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

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 17 CR 0428601
	)	
JASON VAN DYKE,	)	Hon. Vincent M. Gaughan
	)	
Defendant.	)	

INTERVENORS' CONSOLIDATED RESPONSE IN OPPOSITION TO PEOPLE'S MOTIONS TO SEAL *LYNCH* RECONSIDERATION MOTION AND EXPERT BRIEF

Intervenors[1] file this memorandum in opposition to (1) the People's Request to Seal Defendant's Motion to Reconsider *Lynch* Witness Testimony, and (2) the People's Request to Seal Brief Regarding Expert Testimony. The Court should deny both motions for three fundamental reasons.

First, both motions erroneously rely on the Court's earlier rulings that precluded the First Amendment and common law presumptions of public access from applying to court file documents in this case. The Court's February 3, 2017 order has now been vacated as a result of the Illinois Supreme Court's May 23, 2018 Supervisory Order.

Second, the presumption of public access applies to the documents filed in this case, including the two documents that the State seeks to seal here.

Third, the State has not set forth a basis – nor could it – to support the kind of judicial findings required under the law to maintain these documents under seal. In addition, no basis has been or could be asserted to deny the public access to any rulings the Court may have made on

[1] Intervenors are the Chicago Tribune Company, LLC; Sun-Times Media, LLC; the Associated Press; WLS Television, Inc.; WGN Continental Broadcasting Company, LLC; WFLD Fox 32 Chicago; Chicago Public Media, Inc.; and the Reporters Committee for Freedom of the Press.

either the *Lynch* or expert testimony issues. Accordingly, the Court should deny both motions to seal and immediately make available to the public all of the Court's rulings that are currently under seal.

BACKGROUND

The State has filed separate motions to seal (1) Defendant's Motion to Reconsider *Lynch* Witness Testimony (the "*Lynch* Motion") and (2) a brief submitted in connection with an issue regarding an expert witness (the "Expert Brief").[2] In these motions, the State argues that the Court "previously heard arguments and made findings" closing public hearings relating to the defense's motions in limine regarding (1) evidence proffered under *People v. Lynch*, 104 Ill. 2d 194 (1984), and (2) the admissibility of proffered defense expert testimony, asserting that such secrecy was necessary "to protect the rights of the parties to a fair trial as well as to ensure the safety and privacy of the witness[es]." People's Request to Seal Defendant's Motion to Reconsider *Lynch* Witness Testimony ("People's Motion to Seal *Lynch* Motion") at 1; People's Request to Seal Brief Regarding Expert Witness ("People's Motion to Seal Expert Brief") at 1. The motions state further that the *Lynch* Motion and the Expert Brief should be sealed "for the same reasons" as those on which this Court relied in closing the related public hearings, *id.*, apparently relying on an order the Court entered on May 4 to close those hearings over Intervenors' objections. *See* May 4, 2018 Order (Ex. A).

On May 23, the Illinois Supreme Court issued a Supervisory Order directing that this Court's February 3, 2017 Order – which required that all documents in this matter be filed in chambers – be vacated. Ex. A to Intervenors' Supplemental Motion for Access to Court Filings.

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[2] Intervenors understand from the State that this brief is entitled "State's Response to Defendant's Opposition to the People's Motion in Limine (Dr. (NAME REDACTED))" and was filed on or about May 31, 2018.

This Court vacated the February 2017 Order on May 24. Neither of the State's two motions to seal acknowledge this. Nor does either motion address whether the presumption of public access applies, whether suppressing these two documents is essential to preserve any higher interest, or whether the Court could make on-the-record findings narrowly tailored to protect that interest. Nor does either motion to seal address whether public access to either document would create a "substantial probability" of prejudicing Defendant's fair trial right, or whether reasonable alternative measures, such as *voir dire*, would be inadequate to protect that right. *See Press-Enterprise Co. v. Superior Ct.*, 478 U.S. 1, 13-15 (1986).

Intervenors have not seen the Expert Brief, but they have reviewed the already public People's Motion in Limine (Dr. (NAME REDACTED)) (Ex. B) concerning the same expert. In this public motion, the State redacted the expert's name but disclosed that the defense seeks to have this expert witness testify to the following:

- the "neurophysiological response mechanisms including but not limited to the alterations in perceptions, thinking, behavior, and memory";
- "sensory and perceptual adaptations, alterations of memory, and post-shooting officer reactions"; and
- statements made by Defendant to the witness during a 2016 psychological examination, on topics including Defendant's "state of mind" at the time of the McDonald shooting, his explanation for his conduct including why he shot McDonald, his actions after the shooting, his return to work, and how his involvement in the shooting has affected his life.

People's Motion in Limine (Dr. (NAME REDACTED)) at 2. Hearings on this motion were closed, and Intervenors are not aware of any written orders concerning the People's Motion in Limine. Therefore, Intervenors and the public do not know what rulings the Court made, if any, as to the admissibility of this expert's proffered testimony.

Intervenors have seen the publicly filed *Lynch* Motion (Ex. C), which contains more than four pages of redactions. In the *Lynch* Motion, the Defendant asks the Court to reconsider the

admissibility of the testimony of two witnesses whose information apparently was ruled inadmissible by the Court during the May 4 closed hearing. *Lynch* Motion at 1. Although Intervenors have not seen the redacted material (which the State apparently now seeks to seal), Intervenors surmise that the redacted information consists of at least (1) accounts or descriptions of the information that the two witnesses (or others) would provide; and (2) rulings that the Court made as to these or other *Lynch* witnesses.

On January 18, 2018, the Court heard an extensive proffer of the *Lynch* evidence from the defense in open court. 1/18/18 Tr. (Ex. D) at 11-58. That evidence is summarized as follows:

- **Witness Nos. 6, 7:** that on August 26, 2013, in an incident in a courthouse lockup area at the Cook County Juvenile Court, McDonald attempted to strike a Cook County Sheriff's deputy who had sought to restrain him and then threw a pair of handcuffs at the deputy. *Id.* at 21-22. It was not clear whether Witness No. 7 could offer a firsthand account of this event, and the Court reserved ruling on January 18 concerning the extent of that witness's testimony. *Id.* at 26, 28.

- **Witness Nos. 8 and 9:** that on an unspecified date at the Juvenile Temporary Detention Center ("JTDC"), McDonald became angry, threatened staff, incited other detainees against staff, and eventually "aggressively resisted restraints by swinging his torso and kicking his legs and at one point wrapping his arms around a female staff member," whereupon he continued to resist by kicking his legs and "jumped to his feet and attempted to spit at staff members." *Id.* at 31-32.

- **Witness Nos. 14, 15:** that on February 16, 2014, at the JTDC, McDonald verbally threatened a staff member, "refused to obey directives," and "ripped a phone . . . off the console and pulled out all of the cords" before resisting staff members' efforts to restrain him and further threatening a staff member. *Id.* at 40-42.

- **Witness No. 16:** that on January 20, 2014, at the JTDC, McDonald "became very aggressive, angry and attempted to break a television set," and when confronted by staff, McDonald swore, "continued to be belligerent," and punched a staff member in the chest with a closed fist. *Id.* at 44-45.

- **Witness No. 17:** that on January 19, 2014, at the JTDC, McDonald became involved in a fight in a television area of the facility and then punched another detainee multiple times after staff told him to sit down. *Id.* at 46-47.

- **Witness No. 23:** that on February 20, 2014, at Juvenile Court, McDonald was found to have violated his probation after a positive drug test, and while being escorted out of the courtroom, he "left in an aggressive manner and ended up

spitting on a sheriff," threatening another detainee, and telling a staff member that "he should kill her." *Id.* at 54-55.

Again, Intervenors are not aware of how the Court ruled on May 4 as to which witness testimony would or would not be admitted under *Lynch.* But according to the unredacted, public portion of the *Lynch* Motion, eight witnesses testified at the closed May 4 hearing, and "[t]he court ruled that six [6] of the witnesses would be permitted to testify at trial, and also ruled on the scope of their testimony." *Lynch* Motion at 1.

ARGUMENT

The First Amendment and common law presumptions of public access apply to both the *Lynch* Motion and the Expert Brief. No legally proper argument has been made – or can be made – that sealing these documents is essential to preserve any higher interest in this case. The idea that publicity over these documents could create a substantial probability of prejudice to the Defendant's fair trial right is pure speculation, and *voir dire* and instructions to the jury would provide a more than adequate safeguard. As for witness identities, no showing has been made that their safety is in jeopardy. Even assuming that it is, the State has not shown that redaction of their names or other identifying information would be insufficient to protect their safety and privacy, particularly given that the *Lynch* evidence already was proffered publicly in open court on January 18, 2018. The Court should deny both requests to seal and should release redacted transcripts of the closed hearings revealing how, if at all, the Court ruled.

I. To The Extent The Motions To Seal Rely On Rulings Based On The Court's Now-Vacated February 3, 2017 Order, Those Rulings Are No Longer Valid.

In moving to seal the *Lynch* Motion and the Expert Brief, the prosecution expressly relies on the Court's May 4 order closing the *Lynch* and defense expert hearings. *See* People's Motion to Seal *Lynch* Motion; People's Motion to Seal Expert Brief. But on May 23, the Illinois Supreme Court issued a Supervisory Order directing that the February 2017 Order be vacated. As

Intervenors established in their Reply Memorandum in Support of Their Supplemental Motion, filed June 11, the Supervisory Order reflected the Supreme Court's rejection of this Court's view that the First Amendment and common law presumptions of public access did not apply to the court file documents in this case because the February 2017 Order prevented any documents from being filed in public in the first place. With the February 2017 Order vacated, any rulings based upon it, particularly as they concern sealing or suppression of information from the public, are no longer valid on public access issues. As the State has relied almost entirely on pre-May 23 rulings for its basis to seal the *Lynch* Motion and the Expert Brief, and has presented no other basis for sealing, the Court should deny the motions to seal.

II. The Presumption Of Public Access Applies To The *Lynch* Motion And The Expert Brief.

The First Amendment and common law presumptions of public access apply to both the *Lynch* Motion and the Expert Brief, both of which are judicial documents filed with the Court. *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 236 (2000). This Court erroneously determined, in its May 4 Order, that the *Lynch* and expert hearings were not subject to the presumption of public access because the subject matter of the closed hearings was not historically open to the public (the "experience test") and did not play a positive role in the functioning of these hearings (the "logic test"). May 4 Order at 3-5. This was an incorrect legal conclusion for at least three reasons.

First, this Court found that the hearings did not concern a subject matter that had been historically open to the public, reasoning that "[b]oth concern potential evidence that may not be admissible at trial." *Id.* at 4-5. But the fact that a pretrial hearing may include potentially inadmissible evidence does not mean that it fails the experience test. In *Waller v. Georgia*, 467 U.S. 39, 45 (1984), for example, the United States Supreme Court recognized the need for public

access to a suppression hearing even though, as here, the hearing concerned potentially inadmissible evidence. Further, the Court erred as a matter of law in finding that the subject matter of the closed hearings was "functionally the same as pretrial depositions" to which the presumption does not attach. May 4 Order at 5 (citing *People v. Pelo*, 384 Ill. App. 3d 776 (4th Dist. 2008)). Unlike *Pelo*, in which there was no judicial supervision, this Court presided over the closed *Lynch* and expert hearings. In *Pelo*, the Appellate Court was addressing a videotaped evidence deposition never filed with the court or in public, and not testimony in a courtroom. Indeed, the Appellate Court explicitly distinguished deposition testimony from testimony that, like here, involves judicial supervision. *Id.* at 783. The evidence deposition in *Pelo* was fundamentally different from this matter in which the State seeks to seal two judicial documents that were filed with the Court and that therefore are subject to the presumption of public access. *See A.P. v. M.E.E.*, 354 Ill. App. 3d 989, 997 (1st Dist. 2004) (citing *Skolnick*, 191 Ill. 2d at 236).

Second, with regard to the logic test, the Court in its May 4 Order held that public access does not play a significant positive role in the functioning of these hearings because public access "could result in potential jurors learning of information that is inadmissible or otherwise prejudicial to the Defendant." May 4 Order at 5. Again, this conclusion is wrong as a matter of law, as it failed to give proper weight to relevant case law recognizing that pre-trial criminal hearings are presumptively open even though this means members of the public may potentially hear evidence prior to a jury hearing it. *See, e.g.*, *Waller*, 467 U.S. at 50.[3] "Th[e] question is not whether the

[3] The Court attempted to distinguish *Waller* by pronouncing the public interest in suppression hearings as "particularly strong." May 4 Order at 5 (noting that suppression hearings are different from the closed *Lynch* and expert hearings because they involve "ancillary matters of improper police action."). Although the public interest in suppression hearings may be "particularly strong," so is the public interest in hearings on motions involving evidentiary decisions. *See People v. LaGrone*, 361 Ill. App. 3d 532, 538 (4th Dist. 2005) (rejecting as reason for closure that media may misuse inadmissible information from hearings on motions *in limine*). That is particularly true in a case as important as this one.

information would taint potential jurors, but whether the circumstances of access would make it so that *voir dire* could not remedy any taint. Widespread publicity does not necessarily result in widespread knowledge among potential jurors of the facts reported." *LaGrone*, 361 Ill. App. 3d at 537.

Third, the Court noted that the closed *Lynch* and expert hearings "bear no resemblance to a trial or have any likelihood of producing a final adjudication." May 4 Order at 5. In *LaGrone*, the closed hearings concerned the admissibility of some of the victims' statements as well as evidence of defendant's character. 361 Ill. App. 3d at 538. Neither of the *LaGrone* hearings was any more likely than the *Lynch* or expert hearings to produce a final adjudication or induce a plea bargain. Nevertheless, the hearings in *LaGrone* were entitled to the presumption, as are the *Lynch* Motion and the Expert Brief here.

Particularly in a case such as this, it is essential that the press and public have access to the process at *every stage* of the proceedings – including critical pre-trial proceedings – to monitor and ensure that the system is working, and to promote respect for the judicial process itself. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they have been prohibited from observing." *Richmond Newsp., Inc. v. Virginia*, 448 U.S. 555, 572 (1980). Transparency promotes respect for the judicial system by enabling the public to understand what is happening in the courts. By contrast, when court documents and testimony are sealed off from public view, the court's interest is injured, as the judicial system loses the benefit of public scrutiny, and public confidence in the system erodes. This reasoning applies with even greater force to judicial rulings. They are the property of the public, which underwrites and whose confidence sustains the judicial system that produces them. *See A.P.*, 354 Ill. App. 3d at 997, citing *Pepsico, Inc. v. Redmond*, 46 F.3d 29, 31 (7th Cir. 1995).

Accordingly, the Court's May 4 Order did not supply any legally proper basis for concluding that the *Lynch* Motion or the Expert Brief should be sealed.

III. The Presumption Of Public Access Has Not Been And Cannot Be Overcome Here.

Because the presumption of public access applies to the two documents sought to be sealed here, the documents may not be sealed unless the Court makes findings on the record that sealing is essential to preserve a higher interest and is narrowly tailored to protect that interest. *Press-Enterprise Co.*, 478 U.S. at 13–15. In addition, where the interest is the defendant's fair trial right, the Court may not seal unless it finds that public access would create a "substantial probability" of prejudicing such right and that reasonable alternative measures, such as *voir dire*, would be inadequate to protect that right. *Id.* In support of the two instant motions to seal, the State has offered no basis for these required judicial findings, and no such basis could be asserted.

As for the *Lynch* Motion, the public already has heard an extensive public proffer of all of the *Lynch* evidence. 1/18/18 Tr. (Ex. D) at 11-58. As this Court occasionally has stated, the "barn door" already has been opened and cannot now be closed – and courts have held the same. 4/28/18 Tr. (Ex. E) at 50; *see also In re Continental Illinois Sec. Litig.*, 732 F.2d 1302, 1313 (7th Cir. 1985) ("Once the evidence has become known to members of the public, including representatives of the press, through their attendance at a public session of court, it would take the most extraordinary circumstance to justify restrictions on the opportunity of those not physically in attendance at the courtroom to see and hear the evidence . . . ."). The public has already heard from nine *Lynch* witnesses by proffer on January 18, 2018. To the extent there is any overlap between that testimony and the testimony or ruling discussed in the *Lynch* Motion, there is no basis to seal such information already in the public domain.

Certainly, the May 4 Order does not establish a basis for the judicial findings required to seal either *Lynch* Motion or the Expert Brief. Although the May 4 Order cited witness security

and various threats in the courthouse environs as a basis for finding that open hearings on the *Lynch* issues would create a "substantial probability" of prejudice to Defendant's fair trial right, the Court did so in conclusory, speculative terms. *See* May 4 Order at 8-9. Even if there were a real threat to witness security, the Court failed to explain how measures designed to protect witness security, such as redaction of witness names, or the extensive security measures visibly in place in and around the courtroom, would not counter any conceivable influence that publicity could have on Defendant's fair trial right. *Id.* The Court further dismissed the availability of reasonable alternative measures to protect that right with the statement that "[t]he Court cannot assume, ahead of time, that *voir dire* or instructions will cure any prejudice when it has the ability to prevent it." May 4 Order at 9. By that reasoning, alternative measures would almost never be found adequate, and public access would occur in only the rarest of cases. The well-established law is that jurors are presumed to follow their instructions and that a court's ability to control influences on the jury sets a "high bar" for attempts to deny public access based on speculation about "juror prejudice due to pretrial publicity." *Skilling v. United States,* 561 U.S. 358, 399 n.34 (2010). "News coverage of civil and criminal trials of public interest conveys to society at large how our justice system operates. And it is a premise of that system that jurors will set aside their preconceptions when they enter the courtroom and decide cases based on the evidence presented." *Id.; see also LaGrone*, 361 Ill. App. 3d at 537 ("*voir dire* is the preferred method for guarding against the effects of pretrial publicity"); *People v. Taylor*, 166 Ill. 2d 414, 438-39 (1995) (holding that jurors are presumed to follow their instructions, even when exposed to extraneous material).

Moreover, the Court's May 4 Order relied on recent testimony before the Court from a defense expert in social psychology, Dr. Bryan Edelman, in support of the Court's conclusions about the effect of pretrial publicity on the fair trial right. *Id.* at 6. Dr. Edelman's testimony bore upon the two critical aspects of the judicial findings required for suppression to protect the fair

trial right: whether disclosure will create a "substantial probability" of prejudice to that right, and whether reasonable alternative measures are inadequate to protect it:

> [T]here can be inflammatory coverage; but it doesn't mean that it has really impacted the community. I've had cases where there's been hundreds of articles; and then you do the survey, less than half of the – the jury pool is familiar with the case. It just doesn't capture their attention.

4/18/18 Tr. (Ex. F) at 60. Dr. Edelman's testimony that even "inflammatory" news coverage often does not reach the jury pool undermines any argument that public disclosure of the *Lynch* Motion, the Expert Brief, or Your Honor's substantive rulings on either of those issues would truly create a "substantial probability" of prejudicing Defendant's fair trial right.

> [A]ssuming that . . . there's high recognition, or appears to be significant pre-judgment, I would recommend different remedial measures. It would be – sometimes they're minor; and it's just maybe an individual sequestered *voir dire*, or extended jury questionnaire, or excluding jurors who on the questionnaire say they're familiar with the case; and it stops there.

Id. 60-61. Dr. Edelman's testimony that remedial measures such as *voir dire*, jury questionnaires, and Your Honor's ability to exclude jurors who have been exposed to news coverage of a case also undermines any argument that reasonable alternative measures available to the Court would be inadequate to protect the fair trial right.

In its two motions to seal, the State presents no additional argument in support of any basis for Your Honor to find that disclosure of the *Lynch* Motion, the Expert Brief, or the Court's rulings will create a "substantial probability" of prejudice to the fair trial right, or that reasonable alternative measures would be inadequate to protect it. Dr. Edelman's testimony instead strongly suggests the contrary conclusion, namely that there is no basis for the Court to make such findings.

CONCLUSION

The First Amendment and common law presumptions of access apply to the *Lynch* Motion and the Expert Brief. The motions to seal cannot be granted unless that presumption is overcome,

and the State has supplied no reason to believe the presumption can be overcome here. For these reasons, the Court should deny both motions to seal and, at a minimum, order the release of portions of the two documents and the closed hearing transcripts reflecting what the Court actually has ruled on both of these issues in this case of substantial public import.

Dated: June 12, 2018

Respectfully submitted,

CHICAGO PUBLIC MEDIA, INC.

By: _____
One of Its Attorneys

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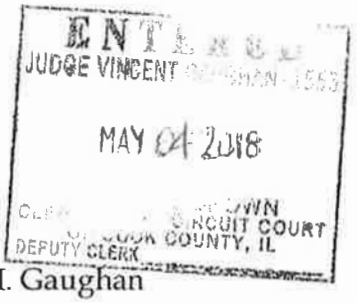
EXHIBIT A

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

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	17 CR 04286-01
Plaintiff,	)	
	)	
v.	)	
	)	
JASON VAN DYKE,	)	
	)	Hon. Vincent M. Gaughan
Defendant.	)	Judge Presiding



Order Closing May 4, 2018 Proceedings

The Court granted leave to seven news organizations (Intervenors) to intervene in this action regarding access to records and proceedings. Two matters, a hearing regarding admissibility of material under *People v. Lynch*, 104 Ill. 2d 194 (1984), and a hearing on the admissibility of a certain expert's testimony offered by the Defense or limits thereon, are scheduled to be heard on May 4, 2018. The State moved for closure of these proceedings and the Defense agreed. On April 28, 2018, the Court indicated, preliminarily, it would close the May 4 proceedings. Intervenors object to closure and the Court allowed Intervenors to file a brief on their position. The Court has reviewed that brief, pleadings of the parties, and relevant authority. Accordingly, the May 4 proceedings will be closed to the media and general public.

Legal Standard

The public has parallel rights of access to court records and proceedings rooted in the federal and state constitutions, common law, and state statute. *People v. Kelly*, 397

Ill. App. 3d 232, 242 (2009). As the Court commented on April 28, "the first amendment...enables all the other articles and amendments in our Constitution to be strong."[1] Indeed, openness is a keystone to the integrity of the administration of criminal justice. See *Richmond Newspapers v. Virginia*, 448 U.S. 555, 564-73 (1980) (discussing historical tradition of open criminal trials and the benefits of public access). But, both the United States and Illinois Supreme Courts recognize the right of public access is not absolute. *Press-Enterprise Co. v. Superior Court of California for the County of Riverside*, 478 U.S. 1, 9 (1986) (*Press-Enterprise II*); *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 231 (2000). Rather, the first amendment gives rise to a qualified right of access when the tests of experience and logic render the record or proceedings presumptively open. *Kelly*, 397 Ill. App. 3d at 260 (citing *Press-Enterprise II*, 478 U.S. at 9). The experience test examines whether "there has been a tradition of accessibility;" and the logic test inquires whether "public access plays a significant positive role in the functioning of the particular process in question." *Press Enterprise II*, 478 U.S. at 8.

"If the presumption applies to a certain type of proceeding or record, the trial court cannot close this type of proceeding or record, unless the court makes specific findings demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve those values." *Kelly*, 397 Ill. App. 3d. at 261 (citing *Press-Enterprise II*, 478 U.S. at 13-14; *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 501, 510 (1984) (*Press-Enterprise I*). "If the value asserted is the defendant's right to a fair trial, then the trial court's findings must demonstrate, first,

[1] Report of Proceedings, April 28, 2018, p. 9.

that there is a substantial probability that defendant's trial will be prejudiced by publicity that closure will prevent; and second, that reasonable alternatives cannot adequately protect the defendant's fair trial rights. *Id.* (citing *Press-Enterprise II*, 478 U.S. at 13-14).

In a criminal proceeding, "[n]o right ranks higher than the right of the accused to a fair trial." *Press-Enterprise I*, 464 U.S. at 508 (*Press-Enterprise I*). Thus, the interests of the public's right of access and a defendant's right to a fair trial may be in competition. *People v. LaGrone*, 361 Ill. App. 3d 532, 535 (2005). So, in determining the extent of access, a court has to "craft a careful and delicate balance." *Kelly*, 397 Ill. App. 3d at 256. The trial court should "take in to consideration all facts and circumstances unique to that case and decide the appropriate parameters of closure" – what is restricted and for how long. *Id.* (internal quotes omitted).

Analysis

A presumption of access can attach to certain pretrial criminal proceedings. See, e.g., *Waller v. Georgia*, 467 U.S. 39 (1984) (presumption applied to a hearing on a motion to suppress wiretap evidence). However, the presumption is most acute when the pretrial proceeding itself resembles a trial and has a likelihood of resulting in a final adjudication of the case. *Press Enterprise II*, 478 U.S. at 12 ("California preliminary hearings are sufficiently like a trial to justify [public access].***Because of its extensive scope, the preliminary hearing is often the final and most important step in the criminal proceeding"); *Kelly*, 397 Ill. App. 3d at 258 (describing *Waller* decision noting "a suppression hearing will be, in effect, the only trial if the defendant subsequently pleads

guilty" and "a suppression hearing often resembles a bench trial"). In those instances, the presumption of access that applies to criminal trials through the experience and logic tests extends to pretrial hearings.

In *Kelly*, the appellate court found the presumption of access did not attach to four pretrial hearings concerning evidence of other crimes and questionnaires for potential jurors. *Id.* at 259. The court noted those proceedings bore no resemblance to the suppression hearing in *Waller*, the subject matter of the proceedings was not historically open to the public, and their purpose and function would not be furthered by disclosure. *Id.* The other crimes evidence did not pass the experience test because "potential evidence does not carry a presumption of access until its use in court." *Id.* at 260 (interpreting *People v. Pelo*, 384 Ill. App. 3d 776, 782-83 (2008)); nor the logic test because "publicity could undermine the whole purpose of the hearing, which is to screen out unreliable or illegally obtained evidence." *Id.* quoting *Press-Enterprise II*, 478 U.S. at 14-15 (internal quotes omitted).

The *Kelly* court further noted that even if the presumption of access applied to the proceedings the balancing of competing interests along with appropriate parameters warranted closure. *Id.* The defendant's right to a public trial was not at issue. *Id.* at 262. Intense coverage of the case was an undisputed fact. *Id.* at 263. And privacy interests of sex crime victims and minors were at stake. *Id.*

The proceedings at issue and surrounding circumstances here bear strong similarity to *Kelly* in a number of regards. First, the subject matter of the May 4 proceedings is unlike those that have been historically open to the public. Both concern

potential evidence that may not be admissible at trial. They are functionally the same as pretrial depositions, with the only difference being that the Judge will be present. *Cf. Pelo*, 384 Ill. App. 3d 776 (presumption did not apply to pretrial deposition not yet entered into evidence). Thus, these do not seem to pass the experience test.

Likewise, public access would not further the purpose and function of these hearings. The proceedings concern admissibility of evidence and disclosure could result in potential jurors learning of information that is inadmissible or otherwise prejudicial to the Defendant.

Moreover, these pretrial hearings bear no resemblance to a trial or have any likelihood of producing a final adjudication. The proceedings will not function like a "full-scale trial." *Press-Enterprise II*, 478 U.S. at 7. And it is not reasonably conceivable the outcome of the hearings will induce a plea bargain. Thus, they are unlike the preliminary hearing discussed in *Press Enterprise II* or the suppression hearing in *Waller*. The Supreme Court commented that the need for a public hearing is particularly strong when the pretrial hearing concerns allegations of police misconduct "since the public has a strong interest in exposing substantial allegations of police conduct to the salutary effects of public scrutiny." *Kelly* 397 Ill. App. 3d at 258 (quoting *Waller*, 467 U.S at 47) (internal quotation marks omitted). The subject matter at issue here do not involve ancillary matters of improper police action like those raised in a suppression hearing that would not otherwise be exposed to the "salutary effects of public scrutiny." Rather, the offense itself is an allegation of improper police conduct so the "particularly strong" need for public scrutiny will be satisfied by the public trial.

Next, even if the presumption of access were to apply to these proceedings, the Court's balancing of competing interests results in a conclusion that closure is warranted. From the outset, it has been manifestly clear that this case is the subject of intensive public interest and media coverage. As the Intervenors stated in their motion to intervene, "[t]he media and the public have a significant interest in this important criminal matter in which a Chicago police officer allegedly murdered a teenager by shooting him 16 times in an incident recorded by a police video camera." And "the incident has become part of the national discussion about urban policing in America." Intervenors also note "[r]eporters have attended every court hearing since Officer Van Dyke was charged *** in November 2015."

Likewise, A LEXIS search of major news publications using the names Jason Van Dyke and Laquan McDonald yields 8,164[2] articles since November 2015. An internet search using Google returned over 1,120,000 "hits." (A court can take judicial notice of media coverage to assess "the probable extent of publicity." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562 (1976)). Further underscoring the level of interest, an expert on the effect of pretrial publicity, Dr. Bryan Edelman, testified this case is in the top four he has worked on in his career in terms of extent of media coverage.[3] (He noted his experience includes trials stemming from the 2013 Boston Marathon bombing, the 2012 theater mass shooting in Aurora, Colorado, the prosecution of a priest for murdering a young woman decades earlier in Hidalgo County, Texas, and the prosecution of

[2] As of April 24, 2018

[3] Report of Proceedings, Apr. 8, 2018, at 89-90.

Timothy McVeigh for the 1995 Oklahoma City bombing). Accordingly, that there is widespread and intense publicity concerning this case is more than speculative: it is indisputable. *Cf. Kelly*, 397 Ill. App. 3d at 240, 263.

This Court has stated this case, which has been pending for over two years since the initial indictment and over three years since the occurrence of the charged offense, will go to trial this summer. With the trial nearing, "adverse publicity can endanger the ability of a defendant to receive a fair trial." *Gannett Co. v. DePasquale*, 443 U.S. 368, 378, (1979) (internal citations omitted). And "[t]o safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity." *Id.*

Intervenors contend the Defendant's fair trial interests are diminished because the proceedings concern potentially exculpatory evidence the Defendant wants to be admitted at trial. Thus, in the Intervenors' argument, the subject matter is distinguishable from other crimes evidence like that at issue in *Kelly*. The Court is not persuaded that distinction requires a different result. *Lynch* evidence is much like other crimes evidence—both are allegations of a person's bad conduct and character. In fact, the very same conduct has the potential to be either depending on how it might come before a court. However it presents, such material is not yet in evidence before trial and may not be admissible. So, ultimately, the purpose and function of a pretrial hearing on *Lynch* evidence is similar to one regarding other crimes and disclosure would similarly undermine that purpose.

Within the same argument, Intervenors posit that since a suppression hearing would involve incriminating evidence, the presumption of access must, by force of logic, attach to hearings involving potentially exculpatory evidence. The Court is not persuaded. The public interest supporting the openness of suppression hearings does not derive from whether the evidence at issue is harmful or helpful to the defendant: it derives from the "particularly strong" need for public scrutiny of allegations of police misconduct. As explained earlier, the trial on this charge will meet that interest.

Further, the proceeding on *Lynch* material will concern a minor. The privacy interests generally afforded a minor were noted in *Kelly* and are applicable here, even though this case does not involve a sex crime. Intervenors argue *Kelly* was "a highly unusual case" because the hearings at issue "involved allegations of unlawful sex with an underage female." In so arguing, Intervenors seem to contend that fact alone distinguished it from *Waller*. The Court disagrees. The *Kelly* court noted consideration of several reasons made closure proper.

In addition, this case presents serious safety concerns. The Constitution compels courts not only to vindicate individual rights after a deprivation, but also in applicable circumstances, to take actions to ensure the protection of those rights, of which, life and liberty are paramount. During the pendency of this case, the Defense has reported several threats toward the Defendant. The Court received a copy of a flier distributed in front of the Leighton Building that, in part, called for violence against the Defendant. While the flier is an example that appears to come from a certain point of view, other material reported by the Defense and available on the internet is no less intense or

inflammatory. The Court is greatly concerned that the witnesses summoned to appear at the May 4 hearings could be exposed to harm. Aside from the effect these circumstances may have on the truth-seeking function of the case, the Court has a duty to the witnesses for their basic safety.

Based on these considerations, the Court finds there is a substantial probability that Defendant's trial will be prejudiced and the safety of witnesses will be at risk if the May 4 proceedings are open. Only closure will prevent that harm.

Intervenors do not suggest alternatives to closure other than to state "*voir dire* and instructions can and should be an adequate alternative." And "'[i]t is presumed that juries will obey the Court's instructions to limit themselves to the facts in evidence." While *voir dire* can normally "identify those jurors whose prior knowledge of a case would disable them from rendering an impartial verdict," courts recognize there are "circumstances where *voir dire* cannot remove the taint" of pretrial publicity. *Kelly*, 397 Ill App. 3d at 264. *Voir dire* and instructions are measures a court can employ *post hoc* to address the effects of pretrial publicity. The Court cannot assume, ahead of time, that *voir dire* or instructions will cure any prejudice when it has the ability to prevent it. This Court has a duty to prevent this from becoming a "rare case" where such measures cannot protect the right to a fair trial. *Id.* Accordingly, the Court finds reasonable alternatives to closure cannot adequately protect the Defendant's fair trial rights.

In sum, these proceedings do not give rise to a presumption of access. Closure is essential to preserve competing interests. And reasonable alternatives are not available.

Despite closure of the in-court hearings, transcripts will be available as they have been for all proceedings in this case.

Conclusion

Based on the foregoing, the proceedings regarding the Defense's motions to admit *Lynch* evidence and expert testimony on May 4, 2018, or any date to which these specific matters may continue, shall be closed to the public and media.

Entered:

Vincent M. Gaughan

Judge Vincent M. Gaughan
Cook County Circuit Court
Criminal Division 1553

Date: May 4, 2018

ENTERED
JUDGE VINCENT GAUGHAN-1553
MAY 04 2018
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

EXHIBIT B

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

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff,)
)
vs.) Gen. No. 17 CR 4286
)
JASON VAN DYKE)
)
Defendant.)

PEOPLE'S MOTION IN LIMINE (Dr. [redacted]

NOW COME the PEOPLE OF THE STATE OF ILLINOIS, by and through their Attorney, Joseph H. McMahon, Special Prosecutor and State's Attorney of Kane County, Illinois, and ask this Court to bar the defense expert, Dr. [redacted] from testifying or making the following statements at trial and state as follows:

INTRODUCTION

In Illinois whether to admit expert testimony is within the sound discretion of the trial court. The trial court must determine if the testimony is relevant and if the testimony will assist the jury. Expert testimony is not admissible on matters of common knowledge unless the subject is difficult to understand and explain. *People v. Gilliam*, 172 Ill. 2d 484, 218 Ill Dec. 884 (1996). The defendant, through Dr. [redacted] is attempting to introduce his own state of mind, hearsay of other potential witnesses and opinions on the credibility of witnesses. Each is an issue for the jury to observe and evaluate. Issues of credibility, the defendant's intent and state of mind are matters that jurors are capable of and are expected to determine in every criminal case. The present case does not present a unique set of facts or psychological issues that require the

testimony of an expert witness and Dr. [redacted] testimony is neither necessary to aid the fact-finder nor an appropriate use of expert testimony to introduce otherwise hearsay statements.

The defendant has disclosed that he intends to call Dr. [redacted] as an expert in physiological reactions experienced by police officers during and following an officer involved shooting. Further, he expects that Dr. [redacted] will testify to the neurophysiological response mechanisms included but not limited to the alterations in perceptions, thinking, behavior and memory. The defense has also disclosed that Dr. [redacted] will testify regarding sensory and perceptual adaptations, alterations of memory, and post-shooting officer reactions.

The People anticipate that the defense will attempt to have Dr. [redacted] testify to statements the defendant made to him during a psychological evaluation performed on April 1, 2016. These statements will be offered for the truth of the matter asserted and go to the defendant's state of mind at the time of the shooting. The People object to Dr. [redacted] anticipated testimony and the attempt to introduce the defendant's state of mind, the defendant's explanation for his conduct and any testimony about what actions he took after the shooting and request this Court to:

1. Bar Dr. [redacted] from testifying to any out of court statements made by the defendant;
2. Bar Dr. [redacted] from testifying about what actions the defendant took after the shooting:
3. Bar Dr. [redacted] from testifying about the defendant's return to work;
4. Bar Dr. [redacted] from testifying about how killing Laquan McDonald affected the defendant's life; and
5. Bar Dr. [redacted] from testifying as to why the defendant shot Laquan McDonald.

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LEGAL ANALYSIS AND ARGUMENT

In Illinois, the rules governing the admissibility of expert testimony is well-established. First, trial judges are given broad discretion in determining the admissibility of expert testimony. *People v. Enis*, 139 Ill. 2d 264, (1990). Indeed, "expert testimony is only necessary when the subject is both particularly within the witness's experience and qualifications and beyond that of the average jurors, and when it will aid the jury in reaching its conclusion. Expert testimony is not admissible on matters of common knowledge unless the subject is difficult to understand and explain." *People v. Becker*, 239 Ill. 2d 215, 234 (2010).

1. Dr. [redacted] should be barred from testifying about the defendant's state of mind.

The Court should bar Dr. [redacted] from testifying to the defendant's state of mind at the time he shot and killed Laquan McDonald. In *People v. Hulitt*, 361 Ill. App. 3d 634 (2005), the defense wanted to call an expert psychologist to testify as to the defendant's appreciation of the risk involved when he committed certain acts which caused the death of the victim. The court held that recklessness was not a state of mind which required an expert. The court also held that the expert could not testify to the defendant's state of mind at the time of the offense because the expert was not present with the defendant nor did he observe the acts.

Here, Dr. [redacted] is expected to be called to explain the alteration in perceptions, thinking, behavior and memory of the defendant. Permitting Dr. [redacted] to testify to the defendant's alteration in perceptions, thinking and perceptual adaptations goes directly to the defendant's state of mind at the time he shot Laquan McDonald. Presumably, Dr. [redacted] will attempt to explain away facts that are known to be true when he testifies to an altered perception. The jury does not need the assistance of an expert in determining the actions that took place on October 20, 2014.

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The jury will have an opportunity to view the video of the shooting. Additionally the jury does not need Dr. [redacted] to tell them what thoughts were going through the defendant's mind before and during the shooting, because only the defendant can know that information. Any testimony related by Dr. [redacted] in that regard is inadmissible, self-serving hearsay.

In *People v. Pertz*, 242 Ill. App. 3d 864 (1993), the court barred a defense expert from testifying to the defendant's state of mind stating that if the expert was allowed to testify as to the defendant's intent that would have usurped the province of the jury. The expert was allowed to opine that the defendant was suffering from a personality disorder on the night of his wife's death. The expert's testimony was offered to show that the defendant lacked the mental state of intent but that he acted recklessly. Here, Dr. [redacted] testimony that the defendant had an altered state of reality or perception is intended to show that the defendant was justified when he feared for his life.

In *People v. Raines*, 354 Ill. App. 3d 209, (2004), the court held that the trial court did not abuse its discretion when the defense expert was barred from testifying as to the defendant's state of mind.

> "The trial court barred Dr. Kuncel from testifying to defendant's state of mind when he shot Deckard, finding defendant's state of mind was a matter of common knowledge. On appeal, defendant does not argue that Dr. Kuncel's testimony was necessary to explain matters beyond the common knowledge of ordinary persons. Rather, defendant argues that his state of mind at the time of the crime was relevant to the issue of whether he intended to kill Deckard, and therefore, Dr. Kuncel's testimony would have assisted the jury. "The question of [a] defendant's state of mind at the time of the crime [is] a question of fact to be determined by the jury." *People v. Pertz*, 242 Ill.App.3d 864, 903, 183 Ill.Dec. 77, 610 N.E.2d 1321, 1346 (1993), citing *People v. Elder*, 219 Ill.App.3d 223, 225, 161 Ill.Dec. 872, 579 N.E.2d 420, 421 (1991). "Mental states, such as the intent to kill or to cause great bodily harm, are not commonly established by direct evidence and may be inferred from the character of the defendant's conduct and the circumstances surrounding the commission of the offense." *People v. Adams*, 308 Ill.App.3d 995, 1006, 242 Ill.Dec. 651, 721 N.E.2d 1182, 1190 (1999), citing *People v. Summers*, 202 Ill.App.3d 1, 10, 147 Ill.Dec. 793, 559 N.E.2d 1133, 1138 (1990). The trial

> court's bar of Dr. Kuncel's specific testimony that defendant did not intend to shoot was not an abuse of discretion. Dr. Kuncel's testimony was not offered in support of any asserted defense by defendant, *e.g.*, insanity, and defendant did not argue that the testimony was necessary to explain evidence beyond the common knowledge of the jury. Therefore, the court correctly barred Dr. Kuncel's testimony regarding defendant's state of mind at the time of the crime. Consequently, however, we fail to see the relevance of any of Dr. Kuncel's testimony and question whether the court should have allowed Dr. Kuncel's testimony at all. Regardless, the court did not abuse its discretion"

Additionally, in *People v. Elder*, 219 Ill. App. 3d 223, (1991) the court stated in barring a defense expert, "The question of the defendant's mental condition at the time of the crime is a question of fact to be determined by the trier of fact. (*People v. Ford* (1968), 39 Ill.2d 318, 235 N.E.2d 576.) Expert opinion may not be admitted on matters of common knowledge unless the subject is difficult to comprehend and explain, and went on to find that a jury is capable of determining whether the defendant was acting under a sudden and intense passion as a result of serious provocation." (*People v. Johnson* (1981), 97 Ill.App.3d 1055, 53 Ill.Dec. 402, 423 N.E.2d 1206.) The fact finder in the present case will be asked to determine the defendant's state of mind and is free to make reasonable inferences based on the actions of the defendant, Laquan McDonald and others, along with the statements of the defendant and the circumstances surrounding the shooting of Laquan McDonald.

A jury does not need an expert to assist them in judging the credibility of the witnesses including the defendant if he testifies. The defense indicates that Dr. [redacted] will testify to alterations of memory. It would appear that expert testimony as to alterations of memory would be offered to explain why the defendant made a statement about the events that occurred on October 20, 2014, which are now known to be false. The jury can determine the credibility of all witness including the defendant without the testimony of Dr. [redacted]

II. Dr. [redacted] should be barred from testifying to other out of court statements of witnesses and the defendant

Dr. [redacted] should be barred from testifying to information which is not relevant to the charges in the indictment. Dr. [redacted] should be barred from testifying that the defendant had never received any specific education as to the types of mental and behavioral phenomenas that occur during a critical incident.

Dr. [redacted] should be barred from testifying to any statement Detective McNaughton or any other member of the Chicago Police Department made to the defendant at the scene or later at area central because it is irrelevant what members of the police department said to the defendant after the shooting.

Dr. [redacted] should be barred from testifying as to any actions the defendant took when he left area central after the shooting, when the defendant went home or what his wife said to him. This testimony is irrelevant to issues before the jury and any statements the defendant's wife made are hearsay.

Dr. [redacted] should be barred from testifying as to the defendant's return to work after the shooting, his response to police calls after the shooting, and any treatment the defendant sought after the shooting. This testimony is irrelevant to whether or not the defendant committed first degree murder, aggravated battery with a firearm or official misconduct.

Dr. [redacted] should be barred from testifying as to any statements made to him by the defendant or in the alternative the defendant should be required to testify prior to Dr. [redacted] testifying as an expert in the case. The defendant cannot admit his own statement about what occurred on October 14, 2014, through the testimony of another witness. Under the hearsay rule, a party is ordinarily excluded from proving his own out-of-court self-serving statements (*People v. Colletti* (1968), 101 Ill. App. 2d 51, 242 N.E. 2d 63, *cert.denied*, (1969). The rationale for

exclusion is that testimony regarding out-of-court statements made by a defendant after commission of a crime is not competent because the defendant had a motive to fabricate favorable testimony relating to his innocence. (*People v. Lewis* (1979), 75 Ill.App.3d 259, 30 Ill.Dec. 751, 393 N.E.2d 1098.)

CONCLUSION

Dr. [redacted] should be barred from testifying as an expert in this case, because his testimony will not assist the jury and is offered on an issue that is not beyond the common knowledge of a jury. Dr. [redacted] testimony regarding statements in his report are irrelevant to the issues before the jury and an attempt to introduce inadmissible and irrelevant hearsay. In the alternative, Dr. [redacted] should not be allowed to testify prior to the defendant testifying on his own behalf. Granting this *motion in limine* does not bar the defendant from presenting a self-defense claim nor does is prevent the defendant from testifying regarding his actions. Therefore, the People pray that this Honorable Court grant the *People's Motion in Limine* and bar Dr. [redacted] from testifying.

Dated: March 8, 2018

Respectably Submitted,

Joseph H. McMahon, State's Attorney for
Kane County and Special Prosecutor

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EXHIBIT C

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

PEOPLE OF THE STATE OF ILLINOIS	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 17 CR 4286**
	)	
JASON VAN DYKE,	)	
Defendant.	)	

MOTION TO RECONSIDER LYNCH WITNESS TESTIMONY

NOW COMES the Defendant, in the above-entitled cause, JASON VAN DYKE, by and through his attorneys, THE HERBERT LAW FIRM, and respectfully moves this Honorable Court to reconsider its ruling on May 4, 2018 as to Lynch witness testimony, which denied permitting certain testimony at trial from witnesses regarding Laquan McDonald's prior violent and aggressive acts.

In support thereof, Defendant states as follows:

On May 4, 2018, the Court held a hearing as to what Lynch material would be admissible at trial. The Defense called eight (8) witnesses who testified to the prior violent and aggressive acts of Laquan McDonald. The court ruled that six (6) of the witnesses would be permitted to testify at trial, and also ruled on the scope of their testimony.

This motion to reconsider addresses two (2) of the witness's testimony from May 4, 2018, as follows:

ARGUMENT

In Illinois, *People v. Lynch*, 104 Ill.2d 194 (1984) provides the seminal law regarding the admissibility of character evidence in cases where self-defense has been raised. *People v. Figueroa*, 381 Ill. App. 3d 828, 841 (2008). A victim's aggressive and violent character may be used to support a self-defense claim in two ways: (1) to establish that the defendant's knowledge of the victim's violent tendencies affected his perceptions of and reactions to the victim's behavior; and (2) to support the defendant's version of the facts where there are conflicting accounts of the incident at issue. *Lynch*, 104 Ill. 2d at 199-200. Under the first prong, "the evidence is relevant only if the defendant knew of the victim's violent acts." *Figueroa*, 381 Ill. App. 3d at 841. 828, 841, 886 N.E.2d 455, 319 Ill. Dec. 692 (2008). Under the second prong, the defendant's knowledge of the victim's violent character at the time of the event is irrelevant, but there must be conflicting accounts of the incident. *Id.* The victim's character is circumstantial evidence, which may provide the jury with additional facts to help decide what really happened. *Lynch*, 104 Ill. 2d at 200. *People v. Russell*, 2016 IL App (1st) 132363-U, ¶ 86. Mr. Van Dyke should be permitted to present *Lynch* evidence to establish that his knowledge of McDonald's violent acts preceding the shooting incident affected his perceptions of and reactions to McDonald's behavior. Additionally, Mr. Van Dyke should be permitted to present Lynch evidence to support his version of the facts because there are conflicting accounts of what transpired on October 20, 2014.

Evidence of McDonald's Prior Aggressive and Violent Acts Should be Permitted to Support Mr. Van Dyke's Claim that McDonald was the Initial Aggressor.

As stated above, when self-defense is properly raised, as is the case here, the defendant may offer evidence of the victim's aggressive and violent character where there are conflicting accounts regarding who was the initial aggressor so that evidence of the victim's propensity for aggressiveness and violence may be admissible to support the defendant's account of events. *People v. Salcedo*, 2011 IL App (1st) 83148 (2011). Whether or not the defendant knew of this evidence at the time of the event is irrelevant. *People v. Lynch*, 104 Ill.2d 194, 200 (1984). Here, Mr. Van Dyke is asserting that he acted out of self-defense. Therefore, Mr. Van Dyke has the right to introduce evidence of McDonald's aggressive and violent behavior in support of his defense because that evidence is directly related to the elements of self-defense. *People v. Robinson*, 163 Ill. App. 3d 754, 772 (1st Dist. 1987).

Mr. Van Dyke seeks to introduce certain evidence of McDonald's aggressive and violent character. Mr. Van Dyke should be permitted to present this evidence demonstrating McDonald's violent, aggressive character because it corroborates his claim that McDonald was the aggressor. At the May 4, 2018 hearing as to which witnesses and testimony would be permissible under Lynch, this Court ruled as follows:

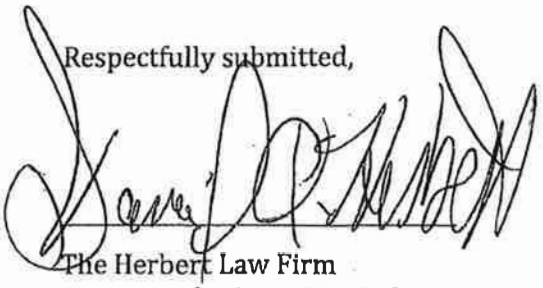
[redacted]

[redacted]

[redacted]

[redacted]

Respectfully submitted,



The Herbert Law Firm
Attorneys for Jason Van Dyke

The Herbert Law Firm
Attorney No. 39917
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Chicago, IL 60661
312-655-7660

EXHIBITS A-D

NOT ATTACHED PURSUANT TO THE COURT'S ORDER AND PEOPLE'S MOTION TO SEAL

EXHIBIT D

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

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

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff, vs. JASON VAN DYKE, Defendant.	No. 17 CR 4286

LYNCH MOTION

REPORT OF PROCEEDINGS had at the hearing of the above-entitled cause before the HONORABLE VINCENT M. GAUGHAN, Judge of said court, on the 18th day of January, 2018.

APPEARANCES:

HONORABLE JOSEPH McMAHON, State's Attorney of Kane County,
Court-Appointed Special Prosecutor, and
MS. JODY GLEASON and
MR. DANIEL WEILER,
Assistant Special Prosecutors,
on behalf of the People;

MR. DANIEL HERBERT and
MS. TAMMY WENDT and
MS. ELIZABETH FLEMING and
MR. RANDY RUECKERT,
on behalf of the Defendant;

Alexandra Hartzell, CSR
Official Court Reporter
Criminal Division
License #084-004590

APPEARANCES: (Cont'd)

MS. ERICA WASHINGTON,
Staff Attorney.

MS. GLEASON: Yes.

THE COURT: And I'll give you the right of rebuttal. Proceed on witness number 1.

MR. HERBERT: Judge, just as a backdrop we received information about individuals that have knowledge, firsthand knowledge of the violent and aggressive acts. We sought to interview all of those witnesses to find out what in fact they know of this violence. As the motion and the proffer sets out there were several witnesses that were extremely reluctant to provide us information, they were fearful about testifying here in court and there was also many of the witnesses had to be -- their recollections had to be refreshed with reports and the reason for those, Judge, is with many of the juvenile detention workers many of them indicated that they had multiple incidents with Laquan McDonald so they needed to be refreshed as to which report we were seeking to find out their knowledge on.

So with respect to witness number 1, Judge, on November 25th, 2017 at approximately 10 in the morning our investigator spoke with a female who is listed as a witness here, number 1, about an incident that took place on the night in question, October 20th, 2014. This individual did not want to go into detail of the incident with my investigator, she indicated that she did not want to testify

on behalf of anyone related to Mr. Van Dyke, nonetheless my investigator read a narrative of a report and the witness essentially said that if it's in the report then I probably said it or something similar. Specifically what was read and what we would be seeking to introduce is that on October 20th McDonald walked up to the woman's car after she parked outside of her home and asked her who the F she knows living here. McDonald asked the woman if he could use her car, she denied him. The woman was not comfortable exiting her vehicle alone with McDonald there so she drove around hoping that McDonald would leave. As the woman made a left hand turn down the street in front of a residence McDonald was there and jumped in front of her vehicle and asked her to pull her car over. That is the extent of our proffer with respect to witness number 1.

THE COURT: Thank you very much.

MS. GLEASON: In response to witness number 1 the whole premise behind the second prong of Lynch is an act of violence, there is absolutely no act of violence in their description. The fact that Laquan at times may use language that might be vulgar or inappropriate is not an act of violence. In addition, Judge, reading from their Exhibit 3, which they attached, regarding what this witness said at the time that this incident was reported she indicated that

Laquan was neither rude nor disrespectful during their encounter and the police had him apologize. It is certainly not the type of violence -- the state's position is that is not an act of violence and not a type of incident that would fall under the second prong of Lynch.

THE COURT: Mr. Herbert?

MR. HERBERT: We would argue that there are inconsistent statements with respect to this witness, she had provided statements at two different points in time. The first point in time she provided the statements that we had just proffered. Those statements certainly indicate a propensity for violence. This was an -- Mr. McDonald did not know this woman, he was seeking her vehicle, he confronted her, he used profanities, this was not somebody asking for a vehicle, this was somebody attempting to take by force the vehicle which I think is borne out in the actions where he then confronts her a second time. As your Honor knows it's not -- Lynch material is not limited to convictions, Lynch material --

THE COURT: You know I certainly now what 403 says. Thank you. My decision on this is that there is no propensity towards violence and again as pointed out by the defense there is inconsistent statements so I don't know how much value witness number 1's testimony would be if it was impeached as soon as she got into cross examination. Again

there is no -- not enough grounds to show that this would come within the doctrine of Lynch so she is not going to testify. Moving on to witness number 2.

MR. HERBERT: With respect to witness number 2 on December 21st, 2017 at approximately 11:32 in the morning our investigator interviewed a Cook County sheriff's police officer. The investigator asked the officer about a report that he prepared dated January 21st, 2014.

THE COURT: He did more than ask, he read the report to him, right?

MR. HERBERT: Yes, read the report.

THE COURT: Go ahead.

MR. HERBERT: And what he read was an incident that took place at approximately 2:30 p.m. at the Juvenile Detention Facility at 1100 South Hamilton Avenue. What this witness observed was Mr. McDonald while in custody striking with both fists the arms and face of another individual that was in custody.

THE COURT: Thank you.

MS. GLEASON: Your Honor, the state's position is that this does not come in under Lynch if they called this particular witness, the witness that should be called to see whether or not it would come in under Lynch would be the individual who was involved in the battery with Laquan

McDonald. This particular witness walked --

THE COURT: I'm sorry, State, what if there were a shooting or God forbid a homicide and you had an occurrence witness there, so you are saying that that person can't be called, no, I'm not going for that logic.

MS. GLEASON: Your Honor --

THE COURT: Because there is a 5th District case down state that says people that were there could testify to the events.

MS. GLEASON: That is correct, your Honor, I totally understand that, however, this particular witness they are wanting to call tells their investigator that he vaguely recalls the incident and that is about it. We don't know what he really recalls, your Honor, I think it's too uncertain at this time and vague to be allowed under Lynch.

THE COURT: Mr. Herbert?

MR. HERBERT: Judge, Mr. McDonald was arrested for this incident so to the extent that the person that was on the receiving end of the beating that person needing to be called --

THE COURT: No, just stick with witness number 2.

MR. HERBERT: That's what I'm referring to.

THE COURT: Was not the subject of the beating.

MR. HERBERT: Correct.

THE COURT: So stick to witness number 2.

MR. HERBERT: I'm responding to their argument saying that the person receiving the beating was --

THE COURT: Just listen to what I say for a change and you said -- I told you that occurrence witnesses can testify to events so go ahead, anything else?

MR. HERBERT: So this witness witnessed what he believed was a criminal act and in fact placed -- took the appropriate action and arrested Mr. McDonald for this physical act which specifically was battery which is certainly a propensity for violence.

THE COURT: I certainly -- you know, that would be a basis but, Mr. Herbert, quoting the proffer of proof, Mr. Lopez stated to investigator -- I'm sorry, I messed up, I should hold myself in contempt. The sheriff's police officer testified -- well, stated that he vaguely recalls, the way you have presented it it sounded like he was the one that told your investigator when actually your investigator read the report to him and then he said he vaguely recalls the incident. Under this situation because of his lack of memory I'm not going to allow him to testify so moving on to 3.

MR. HERBERT: If I can briefly --

THE COURT: No, you did have this, come on now. Either I control this or I don't and I'm not going to be in partners

with you. Listen to the way I say things are going. Move on.

MR. HERBERT: With respect to witness number 3, on November 24th, 2017 at 3 p.m. our investigator interviewed a Chicago police detective and asked about an incident involving Laquan McDonald where he was placed under arrest by this detective. Our investigator read the narrative of the incident to the witness and the witness indicated that she recalled the above incident and she recalled that the narrative which provided the following information was accurate and correct. On that date, time and location Mr. McDonald was eventually arrested for selling cannabis on school grounds and resisting arrest. And as a point of note we certainly don't imply that selling cannabis is indicative towards Lynch, it is the resisting arrest part. The detective in this case observed Mr. McDonald in a hand-to-hand transaction that took place on school grounds. Mr. McDonald apparently looked in the arresting officer's direction and fled. Mr. McDonald was given verbal directions to get on the ground. As the arresting officers -- he resisted those verbal directions and as the arresting officers attempted to place him in custody Mr. McDonald pushed up and attempted to flee the lawful arrest. And that is it with respect to this witness and it also goes towards

the second or witness number 4 who was the partner in that case.

THE COURT: Thank you.

MS. GLEASON: Your Honor, the state would make the same argument for both witness number 3 and witness number 4.

THE COURT: Mr. Herbert, are you adopting your argument to witness number 4 also?

MR. HERBERT: Yes.

THE COURT: Thank you very much.

MS. GLEASON: Your Honor, the act of pushing up off the ground and attempting to flee is not an act of violence under Lynch. Based on their proffer the witness would say he pushed up off the ground, there was never any indication there was any contact between the officer and Laquan McDonald, he obviously doesn't want to be arrested so he is going to try to get away. There is certainly no act of violence under Lynch and it's for that reason that we obviously would not allow this evidence at trial so the state would ask that you deny both 3 and 4.

THE COURT: Thank you. Mr. Herbert?

MR. HERBERT: Judge, the act of resisting an arrest, simply fleeing I know the courts have ruled is not in and of itself an act indicative of a propensity for violence, however we don't have that in this case, we have fleeing and

actively resisting police officers, that is an act of an aggressive nature and it shows a propensity for violence. It was a lawful arrest, there were lawful orders given and Mr. McDonald not only refused to obey those commands he actively resisted against those police officers.

THE COURT: Thank you. I have heard the arguments concerning witness number 3 and number 4. The act of resisting arrest has different components, there is also a charge of resisting arrest with bodily harm. Here there is no allegation of any bodily harm when resisting arrest. Pushing up and fleeing, push ups can't be considered an act of violence so, no, number 3 and 4 are not allowed. Proceed, please.

MR. HERBERT: Sure. With respect to witness number 5 then. Judge, on November 24th, 2017 at approximately 3:30 p.m. our investigator interviewed a Chicago police detective and -- about an incident in which Mr. McDonald was placed under arrest by that detective. Mr. Walsh again read the narrative of the police report to the detective which contained the following language which the detective remembered, had an independent recollection of. In this situation the police officer, the detective, observed Mr. McDonald shouting blows, blows in a high narcotics area, he was approached by the detective, Mr. McDonald again fled,

the officers chased him, they were eventually able to apprehend him and recovered heroin on his person. Mr. McDonald admitted to being a member of the New Breed street gang. While Mr. McDonald was in custody he became extremely erratic and angry and shouting vulgarities at police officers that were in the vicinity and again in this case, Judge -- that's it with respect to that. The vulgarities were also compounded by shouting not only the vulgarities but continuous shouting and pounding on the cell door while in custody.

THE COURT: Ms. Gleason?

MS. GLEASON: Your Honor, the state would ask that you deny number 5. There is absolutely no act of violence in this whatsoever. In their proffer they indicated that he is using vulgar language, which may be inappropriate, but it is certainly not violent and the fact that he pounded on the cell door, Judge, it is certainly not a violent act. They have already admitted the possession does not come in and the fact that someone may or may not be a gang member certainly doesn't come in under Lynch.

THE COURT: Mr. Herbert?

MR. HERBERT: Judge, briefly in response. What we have in this situation and I think that your Honor has seen it by looking at the proffers is not only are these violent acts

which might not result in actual physical injuries to arresting officers but what it shows is this violence towards authority figures and that is continuous throughout our proffer of individuals and I think it's relevant certainly to this case but the mere act of law enforcement officers and people in detention facilities and sheriffs in courtrooms and judges in courtroom as we'll see later on with this certainly individuals that make threats to those people in that position the legislature recognizes that as an aggravating factor and I'm asking the court to recognize that when considering the nature and value of the violence.

THE COURT: Looking at witness number 5 of course the arrest and the admission of being in a gang would not be under Lynch. The operative scenario is while in custody Mr. McDonald became erratic and angry, shouting vulgarities. There was no mention of any type of threats to these officers. The other thing is he was pounding on a cell door which means that -- just from the general context that he has been arrested so there was an impossibility of any violence happening, there is no proximity to any of the law enforcement people close to the cell door that they could have been grabbed or struck. Witness number 5 will not be allowed to testify under the Lynch doctrine. Number 6.

MR. HERBERT: With respect to witness number 6 our

investigator on December 21st, 2017 at approximately 11:53 in the morning interviewed a Cook County deputy sheriff who had placed Mr. McDonald under arrest for an incident. My investigator read the narrative to the sheriff who indicated that he recalled the incident. The narrative to which the sheriff remembered recalling took place again at the Juvenile Detention Facility in which Mr. McDonald was in custody. It was on August 26th, 2013 Mr. McDonald was arrested and eventually charged with two counts of aggravated battery to a police officer. Mr. McDonald was arrested after being held in custody by a juvenile judge. During which McDonald became very angry and started yelling and cursing while in the courtroom in front of the judge. Mr. McDonald refused to calm down at which point he was escorted to a custody area. As he entered the lockup Mr. McDonald became angry at another minor and the -- our witness observed Mr. McDonald attempt to strike that minor. The deputy sheriff then escorted Mr. McDonald to another lockup because of that incident at which time Mr. McDonald became angry, started cursing and waving his arms. The deputy sheriff attempted to restrain Mr. McDonald for his actions and upon doing so Mr. McDonald turned and attempted to strike the deputy sheriff who was in full uniform in the custodial area of the jail. He attempted to strike the deputy sheriff. The deputy sheriff was luckily

able to block those strikes. Mr. McDonald was then restrained and taken to the ground. As Mr. McDonald was removed from the ground he grabbed a pair of handcuffs and threw them at the deputy sheriff.

THE COURT: Ms. Gleason?

MS. GLEASON: Your Honor, the state's position is that it should not be allowed under Lynch. Witness number 6, your Honor, is not the witness who apparently had the handcuffs thrown at him.

THE COURT: State, under your theory then anybody in a first-degree murder case wouldn't be allowed to be prosecuted unless the victim came. The victim is dead in those cases.

MS. GLEASON: That is not my theory.

THE COURT: You're saying -- you know, this is a physical observation, that is not a controlling criteria.

MS. GLEASON: It's not. What is is this is totally insufficient, they read this to the officer and what they say then is it's -- that the officer indicates he recalls the incident, that's all, we don't know any specific -- what exactly the officer actually recalls of this, your Honor, we don't know if the officer was actually present when Laquan threw a pair of handcuffs at the other officer. That is what I'm saying, Judge, it's insufficient because they don't lay out here what exactly this officer recalls just, hey, he

recalled the incident, is that the incident where he was combative and waving his arms at somebody or is that when he threw something at another officer and so I think under that situation this is not a conviction, only arrest, they need to have that other officer and present evidence to you.

THE COURT: But where do you see wherein this proffer that it said he vaguely remembers?

MS. GLEASON: I'm not saying he vaguely remembers, it says after reviewing the report the officer recalled the incident, this incident that involved McDonald, it doesn't indicate what it was he recalled about the incident, the whole thing, part of it so that's why I'm saying throwing the handcuffs should not come in.

THE COURT: Okay.

MS. GLEASON: Besides I don't think that is necessarily an act of violence under Lynch but that is the state's argument.

THE COURT: Thank you. Mr. Herbert?

MR. HERBERT: Judge, with respect to reading the narratives to these law enforcement officers --

THE COURT: I have no problem with that because every witness that ever testified in law enforcement everybody asks them to take a look at their police reports before they testify, that is not a criteria that would invalidate

someone's testimony otherwise we would have no criminal cases being tried so you don't have to emphasize that point.

MR. HERBERT: With respect to the sufficiency of the proffer I think Ms. Gleason is confused as to what our client knew or witness knew. Our witness spoke to the incidents that were documented in the report and spoke to his firsthand knowledge of those incidents.

THE COURT: Under this circumstance witness number 6 will be allowed to testify. Here is -- all I'm doing right now is making rulings on whether these would be Lynch witnesses, later on we are going to have an issues conference about the extent and what they are going to be testifying to if they are allowed to testify. Witness number 7.

MR. HERBERT: Judge, witness number 7, we start now with witnesses from the Juvenile Detention Center. These are -- the next several witnesses that we have interviewed or in some cases attempted to interview stem from that. We obtained that information to show -- we paired this down quite a bit just for the court's edification. There were 73 incident reports generated involving Laquan McDonald while in juvenile detention. 71 of those Laquan McDonald was listed as the accused. So my point of reference in that, Judge, is we took painstakingly steps to narrow down the witnesses that we believe actually are relevant to showing the propensity

for violence. And I should say witness number 7 that goes with witness number 6, the acts that were proffered as to witness number 6. I will note that witness number 7 was interviewed and she had difficulty remembering the specific incident, she said that she remembered Mr. McDonald as a high risk, violent, aggressive individual, she had multiple incidents with him and she also expressed, and a number of witnesses that we have not included in this, she expressed significant fear about testifying in this case, she was fearful about her reputation --

THE COURT: That's why this motion should have been filed under the decorum order but go ahead.

MR. HERBERT: She is fearful for her well-being, her reputation with the -- with her employer and I think that's --

THE COURT: Who is she employed by?

MR. HERBERT: She is employed by the Cook County Juvenile Detention Center.

THE COURT: That's a governmental body?

MR. HERBERT: Yes.

THE COURT: And her employer would penalize her for testifying in a case?

MR. HERBERT: I can't speak to that.

THE COURT: Well, I can, that person would be obstructing

justice, her employer, that is an easy one.

MR. HERBERT: I think the point is -- I agree with you 100 percent. The point is a lot of these witnesses in this case -- you know we know the significance and the attitude towards this case. A lot of our witnesses we had trouble getting them to fully agree to the facts in which they prepared reports and I think that's significant because obviously if they are --

THE COURT: Mr. Herbert, here is the thing, I'm deciding whether these would be appropriate witnesses under the Lynch doctrine as followed by our Illinois Supreme Court. I have seen over the many years I have been on the bench there has been a tremendous amount of reluctant witnesses, fear of retribution from the community when they testify for the state, and it's a shame that people have to go through this, but these witnesses have to testify otherwise the whole system would fall apart, so I understand and I have empathy for them and I'm going to say this once more, that's why I this emphasized this should have been filed under the decorum order, now you are starting to say my arguments and I certainly agree with you and this will be the last time I bring up the decorum order but again she is going to be allowed to testify; as to the extent we're going to do that at an issue conference.

MR. HERBERT: Moving on to investigator number -- witness number 8.

MS. GLEASON: May I? I have never had a chance to respond.

THE COURT: I'm sorry.

MS. GLEASON: Judge, when you say she is going to be allowed to testify when the only thing that she says in the proffer is that he was a high risk, more aggressive and violent youth. There is never any indication that she remembers any specific act whatsoever. So what can she testify to, just that she believes, she can't testify to her opinion of Laquan McDonald so the state is asking that that be denied under Lynch.

THE COURT: There is another section under Illinois rules of evidence that this might come in and I really want to apologize for not giving you a chance but I'm taking into consideration what you said, this is just the initial step and she might say that she doesn't recall anything right now or no independent -- I don't know what that is right now. This is first glance and certainly she is coming under that criteria, I will allow -- she will be allowed to fit the Lynch doctrine and then we'll see later on to what extent. Moving on to 8.

MR. HERBERT: I believe we are on 7, Judge -- no, we are

on 8, you are correct. Again this goes to our detention center witnesses, these witnesses as are many of the other witnesses that we proffered are law enforcement and I would just state that as we noted in our brief the court has noted the significance of the person on the receiving end of the violence being a law enforcement officer as being significant People versus Cook where they talk about --

THE COURT: I didn't say anything about being law enforcement or anything else like this, their significance but go ahead.

MR. HERBERT: I just think we have to -- that the court -- I ask the court to view these witnesses under the backdrop that they are law enforcement because the appellate court has certainly done the same when they have analyzed the cases in Cook and the Bedoya case, B-e-d-o-y-a, where they said the evidence concerning the decedent's prior act of aggravated battery especially because they involve police officers was clearly relevant to the issue of who was the first aggressor in this instance. And, Judge, that was the Bedoya where it was Milwaukee police officers that were involved in a murder essentially, they were off duty and they came to Chicago and so the court recognizes significance of they had previous violence towards on-duty police officers that were unrelated to this incident and the court recognizes that --

THE COURT: But that wasn't under Lynch but go ahead. Go on with this.

MR. HERBERT: So we are on witness number 8 who is a Cook County Juvenile Temporary Detention Center employee. On December 5th, 2017 at approximately 11:08 in the morning our investigator interviewed this individual and again our investigator asked him about an arrest and a report that was prepared and this witness indicated that he remembered the incident and specifically he was asked to talk about the -- what happened, what was contained in the narrative, Judge, and what happened was while in custody at the Juvenile Detention Center resident McDonald verbally assaulted and threatened the staff who are Juvenile Detention Center employees for an hour and began to insight his peers. He tried to insight his peers by stating, quote, turn up on rovers which we see is a term that Mr. McDonald uses frequently towards the staff members. F the TL and ATL, F these bitch ass staff and when I see the rovers I'm going to beat their asses just like I did the other day; when we come out of our rooms we turning this bitch up on Angelo. Continuing Mr. McDonald continues to say F the staff, and obviously when I'm saying F the staff he used the F word. Don't listen to them, turn this bitch up as he is talking to other residents, I'm going to beat the rovers' ass when I see

them; when I went to court I told the judge I'll put a slug into her head, you think I give an F about a write up, talking again about one of the staff members.

THE COURT: Ms. Gleason?

MS. GLEASON: Judge, perhaps he wants to address number 9 too, they're both the same incident, 8 and 9.

THE COURT: Thank you.

MR. HERBERT: Sure. This individual, witness number 9, also a Juvenile Detention Center employee was also interviewed by my investigator on December 7th at approximately 4:15. The person was interviewed and read a narrative report and in that narrative it talks about an incident, essentially the same incident but witnessing different things. This witness talks about how Mr. McDonald physically assaulted, threatened and resisted witness number 8 so he is speaking to what he saw with respect to the actions taken against witness number 8 as well as actions taken against this person too is what he talks about, that he was assaulted, threatened and resisted by Mr. McDonald. He aggressively resisted restraints by swinging his torso and kicking his legs and at one point wrapping his arms around a female staff member, this caused the staff to have to take aggressive actions and took Mr. McDonald to the floor where he again was resisting and attempting to escape. His legs

were eventually secured because he was kicking and they were attempting to restrain his kicks. He continued to resist wildly was the term used. As the staff attempted to handcuff him Mr. McDonald became aggressive, threatened staff and attempted to push free from staff member restraints. He refused to comply with lawful verbal directives and continued to fight and resist while yelling F that and I'm F y'all up. They finally were able to get Mr. McDonald into his room and as the door began to close Mr. McDonald allegedly jumped to his feet and attempted to spit at staff members.

THE COURT: Mr. Gleason?

MS. GLEASON: Your Honor, as to witness number 8, the state's position is evidence from witness number 8 should not come in under Lynch. Again, your Honor, their proffers are sketchy in what these individuals actually saw, it just says they recall the incident. The second one, number 9, was a rover who somebody is -- has to respond to incidents, he clearly was not there at the beginning of the incident, he is there, his job obviously is to take Laquan into his cell. He indicates that he was taken to the floor, he is resisting, Judge, again I don't know that resisting is an act of violence that falls under Lynch. He indicates that when he removes the handcuffs he becomes aggressive and attempts to push free from a staff member, he doesn't say he is pushing

free from himself but just pushing free in and of itself you don't want to go into custody, Judge, I don't think that is a violent act that should fall into the second prong of Lynch and the state would ask that 8 and 9 both be denied.

THE COURT: Mr. Herbert?

MR. HERBERT: Judge, with respect to not obeying police orders and resisting, those are relevant not only to the elements of self defense but they are also relevant to Mr. Van Dyke's defense of use of force by a police officer. As the court knows police officers are allowed to use deadly force in various situations including when they reasonably feel threatened but also in situations where an individual is resisting and attempting to escape from a lawful arrest. So I would speak that all of these incidents where Mr. McDonald is resisting lawful arrests those are not only relevant to his violent nature but certainly also relevant to the element of police officers use of force as codified by the Illinois statutes.

THE COURT: As far as number 8 and 9 I find that they come under the Lynch doctrine, they would be allowed to testify.

MR. HERBERT: Moving on to witness number 10, again this individual is -- their position is -- she is a youth development specialist employed by the Cook County Juvenile

Detention Center. Our investigator interviewed or attempted to interview this individual regarding an incident that occurred on March 27th that involved a physical assault by Mr. McDonald against her. The incident again took place at the Juvenile Detention Facility and in that case Mr. McDonald physically assaulted this female youth specialist. He at one point wrapped both his arms around the female in a bear hug and this witness not only witnessed that but ordered McDonald not to touch this female. But Mr. McDonald continued to hold on to her. The female was forced to pull away at which time Mr. McDonald grabbed both of her wrists. Mr. McDonald was charged as a result of this incident with the physical assault against an adult, he was given what they refer to in the juvenile detention facility as a due process hearing and was found guilty of that assault.

THE COURT: Ms. Gleason?

MS. GLEASON: Judge, 11 also deals with the same incident if he wants to address that at the same time.

THE COURT: Thank you. Proceed.

MR. HERBERT: Sure. Mr. -- the witness in -- witness number 11 is also a youth development specialist employed by the Cook County Juvenile Detention Center and he was interviewed or attempted to be interviewed by my investigator on three different dates. This witness refused to return

calls but again the -- he prepared a report in this case and --

THE COURT: Again that would be hearsay so don't go into it.

MR. HERBERT: I agree but I think it goes back to the point where people don't want to come in and testify and I think if they had a subpoena they were going to come in and testify which is the only reason why we proffered that. His narrative essentially --

THE COURT: Mr. Herbert, come on now, the second prong of the Lynch doctrine says it can't be hearsay so I don't care what his report says; if he refused to testify, you don't know if he is going to be consistent with his report. Ms. Gleason?

MS. GLEASON: Your Honor, the state would ask that you deny witness 10 and 11. Neither one of them were interviewed by the defense, obviously we have no idea what it is they are going to say, your Honor. I know it indicates that their investigator attempted to make phone calls, well, how about going out and knocking on doors and finding out what people might actually say so we would ask that you deny 10 and 11 because obviously at this point we have no idea what they would say.

THE COURT: Yes.

MR. HERBERT: With respect to that, Judge, we made every attempt to knock on doors of people but these individuals are represented by a county attorney and we received resistance virtually at every step as the court knows because we had to call in one of the attorneys on a subpoena but these individuals we were not able to get their personal information because of the fact that they are law enforcement so that precluded our investigator from being able to conduct a more thorough interview and again we --

THE COURT: Well, no matter how much personal information you have if they refuse to talk you can't have an interview so -- I mean that aside today in this age to tell me you can't get personal information about someone on Google doesn't make sense so that part of it, that you couldn't get information, doesn't have much merit but the other thing again as pointed out by the state, number 10 and 11 refused to talk so we really don't know what they are going to say so that is a no on 10 and 11.

MR. HERBERT: Moving on to number 12 then, this individual she is also a youth development specialist at the Cook County Juvenile Detention Center. Again our investigator attempted to interview her at several different locations about an incident that occurred on March 9th, 2014 in which this individual was a victim to an attack by

Mr. McDonald who physically and verbally assaulted this individual stating to this person that he will beat your -- I'll beat your ass, F you. Mr. McDonald with open palms pushed this individual in the chest causing the person to stumble backwards. Mr. McDonald in this case was provided with a due process hearing on the incident and was found guilty so, Judge, we would state with respect to this witness as well as the previous one, sorry to go back to that, but these are essentially convictions that would be consistent with coming in without proffered testimony from a victim or a witness in this case.

THE COURT: Well, you haven't presented any case law that these are self authenticating so that is not at issue right now. The other thing is I certainly want a brief on whether this is self authenticating and this process is considered a conviction by the Supreme Court under the Lynch doctrine. Ms. Gleason?

MS. GLEASON: Judge, both 12 and 13 are the same incident where neither one of the individuals were interviewed. Judge, I want to correct I think something Mr. Herbert said. He indicated that they didn't have the addresses, they subpoenaed the personnel to come into this courtroom and she came that day with a list of witnesses. So I think it was their personal addresses, Judge, she was told to talk to the

defense so this idea they never got addresses; if they didn't, they never brought that back in front of the court to indicate they were not allowed to get addresses so certainly it's the state's position they could have gone and knocked on doors, et cetera to try to attempt to interview them and not to try to interview people on the phone but again we don't know what it is they will say, they weren't interviewed so I ask that you deny both 12 ask 13.

THE COURT: Mr. Herbert?

MR. HERBERT: Judge, these individuals were interviewed at their place of work. I believe because we did not have --

THE COURT: Number --

MR. HERBERT: All of these detention center --

THE COURT: Let's focus, come on, don't start wandering around legally, we are talking about 12 and 13, right?

MR. HERBERT: Yes.

THE COURT: How could they be interviewed if they didn't call back or talk.

MR. HERBERT: They were not interviewed.

THE COURT: You said they were. You don't want to have me read it back. They weren't interviewed. Go on with the rest of your presentation.

MR. HERBERT: Judge, with respect to the convictions if it's deemed --

THE COURT: That's on a different thing, right now this is the second prong. This is not -- you didn't proffer these under self authenticating. That's why I asked you to do this and then there should be case law supporting this process that over in juvenile detention centers that they have this due process hearing that would be equivalent of a conviction, you haven't done that, I certainly am going to give you time to brief that but you should have done that, that is the purpose of this proffer.

MR. HERBERT: With respect to that issue we looked --

THE COURT: No, I'm not going into that issue right now, you want to wander, focus. As far as number 12 and 13 they refused to be interviewed or call back, they will not be allowed in under Lynch.

MR. HERBERT: Moving on to number 14, this individual is an assistant team leader for the Cook County Juvenile Detention Center. On December 5th, 2017 at approximately noon our investigator interviewed this individual via telephone. He read -- my investigator read the report to this individual regarding an incident that took place on February 20th, 2014 at the courtroom in front of the judge in a particular calendar in the Juvenile Detention Center. In that case this witness observed McDonald or he heard McDonald told him that he -- that he spit on a female sheriff and he

hit her in the head with his head. This is information that Mr. McDonald told to this individual. And that is it for that individual.

THE COURT: Thank you.

MS. GLEASON: Judge, I assume that Mr. Herbert is reading from Exhibit 14 which was the next one, Exhibit 14, at least their proffer indicates that Mr. -- strike that. Witness number 14 indicated that he saw Mr. McDonald rip a phone off a console, pull the cord, he attempted to restrain him but was unsuccessful and then somebody else stepped in to assist so I don't know what Mr. Herbert is referring to when he is talking about this other narrative that he just told the court.

MR. HERBERT: That was, Judge -- Judge -- we -- you know what, I apologize, you are correct, that was an individual whose proffer we removed so everything with respect to that March --

THE COURT: Start over again so it is not confusing.

MR. HERBERT: How about we move right to witness number 14.

THE COURT: That is what we are on.

MR. HERBERT: I know. But it's a different narrative to which --

THE COURT: That's why I said start over again, you have

to start paying attention to me.

MR. HERBERT: In this incident on February 16th, 2014 the witness who again was an assistant team leader for the Juvenile Detention Center Mr. McDonald verbally assaulted and threatened this team leader. He refused to obey directives, he ripped a phone which was the property of the Cook County Detention Center off the console and pulled out all the cords. This individual attempted to restrain Mr. McDonald but he was unsuccessful. At the time he was assisted by another team leader and they stepped in and they were eventually able to take down Mr. McDonald who was resisting and upon taking Mr. McDonald down he threatened this witness, witness number 14, by stating to him that he would kick his ass when he exits his room and that he is on that with me.

THE COURT: State?

MS. GLEASON: Your Honor, as to that we would ask that you deny that. We cited in our response, your Honor, the case of People versus Gilbert where the court had held that criminal damage to property would not come in under Lynch so it's the state's position that pulling out the phone cords and damaging a phone does not come in under Lynch. The fact that he attempted to restrain him, they took him down obviously indicates that they did their job in restraining Mr. McDonald and the fact that Mr. McDonald says like, hey,

when I get out of my cell I should kick your ass that is obviously not a violent act under Lynch so we would ask that you deny witness 14.

THE COURT: Now, witness 15 is under the same incident; is that correct?

MS. GLEASON: Your Honor, they --

MR. HERBERT: Yes.

MS. GLEASON: They proffer two incidents from Mr. August, they have only addressed -- strike that. Witness number 14, your Honor, they only address one.

THE COURT: What about witness number 15?

MS. GLEASON: Witness 15 does go to the incident of February 16th, 2014.

THE COURT: Ms. Herbert has an influence on you, you are not paying attention either. So 14 and 15 would be the same incident, right?

MR. HERBERT: Correct.

THE COURT: Go on 15 and then Ms. Gleason can respond to 14 and 15.

MR. HERBERT: 15 I think it would be essentially the same narrative but again our investigator interviewed this individual on December 5th at approximately 1 o'clock via telephone, read the narrative of the report and this individual -- this witness his testimony was, his memory of

the event was essentially the same as witness number 14 because they were both there for the incident.

THE COURT: Ms. Gleason, could you address 14 and 15.

MS. GLEASON: Your Honor, as to 15, your Honor, we would have the same argument as in 14, the criminal damage obviously doesn't come in under Lynch. Again the second witness says that he stepped in and they -- he was able to assist the other officer in taking down Mr. McDonald and then Mr. McDonald made a statement he should kick his ass and some other statement he is on with that, Judge, who knows what that means. So certainly we don't believe that making a statement to kick somebody's ass is a violent act that would come in under Lynch and certainly it might not be appropriate but it doesn't come in under Lynch.

THE COURT: Thank you.

MR. HERBERT: Judge, with respect to criminal damage, criminal damage is not necessarily indicative of a propensity for violence in a normal sense of criminal damage, someone damages property, I would submit that this case is different. This is a case where it's an akin to somebody --

THE COURT: Just so the record is clear this phone was ripped or taken off the desk contemporaneous with these other actions, right?

MR. HERBERT: Yes.

THE COURT: So I agree with the state that criminal damage to property in an isolated incident with nothing more wouldn't be appropriate but you have to take this in context so anything else?

MR. HERBERT: No.

THE COURT: As far as the witness number 14 and 15 they will be allowed to testify under the Lynch doctrine. At this time we're going to take a recess and go on with the rest of the call.

(Whereupon the above-entitled case was passed and later recalled.)

THE CLERK: Recalling Jason Van Dyke.

THE COURT: We are on witness number?

MR. HERBERT: 16.

THE COURT: 16.

MR. HERBERT: Judge, this individual works as a youth development specialist for the Cook County Temporary Detention Center. On December 5th our investigator interviewed this individual at approximately 12:42 p.m., he read Mr. -- or the individual witness a narrative report in which he prepared in which it contained an incident that took place on January 20th, 2014 at 6:30 p.m. In that incident Mr. McDonald physically assaulted and verbally abused this witness while he was working in his capacity as a youth

development specialist. This witness attempted to deescalate Mr. McDonald after he became very aggressive, angry and attempted to break a television set located within the detention facility. Mr. McDonald when confronted by the staff member witness stated F this shit, staff, I need my gym shoes and an Fing phone call and F you bitch ass staff, I'm going to break this mother Fing TV down. Mr. McDonald continued to be belligerent and with a closed fist he punched the caseworker, this witness, in the chest and was eventually detained.

THE COURT: Thank you. Ms. Gleason?

MS. GLEASON: Your Honor, the fact that he actually punched the witness in the chest may come in under the second prong of Lynch however, Judge, the state's position that he pulled out cords from a TV and then staff stood between him our position is any criminal damage to property should not come in, there was no damage to the property --

THE COURT: Again if this is an isolated incident, come on, you know, you're an outstanding prosecutor, you don't think you would be putting that in in a case in chief if you were charging somebody with this, of course you would, I understand your position but sometimes you have to be realistic too.

MS. GLEASON: And, Judge, certainly the comments that

Mr. McDonald made saying that F this shit and I want my gym shoes and calling staff names that certainly shouldn't come in under Lynch because it's not an act of violence, just because you are using vulgar or inappropriate language, so the fact that he hit the officer may come in the second prong of Lynch, that is our position, none of the rest of it should come in.

MR. HERBERT: Judge, I would say that again those --

THE COURT: Nobody better be using a phone.

MR. HERBERT: I would say that those statements are certainly indicative of violence for a number of reasons but the biggest I think is that these individuals are authority figures and he is specifically referring to them in his derogatory comments as staff and rovers and things of that nature so I think it goes towards violence towards these people in authority positions.

THE COURT: Here is -- it certainly is coming in. These things have to be taken in context, I understand the state's position, this will be allowed in under Lynch. Again these are the preliminary decisions I'm making and then we will have an issues conference about what is actually allowed in as evidence concerning this Lynch material. Go ahead to 17.

MR. HERBERT: This individual she was a female youth development specialist at Cook County Juvenile Detention

Center, she was interviewed by our investigator on December 5th at approximately 1:15 p.m. And she was asked about a report and she indicated that she remembered this incident which occurred on January 19th, 2014 again at the Juvenile Detention Facility. In that case Mr. McDonald was eventually arrested and charged with a fight in which he was involved in a resident on resident physical altercation while in the TV area. Mr. McDonald was told to have a seat in the room upon fighting by the staff and he began to punch another resident, juvenile multiple times.

THE COURT: You said he was arrested, what happened after the arrest?

MR. HERBERT: There was no disposition, he was arrested and there was no due process hearing on this.

THE COURT: State?

MS. GLEASON: Judge, the state's position is that Mr. Herbert is using the term arrested very loosely.

THE COURT: Well, there is no disposition so it would be hearsay anyway, it's not self authenticating.

MS. GLEASON: Judge, it's also our position this witness indicated that she saw him in a fight with another individual, that he punched another individual, Judge, I think those facts alone are irrelevant on whether or not he is the initial aggressor in this case. What the other

individual is doing who knows. And so certainly our position is just because the minor got into a fight with somebody else at the youth home is not relevant in this particular case even if it may fall under an act of violence.

THE COURT: Your position is because this -- somebody gets into a fight with another individual in the same situation, in a youth detention center this is not an act of violence?

MS. GLEASON: It's not relevant under this -- I didn't say it wasn't an act of violence, it's not relevant, what if Laquan was acting in self defense.

THE COURT: Well, then I would not be objecting if I were the state because, you know, I look at the talent that the special prosecution team has that I know you would be able to elicit information that this wasn't an act of violence on his behalf so it will come in. Yes to number 17.

MR. HERBERT: Number 18. This individual was a youth development specialist with the Cook County Juvenile Temporary Detention Center. Our investigator interviewed this individual on December 5th at approximately 2:38 p.m. and he interviewed him about a report in which --

THE COURT: Here is the whole thing. The witness says that he told your investigator that the above incident likely occurred and he cannot deny the facts but he doesn't have a

recollection so go ahead, State -- I'll just say no, it doesn't come in, no independent recollection.

MR. HERBERT: Moving on to number 19 then. This individual was staff at Cook County Juvenile Detention Center and on that -- on December 12th, 2017 at approximately 3:15 our investigator interviewed this individual via phone and he interviewed this individual about a report in which he prepared in which this individual stated that on January -- I'm sorry, we're on 19, correct?

THE COURT: Correct.

MR. HERBERT: 19 is the same fact pattern or no -- no, I apologize, it's a different one. Number 19 this witness witnessed Mr. McDonald punch another resident after being refused to take a seat. 19, he says he vaguely remembers this but he said he would testify consistent with his reports in which he indicated that he viewed that.

THE COURT: Thank you. State?

MS. GLEASON: Your Honor, the state would have the same argument on the fact that he says he vaguely remembers, we don't know what he recalls at this point and this should not be allowed.

THE COURT: Mr. Herbert?

MR. HERBERT: Nothing else.

THE COURT: The operative language is he vaguely recalls

so if he testifies consistent with his report that means he doesn't have an independent recollection so that would be hearsay so number 19 is no.

MR. HERBERT: Judge, moving on, the next witness number 20.

THE COURT: There was no interview, right?

MR. HERBERT: Correct.

THE COURT: That's a no.

MR. HERBERT: Moving on to witness 21, rapid response team Cook County Juvenile Detention Center was interviewed by our investigator and was read a report that was prepared by this individual and the report indicated that on October 7th, 2012 at the Juvenile Detention Center Mr. McDonald verbally abused this witness while he was working as a staff member by stating damn you mother Fer's, you think you are all so Fing tough then why are you mother Fer rovers over here again. McDonald continued with calling them bitches and F you all. And that is it with respect to that witness, Judge.

THE COURT: Ms. Gleason?

MS. GLEASON: Your Honor, the state's position is there is no act of violence in these comments that were made by Mr. McDonald, there were no threats whatsoever, he is obviously using language that might be inappropriate but he is calling them names and that is certainly under People

versus Persado (phonetic) which we had cited an arrest for disorderly conduct where defendant was arrested for shouting and displaying gang signs didn't constitute violent behavior, certainly just making -- using bad language doesn't constitute violent behavior.

MR. HERBERT: Judge, I would say that these statements made to another resident or made to somebody that was not in charge of the detention facility on it's face would not be indicative of violence but they are indicative of violence in this case because again he is referring to them as the staff, he is making these threatening statements based upon their actions, the staff member's actions to obtain control of this individual in the detention facility and when he specifically refers to these individuals in their position again this is threatening behavior in the same context if he -- if an inmate made these comments to a sheriff while they are in custody those I don't believe would be considered simply profanity, those would be considered actions that are first of all illegal while in custody and second of all threatening to the members that are tasked with the job of keeping control over an individual.

THE COURT: Again, you know, looking at the statements certainly they are vulgar but there is no threat of violence so number 21 is a no. 22?

MR. HERBERT: 22 is this individual, she is a caseworker with the Cook County Juvenile Detention Center, she was interviewed by our investigator on December 12th, 2017 at approximately 4:20 p.m., she had -- her attorney was with her on another line and she was asked about an incident and whether she recalled this and she recalled the incident in which on September 21st, 2012 Mr. McDonald ended up with a cracked tooth from an incident which he began acting violently. He directed gang signs toward the residents at which time the staff members including this witness told McDonald to stop, McDonald then stated to the staff if you want some I'll give you some, at which point Mr. McDonald got out of this chair, ran out of the room and attempted to fight his peers. Mr. McDonald was eventually physically restrained by the staff who had to use force on him, he refused to comply, the rapid response team was called in which as your Honor knows is the team that comes when there is a violent situation in which somebody needs to be restrained, they gave him instructions to stop and again he refused to do so and they had to -- in their attempt to secure him the rapid respond team members actually fell to the ground and -- in their attempt to obtain or detain Mr. McDonald which they were eventually able to do.

THE COURT: Thank you. State?

MS. GLEASON: Judge, no where in the proffer anywhere does it indicate that the rapid response team fell to the ground. What the proffer indicates is that Laquan McDonald is not following instructions, he gets out of his chair, runs toward some peers, attempts to fight them, it never says that he actually fought them, he attempted to fight them, the rapid response team was called in, they give him instructions when he -- and he became resistant when he was asked to step out of line. He then something with a shoe causing him to fall on the ground and he breaks his tooth and cracks his lip and it says when he falls on the ground it brings the rapid response team with him but that is it. So, Judge, based on that I don't think there are any acts of violence in there that actually falls under Lynch.

MR. HERBERT: I would say that it is completely an act of violence, he is fighting with the rapid response team to the point where it causes these big grown men --

THE COURT: I don't know that.

MR. HERBERT: Large men who are skilled in the avenue of detaining an individual to cause these individuals to fall to the ground so it would certainly put them in harm's way and susceptible to injury and I'm not stating that they were injured but it is certainly an act of violence.

THE COURT: Reviewing that it does not meet the standard

of the Lynch doctrine so that witness number 22 will not be allowed.

MR. HERBERT: Judge, the next witness I believe its misnumbered, it should be witness number 23. Her position is intensive probation. And on that I interviewed this individual, I interviewed her on December 7th, 2017 at the Juvenile Detention Facility at approximately 1:30 and she was asked to talk about an incident which was reported and she remembered this incident, specifically it was on October -- on August 23rd, 2013 Mr. McDonald appeared in a courtroom as a defendant in juvenile court. He apparently went to court high and he was having erratic behavior in front of the judge in court which caused the judge to order Mr. McDonald to undergo a drug test and it came back positive for PCP and marijuana. And that is it on that incident.

THE COURT: State?

MS. GLEASON: The fact that the Laquan may have been high in court certainly doesn't come in under Lynch. And all she indicates is that he was going nuts in court and spitting. What does going nuts mean, Judge, who knows, but certainly that shouldn't come in under Lynch, there is no act of violence actually described.

MR. HERBERT: I'm sorry, I left a part out. It might change her argument.

THE COURT: Go on.

MR. HERBERT: It goes on that after this incident when he came back to court and the drug test was found that he was positive he was escorted out of the courtroom and this was on February 20th, he was found guilty of violating his probation and when he left the courtroom, he left in an aggressive manner and ended up spitting on a sheriff, he was shouting at another inmate saying that he'll beat your ass and he stated to a staff member, a juvenile detention staff member, that he should kill her, I'll beat your ass and anybody who riding with you youth development specialist.

THE COURT: State?

MS. GLEASON: Judge, the only thing that the witness actually tells the investigator apparently is that he was going nuts in court and spitting so there is no indication that she made any comments about what Mr. Herbert just proffered to the court.

THE COURT: She said spitting, right?

MS. GLEASON: Right.

THE COURT: You don't think spitting on another human being is an act of aggression?

MS. GLEASON: She doesn't indicate she saw him spitting on the sheriff, he added that afterwards, she just said he was going nuts and spitting so perhaps --

MR. HERBERT: Spit on a sheriff.

MS. GLEASON: That's not what is in the proffer.

THE COURT: Yes, it is though. If you look at 23, the last -- in the first paragraph it starts off February 20th, 2012, et cetera, he left the courtroom in an aggressive manner, spit on a sheriff and was fighting with them. So that is there. That will come in. 24.

MR. HERBERT: The next witness she is an ERC probation officer which is the early reporting center I believe -- Evening Reporting Center. And I interviewed this woman on December 7th, 2017 at approximately 1:30 p.m. at the Juvenile Detention Center and she was provided a copy of the report with a narrative that stated essentially --

THE COURT: I understand that but then her comment was Ms. So And So stated to Mr. Herbert that she vaguely recalled the incident so under these circumstances it's not coming in.

MR. HERBERT: Okay. With respect to the next witness then, Judge, this individual was a counselor with the county, he was interviewed on December 2nd, 2017 via telephone at approximately 3 p.m., he read this individual a narrative of a report which included language about an incident which occurred on June 18th, 2012 in which Mr. McDonald allegedly struck a peer, inmate in the back of his head a few times throughout the evening and was warned of the consequences by

the staff. Mr. McDonald also directed gang signs to other peers and slapped one in the head. Mr. McDonald then eventually threw a book at a peer and stated to the staff I ain't got to do shit, F you all. Mr. McDonald was then escorted out of this counseling session and sent home and he walked out and stated F you to the staff.

THE COURT: State?

MS. GLEASON: Judge, the proffer indicates that after that report was read the only thing that Mr. Cook said was that he -- Mr. McDonald was in the center for five times, he didn't listen too well, he recalled several incidents one which involved an Hispanic inmate, Judge, there is no indication that what is being talked about in the paragraph I have that was read to them was actually an Hispanic inmate and said the inmate left the program because he was threatened by Mr. McDonald, Judge, so there is no indication in the proffer that they can tie what they've alleged as the incident to what the individuals who were actually interviewed about so we would ask that you deny number 24 or 25, your Honor.

MR. HERBERT: I would state that what Ms. Gleason stated is correct however the individual -- the witness remembered multiple events and the event in which we proffered I believe was one of the events that this individual remembered, there

is no indication that he didn't remember that event, he said there were multiple events involving a Hispanic victim and we would purport that that is the incident that we proffered.

THE COURT: I understand. You have to take this whole thing in context, this looks like it's more a position on Mr. McDonald's part to aggravate the Hispanic young man rather than to do harm and it is the incidents -- and then the other conclusion is Mr. Cook asked -- excuse me, I violated my own rule again. I asked that Mr. McDonald be driven home so looking at the whole context of that that will not come in.

What I want, again so I'm clear on this, is this is the initial rulings whether they come within the purview of the Lynch doctrine as followed by our Illinois Supreme Court and also by Illinois rules of evidence in 403, we'll get down to the particular details about what particular type of testimony will come in but this is again the preliminary so I would like just to draw up -- one of the sides draw up a draft order concerning this hearing and show it to the other side for form and content, that doesn't have to be done today so why don't we have that typed. Now, we have some other materials that have to be done. Could the attorneys approach.

There is a list of expert witnesses that have been

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

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

I, Alexandra Hartzell, Official Court Reporter, of the Circuit Court of Cook County, County Department - Criminal Division, do hereby certify that I reported in shorthand the proceedings had on the hearing in the aforementioned cause; that I thereafter caused the foregoing to be transcribed into typewriting, which I hereby certify to be a true and accurate transcript of the proceedings had before the HONORABLE VINCENT M. GAUGHAN, Judge of said court.

Alexandra Hartzell
Alexandra Hartzell, CSR
Official Court Reporter
License No. 84-004590

Dated this 22nd day of January, 2018.

EXHIBIT E

STATE OF ILLINOIS)
) SS.
COUNTY OF C O O K)

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

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff,
vs.
JASON VAN DYKE,
Defendant.
No. 17 CR 4286

REPORT OF PROCEEDINGS had at the hearing of the above-entitled cause before the HONORABLE VINCENT M. GAUGHAN, Judge of said court, on the 28th day of April, 2018.

PRESENT:
HONORABLE JOSEPH MCMAHON,
State's Attorney of Kane County.
Court-Appointed Special Prosecutor, by:
MR. DAN WEILER,
MS. JODY GLEASON
MS. MARILYN HITE ROSS,
Assistant Special Prosecutors,
Appeared on behalf of the People;

MR. DANIEL HERBERT,
MS. TAMMY WENDT,
MR. RANDY RUECKERT,
Appeared on behalf of the Defendant.

MR. GABRIEL A. FUENTES and MR. BRENDAN HEALEY
Appeared on behalf of the Intervenors.

Denise A. Gross, CSR# 084-003437
Official Court Reporter
2650 S. California Drive, Room 4C02
Chicago, Illinois 60608

THE COURT: Mr. Fuentes?

MR. FUENTES: No legal basis has been asserted for withholding this document stating that the presumption doesn't apply or that appropriate findings could not be made or if they were made, that appropriate redactions couldn't be done. I think if names were redacted out of that document, our reporters for our clients would do their best to figure out what that document says and they can be the judges of what's intelligible and what's not.

THE COURT: Mr. Fuentes, again, if you or your wonderful journalists were provided the transcripts, they would see that the names are in the transcripts.

This is primarily a legal document, which is well-written and well-presented. The names of the witnesses are in the public domain. So you can't close the barn door. So this would be allowed.

All right, Mr. Weiler?

MR. WEILER: Your Honor, 43 is Defendant's Response to Motion in Limine to Bar Things Prejudiced in Front of the Police Board. That was filed on May 11, 2017. Again, Judge, that deals with Garrity-protected statements. There are allegations that are unsupported. The intervenors have been critical of our use of The Rules of Professional Responsibility as a guide, and we understand that those

STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

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

I, Denise A. Gross, Official Court Reporter of the Circuit Court of Cook County, County Department - Criminal Division, do hereby certify that I reported in shorthand the proceedings had on the hearing in the aforementioned cause; that I thereafter caused to be transcribed into typewriting the foregoing transcript, which I hereby certify is a true and accurate transcript of the Report of Proceedings had before the Honorable VINCENT M. GAUGHAN, Judge of said Court.

Denise A. Gross

Denise A. Gross, C.S.R.
Official Court Reporter
CSR License No. 084-003437

Dated this 30th day of April, 2018.

EXHIBIT F

STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

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

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff,

v.

JASON VAN DYKE,

Defendant.

No. 17-CR-04286-01

REPORT OF PROCEEDINGS had at the hearing of the above-entitled cause, before the HONORABLE VINCENT M. GAUGHAN, one of the Judges of said Division, on the 18th day of April, 2018.

APPEARANCES:
HON. JOSEPH H. McMAHON,
State's Attorney of Kane County,
Court-Appointed Special Prosecutor, and
MR. JOSEPH M. CULLEN, and
MS. JODY P. GLEASON, and
MR. DANIEL H. WEILER, and
MS. MARILYN HITE ROSS,
Assistant State's Attorneys,
on behalf of the People;

MR. DANIEL Q. HERBERT, and
MS. TAMMY L. WENDT, and
MR. RANDY RUECKERT,
on behalf of the Defendant;

GLORIA M. SCHUELKE, CSR, RPR
Official Court Reporter
2650 S. California - 4C02, Chicago, Illinois 60608
Illinois CSR License No. 084-001886

APPEARANCES: (Continued)

MR. BRENDAN J. HEALEY,
on behalf of the Reporters Committee for
Freedom of the Press;

MR. GABRIEL A. FUENTES,
MR. JEFFREY D. COLMAN,
MR. PATRICK E. CORDOVA,
on behalf of Chicago Media;

MS. NATALIE J. SPEARS,
on behalf of the Chicago Tribune;

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PEOPLE v. JASON VAN DYKE

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Official Court Reporter, Criminal Division

Illinois CSR License No. 084-001886

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the newspaper articles, the coverage, and spending some time to review it, and just to see if there's really anything there, is there prejudicial content, is it inflammatory, or it just very neutral coverage, and what's the extent of the coverage.

In most of the cases out there, there's really not enough that would justify wasting time or resources of going onto the next phase. So, many of them, at that point, I just recommend stopping it.

If there is extensive and -- and inflammatory coverage, and prejudicial coverage, we would move to the second phase, which is doing a community attitude survey.

And once that's finished, there's a preliminary review of the data to see if it's -- if there's any issue.

The question is, there can be inflammatory coverage; but it doesn't mean that it's really impacted the community. I've had cases where there's been hundred of articles; and then you do the survey, less than half of the -- the Jury pool is familiar with the case. It just doesn't capture their attention.

But assuming that there is a -- there's high recognition, or appears to be significant pre-judgment,

I would recommend different remedial measures.

It would be -- sometimes they're minor; and it's just maybe an individual sequestered voir dire, or extended Jury questionnaire, or excluding Jurors who on the questionnaire say they're familiar with the case; and it stops there.

To the extreme end, if there's a need for a potential change of venue, which is rare, in most cases I don't recommend that.

And I've been in awkward situations where I've testified in cases where I was recommending against the change of venue, with just some remedial measures; but the defense attorney wanted a change of venue.

So, I've had those scenarios, as well.

Q. So, you have worked mostly against change of venue, correct?

A. I would say, against it. I -- in most cases I'm hired on, I don't feel like there's a need for it. The data, the findings don't support a change of venue. So, I recommend a lesser measure.

If, for some reason, the -- there's -- there's sensational coverage, it appears that it's kind of seared in the public's consciousness, the case, we

STATE OF ILLINOIS)
)
COUNTY OF C O O K)

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

I, GLORIA M. SCHUELKE, CSR, RPR, Official Court Reporter of the Circuit Court of Cook County, County Department, Criminal Division, do hereby certify that I reported in shorthand the proceedings had at the hearing in the aforementioned cause; that I thereafter caused the foregoing to be transcribed into typewriting, which I hereby certify to be a true and accurate transcript taken to the best of my ability of the Report of Proceedings had before the HONORABLE VINCENT M. GAUGHAN, Judge of said court.

Gloria M Schuelke, CSR, RPR
Official Court Reporter
Illinois CSR License No. 084-001886

Dated this 20th of April, 2018.