

ATTORNEY NO. 10295

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

People of the State of Illinois,

Respondent,

78 C 5267

v.

Anthony McKinney,

Petitioner

Northwestern University,

Third-Party-Respondent.

**THE PEOPLE’S SUPPLEMENTAL REQUEST FOR DISCOVERY AND FOR
DOCUMENTS AND/OR INFORMATION FROM THIRD PARTY RESPONDENTS**

The People of the State of Illinois, by their attorney, ANITA ALVAREZ, State’s Attorney of Cook County, and through her Assistants, CELESTE STACK and DARREN O’BRIEN, respectfully request this Honorable Court’s assistance in bringing the discovery phase to conclusion and offer a discovery status update.

I. INTRODUCTION

In 2007, the People began an investigation at the request of Anthony McKinney’s attorneys. In 2008, the People concluded the wrongful conviction claim had no merit but agreed to a hearing. A hearing allows McKinney to present his alleged new evidence in court. In post-conviction matters, a hearing is also the only method by which to challenge the veracity of the “new” evidence using the results of the People’s investigation.

During the 2007-2008 pre-litigation investigation, only affidavits and video clips of *selected* witnesses from *selected* interviews were tendered. The People’s investigation, however,

revealed that numerous interviews had been conducted and recorded, but withheld. Witnesses described multiple contacts with students during which the students took notes and made recordings. These interviews were not included in the selection of evidence tendered in 2007.

Several months into their investigation, the People requested the missing interview materials. Informal requests were made to both Medill Innocence Project¹ and the Center on Wrongful Convictions.² The requests were not complied with then.

No court had jurisdiction to order discovery until October 2008 when the petition was filed. The People again requested these interview notes and materials in a motion in May of 2009. While other information concerning Medill investigative structure, the primary focus of the request has been the interview notes and recordings.

Today, the requests for all witness interview notes and materials remain unfulfilled. The existence of more interview notes and materials has, however, been confirmed through the production of redacted emails and “student memos.” As set out below, newly obtained records show that MIP tendered all the witness interview materials to McKinney’s attorneys at CWC in April of 2005 and continued to produce materials to the attorneys until at least October of 2006. A lengthy joint investigation was conducted wherein the two groups collaborated for years.

II. DISCOVERY PRODUCTION UPDATE

On June 24, 2010, this litigation took a dramatic turn when it was revealed in open court that the investigative materials produced by journalism school students had been previously shared with McKinney’s attorneys and others associated with the law school. MIP agreed that it had waived any assertion of the Illinois Reporter’s Privilege as to any materials shared with

¹ Hereinafter referred to collectively as “MIP.”

² Hereinafter referred to collectively as “CWC.”

CWC.

For the last year, Northwestern University has been producing materials to the People. Most of the investigative materials are from computer files as hard copies are apparently not available or longer in existence. Most recently, documents generated from the search of five hard drives from MIP computers were tendered.

Combining materials received from both CWC and MIP, the People have received approximately 2000 pages of documents. The majority of the documents are redacted emails between CWC staff and MIP staff. Many of these emails are redundant, in that the same correspondence is repeated and/or included in email attachments.

“Student memos” written by MIP students comprise another large segment of the tendered materials. Their narratives focus on the student/author impressions of encounters with people and places visited. The student memos provide limited information about the actual content of their conversations with witnesses. The memos do not contain the notes taken during interviews although originally they may have been attached as exhibits.

Expense vouchers were tendered, organized by the students who submitted requests for reimbursement. Information concerning witness interview expenses is still outstanding. While salary vouchers for Sergio Serritella were provided, expense vouchers appear to be incomplete.

Newly received records, however, indicate that additional consultants or private investigators were employed by MIP. At least one previously unidentified paid “investigative consultant,” Aaron Patterson, assisted the Medill investigation. No further information other than the amount received and approximate time frame has been given. There are no corresponding records to show what interviews this consultant participated in and his name does not appear in any of the other documents received.

Finally, there are almost 500 items listed in three “privilege logs.” These logs are primarily comprised of email correspondence between the MIP teacher and the students and investigators conducting the McKinney investigation. These emails will hopefully provide important information about witness interviews that may not be found in any other documents.

The People received copies of Medill’s syllabi, lists of video recordings, and lists of student investigators. There are redundancies, repetitions, and extensive redactions. It is apparent that Northwestern University has expended extensive time and resources to comply with this Honorable Court’s discovery orders.

Despite these efforts and the number of pages produced, the most important materials have still not been produced. The verbatim notes or recordings of witness interviews conducted by MIP students have not been tendered even though CWC possessed them at one time. This is a material omission that has not been explained. A few other significant matters have come to light which are also the subject of this filing. The People ask this Honorable Court’s indulgence in submitting this supplemental request.

III. DOCUMENTS RECEIVED CONFIRM THAT MISSING INTERVIEW MATERIALS WERE GIVEN TO CWC. FUNDAMENTAL LEGAL PRINCIPLES REQUIRE PRODUCTION OF THESE HIGHLY RELEVANT WITNESS DOCUMENTS AND/OR RECORDINGS.

In early 2005, MIP invited CWC to represent McKinney and participate in this case. Starting in April of 2005, MIP gave CWC copies of its memos, interviews, videos, and other materials. The documents missing now (the actual interview notes and recordings) were in CWC’s possession. MIP emails repeatedly confirm that CWC possessed all interviews of all witnesses, including verbatim notes and “transcripts” made from the student notes.

Redacted emails also indicate that both CWC and MIP significantly reduced the contents of their files, four years ago. The People have been asking for these interview documents for four

years. The People are entitled to know where these important materials are and who, if anyone, currently possesses them. Therefore, the People respectfully request that CWC, especially petitioner's attorney, explain what happened to these documents and where they are.

A. THE LAW SUPPORTS THE PRODUCTION OF ALL WITNESS NOTES AND RECORDINGS, *NOT* JUST THE FINAL PRODUCT.

This legal discussion dispels the anticipated contention that interviews may be withheld by MIP or counsel for McKinney or CWC on the basis of "relevancy." All notes and/or tapes from all interviews are relevant and must be tendered. Counsel previously stated she would investigate to determine if they have been destroyed. It is time to determine if the defense or subpoena-respondents have knowledge of this destruction. If destruction is confirmed, inquiries should be made as to whether copies of the notes and recordings may be recovered from other sources.

1. Factual History

In support of the above, the following facts are relevant. On June 24, 2011, defense counsel stated that she would try to find the missing materials by asking students, staff, and others. Counsel agreed that previously undisclosed materials had been given to CWC by MIP. Counsel stated her search for those MIP materials would continue. She tendered some of these materials in open court on that date.³

In a colloquy with this Court, counsel did not reveal the extent of materials given by MIP to CWC that is reflected in the emails received in discovery. Counsel said she was given MIP "homework assignments" and answered affirmatively when the Court asked if this included interviews of murder witnesses ("...among other things.") See, Exhibit 1. The following emails

³ The transcript from June 24, 2010 is attached as Exhibit 1.

show a fully collaborative effort between MIP and CWC wherein CWC received extensive materials.

Starting in April of 2005, MIP proceeded to give all the materials in had produced or gathered in the previous two years. Before their first meeting, discussion ensued about the materials being prepared for CWC and counsel anticipated “loading” her car with the materials. Protess instructed staff to copy extensive materials for the meeting.⁴

Over the next 18 months, emails appear wherein CWC repeatedly requests more material. MIP complies with all these requests which extend past the initial tender. For example, missing pages of “interview transcripts” were requested.⁵ MIP replied with assurances to produce materials. MIP staff repeatedly indicated they were complying with the requests.⁶

From early spring in 2005 through October of 2006, counsel received evidence from MIP. The two entities fully collaborated on the investigation. For example, MIP students immediately sent interviews results **with verbatim notes** to CWC.⁷ This not only confirms waiver of privilege as to interview notes, but it shows that verbatim notes were, indeed, taken by the students. This is exactly what the People were told by witnesses that they interviewed.

MIP and CWC were still closely collaborating in 2007 when the People were asked by CWC to investigate. Emails received track the People’s inquiries and progress with their interviews. These emails have disturbing implications as they also confirm the People’s informal requests

⁴ See, Group Exhibit 2

⁵ See, Group Exhibit 3

⁶ See, Group Exhibit 4

⁷ See, Group Exhibit 4

for the missing materials, notes, and other information. These requests started in mid-2007.⁸

In **September** of 2007, very heavily redacted emails between Protes and the MIP assistant discuss the People's requests. Protes asks his assistant to determine what materials MIP still possesses. The assistant replies that they have all the memos and other stuff like videos and correspondence.⁹

Protes replies that they need to institute a new "rule" to "purge" MIP's files "**before* they're surrendered to any outside lawyers." The assistant is concerned that it will "look badly on us" to "completely purge the files now." Protes agrees but states files should be purged in future investigations during the final quarter.¹⁰

In **November** of 2007, Protes begins an email by telling the same assistant that a prosecutor may be calling as prosecutor has "learned" additional discovery exists. Protes instructs the assistant to send the prosecutor back to CWC. Protes then notes that everything (of the MIP files) is gone, all files destroyed. Protes continues by commenting that CWC has destroyed their files, too. Protes concludes : "Too bad if she (Daniel) destroyed them. That's not (my) problem."¹¹ This exchange shows that MIP and probably CWC destroyed materials sometime between September of 2007 and November of 2007. The destruction took place after the People started asking for the interview materials.¹²

⁸ See, Group Exhibit 5

⁹ See, Exhibit 6

¹⁰ See, Exhibit 7

¹¹ See, Exhibit 8

¹² See, Exhibits 8 & 9

B. THE LAW IS CLEAR THAT THESE MATERIALS ARE RELEVANT.

CWC will likely contend that the missing materials are not relevant. This contention is utterly meritless. There is/was no question as to whether the materials counsel repeatedly requested were evidentiary in nature and not homework assignments. The following analysis will hopefully circumvent extended litigation as to relevance. The People maintain that all notes of all witnesses are relevant to this claim.

From a review of basic rules of professional conduct to U.S. Supreme Court and Illinois Supreme Court precedent, it is clear that the retention and production of witness interviews is mandatory. As this Court has succinctly noted, the People are entitled to all the “run-throughs” and not just the final product.¹³

It is axiomatic in Illinois that “[a] lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value [and] shall not counsel or assist another person to do any such act.” *See* Illinois Rule of Professional Conduct 3.4. From the day that McKinney filed this post-conviction petition in 2007, McKinney's counsel has had a continuing duty to preserve, produce and not alter all materials that possess even potential evidentiary value. *See, e.g., Schlup v. Delo*, 513 U.S. 319, 328 (1995). At a minimum, McKinney's counsel failed to comply with this duty. The e-mails produced raise the question of whether notes and interview statements were destroyed, further undermining that duty.

Witness statements are the most important and most common type of evidence. They are the focal point on any investigation and of any litigation. As set out below, the “new” witnesses’ credibility is the focus of the impending hearing on McKinney’s “innocence” claim. When

¹³ See, Exhibit 1-Transcript of June 24, 2011.

wrongful conviction is alleged the scope of relevant materials is even broader than at trial.

Schlup v. Delo, 513 U.S. 319, 328 (1995).

In Schlup v. Delo, 513 U.S.319, 328 (1995), the U.S. Supreme Court noted that when wrongful conviction is claimed-*everything* is relevant. Specifically, Schlup stated:

In assessing the adequacy of petitioner's showing [of actual innocence], the district court is not bound by the rules of admissibility that would govern at trial. Instead, the emphasis on "actual innocence" allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial.
513 U.S. at 328.

The Schlup Court recognized that in evaluating claims of innocence, habeas courts should consider "a broader array of evidence" than that available at trial. The trend in federal courts to expand discovery rights for *respondents* to "innocence" claims. See, Henry v. Marshall, 2009 U.S. Dist. Lexis 14972 (E.D.Cal., Feb. 2009); Bean v. Bagley, 2007 U.S. Dist. Lexis 83684 (S.D. Ohio, March 2009).

In U.S. v. Nixon, the Court stated:

"The need to develop all relevant facts in the adversary system is **both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts.** The 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.**" (emphasis supplied)United States v. Nixon, 418 U.S. 683, 709 (1974).

In Taylor v. Illinois, 484 U.S. 400, 416-419 (U.S. 1988), the defense was barred from calling an important defense witness' because counsel *intentionally hid* the witness until mid-trial. The *Taylor* opinion also stresses the importance of fairness to *both* sides. The following excerpt offers guidance where the defense withholds relevant evidence:

The integrity of the adversary process, which depends both on the presentation of reliable evidence and the rejection of unreliable evidence, 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. At pp.414-415.

The Illinois Supreme Court similarly requires production by counsel and CWC. It is well established in Illinois that the notes, memos, binders, records of statements of criminal investigators are both *relevant and subject to disclosure* before trial. See, e.g., People v. Boclair, 119 Ill. 2d 368, 374-375 (1987) (holding that the notes of defendant’s investigator that were prepared during interviews of State witnesses were discoverable under Rule 413(e)). Boclair further recognized that a trial court could conduct an *in camera* inspection and order the redaction of any privileged or irrelevant information from an investigator’s notes. *Id.* at 376.

While the People have taken issue with much of the alleged “newly discovered evidence,” the People nonetheless agreed to a hearing under post-conviction law. The eyewitness, Wayne Phillips, is now deceased and all of his prior statements are highly relevant if the issue is to be explored. Therefore, if his hearsay statements are allowed into evidence, all of his statements and all of the evidence affecting their credibility must be admitted.

MIP/CWC’s encounters with Wayne Phillips underscore the importance of the interview notes. In 2003, Phillips described himself as “slow and a little crazy.”¹⁴ The exact nature of his disability or condition is unknown but it was apparent that he suffered from one or both.

Over a period of almost 5 years, MIP/CWC had various contacts with Phillips. Materials received show that Phillips identified *McKinney* to both MIP and CWC. Even after Phillips changed his trial testimony, MIP/CWC noted their concern that he would revert back to his trial testimony. They expressed concern at his unpredictability.¹⁵ The actual notes from these

¹⁴ See, Exhibit 10

¹⁵ See, Group Exhibits 10 & 11

interviews are highly relevant.

The People are entitled to all information concerning their contacts with Phillips. For example, to keep control of this important, but volatile witness, MIP purchased Phillips a cell phone.¹⁶ They all bought calling cards over a period of months. It appears that two cell phones were ultimately purchased but the information is unclear as to whether both were for Phillips.

The People do not possess verbatim notes from Phillips interviews. Student memos, however, show that MIP took notes of interviews with Phillips' brother Jerry while Wayne was interviewed by others.¹⁷ All notes of the many Phillips' brothers interviews are especially relevant where petitioner relies on statements of both men as a part of his case.

This repetitive interview process was not confined to Phillips. Francis Drakes, the nephew of Tony Drakes, was interviewed several times but the interview notes have not been tendered. Both MIP/CWC discuss how they would like Francis Drakes' recollection to change to include an admission to murder by Tony Drakes.¹⁸ Clearly, what was actually said in the interviews is important evidence, yet the notes have not been tendered. To detail all missing interview references would be onerous and is unnecessary as the important of the materials is patent.

The foregoing examples of the process employed by MIP, and adopted by CWC, resulted in multiple interviews that were recorded with verbatim notes and possibly audio taping as well. While the school has tendered voluminous documents, the most important evidence is still missing and its present status is unknown.

Counsel for the school has represented that no additional hard copies exist. Materials

¹⁶ See, Exhibit 12

¹⁷ See, Group Exhibits 10 & 11

¹⁸ See, Group Exhibit 13

tendered came from primarily computer files and hard drives. Despite the school's extensive efforts and the product of voluminous materials, the most important documents are still missing.

Therefore, the People request definitive answers from petitioner's counsel to the following questions:

Did counsel and/or CWC possess verbatim notes, recordings, or any interview materials that have not been tendered to the People?

If so, where are these interview materials now? Who possesses the interview materials? How can they be obtained?

Counsel stated that she would investigate the whereabouts of these documents. What is the outcome of that investigation and where can these documents be found?

The People have attempted to get these critical interviews for four years. They have used informal and formal methods of inquiry and production. Why these materials have not been tendered remains a mystery that unfortunately requires this Court's intervention. Therefore, the People respectfully request that counsel explain the status and location of the witness materials.

IV. EMAILS INDICATE THAT THE ORIGINAL "WIRE" RECORDING IS FOUR HOURS LONG. A TWO HOUR VERSION WAS GIVEN TO THE PEOPLE, WHO REQUEST A COURT ORDER FOR THE ORIGINAL RECORDING, FOR THE RECORDING DEVICE, AND ANY EVIDENCE CONCERNING ITS ALLEGED RENTAL AND ITS MAKE AND MODEL.

Recordings were made from a concealed body wire worn by a student during the interview of Tony Drakes in May of 2004.¹⁹ The People received a digital recording that is approximately two hours and 20 minutes in length. A redacted email describes the recording as lasting for four hours.²⁰ Unfortunately, the wire was turned off during the students' interaction with the cab company dispatcher and the cab driver.

¹⁹ First, they spoke to unknown neighbors and to Drakes' parents before meeting Drakes.

²⁰ See, Exhibit 14

The students were adept at turning the wire on and off between conversations that they wanted to record. Therefore, it is unlikely that the missing portion is devoid of substance. The People request a court order for production of the original recording and the four hour version directed to Serritella. The school has been unable to locate and produce the original.

Also, the People request that Serritella supply the wire device used on Tony Drakes as well as the cell phone wires set up on trips to find Michael Lane. Serritella claims he rented the device used for Drakes but has provided no documentation. His expense voucher for the trip does not contain a request for rental reimbursement, although it mentions the wire being used.

Finally, the People request permission to deliver the original wire recording to a qualified forensic service in order to have it examined and possibly enhanced as many key parts are inaudible. From research performed, there does not appear to be any danger of damage to the recording during this examination. Also, if a computer program was used in the recording process, the People request that it be identified. The above requests are directed to Sergio Serritella. The People respectfully request the appropriate court orders be authorized to effectuate these requests.

V. THE PEOPLE REQUEST ANY INFORMATION CONCERNING PAID CONSULTANTS AND FOR SERRITELLA'S EXPENSE RECORDS.

Salary vouchers for Sergio Serritella were provided, but expenses are incomplete. Multiple trips to Kenosha were made to locate Michael Lane for which no witness expense vouchers have been received. The People have asked the school to search for these and are not requesting a subpoena the expense vouchers at this time.

Other expense receipts show that Aaron Patterson was hired to do field investigative

work by MIP.²¹ There has been no other materials tendered that show what interviews Patterson conducted or participated in or if he was present for interviews. This omission could be due to the redactions. Even some expense vouchers have been redacted to exclude the identity of persons present at meals purchased.

If these redacted individuals were acting as investigators in the interview process their work product is relevant. The People request any documents regarding interview materials generated by any paid or unpaid investigators or field consultants who were used in interviews or who were present for witness interviews that have not previously been produced. The school states it has found no other documents concerning Patterson's investigative work. The People will request a court order asking for information on any interviews or relevant documents pertaining to the work of Patterson or any other private investigator employed in this investigation.

WHEREFORE, the People respectfully request that this Honorable Court will allow the People to discover the location and status of missing interview notes and recordings. The People also request that they be allowed to inspect the original "wire" recording, submit it for forensic review, obtain information about wire recording equipment, its make and model and any other "cell phone wires" used. Finally, the People request any records or invoices or interview data from previously unknown investigators or consultants.

Most Respectfully Submitted,

Celeste S. Stack
Darren O'Brien
For the People of the State of Illinois.

²¹ See, Group Exhibit 15.