TO THE COURT PRIOR TO THE COURT DATE, **WILL SUFFICE IN LIEU OF PERSONAL APPEARANCE.**

YOUR FAILURE TO APPEAR IN RESPONSE TO THIS SUBPOENA WILL SUBJECT YOU TO PUNISHMENT FOR CONTEMPT OF THIS COURT.

WITNESS: May 20, 2009

Dorothy Brown

Clerk of the Court

Atty No.
Name Assistant State's Attorney
Attorney for Darren O'Brien
Address The People of the State of Illinois
City 2650 South California Avenue Room 12B10
Telephone Chicago, Illinois 60608
(773)869-4188

SERVICE:
I served this Subpoena by handing a copy to . . . . . .
on . . . . . , 2009
Signed and sworn to before me
. . . . . 2009. . . . . .
NOTARY PUBLIC

NOT VALID FOR SERVICE ON NEWS MEDIA WITHOUT ORDER OF COURT
DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY

ATTACHMENT 1 FOR
SUBPOENA FOR DEFENSE COUNSEL, DAVID PROTESS, MEDILL SCHOOL OF JOURNALISM, SERGIO SERRITELLA, AND TACTICAL SOLUTIONS GROUP
PEOPLE OF THE STATE OF ILLINOIS VS. ANTHONY McKINNEY

1. All notes, memoranda, reports and summaries created by Sarah Forte, Evan Benn, Sam Weiner, Laura Brown, Max Brett, Celina Montoya Tiffany Hopkins Jacqueline Schmelnieck, Zack Firdel, Kelly Nolan, Maridel Reyes and any other journalism students, teachers, investigators or other individuals employed by the Northwestern Journalism school or who worked on the Anthony McKinney case.
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