

**IN THE SUPREME COURT OF THE STATE OF MONTANA
DA 18-0374**

JON KRAKAUER

Petitioner and Appellee,

v.

STATE OF MONTANA, by and
Through its COMMISSIONER OF
Higher education, Clayton T. Christian,

Respondent and Appellant.

John Doe,

Intervenor and Appellant.

**INTERVENOR'S BRIEF IN OPPOSITION TO
APPELLEE'S PETITION FOR REHEARING**

On Appeal from Montana First Judicial District Court,
Lewis and Clark County, The Honorable Michael Menahan, Presiding

APPEARANCES:

<p>David R. Paoli Paoli Law Firm, P.C. 257 West Front Street, Suite A P.O. Box 8131 Missoula, MT 59802 (406) 542-3330 davidpaoli@paoli-law.com</p> <p>Attorney for Intervenor, John Doe</p>	<p>Vivian V. Hammill Helen C. Thigpen Special Assistant Attorneys General Office of the Commissioner of Higher Education Montana University System 560 North Park Ave. Helena, MT 59620-3201 (406) 449-9130 vhammill@montana.edu hthigpen@montana.edu</p> <p>Attorneys for Respondent and Appellant, Commissioner of Higher Education</p>	<p>Peter Michael Meloy Meloy Law Firm P.O. Box 1241 Helena, MT 59624 (406)442-8670 Mike@meloylawfirm.com</p> <p>Attorney for Petitioner and Appellee, Krakauer</p>
---	---	---

TABLE OF CONTENTS

TABLE OF
AUTHORITIES.....4

INTRODUCTION.....6

ARGUMENT.....6

CONCLUSION.....8

CERTIFICATE OF COMPLIANCE.....10

CERTIFICATE OF SERVICE.....11

TABLE OF AUTHORITIES

CASES

<i>T.L.S. v. Mont. Advocacy Program</i> , 2006 MT 262, 334 Mont. 146, 144 P3d 818....	6
<i>Missouliau v. Bd. of Regents</i> , 207 Mont. 513, 675 P.2d 962 (1984)	7

STATUTES AND REGULATIONS

20 U.S.C. § 1232g(b)(2).....7
M.R.App.P. 20(a).....8

**INTERVENOR’S BRIEF IN OPPOSITION TO APPELLEE’S
PETITION FOR REHEARING**

I. INTRODUCTION

Appellant/Intervenor, John Doe (“Doe”), objects to Petitioner/Appellee, Jon Krakauer’s (“Krakauer”) Petition for Rehearing and respectfully request the petition be denied. Krakauer’s arguments claiming error by the Supreme Court are without legitimate basis. These arguments do not meet the difficult burden for granting a rehearing set forth Mont. R. App. P. 20(1)(a).

To avoid unnecessary repetition, Doe adopts and incorporates Appellant/Cross-Appellee, State of Montana’s Brief in Opposition to Krakauer’s Motion for Rehearing.

II. ARGUMENT

The Montana Supreme Court accurately followed the appropriate balancing test between a constitutional challenge to secure documents under the right to know as against the constitutional right to privacy. Krakauer claims the Montana Supreme Court instituted a new, additional requirement in balancing right to know cases against right to privacy. His argument is based on his belief that the Montana Supreme Court committed error in failing to address or cite this Court’s case in *T.L.S. v. Mont. Advocacy Program*, 2006 MT 262, 334 Mont. 146, 144 P3d

818. Contrary to Krakauer’s claim, this Court did not use a “compelling state interest” standard in its analysis. It’s reliance on and citation to *Missoulian v. Bd. of Regents*, 207 Mont. 513, 675 P.2d 962 (1984) provided the basis of the correct balancing test to be employed in the specific facts of this case. Krakauer claims that this Court should reconsider its opinion based on the *T.L.S.* case. However, Krakauer didn’t even cite *T.L.S.* in his reply brief when this Court was undertaking the heavy work of balancing the right to know versus a student’s heightened right to privacy. If he really believed it was controlling precedent that would have resulted in a different outcome, he would have cited it in his reply brief.

Krakauer also argues that the Court failed to rule on the applicability of 20 U.S.C. § 1232g(b)(2), the provision in FERPA that explicitly provides that FERPA does not preempt state law. Krakauer misunderstands the Court’s analysis. The provision merely makes clear that a court’s decision on whether to order release of confidential student records can be guided by state law. The Court’s opinion is clearly based in state law—particularly, balancing the right to know against the right of privacy under Article II, Section 9.

Similarly, to the extent the Court relies on FERPA without addressing Krakauer’s “threshold FERPA arguments,” the Court does so only to point out that the provisions of FERPA speak directly against Krakauer’s argument that Doe had

no reasonable expectation or privacy in his school records. That FERPA addresses a school's "pattern or practice" is quite obviously immaterial to the Court's discussion of FERPA. All of that to say, Krakauer's claim that "THE COURT FAILED TO ADDRESS ARGUMENTS ESSENTIAL TO THE RESOLUTION OF THE CASE," is based on an apparently willful misreading of the Court's opinion. None of his arguments suggest a "question presented by counsel that would have proven decisive to the case" that the Court overlooked. *See* M.R.App.P. 20(a).

CONCLUSION

Krakauer's claims that the Court's opinion is riddled with deficiencies fall flat. The Court addressed the necessary arguments and authorities. M.R.App.P. 20 is not an invitation to reargue matters already decided. The essential points were addressed and resolved, leaving no basis under Rule 20 to rehear the case.

Respectfully submitted this 2nd day of August, 2019.

BY /s/ David R. Paoli
David R. Paoli
Attorney for Intervenor & Appellant

Certificate of Compliance

I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced (except that footnotes and quoted and indented material are single-spaced); with left, right, top and bottom margins of 1 inch; and that the word count calculated by Microsoft Word is 557 words, excluding the Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service.

Dated this 2nd day of August, 2019.

PAOLI LAW FIRM, P.C.

By: /s /David R. Paoli

CERTIFICATE OF SERVICE

I certify that I have filed a true and correct copy of the foregoing with the Clerk of the Montana Supreme Court and that I have served true and accurate copies upon the Clerk of the District Court, each attorney of record, each court reporter from whom a transcript was ordered, and each party not represented by the following means:

Peter Michael Meloy	<input type="checkbox"/>	U.S. Mail
Meloy Law Firm	<input type="checkbox"/>	Express Mail
P.O. Box 1241	<input type="checkbox"/>	Hand-Delivery
Helena, MT 59624	<input type="checkbox"/>	Fax
	<input type="checkbox"/>	Federal Express
	<input checked="" type="checkbox"/>	E-File
Vivian V. Hammill	<input type="checkbox"/>	U.S. Mail
Jessica M. Brubaker	<input type="checkbox"/>	Express Mail
Office of the Commissioner of Higher	<input type="checkbox"/>	Hand-Delivery
Education	<input type="checkbox"/>	Fax
2500 Broadway	<input type="checkbox"/>	Federal Express
Helena, MT 59601	<input checked="" type="checkbox"/>	E-File

Dated this 2nd day of August, 2019

/s/David R. Paoli
By Paoli Law Firm, P.C.

CERTIFICATE OF SERVICE

I, David Robert Paoli, hereby certify that I have served true and accurate copies of the foregoing Brief - Intervenor to the following on 08-02-2019:

Peter M. Meloy (Attorney)
2601 E. Broadway
2601 E. Broadway, P.O. Box 1241
Helena MT 59624
Representing: Jon Krakauer
Service Method: eService

Vivian V Hammill (Attorney)
560 North Park Ave., 4th Floor
Helena MT 59601
Representing: Higher Education, Office of the Commissioner of
Service Method: E-mail Delivery

Helen Clair Thigpen (Attorney)
560 North Park Ave.
P.O. Box 203201
Helena MT 59601
Representing: Higher Education, Office of the Commissioner of
Service Method: E-mail Delivery

Electronically Signed By: David Robert Paoli
Dated: 08-02-2019