

Outtakes from Documentary Are Protected by Reporter's Privilege

The outtakes from a documentary film produced by Ken Burns and others on the Central Park Five are protected from discovery under the First Amendment.

In 2012, Florentine Films released *The Central Park Five*, a documentary film. Florentine Films group includes Ken Burns, David McMahon, and Sarah L. Burns. The Central Park Five were convicted for the 1989 attack of a jogger in New York's Central Park, dubbed the Central Park Jogger. After the five had served their prison terms, another man confessed to the crime and DNA evidence led to the New York District Attorney recommending that the convictions be vacated.

The five subsequently sued the City of New York, the New York Police Department, and the New York County District Attorney's office for conspiracy and perpetuating false evidence in their convictions.

The New York defendants subpoenaed Florentine Films demanding all of the raw footage of interviews with the Central Park Five and their attorneys that did not appear in the documentary. The defendants contended that they needed the raw footage because it was relevant to the question of damages to the Central Park Five when they were in prison, the raw footage might impeach prior testimony, and plaintiffs' attorneys might have waived the attorney-client privilege by being interviewed for the film.

Florentine Films argued that the raw footage was protected by the New York Shield Law and the reporter's privilege under the First Amendment.

A U.S. Magistrate Judge quashed the subpoena. He found that the New York defendants failed to present the court with "a concern so compelling as to override the precious rights of freedom of speech and the press" that the "reporter's privilege seeks to ensure." In addition, the judge found that the defendants failed to show that the information sought was relevant to a significant issue in the case and "that the information is not reasonably obtainable from another source," especially in light of the fact that the defendants had yet to depose the Central Park Five.

In Re McCray, Richardson, Santana, Wise, and Salaam Litigation, D.C.N.Y., No. 03 CV 9685, filed February 19, 2013.