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

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff,	)	
	)	No. 17 CR 09700-01
vs.	)	No. 17 CR 09700-02
	)	No. 17 CR 09700-03
DAVID MARCH, JOSEPH WALSH, and THOMAS GAFFNEY,	)	Hon. Domenica A. Stephenson
	)	
Defendants.	)	

NOTICE OF MOTION

To: See attached Certificate of Service

PLEASE TAKE NOTICE that on **Tuesday, July 10, 2018, at 10:00 a.m.**, Counsel shall appear before the Honorable Domenica A. Stephenson in Courtroom 204, in the Circuit Court of Cook County, Leighton Criminal Courthouse, 2600 S. California, Ave., Chicago, Illinois, and shall present **Intervenors' Motion for Intervention, Access to Sealed Court Filings, and Related Relief (hereafter, "Motion"), and Intervenors' Memorandum in Support of the Motion**, copies of which are hereby served upon you.

Dated: July 6, 2018

Respectfully submitted,

CHICAGO TRIBUNE COMPANY, LLC
SUN-TIMES MEDIA, LLC
THE ASSOCIATED PRESS
WGN CONTINENTAL BROADCASTING CO, LLC.
WFLD FOX 32 CHICAGO
CHICAGO PUBLIC MEDIA, INC.
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

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CERTIFICATE OF SERVICE

Vaishalee V. Yeldandi, an attorney, hereby certifies that on **Friday, July 6, 2018**, she caused the foregoing **Notice of Motion** and attached **Intervenors' Motion for Intervention, Access to Sealed Court Filings, and Related Relief (hereafter, "Motion"), and Memorandum in Support of the Motion** to be served upon counsel listed below via email and United States Mail:

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Vaishalee V. Yeldandi

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

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff, vs. DAVID MARCH, JOSEPH WALSH, and THOMAS GAFFNEY, Defendants.	)	No. 17 CR 09700-01 No. 17 CR 09700-02 No. 17 CR 09700-03 Hon. Domenica A. Stephenson

INTERVENORS' MOTION FOR INTERVENTION, ACCESS TO SEALED COURT FILINGS, AND RELATED RELIEF

The Chicago Tribune Company, LLC; Sun-Times Media, LLC; the Associated Press; WGN Continental Broadcasting Company, LLC; WFLD Fox 32 Chicago; Chicago Public Media, Inc.; and the Reporters Committee for Freedom of the Press (collectively, "Intervenors"), by their undersigned attorneys, file this Motion for Intervention, Access to Sealed Court Filings, and Related Relief ("Motion").

By this Motion, Intervenors seek (1) leave to intervene in this matter for the purpose of asserting their rights of public access, (2) the unsealing of the Special Prosecutor's proffer to admit co-conspirator hearsay testimony and the defendants' motion to dismiss, which were sealed by the Court on June 7, 2018 and June 19, 2018, respectively (and the unsealing of any sealed responses or replies filed subsequently), and (3) notice and an opportunity to be heard as to any court filing (including the sealed proffer and sealed motion to dismiss) or proceeding that the Court is inclined to seal, in whole or in part.

For the reasons stated in Intervenors' Memorandum of Law in Support of Motion for Intervention, Access to Sealed Court Filings, and Related Relief, which is being filed contemporaneously with this Motion, Intervenors respectfully request that the Motion be granted.

Dated: July 6, 2018

Respectfully submitted,

CHICAGO TRIBUNE COMPANY, LLC
SUN-TIMES MEDIA, LLC
THE ASSOCIATED PRESS
WGN CONTINENTAL BROADCASTING CO, LLC.
WFLD FOX 32 CHICAGO
CHICAGO PUBLIC MEDIA, INC.
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

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

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff, vs. DAVID MARCH, JOSEPH WALSH, and THOMAS GAFFNEY Defendants.	)	No. 17 CR 09700-01 No. 17 CR 09700-02 No. 17 CR 09700-03 Hon. Domenica A. Stephenson

INTERVENORS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR INTERVENTION, ACCESS TO SEALED COURT FILINGS, AND RELATED RELIEF

INTRODUCTION

The Chicago Tribune Company, LLC; Sun-Times Media, LLC; the Associated Press; WGN Continental Broadcasting Company, LLC; WFLD Fox 32 Chicago; Chicago Public Media, Inc.; and the Reporters Committee for Freedom of the Press (collectively, "Intervenors") respectfully file this Memorandum of Law in Support of Motion for Intervention, Access to Sealed Court Filings, and Related Relief.

The media and the public have a significant interest in this important criminal matter in which three Chicago police officers allegedly conspired to obstruct justice in the investigation of a fellow officer involved in the alleged murder of teenager Laquan McDonald in an incident recorded by a police video camera. Since the public release of the video in November 2015, a Chicago Police Superintendent was fired, a Cook County State's Attorney lost her re-election bid, and the incident has become part of a national discussion about urban policing in America. News coverage of this case will provide the public with a window into the workings of its criminal justice system and assure the public that justice is being properly served in this important matter.

Although this Court generally has been faithful to the public's right of access to this judicial proceeding, it recently sealed the following two court filings: (1) the Special Prosecutor's proffer to admit co-conspirator hearsay testimony, and (2) the defendants' motion to dismiss. These sealed court filings restrict the public's access to these important proceedings, shielding from public view and scrutiny filings that are presumptively open and potentially important to the disposition of the case.

As far as Intervenors are aware, the Court has not entered—and could not properly enter—the specific findings necessary under the law to justify, on a document-by-document, redaction-by-redaction basis, withholding judicial documents to protect a higher interest or value in this matter. *See Press-Enter. Co. v. Super. Ct.,* 478 U.S. 1, 13 (1986) ("*Press-Enterprise II*"); *Press-Enter. Co. v. Super. Ct.*, 464 U.S. 501, 505-13 (1984) ("*Press-Enterprise I*"); *People v. LaGrone*, 361 Ill. App. 3d 532, 533 (4th Dist. 2005). In the absence of such findings, well-established law under the First Amendment, Illinois Constitution, and common-law right of access entitles Intervenors and the public access to these judicial documents that historically have been open to the public, and whose disclosure furthers the interests of the judicial process.

Accordingly, at this time, Intervenors ask the Court to: (1) permit them to intervene in this matter for the purpose of asserting their rights of public access, and (2) unseal the above-referenced documents as soon as possible, for the public's right of access is immediate and contemporaneous, and the newsworthiness of information is often "fleeting." As this case progresses towards trial, Intervenors request notice and an opportunity to be heard on any future sealing requests and on any other issues related to access for the public and media.

I. FACTS[1]

1. The Intervenors include six news organizations that have provided their readers, subscribers, and viewing and listening audiences with coverage of this case, as well as the Reporters Committee for Freedom of the Press:

- Chicago Tribune Company, LLC publishes the Chicago Tribune, one of the largest daily newspapers in the United States, and operates a popular news and information website, chicagotribune.com, which attracts a national audience.

- Sun-Times Media, LLC publishes the Chicago Sun-Times daily newspaper as well as weekly newspapers and internet news sites. The Chicago Sun-Times is circulated throughout the Chicago area and suburbs.

- The Associated Press is a not-for-profit news cooperative owned by some 1,500 U.S. newspaper members, and its members and subscribers include newspapers, magazines, broadcasters, cable news services, and internet content providers across the country. The Associated Press's news content can reach more than half the world's population on any given day.

- WGN Continental Broadcasting Company, LLC operates WGN-TV (Channel 9), a Chicago-based television station that provides more hours of local news coverage than any other Chicago station, CLTV, a Chicago-based regional cable television news service, and WGN radio (720 AM), a leading Chicago-based broadcaster of news and information content on a signal that reaches across the Midwest. WGN-TV's and WGN Radio's news and information programming is available on a live and archived basis over the internet.

- WFLD Fox 32 Chicago ("WFLD Fox 32"), owned and operated by Fox Television Stations, LLC, is a local broadcast television station based in Chicago, Illinois, that is committed to reporting on significant matters in the public interest to the residents of the greater Chicagoland area. Today, WFLD Fox 32 produces approximately 52 hours of local news every week, provides around the clock coverage on its website, http://www.fbx32chicago.com/, and, working with its affiliated entities, also provides news coverage of events across the country and worldwide.

- Chicago Public Media, Inc. is a not-for-profit public broadcasting company that operates WBEZ 91.5 FM Chicago, which provides local news coverage to its radio audience and to users of wbez.org.

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[1] *See In Interest of A.T.*, 197 Ill. App. 3d 821, 834 (4th Dist. 1990) (citing *People v. Davis*, 65 Ill. 2d 157 (1976)) ("[A] court may take judicial notice of matters of record in its own proceedings.").

- The Reporters Committee for Freedom of the Press is a nonprofit association of reporters and editors dedicated to safeguarding the First Amendment rights and freedom-of-information interests of the news media and the public.

2. As the bench trial currently scheduled for November 26, 2018 gets closer, and as reporters attempt to cover pre-trial hearings on motions that were not released to the public, Intervenors have become increasingly concerned about secrecy in these proceedings.

3. The three-count indictment in this case was returned in June 2017. The indictment alleges that the defendants, three Chicago police officers, conspired to obstruct justice in the investigation of the alleged murder of 17-year-old Laquan McDonald in October 2014. The indictment also charges the defendants with obstruction of justice and official misconduct. A fourth officer, Jason Van Dyke, awaits trial on murder charges in McDonald's death.

4. On July 18, 2017, the case was assigned to this Court.

5. On November 2, 2017, this Court entered an Agreed Protective Order which is attached hereto as Exhibit A. Among other things, the November 2, 2017 Order: (a) defines "Protected Information," (b) restricts the parties' use of that information, including in court filings, (c) sets forth procedures for the sealing of documents containing Protected Information, and (d) provides for challenges by members of the public to the sealing of such information.

6. On April 12, 2018, each of the defendants asserted that they desire a bench trial in this case. Later, on June 19, in scheduling this matter for trial on November 26, 2018, the Court reiterated that this is intended to be a bench trial. (Transcript of Proceedings, June 19, 2018, at 10.)

7. On May 31, 2018, this Court entered an Order (Exhibit B attached hereto), restricting the prosecutor, the defense counsel, and others from (among other things) disseminating information to the public, releasing "any documents, exhibits, photographs, or any evidence, the

admissibility of which may have to be determined by the Court," and making almost any kind of extra-judicial statements.

8. On June 7, 2018, the State submitted to the Court its "proffer on co-conspirator statements" which has been referred to as the "*Santiago* proffer." In making its submission, the State asserted: "The proffer would fall within the court's order from May 31, 2018, Paragraph 2, which concerns any exhibit, the admissibility of which may have to be determined by the court." (Transcript of Proceedings, June 7, 2018, at 6-7.) The Court then suggested that the proffer be filed under seal pursuant to the protective order entered by the Court, and all parties agreed. (*Id.* at 7.)

9. On June 19, 2018, the defendants filed a motion to dismiss the indictment, and they asked that the motion to dismiss be filed under seal. (Transcript of Proceedings, June 19, 2018, at 2-3.) The State noted: "Your Honor, the Santiago proffer was filed, I think, at your request under seal. Probably falls into the same category. We really don't have a position one way or the other." (*Id.* at 3.) The Court then stated: "All right. For now, I did have the filing under seal. To be consistent for now, it will be filed under seal." (*Id.*)

10. Intervenors understand that responses to the *Santiago* proffer and the defendants' motion to dismiss are due on July 10, and we presume those responses also will be filed under seal.

II. THE MOTION TO INTERVENE SHOULD BE GRANTED.

Under well-established Illinois law, intervention is the correct vehicle for the purpose of allowing news organizations, with an interest in obtaining access to court file documents or closed public hearings, to obtain such access. *People v. Pelo*, 384 Ill. App. 3d 776, 779 (4th Dist. 2008) (concluding that Illinois law allows intervention when a party asserts a right of access); *LaGrone*, 361 Ill. App. 3d at 533 (reversing trial court's denial of access sought by media intervenors in criminal case); *A.P. v. M.E.E.*, 354 Ill. App. 3d 989, 991 (1st Dist. 2004) (reversing denial of access

sought by media intervenor in civil case); *see also People v. Kelly*, 397 Ill. App. 3d 232, 243-45 (1st Dist. 2009) (confirming common-law right of media organizations to intervene in Illinois criminal cases to seek access to judicial documents and proceedings).

Here, Intervenors include six news organizations that have provided news coverage in this matter, as well as a nonprofit organization devoted to freedom of the press, and yet have been denied access to portions of the court file in this matter. News organizations seeking to assert the right of public access to court proceedings and judicial records act as "surrogates for the public," *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980), and "must be given an opportunity to be heard." *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 609 n.25 (1982) (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 401 (1979) (Powell, J., concurring)).

Accordingly, given Intervenors' substantial interest in providing the public with information about this case, the Court should permit Intervenors to intervene in this matter for the purpose of asserting their right of access.

III. INTERVENORS' MOTION FOR ACCESS TO THE SEALED COURT FILINGS SHOULD BE GRANTED.

Intervenors seek access to public judicial documents that are subject to a presumption of access under the First Amendment, Article I, Section 4 of the Illinois Constitution, and the common law. Intervenors must be granted access to the *Santiago* proffer and the defendants' motion to dismiss, and any related filings, in the absence of the specific findings required to justify withholding judicial documents under long-established U.S. Supreme Court precedent and controlling Illinois law. *Press-Enterprise II*, 478 U.S. at 13-14; *Press-Enterprise I*, 464 U.S. at 510; *LaGrone*, 361 Ill. App. 3d at 535. To the extent the Court considers making any specific findings, Intervenors respectfully request an opportunity to be heard, so they may review, evaluate,

and—if necessary—challenge those findings, as the hurdle for restricting access to public documents in criminal cases is very high and, respectfully, cannot be met in this case.

A. Judicial Documents and Proceedings Are Presumptively Open to the Public under the Constitutional and Common-Law Rights of Access.

Intervenors, as members and representatives of the public, have a presumptive federal constitutional right of access to judicial documents and proceedings under the First Amendment. *Press-Enterprise II*, 478 U.S. at 11-12; *Press-Enterprise I*, 464 U.S. at 508-10; *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 232 (2000). A "presumption of a right of public access" attaches when a document is filed in court. *Skolnick*, 191 Ill. 2d at 232. Illinois courts also recognize a right of access grounded in the Illinois Constitution, which provides that "[a]ll persons may speak, write, and publish freely." Ill. Const. art. I, § 4.[2] This constitutional, presumptive right of access applies to court records or proceedings of the kind that have been historically open to the public, where openness furthers the court proceeding at issue. *Skolnick*, 191 Ill. 2d at 232; *People v. Zimmerman*, 2017 IL App (4th) 170055, ¶ 10, *appeal allowed*, No. 1222261, 2017 WL 4359033 (Ill. Sept. 27, 2017).

Once the First Amendment presumption of access applies, a trial court may not deny access to a document unless the court makes specific findings demonstrating that the denial of access is "essential to preserve higher values and is narrowly tailored to serve those values." *Kelly*, 397 Ill. App. 3d at 261; *LaGrone*, 361 Ill. App. 3d at 535-36. When the value asserted is a defendant's right to a fair trial in a criminal case, "then the trial court's findings must demonstrate, first, that there is a substantial probability that defendant's trial will be prejudiced by publicity that closure

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[2] In addition to Intervenors' federal and state constitutional rights of access, Illinois and federal courts also recognize a common-law right of access to documents filed in court cases, which Intervenors invoke here as well. *See Skolnick*, 191 Ill. 2d at 230 (citing *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978)).

will prevent; and second, that reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights." *Kelly*, 397 Ill. App. 3d at 261.

B. The Sealed Court Filings in This Matter Are Subject to the Presumption of Access.

In this case, Intervenors seek access to sealed documents (and any related filings) that are subject to the presumption of access. These documents are the kind of court filings that historically are open to the public, and their disclosure furthers the interests of the judicial system by keeping the public informed about the judicial process in this significant criminal case.

1. The Sealed Documents Are of the Kind Historically Open to the Public.

Illinois courts have held that documents filed with the Court have historically been open to the public and are thus subject to the presumption of public access. *Skolnick*, 191 Ill. 2d at 232; *In re Marriage of Johnson*, 232 Ill. App. 3d 1068, 1074 (4th Dist. 1992). An Illinois statute, the Clerks of Court Act, has also long recognized the publicly accessible nature of court documents:

> All records, dockets and books required by law to be kept by such clerks shall be deemed public records, and shall at all times be open to inspection without fee or reward, and all persons shall have free access for inspection and examination to such records, docket and books, and also to all papers on file in the different clerks' offices and shall have the right to take memoranda and abstracts thereto.

705 ILCS 105/16(6).[3] Court documents are not the litigants' property, but rather, they belong to the public, which underwrites 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)).

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[3] The federal authorities are in accord. *See Smith v. United States Dist. Ct. for S. Dist.*, 956 F.2d 647, 649–650 (7th Cir. 1992) (noting that the "well recognized" common law right of access "to judicial records and documents" applies "to civil as well as criminal cases"). The "policy behind" this longstanding common law presumption is "that what transpires in the courtroom is public property." *Id.* at 650 (citation omitted); *see also Citizens First Nat'l Bank v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999) (noting that the public "has an interest in what goes on at all stages of a judicial proceeding").

The currently sealed documents are precisely the kind of court filings that are historically open to the public. Thus, for example, in *In re Time Inc.*, 182 F.3d 270, 271 (4th Cir. 1999), the United States Court of Appeals for the Fourth Circuit held that the First Amendment right of access applied to a motion to dismiss an indictment. Motions to dismiss indictments are frequently filed, and Intervenors are unaware of any instances in which state or federal appellate courts have upheld sealing such motions. Since defendants' pending, but sealed, motion to dismiss could conceivably dispose of the entire criminal case, the public's interest in openness and the need to understand the arguments asserted in the motion are particularly compelling.

Courts also have routinely granted motions to unseal *Santiago* proffers, which are frequently filed, and often required, in conspiracy cases such as this. Attached as Exhibit C are three orders from federal district court judges in Chicago; each holds that *Santiago* proffers must be publicly available. As Your Honor will observe, these decisions include *Santiago* proffers in the high profile cases against former Governors George Ryan and Rod Blagojevich. We have no doubt that the experienced prosecutors and defense lawyers in this case will agree that—in federal court proceedings—*Santiago* proffers are publicly filed, subject to certain limited redactions or exceptions. Since these federal cases apply First Amendment jurisprudence, they are instructive here.

2. Disclosure of these Sealed Documents Furthers the Judicial Process Here.

Intervenors' access to these sealed documents will further the interests of the judicial system in this important and widely followed criminal matter. "Public scrutiny over the court system promotes community respect for the rule of law, provides a check on the activities of judges and litigants, and fosters more accurate fact finding." *A.P.*, 354 Ill. App. 3d at 999 (citing *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994)). This case is of high

public interest, and unfettered press coverage of it enhances the public's confidence in the judicial process. *See also Richmond Newspapers*, 448 U.S. at 575 ("It would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted."); *Press-Enterprise I*, 464 U.S. at 508 ("Openness . . . enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system."); *Skolnick*, 191 Ill. 2d at 230 ("[T]he availability of court files for public scrutiny is essential to the public's right to monitor the functioning of our courts, thereby insuring quality, honesty and respect for our legal system.") (citations and quotations omitted); *In re Marriage of Johnson*, 232 Ill. App. 3d at 1074 ("When courts are open, their work is observed and understood, and understanding leads to respect.").

Police misconduct allegations are at the core of this matter, and public interest in observing and understanding these judicial proceedings and the documents filed in them is thus particularly keen. In *Waller v. Georgia*, 467 U.S. 39 (1984), for example, the Supreme Court held that a suppression hearing involving allegations of police misconduct was presumptively accessible to the public because the subject matter of official misconduct carries "a 'particularly strong' need for public scrutiny." *Kelly*, 397 Ill. App. 3d at 259 (quoting *Waller*, 467 U.S. at 47). Further, "[t]he appropriateness of making court files accessible is accentuated in cases" like this "where the government is a party: in such circumstances, the public's right to know what the executive branch is about coalesces with the concomitant right of the citizenry to appraise the judicial branch." *Smith*, 956 F.2d at 650 (internal citation and quotations omitted).

Accordingly, because publicly filed court documents in this high-profile criminal matter are of the kind historically open to the public, and because their disclosure furthers the purpose of the judicial proceedings, the presumptive right of public access applies. Access to the sealed

documents thus may not be denied absent the requisite findings that denial of access is necessary to preserve a higher interest and is narrowly tailored to preserve that interest. As explained below, the Court has yet to make those findings and, we respectfully submit, cannot properly do so.

C. This Court Has Not Made Findings Necessary to Support Denial of Access.

Intervenors are not aware of any findings made in support of denying access to the sealed documents here. The transcript of proceedings from June 7 and June 19—the dates when these court filings were sealed—do not show that any findings were made to warrant sealing. As best Intervenors can ascertain, neither the November 2, 2017 Order nor the May 31, 2018 Order make anything close to the requisite findings necessary to support sealing the court filings currently pending before the Court. To the extent that the Court sealed the documents at issue here in reliance on its May 31, 2018 Order (prohibiting the parties from "releas[ing] or authoriz[ing] the release of any documents . . . or any evidence, the admissibility of which may have to be determined by the Court"), Intervenors urge the Court to narrow the breadth of that Order to comport with the presumption of access for court filings and the *Press-Enterprise* test set forth above. The Court may not seal publicly filed court documents without providing notice to the public and making specific, particularized findings on the record justifying such secrecy. *Press-Enterprise II*, 478 U.S. at 13-14.

Denials of public access are only permitted after a court makes specific, narrowly tailored findings to support such secrecy on a document-by-document basis. *See A.P.*, 354 Ill. App. 3d at 1001 ("[T]he court should limit sealing orders to particular documents or portions thereof which are directly relevant to the legitimate interest in confidentiality."). The fact that "evidence" may be inadmissible is not, in and of itself, a lawful basis for sealing a court filing. *See, e.g.*, *Smith*, 956 F.2d at 650 (rejecting argument that because memorandum was not in evidence, it was not accessible, explaining that jurisprudence on access "is not so narrow—they speak of judicial

records, not items in evidence," and noting that "judicial records include transcripts of proceedings, everything in the record, including items not admitted into evidence"). Indeed, in *Waller*, 467 U.S. at 48, the United States Supreme Court expressly ruled that proceedings on a motion to suppress evidence are presumptively open to the public. In addition, here, given that all three defendants have already advised the Court that they desire a bench trial (Transcript of Proceedings, April 12, 2018, at 6-7), the commonly made argument—that sealing is necessary in order to keep certain information from potential jurors —is inapplicable.

In the event the Court considers entering any such findings, Intervenors respectfully request the opportunity to participate in that process, to review any proposed findings and, if necessary, to challenge them. In this case—a significant criminal proceeding involving substantial public interest where the defendants have opted to have a bench trial—the Court must protect the public's constitutional right of access and need not weigh that interest against concerns that disclosure might prejudice the defendant's fair trial rights by tainting a jury pool. The Court—which will be the trier of fact in this case—has the sealed documents, and there simply is no reason why Intervenors and the public should be deprived of these court filings.

CONCLUSION

For the foregoing reasons, Intervenors respectfully request that the Court grant the motion for intervention and access to the sealed court filings in this case and provide Intervenors with notice and an opportunity to be heard on any future sealing requests and any other access-related issues.

Dated: July 6, 2018

Respectfully submitted,

CHICAGO TRIBUNE COMPANY, LLC
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EXHIBIT A

STATE OF ILLINOIS) SS.
COUNTY OF COOK)

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

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
v.	)	**Case No. 17 CR 9700**
	)	
DAVID MARCH,	)	
JOSEPH WALSH, and	)	
THOMAS GAFFNEY,	)	
	)	
Defendants.	)	

AGREED PROTECTIVE ORDER

Pursuant to Illinois Supreme Court Rule 415(d), the Court finds justice requires the entry of this Agreed Protective Order, previously agreed to by the State of Illinois and defendants March, Walsh and Gaffney. Accordingly, it is ORDERED:

1. Applicability. This Agreed Protective Order applies to all materials produced or adduced in the course of discovery in this Action, including information produced by the State, defendants, and third parties, responses to discovery requests, deposition testimony and exhibits, and information derived directly therefrom (hereinafter collectively "Documents").

2. Protected Information. Documents that meet the definition of "Protected Information" shall be handled according to the provisions of this Order. Protected Information shall include:

(a) Information regarding a potential or actual crime, including the identities of individuals who were a witness to or victim of a crime, other than the events that are the subject of this Action.

(b) Personally Identifiable Information regarding an individual, which is defined as:

1. For civilians, the combination of an individual's name and an additional unique identifying characteristic other than the individual's name such as home address, Social Security number, or personal telephone number;
2. For CPD personnel, the combination of an individual's name and an additional unique identifying characteristic other than the individual's name such as home address, Social Security number, or personal telephone number. Personally Identifiable Information does not include a CPD officer's "star number," other employee number, business address, or business phone number.

(c) Protected Health Information regarding any individual, such as health status or information regarding the provision of health care. Protected Health Information shall have the same scope and definition as set forth in 45 C.F.R. § 160.103 and 164.501. Protected Health Information includes, but is not limited to, health information, including demographic information, relating to either (a) the past, present, or future physical or mental condition of an individual, (b) the provision of care to an individual, or (c) the payment for care provided to an individual, which identifies the individual or which reasonably could be expected to identify the individual

3. Identification of Protected Information. The producing party is not required to designate a document as containing or constituting Protected Information. It is each party's obligation to ensure Protected Information is treated consistent with this Order.

4. Use of Protected Information. Information produced in this Action shall not be used or disclosed by the receiving parties, counsel for the parties or any other persons for any purpose whatsoever other than in this Action, including any appeal thereof. The parties and counsel for the parties shall not disclose or permit the disclosure of any Protected Information to any third person or entity except as set forth in subparagraphs (a)-(h). Subject to these requirements, the following categories of persons may be allowed to review Protected Information:

(a) Parties. Individual parties and appropriate representatives of the State;

(b) The Court and its personnel;

(c) Court Reporters and Recorders. Court reporters and recorders engaged for depositions or other proceedings;

(d) Contractors. Those persons specifically engaged for the limited purpose of making copies of documents or organizing or processing documents, including outside vendors hired to process electronically stored documents;

(e) Consultants and Experts. Consultants, investigators, or experts employed by the parties or counsel for the parties to assist in the preparation and trial of this action but only after such persons have completed the certification contained in Attachment A, Acknowledgment of Understanding and Agreement to Be Bound;

(f) Witnesses. Witnesses to whom disclosure is reasonably necessary. Witnesses shall not retain a copy of documents containing Protected Information, except witnesses may receive a copy of all exhibits marked at any deposition that may occur in connection with review of a transcript. Pages of transcribed deposition testimony or exhibits to depositions that are designated as Protected Information pursuant to the process set out in this Order must be separately bound by the court reporter and may not be disclosed to anyone except as permitted under this Order.

(g) Author or recipient. The author or recipient of the document (not including a person who received the document in the course of litigation); and

(h) Others by Consent. Other persons only by written consent of the producing party or upon order of the Court and on such conditions as may be agreed or ordered.

5. Court Filings. All Protected Information filed with the Court shall either be redacted or filed in a sealed container on which must be written the caption of this action, the nature of the contents, and a statement in substantially the following form: CONTAINS RESTRICTED INFORMATION SUBJECT TO PROTECTIVE ORDER - OPEN ONLY AS DIRECTED BY THE COURT.

6. Action by the Court. Applications to the Court for an order relating to materials or documents related to Protected Information shall be by motion. Nothing in this Order or any action or agreement of a party under this Order limits the Court's power to make orders concerning the disclosure of documents produced in discovery or at trial.

7. Challenges by Members of the Public to Sealing Orders. A party or interested member of the public has a right to challenge the sealing of particular documents that have been filed under seal, and the party asserting protection will have the burden of demonstrating the propriety of filing under seal.

8. Use at Trial or Hearing. Nothing in this Order affects the use of any document, material, or information at any trial or hearing in this matter. The Court may thereafter make such orders as are necessary to govern the use of such documents or information at trial.

9. Control of Documents. Counsel for the parties shall make reasonable efforts to prevent unauthorized or inadvertent disclosure of Protected Information.

10. Protected Information Subpoenaed or Ordered Produced in Other Litigation.

(a) If a receiving party is served with a subpoena or an order issued in other litigation that would compel disclosure of any material or document that

constitutes Protected Information, the receiving party must so notify the producing party, in writing, immediately and in no event more than three court days after receiving the subpoena or order. Such notification must include a copy of the subpoena or court order.

(b) The receiving party also must immediately inform in writing the party who caused the subpoena or order to issue in the other litigation that some or all of the material covered by the subpoena or order is the subject of this Order. In addition, the receiving party must deliver a copy of this Order promptly to the party in the other action that caused the subpoena to issue.

(c) The purpose of imposing these duties is to alert the interested persons to the existence of this Order and to afford the producing party in this case an opportunity to try to protect its Protected Information in the court from which the subpoena or order issued. The producing party shall bear the burden of seeking protection in that court of its Protected Information, and nothing in these provisions should be construed as authorizing or encouraging a receiving party in this action to disobey a lawful directive from another court. The obligations set forth in this paragraph remain in effect while the party has in its possession, custody or control Protected Information produced in connection with this case.

11. Order Subject to Modification. This Order shall be subject to modification by the Court on its own initiative or on motion of a party or any other person with standing concerning the subject matter.

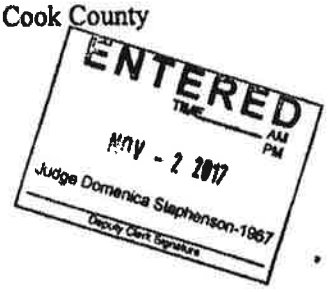
12. No Prior Judicial Determination. This Order is entered based on the representations and agreements of the parties and for the purpose of facilitating discovery. Nothing herein shall be construed or presented as a judicial determination that any document or material identified as Protected Information by counsel or the parties is entitled to protection under Rule 415(d) of the Illinois Supreme Court Rules or otherwise until such time as the Court may rule on a specific document or issue.

13. Persons Bound. This Order shall take effect when entered and shall be binding upon all counsel of record and their law firms, the parties, and persons made subject to this Order by its terms.

DATE: 11-2-17

ENTERED:

Hon. Domenica Stephenson
Judge of the Circuit Court
of Cook County



STATE OF ILLINOIS) SS.
COUNTY OF COOK)

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

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
v.	)	**Case No. 17 CR 9700**
	)	
DAVID MARCH,	)	
JOSEPH WALSH, and	)	
THOMAS GAFFNEY,	)	
	)	
Defendants.	)	

Attachment A to Agreed Protective Order

Acknowledgment of Understanding and Agreement to Be Bound

1. Third-party _____ hereby (i) consents to the terms and conditions of the Agreed Protective Order (the "Order"), as entered by the Court, and (ii) consents to the jurisdiction of the Court for purposes of enforcing the terms of the Order.

2. By executing this Acknowledgment of Understanding and Agreement to Be Bound, the third-party may designate material it has been subpoenaed or requested to produce as Protected Information, as provided in the terms of the Order. The third party agrees to abide by the terms and conditions of the Order.

3. The terms used in this Acknowledgment of Understanding and Agreement to Be Bound have the same meanings as set forth in the Order.

Name:_____
Street Address:_____
City, State, ZIP:_____
Telephone:_____
Facsimile: _____
Email Address: _____
Counsel for Third Party:_____
Dated:_____

Signature:_____

EXHIBIT B

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

PEOPLE OF THE STATE OF ILLINOIS, Plaintiffs,	)	
	)	17 CR-09700-01
v	)	17 CR-09700-02
	)	17 CR-09700-03
DAVID MARCH,	)	
JOSEPH WALSH, and	)	
THOMAS GAFFNEY,	)	
Defendants	)	

ORDER

It is the Order of this Court that no attorney with this case as Prosecutor or Defense Counsel, nor any other attorney working on or with the offices of either of them, nor their agents, staff, or experts, nor any judicial officer or court employee, nor any law enforcement employee or any agency involved in this case, nor any persons subpoenaed or expected to testify in this matter, shall do any of the following

1 Release or authorize the release for public dissemination any purported extrajudicial statement of either the defendant or witnesses relating to this case,
2 Release or authorize the release of any documents, exhibits, photographs or any evidence, the admissibility of which may have to be determined by the Court,
3 Make any statement for public dissemination as to the existence or possible existence of any documents, exhibits, photographs or any evidence, the admissibility of which may have to be determined by the Court,
4 Express outside of court an opinion or make any comment of public dissemination as to the weight, value, or effect of any evidence as tending to establish guilt or innocence,
5 Make any statement outside of court as to the content, nature, substance, or effect of any statements or testimony that is expected to be given in any proceeding in or relating to this matter,
6 Make any out-of-court statement as to the nature, source or effect of any purported evidence alleged to have been accumulated as a result of the investigation of this matter
7 This Order also incorporates Article VIII Illinois Rules of Professional Conduct, effective January 1, 2010

This Order does not include any of the following

1 Quotations from, or any reference without comment to, public records of the Court in the case
2 The scheduling and result of any stage of the judicial proceedings held in open court in an open or public session
3 Any witness may discuss any matter with any Prosecution or Defense Attorney in this action, or any agent thereof, and if represented may discuss any matter with his or her own attorney

Anyone in violation of this court order may be subject to contempt of court

ENTERED [signature] 1967
Judge Domenica A Stephenson
Circuit Court of Cook County
Criminal Division

DATE 5-31-18

ENTERED
TIME _____ AM PM
MAY 11 2018
Judge Domenica Stephenson 1967
Dismissed

EXHIBIT C

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Judge Zagel	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	08 CR 888	DATE	April 14, 2010
CASE TITLE	UNITED STATES OF AMERICA v. ROD BLAGOJEVICH, et al.		

DOCKET ENTRY TEXT:

Motion by Sun Times Media LLC, Associated Press, and Chicago Tribune Company to intervene and for immediate access to the *Santiago* proffer filed under seal (295) is granted.

STATEMENT

I have examined written submissions respecting the pretrial proffer of evidence in support of the prosecution's representation that there is enough evidence of the existence of a conspiracy that admission of alleged co-conspirators' statements is warranted under a well-known exception to the rule against hearsay evidence. *See* Fed. R. Civ. P. 801(d)(2)(E), and *United States v. Santiago*, 582 F.2d 1128 (7th Cir. 1987). The proffer was filed under seal so that objections to its public disclosure could be made. The two defendants have filed papers urging redactions. The redactions sought would cover those portions of the proffer that, it is represented by the prosecution, contain transcriptions of excerpts of certain recorded conversations. The rationale for the redactions are two. The first is that the inclusion of a part of the recording (rather than all the recording) could give the public an incorrect impression of the evidence. The second is that release of a printed excerpt within forty-eight days of the start of trial proceedings could contaminate the jury pool. There is no challenge to the accuracy of the written transcription of the recordings.

In order to determine whether the preconditions for admission of the alleged co-conspirators' statements are met, it is necessary for me to consider the transcriptions, so the substance of the statements will be considered by me in ruling whether the preliminary showing of admissibility has been made. Redaction of material which is not considered in reaching a decision is generally permissible on a variety of grounds. Indeed the rules provide for striking certain kinds of material.

Redaction, in cases where the redacted words are relevant to the case and considered in reaching a decision, is still permitted but discouraged. *See In re Krynicki*, 983 F.2d 74, 75 (7th Cir. 1992) ("Information that is used at trial or otherwise become the basis of decision enters the public record.") (citation omitted). The case for redaction has to be proven not presumed. It is not proven here. If the excerpt of a conversation would have a different meaning if more of the conversation were to be reproduced, the defendants here can reproduce it if either believes that the additional language would help defeat the claim of admissibility made by the prosecution. They too may make preliminary filings under seal and suggest redactions if either

STATEMENT

believes such redactions are justified under law. But it is clear that the remedy to the objection that a portion of a statement may be misleading to the public (and the jury pool) is not redaction but disclosure of the omitted portion. This is true as well when the objection is not that some words had been edited out but rather that another conversation diminishes or destroys the prosecutorial value of the words cited by the Government.

Disclosure of written material a month and a half before the beginning of trial does not come close to presenting a significant threat that a fair jury cannot be found. The experience of the courts in cases which attract significant news coverage has shown that pretrial news reporting is an overstated menace to fair jury trials.

The kind of person who would qualify as a juror even includes, as the Supreme Court has said, a person who has an opinion of the guilt or innocence of the accused so long as that person can put aside that opinion and decide the case on the evidence presented in the courtroom. *See Irvin v. Dowd*, 366 U.S. 717, 722-23 (1961). This rule should come as no surprise. Few of us have gone through life without often discovering that which we firmly believed to be true was in fact false. Those who do have firm opinions that cannot be set aside are usually honest enough to say so. The convinced partisan who denies bias in order to serve on a jury is, ordinarily, seen by court and counsel for what he or she is. More importantly, most people do not retain detailed knowledge of what they read in newspapers or what they hear and see in electronic media. Part of this stems from the sheer volume of media today. Part of it stems from the fact that what is reported seldom has a direct bearing on the lives of those who hear it. It may be interesting to find out that large non-native snakes have been found in the Everglades, but it is not important to the vast majority of Americans, and this is why such stories are not endlessly repeated. There is no urgent need to retain much of what the media reports.

The events which are the subject of this case are not those which make a lasting impression on the mind of readers. The words in papers and magazines and the words read by an anchor on radio or television will not be retained in significant detail by members of the public.[1] I expect that many members of the jury pool will have an impression about the case to be tried. Many have such impressions even now. I do not expect that the printed words in the proffer reprinted or read aloud by news readers will affect the ability of a significant number of potential jurors to comply fully with the rule that they must decide the case on the basis of the evidence heard in court without any reliance on whatever they remember that they read in or saw on the news.

For the foregoing reasons, the motion by Sun Times Media LLC, Associated Press, and Chicago Tribune Company to intervene and for immediate access to the *Santiago* proffer filed under seal is granted.

[1] I do not consider here whether a different standard should apply to release of actual recordings containing the voices of parties to a litigation. It is possible that the impact of such recordings might be far greater than standard news reporting. In any event, no actual recordings have been offered in support of a request for ruling. Such recordings have thus far played no role in any judicial decisions in this case.

Minute Order Form (06/97)

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Suzanne B. Conlon	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	02 CR 892	DATE	1/28/2003
CASE TITLE	UNITED STATES vs. ENAAM M. ARNAOUT		

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION:

DOCKET ENTRY:

(1) ☐ Filed motion of [use listing in "Motion" box above.]

(2) ☐ Brief in support of motion due _____.

(3) ☐ Answer brief to motion due_____. Reply to answer brief due_____.

(4) ☐ Ruling/Hearing on _____ set for _____ at _____.

(5) ☐ Status hearing[held/continued to] [set for/re-set for] on _____ set for _____ at _____.

(6) ☐ Pretrial conference[held/continued to] [set for/re-set for] on _____ set for _____ at _____.

(7) ☐ Trial[set for/re-set for] on _____ at _____.

(8) ☐ [Bench/Jury trial] [Hearing] held/continued to _____ at _____.

(9) ☐ This case is dismissed [with/without] prejudice and without costs[by/agreement/pursuant to]
☐ FRCP4(m) ☐ Local Rule 41.1 ☐ FRCP41(a)(1) ☐ FRCP41(a)(2).

(10) ■ [Other docket entry] Chicago Tribune's motion for immediate unsealing of the government's *Santiago* proffer and related motions *in limine* is granted; the request for unsealing the appendix to the *Santiago* proffer is moot. The clerk is ordered to unseal the following: government's evidentiary proffer supporting admissibility of co-conspirator statements [110-1]; defendant's response and objections to *Santiago* proffer [129-1]; defendant's motion to preclude reference to alleged bad acts of others [94-1] and government's response [124-1]; defendant's motion to exclude Bosnian video [95-1] and government's response [126-1]; defendant's motion to exclude items seized in Bosnia [93-1] and government's response [125-1]; defendant's motion to exclude evidence of historical events, etc.[90-1] and government's response [127-1]. [See Reverse for Details]

Suzanne B. Conlon

(11) ■ [For further detail see order on the reverse side of the original minute order.]

	No notices required, advised in open court.		number of notices	Document Number
	No notices required.			
✓	Notices mailed by judge's staff. AND		JAN 2 9 2003 date docketed	150
X	Notified counsel by telephone.			
	Docketing to mail notices.		docketing deputy initials	
	Mail AO 450 form.		1/28/2003 date mailed notice	
	Copy to judge/magistrate judge.			
CR	courtroom deputy's initials	Date/time received in central Clerk's Office	PW7 mailing deputy initials	

(Reserved for use by the Court)

ORDER

Chicago Tribune intervened to gain access to the government's *Santiago* proffer, which was filed under seal with an appendix of 248 documents marked as government exhibits. Now the government indicates it does not intend to use approximately 206 of those exhibits, at least in its case-in-chief. Chicago Tribune also seeks the unsealing of motions *in limine* and pretrial conferences pertaining to the *Santiago* proffer.[1] Defendant Enaam Arnaout objects to unsealing the proffer because selection of a jury is imminent in this highly-publicized case; the proffered hearsay documents are of disputed admissibility and of an unfairly prejudicial nature.

As fully explained in the portion of the *Santiago* proffer already unsealed by the court, the government's submission seeks a pretrial ruling that otherwise inadmissible hearsay statements satisfy criteria for admissibility under the co-conspirator exception to the hearsay rule. *See* Fed.R.Evid. 801(d)(2)(E); *United States v. Hunt*, 272 F.3d 488, 494 (7th Cir. 2001); *United States v. Santiago*, 582 F.2d 1128, 1134 (7th Cir. 1987). The sufficiency of the *Santiago* proffer has not been resolved. Even assuming the court finds the proffer adequate, admissibility is not a foregone conclusion because issues of authenticity, foundation, relevancy, probative value and unfair prejudice may remain. None of the appendix exhibits have been admitted into evidence, and it appears that most will never be because the government has chosen not to use them at trial.

Arnaout correctly surmises the nature of some documents is inflammatory. Some pertaining to him are about events long ago and do not reflect criminal conduct or any relationship with his charity, Benevolence International Foundation. Some documents pertain to misconduct of others not clearly related to the indictment. However, it is apparent that the narrative and characterizations in the proffer reflect matters alleged in the indictment; those matters have been the subject of intense media coverage and will likely continue to be so, whether or not the proffer is unsealed. Matters discussed in the proffer appear to be cumulative of past media coverage.

Arnaout is correct: media coverage will make selection of a fair and impartial jury a daunting task. The court disagrees with the curious view of the government and Chicago Tribune that jury selection in this case is comparable to high-profile local official corruption cases like *Loren-Maltese* and *Fawell*. Those cases do not implicate the public trauma this country has suffered because of terrorism, deeply affecting our national and individual lives like no other event in recent history. Nor do cases involving corrupt local politicians test our ability to conduct a fair and impartial trial following a barrage of local, national and international publicity, particularly in the wake of the Attorney General's remarkable press conference announcing this indictment.

With the cooperation of counsel, the court shall endeavor to select a fair and impartial jury. However, the court is unable to specifically find, as the First Amendment requires, that sealing the *Santiago* proffer and related motions is essential to prevent a substantial probability that Arnaout's right to a fair trial will be prejudiced, or that careful examination of prospective jurors and cautionary instructions will not suffice to protect his constitutional rights.

Suzanne B. Conlon

[1] The merits of the proffer were not the subject of any hearing or pretrial conference; all scheduling orders were docketed on the public record.

Minute Order Form (06/97)

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Rebecca R. Pallmeyer	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	02 CR 506 - 1, 4	DATE	1/4/2005
CASE TITLE	USA vs. Warner, Ryan		

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION:

DOCKET ENTRY:

(1) ☐ Filed motion of [use listing in "Motion" box above.]

(2) ☐ Brief in support of motion due _____.

(3) ☐ Answer brief to motion due_____. Reply to answer brief due_____.

(4) ☐ Ruling/Hearing on _____ set for _____ at _____.

(5) ☐ Status hearing[held/continued to] [set for/re-set for] on _____ set for _____ at _____.

(6) ☐ Pretrial conference[held/continued to] [set for/re-set for] on _____ set for _____ at _____.

(7) ☐ Trial[set for/re-set for] on _____ at _____.

(8) ☐ [Bench/Jury trial] [Hearing] held/continued to _____ at _____.

(9) ☐ This case is dismissed [with/without] prejudice and without costs[by/agreement/pursuant to]
☐ FRCP4(m) ☐ Local Rule 41.1 ☐ FRCP41(a)(1) ☐ FRCP41(a)(2).

(10) ■ [Other docket entry] Motion Of Chicago Tribune To Intervene And For Immediate Access To Public Records Under Seal is granted.

(11) ☐ [For further detail see order (on reverse side of/attached to) the original minute order.]

✓	No notices required, advised in open court.		number of notices	Document Number
	No notices required.		JAN 0 5 2005 date docketed	
	Notices mailed by judge's staff.			
	Notified counsel by telephone.		docketing deputy initials	
	Docketing to mail notices.			
	Mail AO 450 form.	U.S. DISTRICT COURT	date mailed notice	
	Copy to judge/magistrate judge.	2005 JAN -4 PM 5:15		
ETV	courtroom deputy's initials	Date/time received in central Clerk's Office	mailing deputy initials	

Minute Order Form (06/97)

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Rebecca R. Pallmeyer	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	02 CR 506 - 1, 4	DATE	1/4/2005
CASE TITLE	USA vs. Warner, Ryan		

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION:

DOCKET ENTRY:

(1) ☐ Filed motion of [use listing in "Motion" box above.]

(2) ☐ Brief in support of motion due _____.

(3) ☐ Answer brief to motion due_____. Reply to answer brief due_____.

(4) ☐ Ruling/Hearing on _____ set for _____ at _____.

(5) ☐ Status hearing[held/continued to] [set for/re-set for] on _____ set for _____ at _____.

(6) ☐ Pretrial conference[held/continued to] [set for/re-set for] on _____ set for _____ at _____.

(7) ☐ Trial[set for/re-set for] on _____ at _____.

(8) ☐ [Bench/Jury trial] [Hearing] held/continued to _____ at _____.

(9) ☐ This case is dismissed [with/without] prejudice and without costs[by/agreement/pursuant to]
☐ FRCP4(m) ☐ Local Rule 41.1 ☐ FRCP41(a)(1) ☐ FRCP41(a)(2).

(10) ■ [Other docket entry] Motion For Reconsideration is denied.

(11) ☐ [For further detail see order (on reverse side of/attached to) the original minute order.]

✓	No notices required, advised in open court.		number of notices	Document Number
	No notices required.		JAN 05 2005 date docketed	222
	Notices mailed by judge's staff.			
	Notified counsel by telephone.		docketing deputy initials	
	Docketing to mail notices.	U.S. DISTRICT COURT		
	Mail AO 450 form.	2005 JAN -4 PM 5:15	date mailed notice	
	Copy to judge/magistrate judge.			
ETV	courtroom deputy's initials	Date/time received in central Clerk's Office	mailing deputy initials	

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,) Docket No. 02 CR 506
)
Plaintiff,)
)
vs.)
)
LAWRENCE E. WARNER and)
GEORGE H. RYAN, SR.,) Chicago, Illinois
) January 3, 2005
Defendants.) 12:00 p.m.

TRANSCRIPT OF PROCEEDINGS - Emergency Motion
BEFORE THE HONORABLE REBECCA R. PALLMEYER

APPEARANCES:

For the Plaintiff: HON. PATRICK J. FITZGERALD
UNITED STATES ATTORNEY
BY: MR. PATRICK M. COLLINS
MS. LAURIE J. BARSELLA
219 South Dearborn, 5th Floor
Chicago, Illinois 60604

For the Defendant Lawrence E. Warner: GENSON & GILLESPIE
BY: MR. EDWARD M. GENSON
53 West Jackson Boulevard
Suite 1420
Chicago, Illinois 60604

For the Defendant George H. Ryan, Sr.: WINSTON & STRAWN
BY MR. BRADLEY E. LERMAN
MS. JULIE A. BAUER
35 West Wacker Drive
Chicago, Illinois 60601

APPEARANCES: (Continued)

For the Intervenor Chicago Tribune: SONNENSCHEIN, NATH & ROSENTHAL LLP
BY: MS. NATALIE J. SPEARS
233 South Wacker Drive, Suite 8000
Chicago, Illinois 60606

Court Reporter: FRANCES WARD, CSR, RPR, FCRR
Official Court Reporter
219 S. Dearborn Street, Suite 2118
Chicago, Illinois 60604
(312) 427-7702

THE CLERK: 02 CR 506, United States versus Warner on an emergency motion.

MR. COLLINS: Good afternoon, your Honor. Patrick Collins and Laurie Barsella for the United States.

MR. LERMAN: Good afternoon, your Honor. Brad Lerman and Julie Bauer for George Ryan.

MR. GENSON: Ed Genson on behalf of Mr. Warner.

MS. SPEARS: Good morning, your Honor. Natalie Spears on behalf of the intervenor, Chicago Tribune.

Your Honor, I apologize for not having an appearance and motion on file prior to just a few moments before court, but I just learned this morning that this hearing was taking place.

We wanted to put on record before the Court the Tribune's request to intervene in this case to assert the public's right of access to the Santiago proffer as a judicial document. If the Court feels it appropriate to hear from the Tribune today, I am prepared to do that, or if you would like briefing, I am prepared to do that as well, whatever the Court desires.

THE COURT: Here is the background.

The Santiago proffer was submitted to me, you will all recall, on the 23rd of December. But it got here so late in the day -- which the government had given us notice that that's what would happen -- that I didn't get a chance

to get it. I thought I would be able to read it on Monday, but I was away and did not get here to pick it up. So I have not yet sent it to the public file.

In the meantime, I have gotten a motion from Mr. Ryan's attorneys to reconsider the order that I had entered, which was effectively -- I will take a look at it under seal, but I think it's likely that I will ultimately send it to the public file. My understanding of Mr. Ryan's motion is that he would like to consider that second portion of the Court's earlier determination.

We now have, as of this morning, a motion from the Tribune. I am not sure whether counsel in the underlying case have seen that motion. But the Tribune is asking for access to the Santiago proffer, which I understand -- I am assuming Mr. Ryan's lawyers would oppose.

MR. LERMAN: Judge, we were handed a copy of that motion right before your Honor came out on the bench. So we have read it.

MR. COLLINS: As have we, your Honor.

THE COURT: How should we proceed here?

MR. LERMAN: Well, your Honor, I thought we should start the new year off the same way we ended last year with the consideration of this issue.

I don't bring a motion for reconsideration to the Court lightly. But your Honor has indicated you have not

read the Santiago proffer.

THE COURT: That's correct.

MR. LERMAN: Obviously, we have.

THE COURT: I shouldn't say I have not read it at all. I have read portions of it. I haven't read the entire document.

MR. LERMAN: Your Honor, I guess what I want to start out by saying is that I don't think there is anybody who has read the Santiago proffer or who looks at the attention that this case has gotten and is getting, even today, that can seriously contend that publication of the Santiago proffer will not result in enormous and widespread publicity, and that it's a certainty that some potential jurors will read the articles and coverage on this document and we will wind up excluding those jurors when we go to jury selection.

We absolutely are on the precipice of an event that will impact the jury pool, and we all know it standing here right now. We are -- the current trial date is in mid-March. We are 70-plus days away from trial. What we are talking about is keeping the Santiago proffer under seal until the beginning of the trial in which all admissible evidence will be fully covered in a public trial as opposed to having a document that by definition seeks to admit evidence which has not yet been ruled admissible, which is

based on hearsay statements, many of those statements made by witnesses whose credibility will be challenged.

I am not in any way suggesting that the government did not write a proper Santiago proffer. What I am suggesting is that the nature of the Santiago proffer is to take the government's inferences and allegations and innuendoes and marshal those in such a way to support their contention that various claims against George Ryan and Larry Warner are supported and that hearsay statements by others should be admitted.

For example, your Honor, there is no consideration in the proffer of the credibility of witnesses. There is no substantial discussion in the proffer of the voluminous Brady material that was turned over to us by the government. This is a one-sided document. I am not suggesting that Santiago proffers are anything but one-sided.

But given the amount of coverage that we are going to get here, there is no question that there is going to be prejudice to the jury pool and also to witnesses who would otherwise be sequestered who are now going to have the ability to read in the newspaper not only what the government's theory is of the conspiracy, but what their role is vis-a-vis others, what other people say about various things. This is going to be a very damaging thing to the trial.

What we are asking for is to have this document kept under seal so that the Court can consider it, it can be challenged, there can be rulings on it, and only those portions of it that are admissible become public.

Your Honor, we cited to you in our motion to reconsider the Gannett versus DePasquale case, which is a Supreme Court case, in which the Supreme Court said, in effect, that a suppression hearing could be held in chambers without public or press attending. That was a case that involved a suppression motion for an involuntary confession. The Court ruled that a public hearing on the involuntary nature of the statements would reveal the statements publicly and cause damage to the defendant and potentially prejudice the jury. We think that that's quite analogous to what we are asking for now.

Again, I know the Court hasn't had the opportunity to review it, but there is just no question that this is going to result in massive and widespread publicity here in the Northern District of Illinois. So we ask your Honor to reconsider her ruling.

THE COURT: Mr. Collins.

MR. COLLINS: Your Honor, I will let the Tribune speak to the First Amendment issues. I don't have much more to say than I said last time.

Number one is that we believe that proceedings

generally should be public. The fact that something hasn't been earmarked as admissible evidence, certainly the Court is going to consider that. There is going to be all sorts of motions in limine. Other things are going to have to be heard publicly. We think setting a precedent now 70-some days before trial that this particular document has to be kept under wraps, we think, is not wise.

Number two, Judge, I guess I don't think I would be saying all this if we had a terrible experience in the Fawell case. In the Fawell case, as we talked about last time, it does give some guidance. There were more salacious allegations as that word has been used before your Honor. There has been front-page headlines about that. Your Honor dealt with it in jury selection. I think we all learned -- or at least I certainly learned -- that the public doesn't hang on every word that appears in this courtroom.

Your Honor, the fact of the matter is if this document would have just been released in the normal course during last week, whatever would have been -- and I am not suggesting there wouldn't have been any articles. Of course, there will be. But that would have been past and now we would be on to the next phase.

Three months from now, Judge, is an eternity in people's minds, and we learned that in the Fawell case. That's why I guess this doesn't -- this, to me, is a tempest

in a teapot.

Frankly, I think the more that we are in here talking about how we have to keep this under wraps, the more people are going to be in this courtroom every day waiting for this thing to be released. I think we should release it and get it done with and prepare for trial.

THE COURT: Ms. Spears.

MS. SPEARS: Your Honor, to begin with, this is, obviously, an important criminal proceeding involving alleged abuse of public office. In general, the United States Supreme Court has held that in criminal cases it would be difficult to single out any aspect of government more important and of higher concern to the people than the manner in which criminal trials take place in our public courtrooms.

Here there is a situation where we have a Santiago proffer. In other cases before judges in this district similar issues have arisen and the courts have held that the Santiago proffer should remain public. I have a case here, the United States versus Eneam Arnaout, which was before Judge Conlon. I have the minute order that was issued unsealing the Santiago proffer in that case, which I am happy to hand up to the Court.

(Document tendered.)

MS. SPEARS: I have copies for counsel as well.

(Document tendered.)

MS. SPEARS: The reason that Judge Conlon unsealed it in that case and that the United States Supreme Court and that the Seventh Circuit has said time and again that the closure of records and the sealing of documents does far more harm to the public's right of access and the public's right to know about criminal proceedings than actually unsealing, which is, I think, what counsel was speaking to a second ago.

In a situation where a document is asked to be sealed, the Court has to make specific findings on the record that as a last resort there is no other alternative to sealing. In the Seventh Circuit they have said that overcoming this presumption is a most formidable task and the Court must be firmly convinced that it would be inappropriate to unseal the document.

Here, Santiago proffers are traditionally filed openly as part of the public court record. There has already been significant pretrial publicity. This is not going to add anything. There's simply no justification for sealing it in this case when you weigh the issues.

There is extensive voir dire examination and other measures, including jury instructions and admonitions, that can be used by this Court. The Seventh Circuit has recognized in Peters -- and I will cite this case to the

Court, 754 F.2d 753. It's at 762.

The Court found that extensive jury research has shown that through protective measures, such as voir dire and jury admonitions, et cetera, the Court can control and can protect a defendant's right to a fair trial.

So in this case -- I am happy to, if the Court would prefer, submit a brief with the litany of Supreme Court and Seventh Circuit cases arguing in favor of unsealing and of public access to court pleadings such as this one.

But I think it's sufficient to say that in this case it's clear that this is a document that should not be sealed. It would do far more harm to the fairness of the trial to seal a document like this than to allow it to be opened and allow the Court to simply use the measures it has in place as alternative measures to sealing to protect the institution of the trial.

THE COURT: Mr. Genson, you wanted to be heard.

MR. GENSON: Your Honor, no one is suggesting that the public isn't going to know about it. It's my understanding that we are only talking about sealing this document until we pick a jury. Until we have a jury that's properly instructed by you that they are not to read any papers, that they are not to listen to television broadcasts or radio broadcasts, then the whole world can know about it.

Let me just make this point. We have a case -- and your Honor saw the press clippings we filed before the last -- I just got something in the mail the other day with a picture of Ryan. I kept it. Pictures of Ryan just before the last election actually. I noticed it -- we were -- pictures of Ryan with the word "corruption." So, I mean, this is all encompassing here, Judge. We have a situation which I think is unprecedented relative to the amount of bad publicity we had.

Again, we have a case here. We are only asking that this be sealed until we start picking a jury in this case. Look at the situation with regard to a jury. We are looking for a fair jury here. We have a situation where it's going to be six months. A lot of very, very bright jurors are going to be kicked off. Our jury pool is going to be limited to people that can take six months off of work. So we are limited right at the beginning.

Now we want to limit it some more because people who are aware and look at the media every day and look at the papers every day and listen to television every day, we are going to have to preclude them because they have read the 100 and some pages of the Santiago proffer. I have never seen a Santiago proffer this long.

I am suggesting to your Honor that what we are doing every time we do something in this case is limiting

the jury pool more and more. First, we are limiting it because of the time. Then we are limiting it because of the topics, the subject matter. Now we are going to be limiting it a little bit more because very bright jurors who look at the paper are going to be so acquainted with this and have their opinions already made up, so they are going to get kicked off the jury. What kind of a jury are we going to get here?

Mr. Collins is right, because Mr. Collins says you would be surprised -- we were surprised at the number of people that don't read the paper. But the fact is, those people that do read the paper are going to get kicked off, too. So I am suggesting to your Honor, just because of our quest for a fair jury for Mr. Warner and Mr. Ryan, I think it's necessary to take some sort of remedial measures in this case.

Now, one of the things that I said last time was have your Honor read the proffer. Perhaps there will be things that you do want to preclude.

But remember this, I am not asking your Honor to not release it. This isn't like these divorce cases you get in state court where they hide this stuff forever. I am saying that I have trust in the jury that when your Honor says to that jury, "Don't read it. Don't listen to it," they won't. If the proffer is released the day we pick that

jury, or at least the day that your Honor can so instruct the jurors -- and that's just, what, six or seven weeks -- it's going to allow us at least to get a fair jury. That's all I want in this case.

MR. LERMAN: Your Honor, if I could just agree with Mr. Genson.

The document that we are dealing with is of a unique nature. It's a 115-page basic closing statement of the government. When I say one-sided, I don't mean that it's unfair for them to do it that way. But when it gets published it's really a one-sided version of the case that gets printed and sent out. There is no response. There is no cross-examination. There is no context.

It is going to prejudice jurors. I absolutely agree with Mr. Genson that what it's going to do, anybody who follows current events, reads the newspaper or listens to the news is going to come to this courtroom in 70 days and say, oh, yes, I remember reading about this statement by such and such a witness. Joe Blow said this. Mary Smith said this. We are going to have people who are not only acquainted with the fact that these people are under indictment, which is well known, but we are going to have people who are acquainted with the government's version of what the underlying testimony is for identified witnesses. I think that's -- I agree with Mr. Genson. We are talking

about keeping this under seal until the trial commences and the jury can be properly instructed.

MS. SPEARS: Just very briefly, your Honor.

First of all, access is not the public's right only after a jury is selected. It's the public's right throughout all stages of the proceeding. Any of the United States Supreme Court cases and Seventh Circuit cases that speak to voir dire and jury admonitions and all of the other alternatives as being viable alternatives to sealing speak in those terms because they are talking about access at all stages, including preliminary proceedings, including preliminary pleadings such as this one.

So I don't believe that it's fair to say that holding the document in abeyance until after the jury is selected is the right way to go. In fact, the courts are saying that you can have a fair trial by utilizing these measures and still allowing public access to all the proceedings.

Also, access delayed is access denied. If it's not immediate, it fosters the unhealthy notion that the trial has to be -- or some certain portions of the trial have to be conducted in secrecy. That harms the notion that we can have a fair and open court system. It harms it more so than any sealing would ever help it.

MR. COLLINS: Judge, just to correct something

Mr. Genson said.

The government wants a well-versed jury. I did not suggest that the Fawell jury was not a well-read jury. My point was not that they don't read the papers. It's that they read the papers. Number one, they don't take everything at face value in the newspaper. Number two is, once they read it they move on to other things.

Today's news is tomorrow's fish wrap. I think the jurors -- prospective jurors have context for things. In the Fawell case we were closer to the trial and you had arguably more salacious allegations. Judge, there was not one juror that said, "You know what? I can't -- I will be unfair because I read this in the Santiago proffer." Not one.

That's what informs the government's position that we should get this out, get on with it. And the closer we get to trial, the more potential for prejudice there is, Judge. We should get this out and get it done with and move on.

THE COURT: I don't want to make light of the seriousness of the concerns that are being raised here because a fair trial is a fundamental right. Nor do I want to suggest that this trial that we are going to conduct in a few months here is -- it's obviously a very important one, but it's not the only important trial ever conducted or to

be conducted in this courthouse. I am surely not the only judge who has faced the difficult issue of whether pretrial publicity is going to be so damaging that a fair jury can't be selected, even where the defendant is somebody of extraordinary prominence and recognition.

I don't know that there is -- apart from the Gannett case, I don't know that there is authority in this jurisdiction for sealing the Santiago proffer. I think you are probably right that there is nothing that says I can't do it. But, for example, in the Amaout case -- I am not sure what the circumstances were because I don't precisely recall the date that had been scheduled for trial in that case.

Was that a situation where Judge Conlon unsealed the Santiago proffer at the time of trial or did she do so well before it?

MR. COLLINS: I don't know factually. I don't know the answer to that, Judge. We certainly could find that out.

MR. LERMAN: I don't know either, Judge.

MS. SPEARS: It was prior to trial. I do know that. But in terms of exactly when the trial happened afterward, I would have to go back and check. I do know that case involved terrorism charges, though.

THE COURT: I am familiar with the nature of the

again, this is a significant case. I don't make light of it, but there have been other very, very important trials that I believe were conducted pursuant to the ordinary practice.

Now, I understand the defendants' proposal to be that we simply maintain the Santiago proffer under seal until the jury is selected. I understand that's the proposal.

Earlier on, though, Mr. Lerman, you made some comment about challenging material in the Santiago proffer and releasing only certain portions. What procedure did you have in mind?

MR. LERMAN: Well, your Honor, I don't think I had a substantially different procedure than having this done right on the eve of trial, preferably after the jury is selected.

My point only was that there is material that's going to be released and publicized that will be ruled inadmissible or is potentially inadmissible. So not only are we tainting the jury, but we may be tainting -- potentially tainting potential jurors, but we are also potentially tainting them with evidence that won't be admissible.

So my point is until the Court has even had an opportunity to consider what, if any, portions of the

case.

Whatever we do, we need to resolve this rapidly because if the Santiago proffer is going to be released, there is a substantial argument that it ought to be sooner rather than later because -- I don't want to use the expression necessarily "fish wrap" -- but certainly there is a new cycle. Three or four weeks from now people are far less interested in what they have seen today than they will be in whatever the new news is in the middle of February. It might very well be that even those jurors who do pay careful attention to the newspaper, that their memories will have faded in a way that makes it possible for us to consider their use at trial.

We haven't gotten to the phase of jury selection. We have discussed it briefly. I do recognize it's going to be -- I suspect going to be time consuming. We will be interviewing a very large number of people. Obviously, I am thinking that a critical issue will be: How much do they think they know about this case already and how confident can we be in their agreement to put it all aside?

I don't want to create for myself a situation where automatically I have got a group of people who can't answer those questions in a satisfying way on the one hand. On the other hand, I don't want to go out on a limb in this case merely because of its prominence. There have been --

Santiago proffer are not going to be admissible should we be releasing the entire document in its full garb?

THE COURT: Well, it is 114 pages, but I can read that by tomorrow. So why don't we put this over to tomorrow and we can talk again at that time about it.

Let me just comment that what you are talking about, though, the material in the Santiago proffer that was, let's say, inflammatory, that's precisely what got released in Fawell. We did lose some jurors for that reason, and some of that very information did not come into the record. In fact, I think maybe the bulk of it did not come into the record. I don't know which way that cuts.

I guess what I am saying is that I think even jurors exposed to some damaging stuff will not necessarily be influenced by information that they read in the papers until and unless they hear it as evidence in the courtroom, and that I think that the processes we expect to undergo to pick this jury are likely to be effective in getting a jury that can be fair.

I don't want to suggest it's going to be easy. I think it's going to take some time, but I am of the view that it isn't hopeless. We need, what, 16 or 18 jurors. It may take us several days to get there, but this isn't going to be a fast trial anyway.

All right. Tomorrow at noon.

MR. GENSON: I have another matter, Judge.
THE COURT: Mr. Genson.
MR. GENSON: Your Honor, may I sit down?
THE COURT: Of course. That's fine.
MR. GENSON: This case is probably different for me than any case I have ever had. I have never had a case where I have not read every single word of every document and every 3.02 that's been given to me. I never had one before. This one, of course, is impossible. So I've got other people working with me.
We received several disks. The disks were not formatted in a way we could produce the documents right away. It took us two weeks. We have got everything. It took us two weeks. They were nice enough to print it out for me.
Now, this is what's bothering me a little bit. We had received what the government, I believe, characterized as Brady and Giglio before trial. I understood it. We got it. We thanked them for giving it to us. But along with this 72,000 pages -- at least that's what they tell me it is, or 67 or whatever -- that we have gotten on this last set of disks is a letter. The letter said, "You now have all the Brady and Giglio," which implies to me that there is something in there that wasn't in the prediscovery filings. I am scared about it.

like to read the 10,000. In order to get to the 10,000, I don't want to have to go through 72,000.
So if the government could give us a list of the people they are going to call, I would appreciate that. I don't want to come in March 14th -- and I am not going to; it's not my intention, believe me -- and say I don't have time to read it. 72,000 pages is about eight, nine feet of -- we have got 34 boxes. We have got 34 boxes of the printout. I and Carolyn and a couple other people are trying to read this stuff.
My first request is if there is Brady and Giglio in it and that's something that we didn't get before trial and Mr. Collins and Ms. Barsella know about it, tell me what it is. If there is a way that they could tell us the witnesses that they are going to call or concentrate on, I could start with those witnesses and read the other ones later. That's what I would like to do, your Honor. Because it's not just reading them. You got to read them. You've got to pull all -- we had 600 and some thousand documents. You got to pull all the documents that are applicable to that witness. You have to read other witnesses to see what they say about that witness or what that witness said to third parties. We may have to get investigators out. I have been stuck with this before.
But my point is I think that they -- they can't

So if, in fact -- I am not going to read the whole 72,000 pages. They will be read. I am going to read as many as I can. Between us, we know who the major witnesses will be, I think. But if there is any Brady and Giglio, any Brady and Giglio in that 72,000 pages, rather than hand me 72,000 pages and say, "Find it," if the government has knowledge of Brady and Giglio in that 72,000 pages that they didn't give us before trial, I want to know what it is.
I don't think it's fair to give me an amount of -- a number of pages that I can't read. The best you can do is 500 pages a day. It's eight weeks to trial, or ten weeks to trial. So that's the best you can do. So I am not going to be able to read all of it. I would hate to come across after the trial or during the trial pieces of information that I should have had before trial.
So what I would ask, your Honor, is that if there is Brady and Giglio in this last submission, that the government at least, if they know it's there, tell me about it so I can concentrate on it.
The other thing I would like, your Honor, is -- and I know they don't have to give us a list of witnesses or tell us who their -- your Honor made a comment last time, out of the 72,000 pages there is maybe 10,000 pages that are relevant. I don't know that to be the case here, but your Honor made that comment. Accepting that to be true, I would

just give us a letter with that and say, "Now our Brady and Giglio obligations are fulfilled. If it's there, find it."
I would like to get some clarification from Mr. Collins relative to that issue.
MR. COLLINS: Judge, I would be happy to write his opening and closing statement, if he'd like, as well.
MR. GENSON: I would like that, too.
MR. COLLINS: Judge, there was no magic to that statement. We have turned over a lot of material in advance of the most recent deadline, which they just got last week in hard copy form. We turned over things that arguably could be Brady or Giglio.
My understanding, Judge, if Witness X mentioned something that could be a bad act about Mr. Fawell, for example, we'd turn over that 3.02 of Mr. X. Whether that statement is true or not of Mr. Fawell, Mr. X said it, and that's information they are entitled to have.
So we have not culled line by line through every 3.02 in this case to say this is Brady, this is Giglio material. We have given them everything we possibly can.
Mr. Genson now has a nice opening in his schedule. That trial with Judge Moran we understand is gone. So he has extra time to read this material. 70,000 pages of 3.02s and documents are what we had to produce recently. Going through line by line to say this is Brady, this is Giglio

would be virtually impossible to do.

Our obligation was to give it to them. We haven't buried it. We turned the stuff over. The principal witnesses for which there were Brady or Giglio stuff, we turned that over in a fairly coordinated fashion, sometimes at their request. We haven't hidden things and only given it to them now, Judge. That's just not how this has been done.

In terms of witnesses, I thought there is a process that the Court ordered in terms of how we will deal with witnesses. I am happy to share with them shortly what our first few witnesses are going to be. I don't think it's going to be a big shock to them. But this is a six-month trial, Judge. They have a lot of paper to digest, but this is 70 days before trial.

I am not sure exactly what Mr. Genson wants me to do other than go through the reports item by item with him, which I don't think we are obliged to do.

THE COURT: I think what he wants you to do is telegraph where he's likely to find Brady and Giglio material, and I understand you're objecting to that.

The other part of the request, though, is give us a clue in what order you expect to present witnesses because that would enable Mr. Genson to focus early on on what he needs to be prepared for early on.

see is that, as Mr. Collins points out, the government has to give stuff -- everything that could be Brady or Giglio material, whether or not they think it's -- whether or not the government agrees that that material is or could be exculpatory.

MR. GENSON: If he had gotten that statement out of his last letter, I'd have been a happy guy. They gave us, I thought, what they perceived to be Brady and Giglio before trial. We have extensive numbers of 3.02s.

What I am concerned with that sentence that came with the last 70,000, there is some more in there, but we don't particularly want to tell you where it is. Now, if Mr. Collins says he doesn't know of any more than he gave us before trial, I take him at his word.

MR. COLLINS: Well, Judge, if he would have raised this with me before court, I would have been happy to tell him there was no magic to that statement, number one.

Number two, the Giglio -- I differentiate Giglio from Brady. I mean, Brady is information that tends to be exculpatory. Giglio can be something that's more of an impeachment issue. For us to say that you -- for us to have said before December 29th when they got the 72,000 pages that, "We have given you all Giglio," I would not have been comfortable saying that.

THE COURT: So what you meant was this concludes

MR. COLLINS: I have no problem with that. In fact --

MR. GENSON: There is one last matter. This is just informing the Court. Mr. Adam may have health problems. So I am on the market or I am trying to get another lawyer without conflicts to represent Mr. Fawell. I should be able to do that. There shouldn't be any delay because of it. I just wanted your Honor to know and be aware of it.

MR. COLLINS: Well, on that note, Judge, Mr. Fawell will likely be one of the government's first witnesses. To the extent there is an issue there, there is no doubt that he will be one of the government -- I am not saying the first, but he will be one of the government's first witnesses.

THE COURT: Ms. Spears.

MS. SPEARS: I just checked and I wanted to clarify the record.

In the Enaam Arnaout case, that was prior to jury selection that the ruling was made.

THE COURT: Thank you.

It sounds like we have a commitment from the government to notify counsel of which witnesses they expect will be first.

I guess the problem with the other request that I

any Giglio material that was not previously identified?

MR. COLLINS: That, I think, is a fair interpretation of what that was meant to say, Judge. Our obligations are ongoing. There are reports that are being written. There are recent -- people that are being interviewed. We are going to be interviewing people, Judge, up to trial, during trial. We are going to provide the defense those reports as soon as they are written. I am not saying there is all these reports that haven't been written yet. What I am saying is we are going to be interviewing people up to trial. There could be Giglio that will come a week from now, a month from now that I don't know about today. Obviously, we are obliged to give it to them and we will.

THE COURT: The comment in your letter was not intended to suggest that there is some additional Brady material that's in the 72,000 that wasn't previously produced.

MR. COLLINS: Or that we tucked something in on page 69,000 that we should have given them two months ago. That wasn't it at all.

MS. BARSELLA: Judge, just again, I will reiterate what Mr. Collins was saying.

From the time that we originally started the production, I believe at that moment, for example,

Mr. Fawell was not imagined to be a witness. So, therefore, any Giglio material that would pertain to Mr. Fawell at the time that we first started producing shortly after the indictment would not have been Giglio because we were not expecting Mr. Fawell to be a witness. Now that we expect that he will be a witness, we now have Giglio material as to that witness to produce.

As Mr. Collins has said, there are interviews and reports that are being written even now. So, of course, in those documents there could be Giglio material. I don't know of any Brady, but you can't rule that out in the sense that they are being produced right now. They are being created right now.

MR. GENSON: I trust Mr. Collins at his word.

THE COURT: All right.

When we get together tomorrow can we talk about the -- have you had a chance to talk about the questionnaire and the letter?

MR. COLLINS: We have talked a little bit internally, Judge, but not amongst the parties.

MR. GENSON: Could we have a few days for that, your Honor?

THE COURT: You need a little more time for that? Why don't we just schedule that then when we get together --

MR. GENSON: Are you talking about the letter to

the jury?

THE COURT: Yes. Did we already set a date on that?

MR. COLLINS: I thought you set a status for January 14th for that.

THE COURT: That's right. A week from Friday.

MR. GENSON: Thank you, Judge.

THE COURT: I will see you tomorrow then at noon.

MR. COLLINS: Thank you.

MR. LERMAN: Thank you, your Honor.

MS. SPEARS: Thank you.

(An adjournment was taken at 12:40 p.m.)

* * * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

F_____, _____, 2005.

Official Court Reporter

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,) Docket No. 02 CR 506
)
Plaintiff,)
)
vs.)
)
LAWRENCE E. WARNER and)
GEORGE H. RYAN, SR.,) Chicago, Illinois
) January 4, 2005
Defendants.) 12:00 p.m.

TRANSCRIPT OF PROCEEDINGS - Motion
BEFORE THE HONORABLE REBECCA R. PALLMEYER

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THE CLERK: 02 CR 506, United States versus Warner and Ryan on continued motions.

MR. KRAUS: Good morning, your Honor. Kenneth Kraus. I am here to substitute as the new attorney for the Tribune today. If I could give you my motion to substitute an appearance.

THE COURT: Sure. Good morning, Mr. Kraus; or, actually, I guess it's afternoon.

MR. KRAUS: It's our original signature on the motion to substitute and an appearance form. I will serve any counsel in court that I haven't served. I think I have served most of them.

THE COURT: Okay. Thank you.

MR. COLLINS: Good afternoon, your Honor. Patrick Collins and Laurie Barsella for the United States.

MR. LERMAN: Good afternoon, your Honor. Brad Lerman and Julie Bauer for George Ryan.

MS. GURLAND: Good afternoon, your Honor. Carolyn Gurland and Ed Genson on behalf of Mr. Lawrence Warner.

THE COURT: Good afternoon.

Has the Tribune's position changed?

MR. KRAUS: No, it hasn't, your Honor. We still think the Santiago proffer should be unsealed at this time.

THE COURT: Anything further that anybody wants to add to the discussions that we have had on this on -- well,

I guess on a couple of occasions?

MR. COLLINS: Not by the government, your Honor.

MR. LERMAN: No, your Honor.

THE COURT: I have had a chance now to -- actually, to read and re-read the Santiago proffer. I have had a chance to look over it carefully. Let me just review some of the considerations that I have got and the reasons that I believe the proffer should now, in fact, be released.

The proffer certainly provides substantial additional evidentiary detail to what -- to the broad outlines of the charges that were set forth in the indictment. But I think it's important to remember that those charges have been public for many months at this point and have always been available to the public and the press.

What we are talking about here are the specifics about how the government intends to prove those charges, at least with respect to coconspirator statements.

One of the concerns that had been raised in an argument in favor of keeping this material under seal is that at least some of the statements arguably will not be admissible under the coconspirator exception or under other exceptions to the hearsay rule.

Having reviewed the proffer, I think some of those concerns may be legitimate. But there are substantial numbers of the statements that are involved here that would

be statements admissible as against Mr. Ryan or Mr. Warner because they were statements made by those individuals themselves. Assuming the government is able to call the witnesses to the stand who actually heard the statements, I think it's likely that they would be admissible without regard to a coconspirator exception.

I note that at least a portion of the information that's included in the proffer is information that is already substantially part of the -- within the press' knowledge or information; and, that is, at least some of the information that was presented at the Fawell trial has appeared again in the government's Santiago proffer. To the extent that that information is prejudicial to a potential jury, it's already, it seems to me, out in the open.

The best argument for continuing to keep this information under wraps is that it will -- disclosure at this time will arguably exacerbate the difficulties that I think we already recognize we will face in connection with jury selection.

It seems to me there is little question that the information, once disclosed, will be available to some members of the jury pool, and some of those individuals who as we stand here today might be eligible to participate may very well see this information and become ineligible for one reason or another, either because they draw inappropriate

there might be.

All of that said, I think one of the observations that I made yesterday is important for us to remember, and that is -- and I think Mr. Collins made this comment as well -- that the sooner we get this information out, the sooner it becomes part of yesterday's news. Arguably, if we delay disclosure still further closer to the time of trial, we have that much greater difficulty.

I know that what the defendants had asked here is not on its face unreasonable; and, that is, not that we withhold the disclosure altogether, but that we simply delay it until after a jury has been selected.

Again, I don't think that's an unreasonable request, but I think the mere fact that it would create greater convenience for me personally and for the lawyers who will be involved with me in the jury selection is not enough of a reason to overcome the presumption that what goes on in the federal courts goes on in the daylight and that the press and the public are entitled to be aware of it or to ignore it at their interest -- at their desire.

Are there other comments?

MR. COLLINS: Not from the government, your Honor.

THE COURT: All right. I will see you then on January 14th.

conclusions from it or are unable or unwilling to keep any predeterminations they may have made based upon it from their minds in connection with the trial.

What that means to me is that the difficulty of jury selection becomes even more difficult, even greater as a result of the release of the information.

That means, once again, that it's going to be more difficult for me, more difficult for all of you, arguably of greater inconvenience to us all, but I don't know that our inconvenience or even a couple of extra days of jury interviewing is enough of a reason that I should seal material that would otherwise ordinarily be disclosed in the ordinary course.

I will observe that Mr. Lerman has made the point -- and I think that Mr. Genson made the same point on behalf of Mr. Warner -- that the proffer functions as a statement by the government. It functions in the same way that an opening statement or a closing statement might function, and to that extent can arguably be viewed as slanted, incomplete and arguably even inaccurate.

The fact that the defendants' attorneys have had access to the proffer now for several days while I myself took time to review it, it seems to me, provides additional time to counsel to prepare whatever response they view as appropriate and to potentially counter whatever prejudice

MR. LERMAN: Your Honor, if I can just change topics for one second.

THE COURT: Sure.

MR. LERMAN: We talked yesterday about -- Mr. Genson talked yesterday about the volume of discovery that we received, and we -- and Mr. Collins indicated that the government might provide us with a list of witnesses at some point.

THE COURT: Yes.

MR. LERMAN: Let me just -- just for the record so that the Court has some background, we had asked Mr. Collins for an index to the material that was produced. He has agreed to give it to us, but he doesn't have one prepared at the present time. We did one. It's 166 pages of documents indexed, about 20 documents per page. But we did a separate index of the names of witnesses who were either interviewed or for whom we have grand jury testimony. Just so the Court knows, it's 1212 individuals, 1,212.

So it really is important, your Honor. We didn't set a date for when the government would give us some indication of an order of witnesses, but it really is not unreasonable in light of -- I had somebody prepare this last night. It is important for us at least to have some clue as to who's coming because we have 1,212 possibilities as we stand here right now.

MR. COLLINS: Judge, again, that request we have no problem trying to work with counsel to assist them. I can say -- we can start with the document, the Santiago proffer. I think it's a fair bet that the names that are prominent in that document will be government witnesses.

As I said yesterday, Mr. Fawell will be one of our first witnesses. I repeat that again today. I would note that it's my understanding and belief that he will be on the witness stand for several weeks. But we have no problem giving them in short order a general list of anticipated witnesses. We don't anticipate calling 1200 witnesses, of course.

I do think, Judge, the Santiago proffer gives the defendants a very good sense of who the major witnesses will be in this case.

As to their order, we have no problem working with them as cooperatively as possible, understanding, as we did in the Fawell case, that there are strategic judgments that get made causing a change in the order. But we have no problem in principle giving them a list of our first ten witnesses, understanding that two and five may be switched depending on how the trial is going. But we are going to try to call less rather than more witnesses, Judge.

THE COURT: Mr. Lerman, can I assume that your effort to get me this number involved the use of some

software?

MR. LERMAN: Well, no. Actually --

THE COURT: Somebody hand-tallied 1,212 witnesses?

MR. LERMAN: Yes, your Honor. And that does not include a supplemental production that I got from Mr. Collins last week of several boxes of material.

THE COURT: The reason I am asking this is I wondered whether at least one way to determine who's likely to be called is if a name shows up more than once or shows up have a dozen times or two dozen times, I think it's more likely than somebody whose name appears only once would be called.

That said, Mr. Collins has indicated he is prepared to work with you on this. I have potentially less interest in hearing from 1200 witnesses. I am sure that we are not talking about that many people and nobody is realistically expecting that.

MR. GENSON: Your Honor?

THE COURT: Mr. Genson.

MR. COLLINS: I thought we were going to get a whole hearing without Mr. Genson.

MR. GENSON: I know you miss me.

Your Honor, I recall that Judge Castillo in the Segal case gave each side a certain number of hours to make their presentation.

THE COURT: You are afraid I haven't entertained that possibility?

MR. GENSON: I was hoping you would.

THE COURT: Well, I think it's an excellent suggestion. I would be happy for you people to make your proposals when we get together again, I guess it's on the 14th.

MR. GENSON: Thank you.

MR. COLLINS: I assume as long as their cross-examination of our witnesses isn't counted against us, Judge, we would be more than happy to agree to that. I mean, of course, if we put on a witness for a day on direct and if the cross is four days, is that five days for us or one day?

MR. GENSON: We can work that out, Judge.

MR. COLLINS: We would be more than happy to work with counsel for that because --

THE COURT: I understand Judge Castillo has some kind of elaborate timekeeping system on this, and I will find out from him how he does it.

MR. LERMAN: Your Honor, I recently tried a case in Akron, Ohio where the judge gave each side 2500 minutes. When you were cross-examining, that time counted against you. At the end of the day the judge would tell us how many minutes we had left in the case.

THE COURT: And I take it the judge himself or herself kept track?

MR. LERMAN: Absolutely.

So we would end the day with 1,921 minutes.

MR. GENSON: I am liking this less and less.

(Laughter.)

THE COURT: Can you guess my reaction?

Of course, I wouldn't want to -- I will take that up. Whatever your proposals are. I will certainly find out whether there is some kind of useful and nonburdensome way we can keep track.

I don't know if -- we have this clock here that we -- it's connected to the computer system, which, as you may know, we have -- in addition to our court reporter, our proceedings are recorded. But this clock is digital and we had it turned around. I think it was during the Fawell trial that we were asked by counsel to turn it around once again. So maybe we can revisit that.

All right. Other matters?

MR. KRAUS: Your Honor, just for clarification then, the Santiago proffer will be unsealed and put in the clerk's office public court file today?

THE COURT: That's right. I am expecting the government's lawyers to take care of that.

MR. GENSON: Mr. Sandborn will have copies for all

the press, I'm sure, Judge.

THE COURT: The short answer is I am not distributing it, but somebody will. I'm sure. I will expect that it will be sent down to the court file.

MR. KRAUS: Is my motion to substitute granted?

THE COURT: Your motion is granted.

Once again, you have adopted Ms. Spears' submissions, correct?

MR. KRAUS: Correct.

THE COURT: That's fine.

MR. KRAUS: Thank you, your Honor.

MR. COLLINS: Thank you, your Honor.

MR. LERMAN: Thank you, your Honor.

(An adjournment was taken at 12:20 p.m.)

* * * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

F_____, 2005.

Official Court Reporter

Appearance (01/29/18) CCCR N114

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

The People of the State of Illinois

Plaintiff

v.

DAVID MARCH, JOSEPH WALSH, and THOMAS GAFFNEY

Defendant(s)

No. 17 CR 09700-01
17 CR 09700-02
17 CR 09700-03

APPEARANCE

The undersigned, as attorney, enters the appearance of

Chicago Public Media, Inc

Intervenors in the above entitled cause.

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Appearance (01/29/18) CCCR N114

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

The People of the State of Illinois
Plaintiff

v.

DAVID MARCH, JOSEPH WALSH, and THOMAS GAFFNEY
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APPEARANCE

The undersigned, as attorney, enters the appearance of
Chicago Public Media, Inc

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