No. _____

IN THE
SUPREME COURT OF ILLINOIS

Chicago Public Media, Inc., Reporters Committee For Freedom Of The Press, WGN Continental Broadcasting Co., LLC, WFLD Fox 32 Chicago, The Associated Press, WLS Television, Inc., Chicago Tribune Co., LLC, Sun-Times Media, LLC,	)	Appeal from the Circuit Court of Cook County, Illinois, County Department, Criminal Division
Movants,	)	Circuit Court No. 17 CR 0428601
v.	)	
The Hon. Vincent M. Gaughan,	)	The Honorable Vincent M. Gaughan,
Respondent.	)	Judge Presiding.

MOTION FOR SUPERVISORY ORDER AND MOVANTS' EXPLANATORY SUGGESTIONS IN SUPPORT OF THEIR MOTION FOR SUPERVISORY ORDER

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MOTION FOR SUPERVISORY ORDER

Pursuant to Supreme Court Rule 383, Movants[1] request this Court for a Supervisory Order compelling the Honorable Vincent M. Gaughan ("Respondent") to vacate Respondent's order requiring all who file motions, briefs, pleadings, and other documents in this matter to do so under seal and in chambers in contravention of the First Amendment. As grounds for this Motion, Movants state as follows:

1. On February 3, 2017, the Circuit Court entered an order, labeled "the Decorum Order" requiring "any documents or pleadings . . . to be filed in room 500 [the courtroom of the Circuit Court presiding judge in this matter] of the George N. Leighton Criminal Courthouse only." (SR4.)

2. The February 2017 Decorum Order "applies to the defense, special prosecutor, and any other party that may occasionally become involved in [the] proceedings." *Id.*

3. According to Respondent, any motion, pleading, or other document filed in chambers, including all documents filed pursuant to the February 2017 Decorum Order, is not subject to a presumption of public access. (SR296-300.)

4. The February 2017 Decorum Order, coupled with Respondent's refusal to recognize motions, briefs, and other pleadings filed in chambers as public documents, has eliminated the well-established First Amendment presumption of access to documents

[1] Movants, and intervenors in the Circuit Court, are The Associated Press; Chicago Public Media, Inc.; the Chicago Tribune Company, LLC; Reporters Committee for Freedom of the Press; Sun-Times Media, LLC; WLS Television, Inc.; WGN Continental Broadcasting Co., LLC; and WFLD Fox 32 Chicago. The Reporters Committee is a non-profit organization dedicated to the promotion of press freedoms, and the remaining intervenors own newspaper, digital, and/or broadcast media operations that have provided news coverage of the *People v. Van Dyke* matter.

filed with the court. *See Press-Enter. Co. v. Superior Cr. Of Cal. For Riverside Cty.*, 478 U.S. 1, 8-9 (1986); *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 232 (2000).

5. Respondent has denied Movants' repeated requests to modify the February 2017 Decorum Order to bring it into compliance with the First Amendment. (SR181-83.)

6. This Court may issue a supervisory order "when the normal appellate process will not afford adequate relief and the dispute involves a matter important to the administration of justice." Ill. Sup. Ct. R. 383; *Burnette v. Terrell*, 232 Ill. 2d 522, 545 (2009) (citations omitted).

7. The Court's intervention under Rule 383 is needed because the standard appellate process is unlikely to afford Movants meaningful relief because Respondent has expressed an intention to commence trial as early as July 2018. (SR79; SR159.)

8. The appellate court will not be able to complete briefing, hold argument, and issue a decision before trial in this matter thereby depriving Movants' of any meaningful opportunity to report on Respondent's administration of justice in this important matter.

WHEREFORE, Movants respectfully request that this Honorable Court grant their Motion for Supervisory Order and the following relief:

(1) the February 2017 Decorum Order is vacated;

(2) going forward, all motions, briefs, pleadings, and other judicial documents in this case shall be filed publicly in the Circuit Court Clerk's Office, subject to any properly supported motion to seal; and

(3) in ruling on any such future motion to seal judicial records, or any motion to reconsider Respondent's earlier sealing of any previously filed judicial records,

Respondent shall adhere to the governing First Amendment standards and enter specific, on-the-record judicial findings supporting suppression under those standards, or release such records in whole or in part, consistent with consideration of the least restrictive alternatives to complete suppression.

MOVANTS' EXPLANATORY SUGGESTIONS IN SUPPORT OF THEIR MOTION FOR SUPERVISORY ORDER

This case presents a fundamental First Amendment issue of critical importance to the citizens of this State and its free press. Respondent, the Hon. Vincent M. Gaughan, through an order he labels a "Decorum Order," unconstitutionally has barred the press and the public from court filings in one of the more significant Illinois criminal cases in recent memory: the prosecution of Chicago police officer Jason Van Dyke on a charge of murder in the shooting death of Laquan McDonald. Movants, which are seven news organizations and a non-profit group dedicated to advocating for press freedoms, ask this Court to exercise its supervisory authority under Supreme Court Rule 383 to remove the Respondent's unconstitutional requirement that all judicial documents be filed in secret in the judge's chambers; and to restore the settled First Amendment presumption of public access to judicial documents filed in a criminal case.

Under state and federal constitutional and common law principles, enunciated by this Court and the U.S. Supreme Court, judicial documents and records filed in civil and criminal proceedings are presumed to be open and available to the public. *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 230-33 (2000); *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (citing *Press–Enterprise Co. v. Superior Court*,

464 U.S. 501 (1984) ("*Press-Enterprise I*"); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978).

Subverting that presumption, Respondent's February 2017 Decorum Order has forced all who file documents in the Van Dyke case, including Movants as media intervenors, to file the documents under seal and in the judge's chambers (SR4), whereas ordinarily, the parties and Movants would file motions, pleadings, and other judicial documents in public with the Clerk of the Court, where the Illinois Clerks of Court Act requires them to be available for public inspection. *See* 705 ILCS 105/16(6). But in this case, the judge has concluded that the First Amendment presumption of public access has no application to *any* document filed directly with him, in chambers, under what he has termed a "presumption of protection" (SR183), i.e., a denial of access, applicable to every document in this case.

Accordingly, Respondent has attempted to establish a special criminal proceeding, in which the well-established First Amendment and common-law presumptions of public access to documents filed in courts do not exist. Indeed, if permitted to stand, the February 2017 Decorum Order could be used by judges throughout the State to circumvent the First Amendment; Article I, Section 4 of the Illinois Constitution; and the common law right of access to court records. This Court should not countenance such subversion of constitutional guarantees and should promptly issue a supervisory order.

The February 2017 Decorum Order, on its face and certainly as applied, bars the public and press not only from access to previously filed judicial documents, but also to every judicial document that *will be* filed through the remainder of the case, absent the

judge's consent. By refusing Movants' request to modify or vacate the February 2017 Decorum Order to allow the parties to file their documents in public, Respondent has effectively required the media to make a new request for access every time a new document is filed. That is the inverse of how litigation is conducted in this State (or anywhere else) and the opposite of what the First Amendment and common law access presumptions require.

It is therefore critical that this Court invoke its supervisory authority to overturn the Circuit Court's attempt to destroy the First Amendment presumption of public access. The February 2017 Decorum Order is in irreconcilable conflict with this Court's decision in *Skolnick*, as well as foundational precedent from the U.S. Supreme Court and other federal appeals courts. Moreover, direct appeal to the Illinois Appellate Court will not afford Movants adequate relief, as Respondent has expressed an intent to conduct the trial as early as July 2018, (SR79; SR159), making it likely that the standard course of appellate review will not be complete before this critically important case is concluded. If the media lack any meaningful access to the court file in the weeks and months leading up to and including the trial, their ability to inform the public about this case will be irreparably stymied.

Accordingly, this Court should exercise its supervisory authority under Rule 383 to: (1) vacate Respondent's February 2017 Decorum Order; (2) require that, going forward, all motions, briefs, pleadings, and other judicial documents in this case be filed publicly in the Circuit Court Clerk's Office ("the Clerk's Office"), subject to any properly supported motion to seal; and (3) provide guidance and instruction to Respondent that in

ruling on any such future motion to seal judicial records, or any motion to reconsider Respondent's earlier sealing of any previously filed judicial records, that Respondent adhere to the governing First Amendment standards and enter specific, on-the-record judicial findings supporting suppression under those standards, or release such records in whole or in part, consistent with consideration of the least restrictive alternatives to complete suppression.

FACTUAL BACKGROUND

1. The criminal prosecution giving rise to this Motion involves allegations that a Chicago police officer, Jason Van Dyke, murdered a teenager named Laquan McDonald by shooting him 16 times in an incident recorded by a police video camera in October 2014. Mr. Van Dyke initially was charged in November 2015 and is being prosecuted by a court-appointed special prosecutor under a superseding murder indictment returned in or about March 2017.

2. The Van Dyke prosecution has drawn national interest at a time of significant public debate about urban policing.

3. On February 3, 2017, Respondent entered the Decorum Order, which provided that:

> [A]ny documents or pleadings filed in this matter are to be filed in room 500 [the courtroom of the Circuit Court presiding judge in this matter] of the George N. Leighton Criminal Courthouse only. This order applies to the defense, special prosecutor, and any other party that may occasionally become involved in these proceedings. This procedure will remain in effect unless and until otherwise ordered by the court.

(SR4.) Respondent described the foregoing order as intended "[t]o be in compliance with" an earlier order that, among other things, prohibited the prosecution and defense

lawyers and their agents from releasing publicly, or publicly referring 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." (SR1-3.)

4. Movants filed their Motion for Intervention and Access to Court Documents ("Access Motion") for the purpose of gaining access to judicial documents and proceedings, including seeking relief from the February 2017 Decorum Order. Intervention was granted on March 8, 2018, (SR76-77), but the access issues have been litigated in the Circuit Court for almost two months. In their motion, Movants explained that because Room 500 was Respondent's chambers, the February 2017 Decorum Order meant that the court file in this matter and any documents included in it would not be available for public review at the Clerk's Office. (SR56-57.)

5. The Circuit Court acknowledged as much during oral argument on the Access Motion:

> THE COURT: Have you seen the file? . . . . Of course you have not. So, nobody in the public has seen the file. So, it is not open to the public. So, your premise that it's open to the public, because it's in the file, now, is false, all right, because if it's now open, otherwise, you wouldn't be here. Do you understand that? . . . . [T]he file has not been opened to the public. This has not been disseminated to the public.

(SR152, 153.)

6. When filed, Movants' Access Motion sought access to the then-unknown number of court file documents that had been treated as non-public by the Circuit Court as a result of the February 2017 Decorum Order. Movants, in their briefs and submissions in the Circuit Court, demonstrated that under well-established state and federal law, all court pleadings are subject to the First Amendment presumption of public access, and

that no individualized findings had been made to justify withholding any filings from the public. (SR67-73); (SR118-40.) Movants also asked that the February 2017 Decorum Order be modified to allow all parties – including Movants, whose access-related pleadings were required by Respondent to be filed per the February 2017 Decorum Order – to file court documents publicly in the Clerk's Office. (SR57-58); (SR144); (SR137-38); (SR296-300.)

7. In response to Movants' efforts, the Circuit Court released a public docket sheet, (SR163), and the State identified a list of 111 previously filed documents in the case; the State agreed there was no basis to withhold any portion of 52 of them. (SR166-68, 169-75.) On April 28, 2018, the Court heard argument on the 49 documents as to which the State objected to disclosure on multiple grounds including the claimed inapplicability of the presumption of public access. (SR166-68; SR176-273.)

8. At oral argument, Respondent rebuffed Movants' repeated attempts to explain that the First Amendment presumption of public access applies to *any* document filed for the judge's consideration in this proceeding, whether in chambers or in the Clerk's Office. Respondent circularly concluded that judicial documents filed under his secret filing procedure were never made public and thus could never be subject to the right of public access to them:

> MR. FUENTES: You can't withhold a document that's within the Court file, from the public. If it's presumed to be –
>
> THE COURT: Stop right there.
>
> MR. FUENTES: Yes.

> THE COURT: All right. Now, the Court file you're talking about is one that has – not has – had unlimited access to my lawyers and the public, is that correct?
>
> MR. FUENTES: No, I wouldn't say that the Court file –
>
> THE COURT: Well, your theory is –
>
> MR. FUENTES: -- is –
>
> THE COURT: Excuse me, right now, you know, give me a chance, all right? Your theory is that if it's in the Court file, then the gate is opened, and the cat has ran out of the bag, but I'm telling you, you interrupt me again, you're not talking no more. You got that?
>
> MR. FUENTES: Yes, sir.
>
> THE COURT: All right, but the thing is, nothing has been opened up as of now; and I understand your point; and you're making some good points; but just to have this blanket thing, if it's in the file, then, there is no secrets or there is no – a way that you can preserve [reserve] anything, that you can't do damage control, or anything else like that. I'm not accepting that principle, all right, because otherwise, you wouldn't be here if the file was open, all right? Everybody would have access to it. So, your first premises or a hypothesis that it is open already, is not correct, okay?

(SA150-51.)

9. The Circuit Court then indicated that it would not hear arguments that court file documents filed in chambers per the February 2017 Decorum Order were or even could be subject to the presumption of public access:

> MR. FUENTES: Once they are contained in a document filed with the – in the public –
>
> THE COURT: You keep missing the point. You know, you're fixed on this –
>
> MR. FUENTES: We disagree on that.

> THE COURT: -- one point which undermines your logic, is that the file has not been opened to the public. This has not been disseminated to the public. That's the under – you have to move on. Otherwise, you wouldn't be here.

(SR153.)

10. Finally, when this Court's decision in *Skolnick*, 191 Ill. 2d at 232, was brought to Respondent's attention, Respondent again refused to entertain an argument that the presumption could apply once the February 2017 Decorum Order blocked the public from access to filed documents in the first instance:

> MR. FUENTES: So, we're asking the Court to follow Scholnick [*Skolnick*]; and Scholnick says once it is filed publicly with the Court, whether it's in this room or some other room, it's public.
>
> THE COURT: Will you get off – this has not been filed publicly, otherwise, you wouldn't be here. Do you understand how illogical your presentation is, when you say, once it's been filed publicly? It has not been filed publicly, all right? Thank you.

(SR158.)

11. At a subsequent oral argument on the Access Motion, Respondent reiterated his bright-line determination that all documents submitted directly to a court's legal chambers are not public documents and thus not subject to the First Amendment presumption of public access, given that under the February 2017 Decorum Order, Respondent had "held" them from the public:

> THE COURT: I mean, they are not disclosed. They have been held. So you can't argue that. That is illogical to say that they are in the file, otherwise you wouldn't be here. You wouldn't be wasting your time and your talent –
>
> MR. FUENTES: This was the discussion –
>
> THE COURT: No, move on from that. No, I'm not going to listen to an irrational discussion. That's the purpose of this whole hearing today, to see

> if they are going to be disclosed. I need some consensus now. Do you agree that these are not disclosed at this time –
>
> MR. FUENTES: No, Judge, this is an official document subject to the presumption –
>
> THE COURT: -- whether this is disclosed or isn't?
>
> MR. FUENTES: It's subject to the presumption –
>
> THE COURT: Excuse me, I'm asking a yes or no question . . . . You are saying that these, everything in these motions are already disclosed?
>
> MR. FUENTES: I'm not saying they are disclosed . . . . I am saying they should. They are not disclosed and they should be.
>
> THE COURT: I understand should be. So if we're going to go on bickering back and forth, I'm going to limit your presentation. All right. So can you give me some – come on, let's keep this thing intellectually honest. Are these subject to the inspection of our wonderful journalists here today?
>
> MR. FUENTES: At this time, no.
>
> THE COURT: Okay. That's all I wanted – so they are not disclosed. That's the illogical point that you keep presenting, that they are already in the file so therefore *there is no presumption of protection. That's not true.* And I don't want to hear that argument any more or I'll sit you down, concerning that they are already disclosed. All right. Move on.

(SR181-83) (emphasis added); (SR252-53, 265).

12. Ultimately, Respondent refused to allow public release of 36 of the 49 documents[2] asserted by the State to be outside the First Amendment presumption of public access. (SR296-300; SR177-273.)

[2] The Court's May 4, 2018 Order denying access to these documents lists 35 of these documents as to which relief was denied, with a 36th document, the Defendant's Motion for Change of Venue, listed as "ENTERED AND CONTINUED." (SR296-300.) On April 28 and on May 4, on the record, Movants requested the immediate release of this document, which is of high interest to the press and public, and the Court did not provide immediate release and refused to state anything further than that the request was being

13. Movants also asked Respondent to modify the February 2017 Decorum Order to allow public filing of all documents in the Clerk's Office (subject to motions to seal where appropriate), but Respondent refused. (SR296-300; SR276-78.) Given Respondent's position that judicial documents filed in his chambers are not presumptively open to the public, this ruling effectively (and impermissibly) provided that no documents filed in the Van Dyke prosecution going forward will be subject to the First Amendment presumption of access.

14. Applying a standard free of the First Amendment presumption of access, Respondent offered rationales for refusing to release certain documents. For example, Respondent indicated he would not release Defendant's motions to dismiss the indictment for alleged prosecutorial misconduct because Respondent believed the allegations in the dismissal motions were unfounded or unsupported by evidence, and were harmful or "slanderous" to the reputations of one or more public officials, and "'[t]here's no way to get anybody's reputation back once these allegations would become public." (SR296-300; SR199, 203, 241-42.) Respondent also expressed discomfort with the public disclosure of these motion documents because Movants, as media organizations, refused to provide a wholesale waiver of their fair report privilege, which, among other things, protects media organizations from defamation lawsuits when they report on court proceedings; Respondent later cited this refusal as a ground for denying access. (SR241-42, 253-54.) Respondent's findings in support of his refusal to release these dismissal

"entered and continued." (SR273-74; SR281-83.) At this writing, the Motion for Change of Venue remains under seal, and thus Movants have included it in the number of documents as to which access has been denied.

motions were among several examples of erroneous findings Respondent made to deny access, having erroneously found in the first instance that the presumption of public access did not apply to these documents.

15. Respondent thus concluded that the First Amendment presumption of access does not apply to any documents in the Van Dyke criminal case and that he was "not going to unseal anything before I see it." (SR275.) Respondent memorialized this erroneous view of the First Amendment in a written order issued on May 4, 2018, refusing Movant's request to modify the February 2017 Decorum Order to allow public filing of judicial documents.[3] (SR296-300.)

ARGUMENT

On its face and as applied, the February 2017 Decorum Order seeks to eviscerate the First Amendment. The public and press have effectively been stripped of their right to access and inspect the judicial documents filed in a criminal prosecution of high public interest. Respondent has flipped the First Amendment and common law presumptions of public access into a "presumption of protection" (SR183), suppressing every court filing

[3] Nor is Respondent's disregard for the First Amendment's mandate limited to the wholesale sealing of judicial records under the February 2017 Decorum Order; on May 4, 2018, Respondent closed completely a public hearing over the admissibility of evidence under *People v. Lynch*, 104 Ill. 2d 194 (1984), including all legal argument and the Court's rulings (SR301-10; SR284-89) and impounded the transcript of the hearing, vowing not to release it until trial and not even considering releasing a redacted version. (SR293-94). Respondent also ordered closed a second hearing, later held on May 10, concerning the State's motion to exclude proffered testimony by a defense expert. (*Id.*) Movants, as intervenors in the case, will continue to monitor Respondent's closure of pre-trial hearings concerning the admissibility of evidence and other issues without giving sufficient weight to the First Amendment presumption of access and the need for any court closures to be narrowly tailored to a compelling interest, and Movants may – in the coming weeks or months – need to seek additional relief in this Court.

in this case as a matter of course. This goes far beyond what is necessary to protect the important interest of Defendant's fair trial rights, or any other potentially compelling interests here. What Respondent has done is extraordinary, and the need for this Court's intervention is clear. The importance of this case to the community cannot be overstated. The public must know that justice is being done, no matter what the outcome of the trial. It is therefore essential that the press and public have access to the process at *every stage* of the proceedings – including critical pre-trial proceedings – to monitor and ensure that the system is working, and promote respect for the judicial process itself. Sealed dockets, closed proceedings, and secret rulings do not serve that end. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they have been prohibited from observing." *Richmond Newspapers*, 448 U.S. at 572.

I. The Court Should Exercise Its Supervisory Authority To Vacate The Decorum Order And Bring Respondent Into Compliance With The First Amendment And Common Law Access Rights.

Illinois Supreme Court Rule 383 allows the filing of motions asking this Court to exercise its supervisory authority over a lower court. Ill. Sup. Ct. R. 383. The Court may enter a supervisory order where the ruling of a lower tribunal was "entered in excess of its authority or as an abuse of its discretionary authority." *People ex rel. Daley v. Suria*, 112 Ill. 2d 26, 38 (1986) (citations omitted). This Court's supervisory authority is reserved for "exceptional circumstances," *Statland v. Freeman*, 112 Ill. 2d 494, 497 (1986), such as when the issue or issues presented are "of considerable importance to the administration of justice," *Owen v. Mann*, 105 Ill. 2d 525, 531 (1985). Motions under Rule 383 are most

appropriate where "the normal appellate process" is not likely to afford the movant complete or adequate relief. *Burnette v. Terrell*, 232 Ill. 2d 522, 545 (2009) (citations omitted).

This case presents a textbook example for when the Court should grant a supervisory order. Respondent has entered an order that effectively eliminates the public's presumptive right of access to judicial documents in one of the more significant criminal trials to be held in this State in decades. Respondent also stated his intention to begin the trial as early as July 2018, creating the very real risk that no meaningful appellate review of his patently unconstitutional conduct will be possible. And the specific First Amendment issues in this case implicate core constitutional values, which lie at the very heart of our free society. The Court should therefore expeditiously grant this Motion and require Respondent to comply with his constitutional obligations.

A. The First Amendment Creates A Presumption Of Public Access To Certain Motions, Briefs, and Pleadings Submitted In A Criminal Case.

The First Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment, provides that no law shall "abridg[e] the … freedom of the press." U.S. Const. amend I. The U.S. Supreme Court has held that implicit in that guarantee is a qualified right of access by the press to criminal proceedings and court documents. *Press-Enterprise Co. v. Superior Court of California for Riverside Cty.*, 478 U.S. 1, 8-9 (1986) ("*Press-Enterprise II*"). As this Court has held, the public's right of access to court proceedings and documents, enshrined in the First Amendment and common law, is "essential to the public's right to 'monitor the functioning of our courts . . . .'" *Skolnick*, 191 Ill. 2d at 230 (quoting *In re Continental Illinois Secs.*

Litig., 732 F.2d 1302, 1308 (7th Cir. 1984)). "Openness . . . enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise I*, 464 U.S. at 508.

The black letter precedent of this Court holds that the constitutional and common law right of access includes a presumption of public access to court records that "historically have been open to the public." *Skolnick*, 191 Ill. 2d at 232 (citing *United States v. Corbitt*, 879 F.2d 224, 228 (7th Cir. 1989)). The First Amendment presumption of public access applies to such pleadings, motions, and other papers once they are filed with the court, because "'[l]itigation is a public exercise; it consumes public resources.'" *Skolnick*, 191 Ill. 2d at 236-37 (quoting *Levenstein v. Salafsky*, 164 F.3d 345, 348 (7th Cir. 1998)); *see also Union Oil Co. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000) ("What happens in the halls of government is presumptively public business"); *Pepsico, Inc. v. Redmond*, 46 F.3d 29, 31 (7th Cir. 1995) ("Opinions are not the litigants' property. They belong to the public, which underwrites the judicial system that produces them.") An important rationale for the presumption of public access to materials filed with a court, even discovery materials, is that documents "that influence or underpin the judicial decision" no longer are subject to secrecy that ordinarily might shield those documents from public inspection at the discovery stage. *Baxter Int'l, Inc. v. Abbott Labs.*, 297 F.3d 544, 545 (7th Cir. 2002).

That basic notion – that documents meeting the "experience and logic" test and filed with a court are presumptively accessible – has been recognized by state and federal courts for decades. *See, e.g., United States v. Peters*, 754 F.2d 753, 763 (7th Cir. 1985);

A.P. v. M.E.E., 354 Ill. App. 3d 989, 997 (1st Dist. 2004); *In re Marriage of Johnson*, 232 Ill. App. 3d 1068, 1074 (4th Dist. 1992). And it has been recognized to apply first and foremost to criminal cases. *Smith v. U.S. Dist. Court*, 956 F.2d 647, 650 (7th Cir. 1992). Indeed, "[m]ost of the cases recognizing the presumption of access relate to the right of the public (and press) to attend *criminal* proceedings and to obtain documents used in *criminal* cases." *In re Continental Illinois*, 732 F.2d at 1308 (collecting cases) (emphasis in original). Moreover, the "original inception [of the right of access] was in the realm of criminal proceedings" and only later was "extended to civil proceedings." *Grove Fresh*, 24 F.3d at 897 (citing *Smith*, 956 F.2d at 650). The U.S. Supreme Court has stated that openness is most critical in cases (like the one here) involving allegations against public officials. *See Waller v. Georgia*, 467 U.S. 39, 47 (1984).

Overcoming the presumption of access is "a formidable task." *In re Associated Press*, 162 F.3d at 506. The presumption is rebuttable only by a showing that denial of access is essential to preserve a higher value and is narrowly tailored to serve that interest. *Skolnick*, 191 Ill. 2d at 232 (citing *Grove Fresh*, 24 F.3d at 897). Where the higher value at issue is a criminal defendant's right to a fair trial, the court may deny access only if it finds that: (1) publicity resulting from disclosure would create a "substantial probability" of prejudicing the fair trial right, and (2) reasonable alternatives to denial of access will not adequately protect the right. *Press-Enterprise II*, 478 U.S. at 13-14.

B. By Its Own Terms, The Decorum Order Is In Irreconcilable Conflict With The First Amendment.

The records Respondent is keeping secret under the February 2017 Decorum Order have not only "historically . . . been open to the public," *Skolnick*, 191 Ill. 2d at 232, but Illinois law also requires that the Clerk of the Court keep such records available for public inspection. *See* 705 ILCS 105/16(6). By commanding instead that all documents filed in this matter be filed in room 500 of the George N. Leighton Criminal Courthouse, rather than the Clerk's Office, the February 2017 Decorum Order is a blatant subversion of the law, effectively replacing the First Amendment and common law presumptions of access with Respondent's "presumption of protection" (SR183), which means a presumption of no access, and thus of secrecy.[4] The February 2017 Decorum Order therefore is unconstitutional on its face.

To vindicate the First Amendment, *see Skolnick*, 191 Ill. 2d at 232; *A.P.*, 354 Ill. App. 3d at 993-95, 997, the common law right of access to judicial documents, *see Nixon*, 435 U.S. at 597, and the right of access grounded in the Illinois Constitution's parallel free speech guarantee, *see* Ill. Const. art. I, § 4 (1970), as well as the Illinois statutory right to inspect court records under the Clerks of Court Act, 705 ILCS 105/16(6), this Court

[4] *People v. Kelly*, 397 Ill. App. 3d 232 (1st Dist. 2009), does not justify creating such a presumption of no access to judicial documents. In *Kelly*, a unique case involving allegations of unlawful sexual activity with a child, the court held that the presumption of public access did not apply to a few pretrial documents in a court file (specifically a single motion in limine, a witness list, and two discovery responses), *id.* at 257, 259-60, but it did not uphold or even involve an order such as the February 2017 Decorum Order here, which removes from public access every document from the moment it is filed. This Court is currently reviewing certain aspects of *Kelly* in *People v. Zimmerman*, 2017 IL App (4th) 170055, *appeal allowed*, No. 122261, 2017 WL 4359033 (Ill. Sept. 27, 2017).

should order that the February 2017 Decorum Order be vacated. The Court also should order it replaced with a constitutionally sound procedure in which the parties file their documents in public in the Clerk's Office while allowing the parties to move to file a document under seal, whereupon Respondent could seal the document only by making findings that sealing is necessary to protect a compelling interest and is narrowly tailored to serve that interest. *See Press-Enterprise II*, 478 U.S. at 13-14; *People v. LaGrone*, 361 Ill. App. 3d 532, 535-36 (4th Dist. 2005).

C. Respondent Has Applied The Decorum Order To Seal Permanently Numerous Judicial Documents, Undermining The First Amendment.

Aside from how Respondent's wholesale abrogation of the First Amendment presumption of access violates well established constitutional law, Respondent has further defied the First Amendment through his application of the February 2017 Decorum Order to specific documents. Instead of presuming that court file documents are accessible to the public and placing the burden of justifying closure on the party seeking such closure, as required under *Press-Enterprise II*, the Court has put the onus on Movants to establish why individual documents should be released. Then, in denying release of numerous documents, the Respondent developed and applied standards far below the high bar constitutionally required for denying public access.

By way of example, but without conceding that any of the 36 previously withheld documents may be lawfully withheld from public scrutiny, Respondent developed at least four standards to justify suppressing of 13 of those documents, where such suppression cannot be squared with clear First Amendment doctrine. Accordingly, at a minimum, the Court should exercise its supervisory authority to reject these indefensible standards.

First, Respondent denied access to eight motions, briefs, or other filings relating to two of the defense motions to dismiss the indictment for alleged prosecutorial misconduct by former State's Attorney Anita Alvarez, on the grounds that the motion papers – which Defendant did not object to releasing – contained allegations that had the potential to defame Ms. Alvarez or other public officials, or that the allegations were untrue, unfounded or irrelevant. (SR199, 203, 206, 209, 240-41, 253-54, 264, 268.) But this Court has stated specifically that concerns about an individual's reputation are *not* a proper ground for denying public access to such documents. *Skolnick*, 191 Ill. 2d at 234. Nor is there any basis for suppressing a motion, brief, or other pleading because Respondent believes it to be irrelevant or unsupported by evidence. *See Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 123 (2d Cir. 2006) (holding that determination of presumptive accessibility of documents submitted to the court turns only on whether the assertions were brought to the court's attention, and not on the extent to which the court relied on them). Worse, Respondent then included among his reasons for denying access to these documents the idea that Movants, as media organizations, would not waive their privileges against defamation lawsuits. (SR199, 241-42, 254.) This amounts to an unconstitutional condition. In essence, Respondent held that Movants may access at least these motion documents only if they agree to waive the fair report privileges or other defamation privileges, some of which are constitutionally grounded. *See New York Times v. Sullivan*, 376 U.S. 254 (1964).

Second, Respondent also refused to release three motions or briefs relating to the admissibility of certain evidence regarding the decedent Laquan McDonald's alleged

propensity for violence under *Lynch*, but without finding that withholding these materials was essential to protect higher interests. (SR255-58.) The mere incantation of *Lynch*, however, cannot suffice to justify withholding of a document from the public, particularly when the substance of the witness accounts considered for admission under *Lynch* already was summarized publicly in a hearing on January 18, 2018. (SR7-54.) *See In re Continental Illinois*, 732 F.2d at 1313 ("Once the evidence has become known to the members of the public, including representatives of the press, through their attendance at a public session of court, it would take the most extraordinary circumstance to justify restrictions on the opportunity of those not physically in attendance at the courtroom to see and hear the evidence."). Further, Respondent refused even to release these pleadings with the witness names redacted. (SR255-58.)[5] But it is well-established that courts should "limit sealing orders to particular documents *or portions thereof* which are directly relevant to the legitimate interest in confidentiality." *A.P.*, 354 Ill. App. 3d at 1001 (emphasis added).

Third, Respondent withheld the defense's Motion for Change of Venue, which seeks to move the trial of this matter outside Cook County, on the ground that Defendant is still gathering additional data he plans to submit in support of that motion, and that because Respondent prompted Defendant to file the motion without all the data, release of the motion would be "premature." (SR273-74.) But surely the need to gather data to render a decision falls far short of any viable justification for denying public access to the

[5] In the same vein, Respondent has refused to release a redacted transcript of the May 4, 2018 *Lynch* hearing that he improperly closed to the public in its entirety. (SR293-94).

motion itself. *See In re New York Times Co.*, 828 F.3d 110, 116 (2d Cir. 1987) (noting that sealing must be based on specific, on-the-record findings demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest, and not "[b]road and general findings by the trial court").

Fourth, Respondent applied the February 2017 Decorum Order to force Movants to file, in Respondent's chambers, their own pleadings seeking access to documents and proceedings. One of these filings, a status report, remains in chambers, and Respondent forced Movants to file a second document in chambers before allowing its disclosure. (SR296-300; SR80; SR268-70, 275.) Requiring intervening media organizations to file their documents under seal in public access litigation is a clear abuse of judicial discretion, *A.P.*, 354 Ill. App. 3d at 993, and here no compelling justification was advanced. As to the filing that Respondent has kept under seal, he said he was concerned about the "confidentiality" of communications among the attorneys on the matter, and as to another document he ordered Movants to file under seal, a brief opposing closure of public hearings held May 4 and 10, Respondent stated that he would not "unseal" *any* document until he reviewed the document first. (SR270, 275.) These rationales are plainly insufficient. Going forward, the record establishes that under Respondent's application of the February 2017 Decorum Order, Movants will need to make ongoing, renewed requests for newly filed documents upon learning of them, as they already have been forced to do. (SR290-92.)

It is clear that Respondent prefers to conduct proceedings in his court without a presumption of public access to judicial documents. But that is not the law. The First

Amendment and common law presumptions of access apply in Respondent's courtroom. Respondent's refusal to apply these presumptions is particularly harmful in a case with such importance to the public. Respondent should *not* be allowed to continue to avoid them and the specific findings they require in order to bar the press and public from access to judicial documents in the court file. Based on Respondent's continued and rampant abuses of the First Amendment in sealing the court file, Movants respectfully request that this Court exercise its supervisory authority to vacate the February 2017 Decorum Order in its entirety and instruct Respondent that in ruling on any future motion to seal or motion to reconsider a previous sealing order, sealing, if it is to occur at all, may be permitted only to the extent appropriate after giving proper weight to the First Amendment presumption of access and after applying the rigorous *Press-Enterprise II* test as set forth above.

II. The Harm To Movants Cannot Be Remedied Through The Normal Appellate Process.

It is especially appropriate for this Court to issue a supervisory order "'when the normal appellate process will not afford adequate relief and the dispute involves a matter important to the administration of justice.'" *Burnette*, 232 Ill. 2d at 545 (citation omitted). Here, adequate relief cannot be granted through the ordinary channels because the time required to complete appellate review likely will deprive Movants of their rights even if they prevail. *See e.g. Delgado v. Bd. of Election Comm'rs of City of Chicago*, 224 Ill. 2d 481, 481, 488-89 (2007) (finding that "direct and immediate action [was] necessary" to remove a candidate from a ballot where there was an impending election).

The inadequacy of traditional appellate review is rooted in Respondent's professed intention to commence trial as early as July 2018. (SR79; SR159.) That makes it all but certain that the appellate court will not be able to complete briefing, hold argument, and issue a decision before trial in this matter. To inform the public of what is happening in this important case, Movants seek to vindicate their First Amendment and common law rights of immediate and ongoing access to the filings and proceedings in this case. "The newsworthiness of a particular story is often fleeting. To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression." *Grove Fresh*, 24 F.3d at 897. Only through the immediate intervention of this Court, through the exercise of its unique supervisory powers, can Movants receive a proper remedy before trial.

CONCLUSION

For the foregoing reasons, Movants respectfully request that their Motion for Supervisory Order be granted and that this Court order Respondent to vacate the February 2017 Decorum Order, to require public filing of all judicial documents in the Clerk's Office subject to consideration of motions to seal under proper constitutional and common law standards, and to instruct that in ruling on any such future motion to seal judicial records, or any motion to reconsider Respondent's earlier sealing of any previously filed judicial records, Respondent shall adhere to the governing First Amendment standards and enter specific, on-the-record judicial findings supporting suppression under those standards, or release such records in whole or in part, consistent with consideration of the least restrictive alternatives to complete suppression.

Dated: May 11, 2018

Respectfully submitted,

CHICAGO PUBLIC MEDIA, INC.

By: /s/ Gabriel A. Fuentes
One of Its Attorneys

THE ASSOCIATED PRESS
WLS TELEVISION, INC.
WGN CONTINENTAL BROADCASTING CO., LLC
WFLD FOX 32 CHICAGO
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

By: /s/ Brendan J. Healey w/ consent
One of Their Attorneys

CHICAGO TRIBUNE COMPANY, LLC

By: /s/ Natalie J. Spears w/ consent
One of Its Attorneys

SUN-TIMES MEDIA, LLC

By: /s/ Damon E. Dunn w/ consent
One of Its Attorneys

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ddunn@fvldlaw.com
Counsel for Sun-Times Media, LLC

No. _____

IN THE
SUPREME COURT OF ILLINOIS

Chicago Public Media, Inc., Reporters Committee For Freedom Of The Press, WGN Continental Broadcasting Co., LLC, WFLD Fox 32 Chicago, The Associated Press, WLS Television, Inc., Chicago Tribune Co., LLC, Sun-Times Media, LLC,	)	Appeal from the Circuit Court of Cook County, Illinois, County Department, Criminal Division
Movants,	)	Circuit Court No. 17 CR 0428601
v.	)	
The Hon. Vincent M. Gaughan,	)	The Honorable Vincent M. Gaughan,
Respondent.	)	Judge Presiding.

SUPPORTING RECORD

TABLE OF CONTENTS

AFFIDAVIT OF GABRIEL A. FUENTES

Gabriel A. Fuentes, being duly sworn, states as follows:

1. I am a partner at the law firm Jenner & Block LLP, counsel for Movant Chicago Public Media, Inc., in the matter styled *People of the State of Illinois v. Jason Van Dyke*, Case No. 17 CR 0428601, pending in the Circuit Court of Cook County, Illinois, County Department, Criminal Division.

2. I submit this Affidavit in support of the Motion for Supervisory Order filed by Movants. This Affidavit is submitted to authenticate the documents in the Supporting Record in accordance with Supreme Court Rules 328 and 383(a). I have personal knowledge of the matters stated below and would testify competently thereto if called as a witness.

3. Included in the Supporting Record at SR1-SR3 is a true and correct copy of the Order, Interim No. 15 CR 20622, dated January 20, 2016.

4. Included in the Supporting Record at SR4 is a true and correct copy of the Compliance Order (known as "the Decorum Order"), No. 15 CR 20622, dated February 3, 2017.

5. Included in the Supporting Record at SR5-SR55 is a true and correct copy of excerpts of the Circuit Court Report of Proceedings in No. 17 CR 0428601, dated January 18, 2018.

6. Included in the Supporting Record at SR56-SR59 is a true and correct copy of the Intervenors' Motion for Intervention and for Access to Court Documents, dated March 6, 2018.

7. Included in the Supporting Record at SR60-SR75 is a true and correct copy, without exhibits, of the Intervenors' Memorandum of Law in Support of Motion for Intervention and Access to Court Documents, dated March 6, 2018.

8. Included in the Supporting Record at SR76-SR77 is a true and correct copy of the March 8, 2018 Order granting motion to intervene and other relief.

9. Included in the Supporting Record at SR78-SR81 is a true and correct copy of excerpts of the Circuit Court Report of Proceedings in No. 17 CR 0428601, dated March 28, 2018.

10. Included in the Supporting Record at SR82-SR117 is a true and correct copy of the State's Response to Intervenors Motion for Access to Court Documents, dated April 6, 2018.

11. Included in the Supporting Record at SR118-SR141 is a true and correct copy of the Intervenors' Consolidated Response to Parties' Objections to Public Disclosure of Court File Documents, dated April 13, 2018.

12. Included in the Supporting Record at SR142-SR148 is a true and correct copy of the Intervenors' Third Request for Access to Court File Documents and Other Access-Related Relief, dated April 13, 2018.

13. Included in the Supporting Record at SR149-SR162 is a true and correct copy of excerpts of the Circuit Court Report of Proceedings in No. 17 CR 0428601, dated April 18, 2018.

14. Included in the Supporting Record at SR163 is a true and correct copy of the Order to Clerk of the Court to create and maintain a publicly available docket sheet of the instant case and other relief, dated April 20, 2018.

15. Included in the Supporting Record at SR164-SR175 is a true and correct copy of the April 26, 2018 State's Supplemental Response to Intervenors' Motion for Access, and exhibits A and B to that document.

16. Included in the Supporting Record at SR176-SR279 is a true and correct copy of excerpts of the April 28, 2018 Circuit Court Report of Proceedings in No. 17 CR 0428601.

17. Included in the Supporting Record at SR280-SR295 is a true and correct copy of excerpts of the May 4, 2018 Circuit Court Report of Proceedings in No. 17 CR 0428601.

18. Included in the Supporting Record at SR296-SR300 is a true and correct copy of the May 4, 2018 Order on Intervenors' Motion for Intervention and Access to Court Documents.

19. Included in the Supporting Record at SR301-SR310 is a true and correct copy of the May 4, 2018 Order Closing the May 4, 2018 Proceedings.

Dated: May 11, 2018

Gabriel A. Fuentes

State of Illinois
County of Cook
Signed and sworn to before me
this 11th day of May, 2018

(Notary Public)

OFFICIAL SEAL
CATHY SWIETEK
Notary Public - State of Illinois
My Commission Expires 4/17/2020

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

PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiffs,	)	
vs.	)	No. 15 CR 20622
	)	Interim
JASON VAN DYKE,	)	Decorum Order
Defendant.	)	

ORDER

It is the Order of this court that no attorney connected with this case as Prosecutor or Defense Counsel, nor any other attorney working in 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 of 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 Decorum 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: Vincent M. Gaughan 1553
Judge Vincent M. Gaughan
Circuit Court of Cook County
Criminal Division

DATE: _____

ENTERED
JUDGE VINCENT GAUGHAN - [redacted]
JAN 20 2016
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

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

PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff,	)	
v.	)	**15 CR 2062201**
JASON VAN DYKE,	)	
Defendant.	)	**Hon. Vincent M. Gaughan, Judge Presiding**

ORDER

To be in compliance with the decorum order entered January 20, 2016:

IT IS HEREBY ORDERED that any documents or pleadings filed in this matter are to be filed in room 500 of the George N. Leighton Criminal Courthouse only. This order applies to the defense, special prosecutor, and any other party that may occasionally become involved in these proceedings. This procedure will remain in effect unless and until otherwise ordered by the court.

ENTERED: Vincent M Gaughan
Hon. Vincent M. Gaughan
Circuit Court of Cook County
Criminal Division
1553

DATED: Feb 3, 2017

ENTERED
JUDGE VINCENT GAUGHAN-1553
FEB 03 2017
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

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

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

LYNCH MOTION

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

APPEARANCES:

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

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

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

APPEARANCES: (Cont'd)

MS. ERICA WASHINGTON,
Staff Attorney.

MS. GLEASON: Yes.

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

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

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

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

THE COURT: Thank you very much.

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

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

THE COURT: Mr. Herbert?

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

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

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

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

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

MR. HERBERT: Yes, read the report.

THE COURT: Go ahead.

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

THE COURT: Thank you.

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

McDonald. This particular witness walked --

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

MS. GLEASON: Your Honor --

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

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

THE COURT: Mr. Herbert?

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

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

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

THE COURT: Was not the subject of the beating.

MR. HERBERT: Correct.

THE COURT: So stick to witness number 2.

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

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

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

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

MR. HERBERT: If I can briefly --

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

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

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

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

THE COURT: Thank you.

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

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

MR. HERBERT: Yes.

THE COURT: Thank you very much.

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

THE COURT: Thank you. Mr. Herbert?

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

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

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

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

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

THE COURT: Ms. Gleason?

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

THE COURT: Mr. Herbert?

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

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

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

MR. HERBERT: With respect to witness number 6 our

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

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

THE COURT: Ms. Gleason?

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

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

MS. GLEASON: That is not my theory.

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

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

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

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

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

THE COURT: Okay.

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

THE COURT: Thank you. Mr. Herbert?

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

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

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

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

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

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

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

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

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

THE COURT: Who is she employed by?

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

THE COURT: That's a governmental body?

MR. HERBERT: Yes.

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

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

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

justice, her employer, that is an easy one.

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

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

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

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

THE COURT: I'm sorry.

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

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

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

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

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

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

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

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

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

THE COURT: Ms. Gleason?

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

THE COURT: Thank you.

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

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

THE COURT: Mr. Gleason?

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

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

THE COURT: Mr. Herbert?

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

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

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

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

THE COURT: Ms. Gleason?

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

THE COURT: Thank you. Proceed.

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

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

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

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

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

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

THE COURT: Yes.

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

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

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

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

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

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

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

THE COURT: Mr. Herbert?

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

THE COURT: Number --

MR. HERBERT: All of these detention center --

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

MR. HERBERT: Yes.

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

MR. HERBERT: They were not interviewed.

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

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

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

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

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

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

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

THE COURT: Thank you.

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

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

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

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

THE COURT: That is what we are on.

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

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

to start paying attention to me.

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

THE COURT: State?

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

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

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

MS. GLEASON: Your Honor, they --

MR. HERBERT: Yes.

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

THE COURT: What about witness number 15?

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

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

MR. HERBERT: Correct.

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

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

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

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

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

THE COURT: Thank you.

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

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

MR. HERBERT: Yes.

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

MR. HERBERT: No.

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

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

THE CLERK: Recalling Jason Van Dyke.

THE COURT: We are on witness number?

MR. HERBERT: 16.

THE COURT: 16.

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

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

THE COURT: Thank you. Ms. Gleason?

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

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

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

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

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

THE COURT: Nobody better be using a phone.

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

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

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

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

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

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

THE COURT: State?

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Correct.

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

THE COURT: Thank you. State?

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

THE COURT: Mr. Herbert?

MR. HERBERT: Nothing else.

THE COURT: The operative language is he vaguely recalls

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

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

THE COURT: There was no interview, right?

MR. HERBERT: Correct.

THE COURT: That's a no.

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

THE COURT: Ms. Gleason?

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

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

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

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

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

THE COURT: Thank you. State?

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

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

THE COURT: I don't know that.

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

THE COURT: Reviewing that it does not meet the standard

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

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

THE COURT: State?

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

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

THE COURT: Go on.

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

THE COURT: State?

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

THE COURT: She said spitting, right?

MS. GLEASON: Right.

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

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

MR. HERBERT: Spit on a sheriff.

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

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

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

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

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

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

THE COURT: State?

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

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

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

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

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

There is a list of expert witnesses that have been

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

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

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

Alexandra Hartzell

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

Dated this 22nd day of January, 2018.

Filed Pursuant to Decorum Order Entered February 3, 2017

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

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff,

vs.

JASON VAN DYKE,

Defendant.

[redacted]

No. 17 CR 0428601

Hon. Vincent M. Gaughan

INTERVENORS' MOTION FOR INTERVENTION AND FOR ACCESS TO COURT DOCUMENTS

Intervenors, the Chicago Tribune Company, LLC; Sun-Times Media, LLC; the Associated Press; WLS Television, Inc.; WGN Continental Broadcasting Company, LLC; WFLD Fox 32 Chicago; Chicago Public Media, Inc.; and the Reporters Committee for Freedom of the Press (collectively, "Intervenors"), by their undersigned attorneys, file this Motion for Intervention and for Access to Court Documents. In support of this Motion, Intervenors state as follows:

1. Intervenors are seven news organizations which have provided the public with news coverage of this important criminal matter, and the Reporters Committee for Freedom of the Press, a non-profit organization dedicated to safeguarding the First Amendment rights and freedom-of-information interests of the news media and the public. Intervenors have a well-established legal right to access to the court file in this matter, in order to provide the public with ongoing news coverage of this matter.

2. Under orders dated January 20, 2016 and February 3, 2017 (collectively "the Decorum Order"), the Court has required the parties to file all court documents in this case in courtroom 500. As a result, Intervenors have been unable to obtain access to a substantial part of

the court file, including but not limited to motions and exhibits argued publicly or mentioned in open court at hearings including December 6 and 13, 2017, and January 18, 2018.

3. Intervention is a proper vehicle for the media to accomplish the limited purpose of asking the Court to allow Intervenors and the public access to the court file.

4. The documents in the court file are accessible to the public under the First Amendment to the U.S. Constitution, the Illinois Constitution and the common-law right of access to public documents. *See Press-Enter. Co. v. Superior Court of California for Riverside Cty.*, 478 U.S. 1, 13 (1986) ("*Press-Enterprise II*"); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505-13 (1984) ("*Press-Enterprise I*"); Ill. Const. art. I, § 4 (1970); *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 232 (2000). These documents cannot be shielded from public view absent specific findings that closure is essential to serve a higher value and narrowly tailored to achieve that end, and that in a criminal case such as this one, reasonable alternatives to closure are inadequate to protect the defendant's fair trial rights. The Decorum Order contains no such specific, required, and narrowly tailored findings, and Intervenors are not aware of the Court having made such required findings. The court file may not be withheld from public access without such findings.

5. In this Motion, Intervenors therefore seek:

   a. Leave to intervene in this matter for the purpose of asking the Court to grant them access to the court file, and to comment upon any other issues implicating the rights of the public and the media to open access to these proceedings;

   b. Access to the court file, and, as to any document the Court is inclined to withhold or redact in whole or in part, an opportunity to be heard as to such findings; and

   c. Relief from the Court's February 3, 2017 order requiring all materials to be filed in chambers, as Intervenors know of no basis for denying the public

access to their intervention motion papers and request that the motion papers be available in the Clerk's Office and open for public dissemination.[1]

6. Intervenors contacted counsel for the State and for the Defendant in advance of the filing of this Motion and provided them with draft copies of this Motion and its supporting Memorandum of Law, but Intervenors were unable to determine the respective positions of the State and the Defendant in advance of filing.

WHEREFORE, for the foregoing reasons, and for the reasons stated in Intervenors' Memorandum of Law in Support of Their Motion for Intervention and Access to the Court File, Intervenors respectfully request that the Motion be GRANTED.

Dated: March 6, 2018

Respectfully submitted,

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

By: _____
Attorney for Chicago Public Media, Inc.

By: _____
Attorney for Reporters Committee for Freedom of the Press

[1] Intervenors, who object to the Decorum Order for reasons stated in their Motion and supporting Memorandum of Law, have filed these documents in chambers and have affixed the above header or legend in order to ensure full compliance with the Decorum Order. Nothing about Intervenors' efforts to comply with the Decorum Order in connection with the filing of the Motion or Memorandum of Law is intended to suggest that any part of those documents should not be made public.

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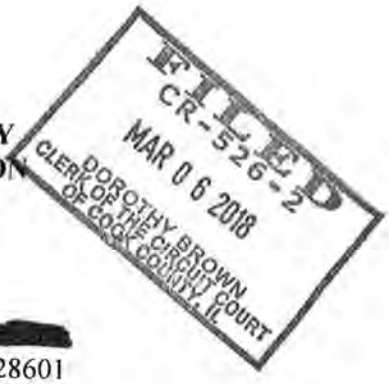
Filed Pursuant to Decorum Order Entered February 3, 2017



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

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

INTERVENORS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR INTERVENTION AND FOR ACCESS TO COURT DOCUMENTS

INTRODUCTION

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

The media and the public have a significant interest in this important criminal matter in which a Chicago police officer allegedly murdered a teenager by shooting him 16 times in an incident recorded by a police video camera. Since the public release of the video more than two years ago, 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. In many ways, news coverage of this important case will provide the public with a window into the workings of its criminal justice system.

Reporters have attended every court hearing since Officer Van Dyke was charged more than two years ago, in November 2015. But, media coverage has been substantially impeded by

the entry of this Court's "Decorum Order" and "Supplement to Decorum Order" (hereafter collectively referred to as the "Decorum Order"). In effect, whether intended or not, the Decorum Order serves as an impoundment order, and the pleadings, briefs, exhibits, and other filings in this case—which are constitutionally presumed to be public documents—have been shielded from public view and scrutiny.

The Intervenors include seven news organizations that have provided their readers, subscribers, and viewing and listening audiences with coverage of this case:

- 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.

- WLS Television, Inc. operates WLS-TV, also known as ABC7 Chicago, which provides broadcast news to a large television audience in Chicago, along with online content available abc7chicago.com.

- WGN Continental Broadcasting Company, LLC operates WGN-TV, Chicago's channel 9, local cable news network CLTV, and WGN Radio. Together with their respective websites each of them is a leading source of local and regional news.

- 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.fox32chicago.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.

- Intervenors also include the Reporters Committee for Freedom of the Press, 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.

As the parties in the case get closer to trial, and as reporters have covered a series of open pre-trial hearings on motions that were never released to the public, Intervenors have become increasingly concerned about the impoundment of the Court file.

The Clerk's Office is required by law to maintain a docket sheet of all court proceedings, but—because the Decorum Order requires that all filings be made with the Clerk in Your Honor's chambers and not with the Clerk's Office—the available documents identifying filed materials in this case are woefully incomplete and inadequate. Without a readily available and comprehensive public docket sheet, Intervenors are unable to determine the full extent of the filings that are unavailable to the public. But in view of the withheld documents Intervenors have identified, and of the recent January 18, 2018 colloquy in which the defense pledged to file all documents going forward under the Decorum Order, Intervenors ask the Court to provide full access to the court file. As far as Intervenors are aware, the Court has not entered – and cannot properly enter – the specific judicial findings necessary under the law to justify impounding the entire file, or large portions of it, to protect a higher interest or value in this matter. *See Press-Enter. Co. v. Superior Court of California for Riverside Cty.*, 478 U.S. 1, 13 (1986) ("*Press-Enterprise II*"); *Press-Enterprise Co. v. Superior Court*, 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, which must be narrowly tailored and made on a document-by-document, redaction-by-redaction basis, well-established law under the First Amendment, the Illinois Constitution, and the common-law right

of access entitles Intervenors and the public to have access to judicial documents that historically have been open to the public, and whose disclosure furthers the interests of the judicial process.

In Part I of this Memorandum, we briefly set forth facts which we believe are uncontested. In Part II, we explain why intervention is the proper vehicle for the Intervenors' limited purpose of asserting their federal and state constitutional and common-law right of access to the full court file in this important criminal matter of high public interest. In Part III, Intervenors set forth why Intervenors and the public must receive access to the court file in this matter, in the absence of specific findings by the Court justifying each instance of any documents (or any portion thereof) being withheld from public access.

I. FACTS[1]

1. On January 20, 2016, the Court entered the first of two orders that have become known as "the Decorum Order." The first order barred extrajudicial statements relating to the case and the public release of "any documents, exhibits, photographs or any evidence, the admissibility of which may have to be determined by the Court." Ex. 1, 1/20/16 Order ("the Initial Decorum Order").

2. A year later, on February 3, 2017, the Court modified the Initial Decorum Order to require that "any documents or pleadings filed in this matter are to be filed in [court]room 500 of the George N. Leighton Criminal Courthouse only." Ex. 2, 2/3/17 Order ("Supplement to Decorum Order").

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

3. Still another year later, defense counsel stated on the record that "[w]e're going to file everything with a Decorum Order from now on," and the Court expressed its approval. Ex. 3, 1/18/18 Tr. at 61.

4. Because of the entry of the Decorum Order, many of the filed pleadings and motions in this case have been unavailable to the Intervenors and the public.

5. Intervenors have sought unsuccessfully to determine the full extent of court documents that are unavailable under the Decorum Order.

6. The court file in this matter is not available for public review at the Cook County Circuit Court Clerk's Office ("the Clerk's Office"). The file is maintained in courtroom 500 pursuant to the Decorum Order but is not available for public review in courtroom 500.

7. A select number of court documents and orders are available for public review at computer terminals accessible to the public at the 5th-floor Clerk's Office at the George N. Leighton Criminal Courthouse, but these documents do not represent anything close to the complete court file.

8. There is no publicly available "docket sheet" in this matter. Instead, selected documents are identified on publicly available computerized listings in the Clerk's Office, but they do not identify or provide access to all documents filed in the case.

9. Many filings are not available to the public pursuant to the Decorum Order and practices that have been developed by the parties and the Court in implementing the Decorum Order. These practices include affixing a stamp to the face of documents to indicate that they are inaccessible to the public pursuant to the Decorum Order. See Ex. 4, 12/20/17 Tr. at 4-5; Ex. 3, 1/18/18 Tr. at 4-5; Ex. 5, 2/1/18 Tr. at 4.

10. Most recently, the parties argued motions in open court on December 6 and 20, 2017, and January 18, 2018, referring during argument to motion papers as well as exhibits, some of which were displayed on a viewing screen in the courtroom (though in a fine print not necessarily readable by journalists or the public). Ex. 6, 12/6/17 Tr. at 19, 21, 46-65, 71-72; Ex. 4, 12/20/17 Tr. at 12, 18-28, 34; Ex. 3, 1/18/18 Tr. at 9-10.

11. Review of those recent transcripts and other court documents shows that by operation of the Decorum Order, the Intervenors and the public have not had access to court filings including those relating to the following:

(a) the Defendant's motion to dismiss the indictment on speedy trial grounds, denied on November 6, 2017;

(b) the Defendant's motion to dismiss the indictment for prosecutorial misconduct, denied on December 20, 2017;

(c) the State's response to Defendant's motion to dismiss for prosecutorial misconduct, filed on or about November 20, 2017;

(d) the Defendant's reply in support of his motion to dismiss for prosecutorial misconduct, filed on or about November 28, 2017;

(e) the State's motion to quash the subpoena upon Jamie Kalven, granted December 13, 2017;

(f) the Defendant's response in opposition to the motion to quash the Kalven subpoena, argued on December 6, 2017; and

(g) the Defendant's motion for admission of certain acts or allegations concerning Laquan McDonald pursuant to *People v. Lynch*, 104 Ill. 2d 194 (1984).[2]

[2] *See* Ex. 6, 12/6/2017 Tr. at 88 (reference to speedy trial motion and motion to dismiss, response, and reply concerning alleged prosecutorial misconduct); Ex. 7, 12/13/2017 Tr. at 3 (reference to motion to quash Kalven subpoena motion and response); Ex. 3, 1/18/18 Tr. at 11-58 (reference to Defendant's *Lynch* motion).

12. Other filed documents may exist that are unavailable to the public but that are not known to Intervenors, because a comprehensive list of filed documents for this matter is not available from the Clerk's Office or in courtroom 500.

II. THE MOTION TO INTERVENE SHOULD BE GRANTED.

Under well-established Illinois law, intervention is the correct vehicle for the limited 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 is a jurisdiction that 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 the common-law right of media organizations to intervene in Illinois criminal cases to seek access to judicial documents and proceedings).

Here, Intervenors are news organizations that have provided news coverage in this matter and yet have been denied access to substantial portions of the court file. 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. for Norfolk County*, 457 U.S. 596, 609 n.25 (1982), quoting *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 401 (1979) (Powell, J., concurring). Intervention is the proper vehicle for the limited purpose of Intervenors' effort to assert their constitutional and common-law rights to obtain access to the court file.

III. INTERVENORS' MOTION FOR ACCESS TO THE COURT FILE MUST BE GRANTED.

Intervenors seek access to public, judicial documents that are subject to a presumption of access under the First Amendment, and they must be granted such access, 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 such specific findings, Intervenors respectfully request an opportunity to be heard, so they may review, evaluate, and – if necessary – challenge such findings, as the hurdle for restricting access to public documents in criminal cases is high, and the parties and the Court have yet to clear it here.

A. Judicial Documents and Proceedings Are Presumptively Accessible Under the Constitutional and Common-Law Rights of Public 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 (1970).[3] This constitutional, presumptive right of access applies to court records or proceedings of the kind that have been historically open to the public, and applies where public disclosure of such records would further

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

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. *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 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 Court File Is Subject to the Presumption of Access.

In this case, Intervenors request access to court file documents, as to which the presumption of access applies because the court file contains documents of the kind historically open to the public, and their disclosure furthers the court proceeding by keeping the public informed about the judicial process in this significant criminal case.

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

Illinois courts have held that documents filed with the Court are subject to the presumption of public access. *In re Marriage of Johnson*, 232 Ill. App. 3d 1068, 1074 (4th Dist. 1992). An Illinois statute, the Clerks of Court Act, also recognizes 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).[4] 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).

The public's broad right of access to court documents under Illinois and federal law is supported by the Illinois Appellate Court's holding in *People v. Kelly*, 397 Ill. App. 3d 232 (1st Dist. 2009). *Kelly*, which involved documents and related hearings containing salacious material about sex with children, held that the records at issue were "not ones that have historically been open to the public," 397 Ill. App. 3d at 259, and *Kelly* distinguished *Waller v. Georgia*, 467 U.S. 39 (1984). In *Waller*, a suppression hearing involving allegations of police misconduct was held to be 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. Accordingly, *Kelly* supports the conclusion that, under the circumstances of this case, the court file documents are in the category of materials that historically have been open to the public. First, police misconduct allegations were not involved in *Kelly* but are at the core of the Van Dyke case, and the public interest in observing and understanding these judicial proceedings and the documents filed in this case is particularly keen. Second, unlike in *Kelly*, the Court on multiple occasions here has permitted counsel to disclose publicly the content of the motions and their exhibits in considerable detail, save only for the names of certain witnesses. Ex. 6, 12/6/17 Tr. at 19, 21, 46-65; Ex. 4, 12/20/17 Tr. at 12, 18-28, 34; Ex. 3, 1/18/18 Tr. at 7-8, 11-58. Third, *Kelly*'s reasoning in affirming the sealing of certain materials (four pretrial hearings, a

[4] The federal authorities are in accord. *See Smith v. United States Dist. Court for Southern 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 of Princeton 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").

prosecution motion to allow evidence of other crimes, a prosecution's supplemental discovery answer, and both parties' witness lists) recently was rejected by the Fourth District in *People v. Zimmerman*, 2017 IL App (4th) 170055, ¶ 10, *appeal allowed*, No. 1222261, 2017 WL 4359033 (Ill. Sept. 27, 2017), as to which the Supreme Court has granted a petition for leave to appeal. *See id.* ("we find *Kelly*'s reliance on our decision in *Pelo* to be misplaced, as that case addressed an evidence deposition, which had not yet been presented at trial, *and not a legal document filed with the court*") (emphasis added).

In this case, while Intervenors do not have available to them a complete "docket sheet" containing an inventory of all filed documents,[5] they know that the file includes at least the motions argued publicly in open court. These motion documents, and all other documents which are contained in the public court file, are historically open to the public and thus subject to the presumption of access.

2. Disclosure of the Court File Furthers the Judicial Process Here.

Intervenors' access to the court file furthers 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*

[5] Courts have recognized the critical importance of a public docket sheet. *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 95 (2d Cir. 2004) (recognizing a qualified First Amendment right of access to unsealed docket sheets in state courts); *see also In re State-Record Co.*, 917 F.2d 124, 129 (4th Cir. 1990) (per curiam) (reversing the sealing of docket sheets in certain criminal matters, holding that an order requiring such sealing was overbroad and violated plaintiffs' First Amendment rights). Indeed, "the ability of the public and press to attend civil and criminal cases would be merely theoretical if the information provided by docket sheets were inaccessible"; docket sheets serve as "a kind of index to judicial proceedings and documents, and endow the public and the press with the capacity to exercise their rights guaranteed by the First Amendment." *Hartford Courant Co.*, 380 F.3d at 93. As a "map of the proceedings," docket sheets not only enhance the appearance of fairness but also the ability of the public and the press to understand the legal system in general as well as what is happening in a particular case. *Id.* at 93.

Distributors, 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 ("the 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.").

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 these documents 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. *Zimmerman*, 2017 IL App (4th) 170055, ¶ 10. As explained below, the Court has yet to make those findings.

C. The Record Available to Intervenors Does Not Contain Findings Necessary To Support Denial of Access.

Intervenors are aware of no findings made in support of denying access to the file or any documents within it. The Decorum Order does not contain such findings. Ex. 1 and 2, Decorum Order. Intervenors appreciate that the Court at times has stated that certain information, such as the names of witnesses whose safety the Court fears might be jeopardized by public disclosure of their names, for example, should not be disclosed publicly. Ex. 3, 1/18/18 Tr. at 7-8. But,

respectfully, denying public access to the entirety of the documents containing witness names and to a large portion of the court file in this case, including every document the defense will file from now on, is an overbroad approach and violates federal and state law establishing that these documents are presumptively available to the public. *See Press-Enterprise II*, 478 U.S. at 8; *Skolnick*, 191 Ill. 2d at 232. Denial of public access can be made only with required and specific, narrowly tailored findings on a document-by-document basis. *See A.P.*, 354 Ill. App. 3d at 1001 (stating that confidentiality concerns "may warrant the sealing of particular documents, but they do not justify the extreme action of sealing entire court files where not every document therein implicates these concerns . . . . [t]he court should limit sealing orders to particular documents or portions thereof which are directly relevant to the legitimate interest in confidentiality"). As far as Intervenors are aware, such findings, including any that would satisfy *Kelly*'s requirement that in a criminal case, reasonable alternatives to withholding documents would fail to protect fair trial rights, have not been made.

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 and news coverage – Intervenors acknowledge that the Court has the important responsibility to protect values including the defendant's right to a fair trial, along with the public's constitutional right of access. But the way to protect fair trial rights is not presumptive denial of access, or presumptive denial of news coverage, where alternative measures are fully available to the parties to the case. The question of alternative measures, including voir dire and management of the jury venire and petit jury, would have to be considered carefully by the parties, the Court,

and Intervenors, if the Court were to consider the entry of any findings denying access to any public document or hearing.[6]

In addition, while Intervenors have filed the instant Motion in courtroom 500 in order to comply with the Decorum Order, Intervenors are respectfully requesting leave to file the Motion in the Clerk's Office for public review.[7] The Intervenors are unaware of any aspect of the Motion, or of this Memorandum, requiring filing under seal or in any other non-public manner. *See A.P.*, 354 Ill. App. 3d at 993 (holding that trial court abused its discretion in requiring intervenor Chicago Tribune to file under seal its briefs challenging the sealing of a court file).

---

[6] Additionally, the Court has conducted certain proceedings in chambers and later has disclosed summaries, prepared by the parties, of what occurred during the closed proceedings. According to Court staff, the closed proceedings were held without a court reporter present, so no transcripts exist or are available. Closed proceedings in this matter have occurred during the two most recent hearings, on January 18, 2018, and February 1, 2018. Ex. 3, 1/18/18 Tr. at 64; Ex. 5, 2/1/18 Tr. at 13-14. After the closed proceeding on January 18, the Court stated on the record that matters discussed in chambers included a possible defense change-of-venue motion. Ex. 3, 1/18/18 Tr. at 64. After the closed proceeding on February 1, the Court stated on the record that the matters discussed included "security" and "subpoenaed material." Ex. 5, 2/1/18 Tr. at 13-14. Intervenors respectfully submit that the analysis in this Motion as to court file documents applies equally to any future closed hearings, and that to the extent the Court seeks to close any future hearings, it may not do so without entering the required, specific findings, which would then be available for review, consideration, and possible challenge by the Intervenors. Intervenors also respectfully request that a court reporter be present for any such closed hearings, so that, if necessary, the nature of the hearing may be fully available to any reviewing court, should review become necessary.

[7] Intervenors, who object to the Decorum Order for reasons stated in their Motion and supporting Memorandum of Law, have filed these documents in chambers and have affixed the above header or legend in order to ensure full compliance with the Decorum Order. Nothing about Intervenors' efforts to comply with the Decorum Order in connection with the filing of the Motion or Memorandum of Law is intended to suggest that any part of those documents should not be made public.

CONCLUSION

For the foregoing reasons, Intervenors respectfully request that the Court grant the motion for intervention and grant Intervenors access to the entire court file.

Dated: March 6, 2018

Respectfully submitted,

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

By: _____
Attorney for Chicago Public Media, Inc.

By: _____
Attorney for Reporters Committee for Freedom of the Press

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Gabriel A. Fuentes
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John W. Zucker
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Counsel for WLS Television, Inc.

David Keneipp
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1999 South Bundy Drive
Los Angeles, CA 90025
Counsel for WFLD Fox 32 Chicago

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

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

ORDER (page 1 of 2)

This cause coming to be heard on the Motion by Intervenors, the Chicago Tribune Company, LLC; Sun-Times Media, LLC; the Associated Press; WLS Television, Inc.; WGN Continental Broadcasting Company, LLC; WFLD Fox 32 Chicago; Chicago Public Media, Inc.; and the Reporters Committee for Freedom of the Press (collectively, "Intervenors") for Intervention and for Access to Court Documents ("the Motion"), proper notice having been given, and the Court having been fully advised in the premises, IT IS HEREBY ORDERED:

1. Leave is GRANTED to Intervenors to intervene in this matter;

2. Intervenors are GRANTED relief from the Court's February 3, 2017 order requiring all materials to be filed in Room 500, and are granted leave to file the Motion and supporting Memorandum of Law, ~~with exhibits~~, in the Clerk's Office where these documents shall be made available to the public; and / excluding the exhibits which are already publicly available

3. ~~The State and the Defendant are GRANTED leave to file any responses to that portion of the Motion that seeks public access of other filed materials on or before March ___, 2018. Intervenors may file a reply to such responses on or before March ___, 2018. The Motion is set for hearing on _____, 2018, at 9 a.m.~~

ENTERED: Vincent M. Gaughan
The Hon. Vincent M. Gaughan 1553

Order prepared by:
Gabriel A. Fuentes
Jenner & Block LLP
353 N. Clark St.
Chicago, IL 60654
(312) 222-9350
Counsel for Chicago Public Media, Inc.

ENTERED
JUDGE VINCENT GAUGHAN-1553
MAR 08 2018
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Order **(2/24/05) CCG N002**

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

People of the State of Illinois

v.

Jason Van Dyke

No. 17 CR 0428601

ORDER (page 2 of 2)

3. The parties and Intervenors are directed to meet and confer about what portions of the court file they contend should or should not be accessible to the public. The parties and Intervenors shall appear before the Court on March 28, 2018, at 9 a.m., to report the outcome of their discussions.

ENTERED
JUDGE VINCENT GAUGHAN-1553
MAR 08 2018
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Atty. No.: 05003

Name: Gabe Fuentes

Atty. for: Intervenors

Address: Jenner & Block 353 N. Clark St

City/State/Zip: Chicago IL 60654

Telephone: 312.222.9350

ENTERED:

Dated: _____, _____

Vincent M Gaughan
Judge

Judge's No. 1553

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

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

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

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff,

vs.) No. 17 CR 4286

JASON VAN DYKE,

Defendant.

REPORT OF PROCEEDINGS had before the HONORABLE VINCENT M. GAUGHAN, on the 28th day of March, 2018, in Chicago, Illinois.

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

MR. RANDY RUECKERT,
MS. ELIZABETH FLEMING,
ATTORNEYS AT LAW,
appeared on behalf of the Defendant.

ELLEN DUSZA, CSR No. 84-3386
Official Court Reporter
773-674-6065

the Decorum Order.

What else do we have?

MR. McMAHON: Judge, I think that concludes the matters that the State has this morning. I know there are other matters before the Court but --

THE COURT: Let me just say my plans are to have this case go to trial in the summer. All right? I'm not going to say the specific month, but it will go to trial this summer. The factors that have to be looked into, I don't want this inclement weather, with our weather, we don't know whether there would be snowstorms, accidents with the jurors coming to the courthouse, other things happening which would interrupt the trial, so I want the weather to be -- it's something we have a little bit control over is what season it's in. So I just want to give you a heads-up on that.

What else?

Jeff, what do you have today?

Indicating, for the record, an in-court identification.

Go ahead, Gab.

MR. FUENTES: Thank you.

On Monday of this week, the intervenors filed a status report. Your Honor ordered us to confer with the

And then Jeff and Brendan, how long is it going to take you to respond to that?

MR. FUENTES: I think we can respond in a week or less.

THE COURT: Okay. Good. Can you file that on the 13th?

MR. FUENTES: We could, Judge, yes.

THE COURT: Thank you very much.

And these are under the Decorum Order right now.

And then we'll have argument on the 19th of April on this, so we'll see what can be released and what has to be protected.

I want to compliment everybody doing an outstanding job of defending their sides and promoting their sides.

MR. FUENTES: Thank you.

Judge, if I may.

THE COURT: Yeah.

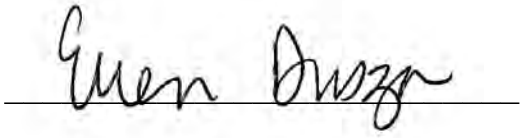
MR. FUENTES: In our status report that we filed on Monday, we made a series of requests, and I just want to make sure that we have clarity as to what the Court is doing with those. I would like to briefly --

THE COURT: They're under advisement.

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

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

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



Official Court Reporter
Ellen Dusza, CSR 84-3386
Circuit Court of Cook County

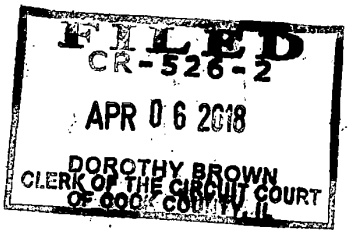
Date: April 11, 2018

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

Filed under the protection of the Decorum Order

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

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



STATE'S RESPSONSE TO INTERVENORS MOTION FOR ACCESS TO COURT DOCUMENTS

NOW COME THE PEOPLE OF THE STATE OF ILLINOIS, by and through their Attorney, JOSEPH H. MCMAHON, Special Prosecutor and State's Attorney of Kane County, Illinois and responds to the Intervenor's Motion for Access to Court Documents as follows:

On December 15, 2015, the Cook County Grand Jury indicted the defendant Jason Van Dyke on six counts of First Degree Murder and one count of Official Misconduct. Before the first appearance of the defendant, an order granting extended media coverage was granted. Orders were later entered to allow extended media coverage at each and every hearing in this case. On January 20, 2016, and February 3, 2017, this court entered Decorum Orders controlling certain behavior of the parties in this case. On August 4, 2016, Joseph H. McMahon was appointed as Special Prosecutor. On March 8, 2018, the Intervenors' Motion to Intervene was granted without objection from either the People or the Defense. Before the March 28, 2018 court date, the People compiled a list of documents to which it took the position that it was duty-bound to object to the release to the media at this time. This Response lays out the justifications for those objections. During the preparation of this response, the People have identified additional documents which are subject to

Filed under the protection of the Decorum Order

the Decorum Order. Those documents are identified below and are included as items 106-111 on the attachment.

The People take very seriously and appreciates the public's right of access to court proceedings. We recognize the constitutional, statutory, and common-law basis of this right. See *People v. Kelly*, 397 Ill.App.3d 232 at 242. However, the right of public access must be balanced against other important, longstanding, and foundational rights granted by our justice system. As the court stated in *Kelly*, "the case at bar require[s] the trial court, in a high profile case, to balance the public's right to know, against both the defendant's right to a fair trial and the court's desire to protect an alleged victim of then minor age. *Id. at 251.*

Courts use exceptionally strong language when describing the importance of a defendant's right to a fair trial. "The central aim of a criminal proceeding is to try the accused fairly". *Waller v. Georgia*, 467 U.S. 39 at 46. "No right ranks higher than the right of the accused to a fair trial". *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 501 at 508. The Appellate Court in *Kelly* (citing *A.P. v. M.E.E.*, 354 Ill.App.3d 989 at 998), explained that when a minor is involved he or she is "entitled to the court's tenderest consideration". *Kelly at 263.* In deciding to temporarily deny access to certain proceedings and records, the trial court has to craft a careful and delicate balance among competing interests. *Id. at 256.*

It is also important to note that although public access to a court proceeding must always be balanced against competing interests, a presumption of access does not apply to every proceeding. Nor does it apply to all documents filed by parties. As the court explained in *Kelly*, the presumption of access only applies to court proceedings and records (1) which have been historically open to the public; and (2) which have a purpose and function that would be furthered by disclosure. *Id.* Applying that standard, the court in *Kelly* found that the presumption of access did not apply to "the

hearings, to the State's motion concerning potential evidence, to the State's discovery, or to the parties' witness lists." *Id at 259.* Potential evidence does not carry a presumption of access until its use in court. *Id interpreting People v. Pelo*, 384 Ill.App.3d 776 at 782-83. "In addition, the function of the hearing could be undermined, if the public and potential jurors received access to the information, even if the trial court ruled that the State was not entitled to use it." *Id. at 260.* Citing *Press-Enterprise II (found at 478 U.S. at 14-15).* The court in *Kelly* went on to find that "public access to an admissibility hearing posed special risks of unfairness, where publicity could undermine the whole purpose of such a hearing which is to screen out unreliable or illegally obtained evidence." *Id.*

Here, in the list crafted by the People, we have identified filings that would not be entitled to a presumption of access. Those filings fall into the following categories:

The first is witness lists and discovery to which the court in *Kelley* found the presumption does not attach.

The second is filings related to the admissibility of evidence at trial, as the court found in *Kelly* in examining similar filings, the purpose of these filings would be greatly undermined if fully reported on in a case with this type of pre-trial publicity.

Included in these types of filings are filings having to do with the admissibility of compelled statements under *Garrity v. New Jersey.* In an example of the lengths the People have gone to ensure that the parties receive a fair trial, the People's trial team has not had access to these filings and was not present at the public hearings. Without rehashing all of the difficulties that these type of statements create in the prosecution of a police officer, these are exactly the types of filings of which careful and tedious litigation could be undermined by complete access by the press.

A third category of filing is those in which the defense includes statements which are regulated by the Court's Decorum Order. The Decorum Order tracks the language of Supreme Court Rule 3.6 which prohibits attorneys from making extrajudicial statements that would pose a serious and imminent threat to the fairness of an adjudicative proceeding. Such statements include ones that relate to: the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness; or the identity of a witness; or the expected testimony of a party or witness; or the nature of physical evidence expected to be presented; or any opinion as to the guilt or innocence of a defendant; and information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial. Those types of statements made in written documents, if released to the public prior to the trial, would pose the same serious and imminent threat to the fairness of an adjudicative proceeding.

Some of the motions that fall under this category are riddled with unfounded attacks on the credibility, reputation or criminal record of prosecutors or the victim. Many defense motions are replete with opinions that the defendant is innocent and was wrongly charged. After hearing, the court ruled that all of the defense allegations of prosecutorial misconduct are unfounded. For example, as to the Defendant's Motion to Dismiss for Prosecutorial Misconduct, the court ruled that "not a scintilla of evidence" of misconduct actually existed.

Some of the motions include the expected testimony of potential witnesses, and many defense motions, and their attachments, include a vast amount of information which the defense knows will not be admissible at trial. Almost none of the attachments to the defense motions were even introduced into evidence at the hearings on the motions. The Constitution does not entitle the public to have access to information that is actually ruled inadmissible. *U.S. v. McVeigh*, 119F.3d 806 at 813.

Filed under the protection of the Decorum Order

Each of the filings objected to by the People falls outside the presumption of access. However, even if the court decides that the presumption does apply to some of the filings, the court should still deny access if it "makes specific findings demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve those values". *Id at 261 citing Press-Enterprise II.* The trial court's findings along these lines will not be disturbed absent a finding of abuse of discretion. *Id. at 254-255.* In making these findings it is important to note the amount of pre-trial publicity surrounding this case. The defense has previously informed the court that thousands of news articles have been written covering this case and there have been millions of online "hits" related to it. The Intervenors claim the case "has become part of a national discussion about urban policing in America". *Intervenors Memorandum* pg 1.

This is the exceptional type of case discussed in *Kelly* in which pre-trial publicity has the potential to undermine the parties' rights to a fair trial. The Intervenors' motion also comes at a time when the parties are preparing to litigate a Motion for Change of Venue as well as finalizing trial preparations for a trial in the not too distant future. The release of the objected to material could undermine the ability of the parties to receive fair proceedings at an important juncture in the case.

Although there are certainly other interests at play, including the privacy rights of both third party witnesses as well as the privacy rights of a deceased minor, the paramount concern in this case is the rights of the parties to a fair trial. This court's Decorum Orders were thoughtfully issued with the goal of ensuring a fair trial to the parties. It should also be noted a verbatim version of a decorum order entered in this case was found to be appropriate by the Appellate Court in *Kelly*. There is also a clear record in this case that this court has balanced concerns of providing a fair trial to the parties against concerns of the media's right to access. The media has been granted extraordinary access to the proceedings. Every minute of each proceeding in this case has been open to the public and

recorded by not only verbatim transcription but also video and audio recording, as well as by still frame photography. The court has indicated that this type of access will likely remain throughout the proceedings and that a live transcription service may be added at the trial. Therefore, the Intervenors themselves have access to verbatim transcripts as well as complete audio and video recordings of each and every hearing. Additionally, it is apparent from the court's orders that any limit of access imposed is not permanent but rather will be lifted once the protected competing interest is properly preserved.

One of the Intervenors' primary concerns is that they have been denied access to certain filings in this case and they have suggested that redaction of certain information would be a reasonable alternative to full denial of access to some documents. As was the case in *Kelly*, here there is so much objectionable material in the defense motions, and that information is so intertwined with the non-objectionable information that redaction would result in a collection of unintelligible nonsense. Furthermore, what the Intervenors fail to recognize is that this court has already carefully set up a system which for all intents and purposes provides the Intervenors with a redacted version of every motion at issue. This is so because the intervenors have the ability to be present to hear, and actually record, all arguments and rulings related to the motions. This system strikes a perfect balance between the parties' need to get all relevant information in front of the trier of fact for consideration and the interests of the parties in receiving a fair trial. It also completely protects the rights of the Intervenors. In this way the court can give careful consideration to any argument presented by the parties and determine whether filed documents are entitled to the presumption of access and whether each contains material which, if released, would jeopardize any other important right.

An example of this system playing out perfectly in this case is the *Lynch* hearing. Both the People and defense were allowed to file briefs containing any information the parties felt was vital to a fair determination of the issues. After reviewing the briefs but before the public hearing, the court chose to exercise its discretion in the interest of protecting the privacy rights of individuals and limited the use of witness names at the actual hearing. In this way, the rights of the individuals were protected with very little information being kept from the public. This system has been narrowly tailored to allow the trial court to be a guardian of the parties' rights to a fair trial while also limiting what information is kept from the public. Furthermore, after the March 8, 2018 court date, the court ordered the parties to further evaluate which filings were entitled to protection, an action designed to further narrowly tailor the protections put in place in this case. It is clear that the court is engaged in a process to carefully and adroitly craft a balance among competing interests.

Specific Basis for the People's Objection to the release of individual documents

Using the filing number from Exhibit A attached, below is an outline of the People's basis for objection to each of the individual documents at issue.

1. State's Factual Proffer in Support of Setting Bond, filed November 24, 2015.

The People do not object to releasing the Factual Proffer in Support of Setting Bond. The factual proffer contains a summary of the allegations that form the basis of the indictment and are facts that are already in the public record. Upon information and belief this information was presented in open court to the judge who originally made a bail determination and release of the pleading will not prejudice the defendant's ability to receive a fair trial.

2. Motion for Pre-Trial Discovery Pursuant to Illinois Supreme Court Rule 413, filed December 29, 2015.

The People do not object to releasing the Motion for Pre-Trial Discovery.

6. Defendant's Motion to Waive Appearance, filed March 23, 2016.

The People object to the release of this document This Motion alleges the defendant's safety is in jeopardy, that he is subject to physical and verbal assaults as he enters the courthouse and alleges the news media has interfered with his ingress and egress from court proceedings. These allegations and statements are designed to elicit sympathy and interfere with the parties' right to receive a fair trial. This Court and the Cook County Sheriff have taken steps to maintain decorum inside and outside the courthouse. This has been the subject of hearings that were open to the public and the media and releasing the pleading would serve no legal purpose and have the potential to impact a jury pool as this matter proceeds to trial.

7. State's Response to Defendant's Motion to Waive Appearance, filed April 13, 2016.

The People object to releasing this document for the same reasons set for the above in relation to Filing #6.

8. Defendant's Reply to the People's Response to Defendant's Motion to Waive Appearance, filed April 7, 2016.

The People object to releasing this document for the same reasons set for the above in relation to Filing #6. Further, the defendant has attached numerous articles and postings in public comment boards which only serve to poison the jury pool and compromise the parties' right to a fair trial. The attachments contain information that is likely to be inadmissible as evidence at trial.

10. Response to the Petitions to Appoint a Special Prosecutor, filed June 1, 2016.

The People do not object to releasing this document. The Response does not contain factual allegations or assertions that could in any way interfere with the defendant's ability to receive a fair trial.

17. People's Initial *Garrity* Team Disclosure to Defendant, filed September 27, 2016.

The People object to the release of this document. This is a document to which the People's trial team has not had access. There are special concerns with the dissemination of materials handled by the People's *Garrity* Team. As outlined in the brief above, dissemination of *Garrity* Team documents at this juncture could undermine the careful and meticulous handling of these matters. Additionally, based on the name of this document, it deals with discovery materials to which a presumption of access does not apply as outlined in the People's Response.

19. People's 1st Supplemental *Garrity* Team Disclosure, filed November 2, 2016.

The People object to the release of this document for the same reasons as stated in #17 above. This is a document to which the People's trial team has not had access.

22. People's 2nd Supplemental *Garrity* Team Disclosure, filed January 10, 2017.

The People object to the release of this document for the same reasons as stated in #17 above. This is a document to which the People's trial team has not had access.

26. Memorandum of Law in Support of Motion to Suppress Evidence Tainted by Exposure to Defendant's Compelled Statement and/or Motion to Dismiss, filed January 18, 2017.

The People object to the release of this Memorandum as it contains the names of actual witnesses and summarizes their alleged statements including allegations about information that was presented to the grand jury.

28. Motion to Dismiss the Indictment for Misconduct at Grand Jury, filed February 3, 2017.

The People object to the release of this document. This is a three-page defense motion. The motion refers to the memorandum and characterizes grand jury testimony. The court heard

arguments on the motion on May 25, 2017 and denied the motion. The court stated on the record its reasons for denying the motion.

29. Memorandum of Law in support of Defendant's Motion to Dismiss the Indictment for Misconduct at Grand Jury, filed February 3, 2017.

The People object to the release of this document. This thirteen-page memorandum includes the entire original grand jury transcript which is attached as Exhibit A. The memorandum is replete with arguments regarding unsubstantiated claims regarding the activities of various public officials and members of the media during the period of time between the shooting of Laquan McDonald and the first indictment. In doing so, it is replete with statements which relate to the character, credibility, reputation or criminal record of a party or witness. The document is replete with the defense's opinion as to the guilt or innocence of the defendant. It also includes information regarding matters which will be inadmissible as evidence at trial. It would be impossible to redact the document because the statements covered by the Decorum Order and Rule 3.6 are so pervasive that redaction would leave nothing more than a collection of unintelligible nonsense.

34. People's Response to the Defendant's Motion to Dismiss the Indictment for Misconduct at Grand Jury, filed March 23, 2017.

The People make no objection to the release of this concise one-page document which lists the date of the indictment and cites relevant case law. In the document, the People included absolutely no statements which could conceivably be prohibited by the Supreme Court Rules.

35. Defendant's Memorandum of Law in Support of Motion to Dismiss the Indictment, filed April 20, 2017.

The People object to the release of this document. In this eleven-page document, the defendant comments at length on the character, credibility, and reputation of a party to the case. The document

is replete with his opinion as to the guilt or innocence of the defendant. It also includes information regarding matters which will be inadmissible as evidence at trial, and comments on the nature of physical evidence and testimony which *will be* expected to be presented at trial. In the document, the defendant's attorney speculates regarding the thought process of prosecutors and witnesses.

36. Defendant's Motion to Dismiss Indictment and/or Other Relief, and Memorandum of Law in Support of the Motion, filed April 20, 2017.

The People object to the release of this document. In these documents, the defendant seeks to dismiss the indictment pursuant to the principles enunciated in *Garrity v New Jersey.* The document contains a summary of grand jury testimony. Grand Jury materials cannot be disclosed without a specific court order directing disclosure. 725 ILCS 5/112-6(c)(3). In the documents, the defendant comments at length on the character, credibility, and reputation of a party to the case. The document is replete with his opinion as to the guilt or innocence of the defendant. It includes unfounded allegations of misconduct which were fully litigated in open court. The memorandum includes unsupported speculation by the defendant's attorney regarding the activities and motives of members of the prosecution and media.

37. Defendant's Motion to Dismiss Indictment (based on alleged misconduct before the Grand Jury, filed April 20, 2017.

The People object to the release of this document. In this two-page document, the defendant makes unfounded comments regarding the character and credibility of a party to the case. The document contains the defendant's opinion regarding evidence presented to the grand jury and allegations regarding information not presented to the grand jury. A redacted version of the document would be one that contains no relevant information at all.

38. Defendant's Second Motion for Bill of Particulars, filed April 20, 2017.

The People object to the release of this document. This motion sets forth the defendant's legal arguments and his claimed defenses that he claims will be based on witness testimony.

39. Defendant's Supplemental Motion to Waive Appearance, filed April 20, 2017.

The People object to the release of this document. The defendant in this motion asserts that the defendant's safety is in jeopardy each time he appears in court. To substantiate this claim, the defendant has attached numerous articles and postings which only serve to poison the jury pool and to compromise the parties; right to a fair trial. Specifically, the defendant has attached numerous news articles with photographs of the defendant leaving court, photographs with comments from Mayor Emmanuel, and news articles which contain information regarding the U.S. Department of Justice civil rights' investigation. These articles also include comments by the defense regarding death threats received by the defendant and his family and depict photographs of protesters described as "an angry group" and statements made by protesters. None of this information would be admissible at trial.

40. Motion in *Limine* to Limit the Scope of *Kastigar* Hearing, filed April 20, 2017.

The People object to the release of this document. This fifteen page document deals with sensitive *Garrity* related issues which should be given careful consideration as noted above. Additionally, the document lists potential trial witnesses and potential evidence that has not yet been ruled admissible.

42. People's Response to Defendant's Motion to Waive Appearance, filed April 27, 2017.

The People do not object to releasing this document.

43. Defendant's Response to Motion *In Limine* to bar Claim of Prejudice, filed May 11, 2017.

The People object to the release of this document. The defendant's response refers to proceedings by the Police Board and references "*Garrity* protected statements". Specifically, the defendant alleges that the Superintendent had planned to introduce immunized/*Garrity* protected statements,

including the transcript of defendant's statement made at the Independent Police Review Authority. The release of these objectionable documents would compromise the parties' right to a fair trial.

44. Response to Motion to Limit Scope of *Kastigar* Hearing, filed May 11, 2017.

The People object to the release of this document. This twenty-six page document deals with sensitive *Garrity* related issues. Additionally, the document lists potential trial witnesses and potential evidence that has not yet been ruled admissible, and likely will not be ruled admissible. Additionally, the attached exhibits are discovery documents, including FBI reports that were not admitted into evidence.

47. People's Combined Response to "Defendant's Motion to Dismiss the Indictment" and "Motion to Dismiss the Indictment and /or Other Relief", filed May 11, 2017.

The People object to the release of this document. In their thirty-three page response to the defendant's two motions to dismiss, as required by statute, the People specifically addressed and admitted or denied the factual allegations made by the defendant's attorneys in their motions to dismiss. In the document, the prosecutors pointed out the many instances in which the defendant's attorneys made allegations which even if true, are irrelevant to any issue which was before the court. The bulk of the People's response consists of analysis of statutes and case law. Interspersed with the legal analysis, the People addressed the defendant's factual allegations. In the document, in response to what proved to be baseless defense allegations, the People quoted extensively from the grand jury transcript and to the extent necessary commented on the grand jury testimony.

58. Brief in Support of People's *Garrity/Kastigar* Hearing Position, filed September 7, 2017.

The People object to the release of this document for the same reasons as outlined in #17. This is a document to which the People's trial team has not had access.

59. Defendant's Response to Motion to Determine Actual Conflict, filed September 27, 2017.

The People object to the release of this document. The defendant's response contains witnesses' names and summaries of their interaction with defense counsel. The response also refers to the attachment of witnesses' statements in the People's motion. There is also an attached waiver by the defendant which lists the names of the officers' attorney Dan Herbert represented during the Independent Police Review Authority interviews on October 20, 2014 and October 21, 2014.

61. People's Motion to Determine Actual Conflict, filed September 28, 2017.

The People object to the release of this document. The documents include witnesses' names, statements, and witness' testimony before the federal grand jury and the Independent Police Review Authority (IPRA). Specifically, this motion includes attachments of IPRA proceedings on October 20, 2014 and October 21, 2014 where several police officers provided testimony with attorney Dan Herbert present as their legal representative. In addition, the motion includes attachments of federal grand jury transcripts from June 24, 2015, June 25, 2015 and July 1, 2015 as well as interviews and attempted interviews of witnesses by federal agents.

65. People's Reply to the Defendant's Reply to the People's Motion to Determine Actual Conflict, filed September 28, 2017.

The People object to the release of this document. In the People's Reply, the witnesses' names are listed as well as their association as clients of attorney Dan Herbert during the Independent Police Review Authority proceedings on October 20, 2014 and October 21, 2014.

66. Defendant's Offer of Proof *Kastigar* Witnesses, filed October 4, 2017.

The People object to the release of this document for the same reasons as outlined in #17. This is a document to which the People's trial team has not had access.

74. Jamie Kalven Motion to Quash Subpoena, filed November 3, 2017.

The People object to the release of this document. For the same reasons as outlined in #17. This is a document to which the People's trial team has not had access. See response to item #17.

76. Defendant's Motion to Dismiss the Indictment Based on Prosecutorial Misconduct, filed November 11, 2017.

The People object to the release of this document. In his twenty-page motion, the defendant attempts to justify his unfounded attack on the character and credibility of a party to the case. In the document, he comments extensively regarding his opinion relating to the guilt or innocence of the defendant. Additionally, he makes numerous unsupported factual claims regarding the allegedly special abilities of police officers, the specific acts and thoughts of the defendant, and the thought process and alleged motivations of prosecutors. None of this evidence would be admissible at trial.

The defendant also attached 159 pages of newspaper articles, emails from various entities including members of the media, email attachments, letters (some of which relate to potential charges against individuals completely unrelated to the defendant), press releases from various entities, internal memoranda, (some of which relate to potential charges against individuals completely unrelated to the defendant), drafts of press releases, and campaign literature. None of the attachments were entered into evidence. The defendant never provided any foundation to establish the authenticity of the documents, the context in which they were created, or their relevance to any issue before the court. The constitution does not entitle the public to have access to information that is actually ruled inadmissible. *McVeigh* 119 F. 3d *at* 813.

In the defendant's actual motion, he liberally quotes from many of his attached documents and provides extensive discussion about his personal opinion regarding the conclusions to be drawn from those documents. The pleading comments at length on the character, credibility, and reputation of a party to the case. The document is replete with opinions as to the guilt or innocence of the

defendant. It includes unfounded allegations of misconduct which were fully litigated in open court. The memorandum includes unsupported speculation by the defendant regarding the activities and motives of members of the prosecution and media. It also includes information regarding matters which will be inadmissible as evidence at trial, and comments on the nature of physical evidence and testimony which *will be* expected to be presented at trial.

77. Motion *in limine* to Admit *Lynch* Material, filed November 6, 2017.

The People object to the release of this document. In the Defendant's Motion *In Limine* to admit *Lynch* Material and the Defendant's Offer of Proof, Amended Offer of Proof and Second Amended offer of Proof the defense list approximately forty-eight witnesses and incidents that they seek to admit under *Lynch*. When they finally proceeded to hearing on the 3rd Amended Offer of Proof they had reduced their request to admit approximately twenty-five witnesses and incidents. Obviously, since they did not proceed on over twenty incidents or witnesses, that information should not be released to the public because it will not be admitted at trial. As stated in *Kelly* , "the case at bar require[s] the trial court, in a high profile case, to balance the public's right to know, against both the defendant's right to a fair trial and the court's desire to protect an alleged victim of then minor age. *Id.*

In all of these documents, the defense comments at length on the character, credibility, and reputation of the victim, Laquan McDonald. The documents include unfounded allegations of misconduct which were fully litigated in open court and most will not be admitted at trial under *Lynch*. The Court has ruled that only nine of the incidents from the 3rd Amended Offer of Proof meet the standard to be admitted under *Lynch*. The court has not ruled how much of the proffered testimony will be allowed at trial. In addition, the defense will have to lay a proper foundation before any of this testimony is admissible. The Court has a duty to ensure that both the prosecution and

defense receive a fair trial. Limiting the release of the names of witnesses and their expected testimony from being released prior to trial ensures that the parties receive a fair trial.

78. People's Motion to Quash Subpoena to Jamie Kalven, filed November 6, 2017.

The People object to the release of this document for the same reasons outlined in #17. This is a document to which the People's trial team has not had access.

79. People's Answer to Discovery, filed November 6, 2017.

The People object to the release of this document. This is a document which is largely a list of witnesses and physical evidence. As outlined above, discovery documents as well as witness lists do not carry a presumption of access as determined in *People v. Kelly*.

80. Defendant Response in Opp. To MTQ Subpoena of Kalven, filed November 20, 2017.

The People object to the release of this document for the same reasons outlined in #17. This is a document to which the People's trial team has not had access.

81. J. Kalven Reply in Support of his Motion to Quash, filed December 4, 2017

The People object to the release of this document for the same reasons outlined in #17. This is a document to which the People's trial team has not had access.

83. People's Supplemental Discovery Response 6, filed December 6, 2017.

This is a one page document with forty-three pages of discovery material. As outlined above, discovery documents as well as witness lists do not carry a presumption of access as determined in *People v. Kelly*. These are not the types of documents that the public has traditionally had a right of access to and disclosure of this document would not further its purpose but would greatly undermine both the privacy rights of the third party witnesses as well as the parties' rights to a fair trial.

84. State's Response to Defendant's Motion to Dismiss the Indictment Based on Prosecutorial Misconduct, filed December 6, 2017.

The People object to the release of this document. In this twenty-three-page response to the defendant's motion to dismiss, as required by statute, the People specifically addressed and admitted or denied the factual allegations made by the defendant in his motions to dismiss. In the document, the prosecutors pointed out the many instances in which the defendant made allegations which even if true are irrelevant to any issue which is or was before the court. The prosecutors included extensive discussion regarding the attachments to the defendant's motion and argued that the attachments do not support the defendant's claim. The remainder of the People's response consists of analysis of statutes and case law. Interspersed with the legal analysis, the People addressed the defendant's factual allegations, which the court ultimately determined were baseless. In the document, in response to what proved to be baseless defense allegations, the People quoted extensively from the grand jury transcript and to the extent necessary commented on the grand jury proceeding.

85. Defense offer of Proof *Lynch*, filed December 6, 2017.

The People object to the release of this document for the same reasons as outlined in #77

86. Defendant's Reply to People's Response to Defendant's Motion In *Limine* to Permit the introduction of *Lynch* Materials, filed December 5, 2017

The People object to the release of this document. In this document the defendant comments on his allegations regarding the criminal record of the victim. He also presents arguments regarding the guilt or innocence of the defendant and provides information regarding what the defendant claims

was thinking when he killed the victim. This is potential trial testimony of a witness that should not be publicized pre-trial.

87. People's Response to Defendant's Motion in Limine to Permit the Introduction of *Lynch* Materials, dated December 6, 2017.

The People object to the release of this document In this document the People provided a response to each incident in the Defendant's motions *in Limine* and offers of proof. After subsequent filings, the defense did not proceed in introducing many of these incidents. The motion when finally presented by the defense contained approximately half of the incidents contained in the original motion in limine. The court has provided a preliminary ruling that nine incidents may come in under *Lynch*. The majority of the allegations contained in the documents will not be admitted as evidence and should not be released to the public at this time.

89. Amended Defense Offer of Proof for *Lynch* Motion Witnesses, filed December 13, 2017.

The People object to the release of this document for the same reasons as outlined in #77.

90. Supplemental Motion to Dismiss the Indictment Based on Prosecutorial Misconduct, filed December 12, 2017.

The People object to the release of this document. This nine-page motion discusses matters completely collateral to the charges against the defendant. In the motion, the defendant attacks the character and credibility of a party to the case, and articulates an opinion regarding the guilt of innocence of the defendant by challenging the integrity of the investigation by attacking the actions and motives of members of the media and investigators.

The motion is followed by 101 pages of attachments. The first attachment is a copy of the defendant's "Memorandum of Law in support of Defendant's Motion to Dismiss the Indictment for

Misconduct at Grand Jury", filed February 3, 2017, which is discussed in item 29 above. The other attachments include a copy of the 15CR20622 Grand Jury transcript, copies of press releases, an email, and a document which, if authentic, may have been created by IPRA. The defense never established any foundation for the attachments and none were entered into evidence.

91. People's Supplemental Discovery Response 7, filed December 20, 2017.

The People object to the release of this document. This is a 2 page document outlining discovery materials and listing potential witnesses. As outlined above, discovery documents as well as witness lists do not carry a presumption of access as determined in *People v. Kelly*.

92. Second Amended Offer of Proof *Lynch*, filed December 20, 2017.

The People object to the release of this document for the same reasons as outlined in #77.

94. Defendant's Third Amended Offer of Proof in Support of Motion to Admit *Lynch* Material, filed January 5, 2018.

The People object to the release of this document for the same reasons as outlined #77.

95. Defendant's Initial Expert Witness Disclosure, filed January 5, 2018.

The People object to the release of this document. This is a discovery document that lists potential defense expert witnesses to be called at trial. The document also includes an extensive summary of the witnesses' expected testimony, which may not be admissible at trial. As outlined above, discovery documents as well as witness lists do not carry a presumption of access as determined in *People v. Kelly*.

96. People's Reply to Third Amended Offer of Proof to Support *Lynch*, filed January 12, 2018.

The People object to the release of this document. In this documents the People provided a response to each incident in the Defendant's motion in *Limine* and offers of proof. After subsequent filings, the defense did not proceed in introducing many of these incidents. The motion when finally presented by the defense contained approximately half of the incidents contained in the original motion in limine. The court has provided a preliminary ruling that nine incidents may come in under Lynch. The majority of the allegations contained in the documents will not be admitted as evidence and should not be released to the public at this time.

97. Memorandum in Support of Motion to Suppress Evidence (Def. Compelled Statement), filed January 17, 2017.

The People object to the release of this document for the same reasons as outlined in #17 This is a document to which the People's trial team has not had access.

106. Defendant's Reply to the People's Response to Defendant's Motion to Dismiss Indictment, filed December 6, 2017.

The People object to the release of this document. In this twelve-page Reply, the defendant criticized the Prosecutor's reasoning set forth in the December 6, 2017 Response. In doing so, the defendant discussed some of the attachments to his November16, 2017 Motion and attempted to justify his attack on the character and credibility of a party to the case. Interspersed throughout the document, the defendant repeatedly rendered an opinion regarding the guilt or innocence of the defendant. He also repeatedly commented on the nature of physical evidence and testimony which will be expected to be presented at trial.

107. Defendant's Motion for Change of Place of Trial, filed March 28, 2018.

The People object to the release of this document. The motion contains allegations which imply that the filing of charges against the defendant were politically motivated. The motion also contains

media publication cites and provides the link to access investigative reports, officer's supplemental reports, and witness accounts regarding the criminal investigation of the defendant. By providing a link to access these documents it is tantamount to listing witnesses' names and a summary of witnesses' testimony. The motion also contains irrelevant comments by Chicago Mayor Emmanuel as well as Facebook postings and comments regarding the defendant's guilt and his subsequent employment by the Fraternal Order of Police. The attachments have not been introduced into evidence and contain information which would not be admissible at trial and information relating to the nature of evidence expected to be presented at trial.

108. Intervenor's Status Report, filed March 28, 2018.

The People object to the release of this document. The report contains email communications between the attorneys for the Intervenors and the People and the Defendant. At the direction of the Court, the People responded in good faith to the Intervenor's request. The Intervenors then filed a status report summarizing the responses by the People and the defendant and attached said correspondence to the Intervenor's status report. The communication between the parties if disclosed would be tantamount to providing an interview regarding the thoughts and perspectives of the People and the defendant regarding the propriety of the prosecution of the case. Specifically, the response by the defendant includes statements regarding the negative publicity that the defendant has received as a result of the criminal charges that were filed against him. In addition, the defendant indicates in his correspondence to the Intervenors that the implementation of the decorum order documents has caused irreparable harm to the defendant. The release of these objectionable documents would circumvent the purpose and intent of the decorum order and would compromise the parties' right to a fair trial. Additionally, in the attachments, the defendant renders his opinion

regarding the guilt or innocence of the defendant and provides information that would be inadmissible as evidence at trial.

109. Defendant's Supplemental list of Expert Witnesses, filed January 5, 2018.

The People object to the release of this document. This is a discovery document that lists potential defense expert witnesses to be called at trial. The document also includes an extensive summary of the witnesses' expected testimony, which may not be admissible at trial. As outlined above, discovery documents as well as witness lists do not carry a presumption of access as determined in *People v. Kelly.*

110. Report of a defense expert, filed February 1, 2018.

The People object to the release of this document. This is a discovery document that lists a potential defense expert witness to be called at trial. The document also includes an extensive summary of the witness's expected testimony, which may not be admissible at trial.

111. Report of a second defense expert, filed February 1, 2018.

The People object to the release of this document. This is a discovery document that lists a potential defense expert witness to be called at trial. The document also includes an extensive summary of the witness's expected testimony, which may not be admissible at trial.

WHEREFORE, the People of the State of Illinois respectfully request that this Court enter an order that the documents listed above remain sealed until the trial in this case is completed.

RESPECTFULLY SUBMITTED,

People of the State of Illinois
Joseph H. McMahon
Special Prosecutor and Kane County State's Attorney

By: _____
Joseph H. McMahon

Filed under the protection of the Decorum Order

Date: April 5, 2018

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People v. Van Dyke

Combined List of Filings and Objections

Filing Number	Name of Item	Date	Objection/ No Objection	Party Objecting	Defendant's Partial Objections	Basis of State's Objection
1	People's Factual Proffer in Support of Setting Bond	7/24/2015	Objection	Both		No objection
2	Motion for Pre-Trial Discovery	12/29/2015	Objection	Both		No objection
3	Agreed memorandum Summarizing 1/29/2016		No objection	x		
4	*Motion to Consolidate	3/15/2016	Objection	Defendant	Objection	
5	Agreed Memorandum Summarizing 3/23/2016		No objection	x		
6	Defendant's Motion to Waive Appearance	3/23/2016	Objection	Both	No objection upon the redaction of arrest report exhibit	contains information that would be inadmissible as evidence at trial; contains opinion as to the guilt or innocence of a defendant;
7	People's Response to Defendant's Motion to Waive Appearance	4/13/2016	Objection	State		contains information that would be inadmissible as evidence at trial; contains opinion as to the guilt or innocence of a defendant;
8	Defendant's Reply to Motion to Waive Appearance	4/27/2016	Objection	State		contains information that would be inadmissible as evidence at trial; contains opinion as to the guilt or innocence of a defendant; contains information that would be inadmissible as evidence at trial;
9	Agreed Memorandum Summarizing 5/5/2016		No objection	x		
10	People's Response in Opposition to Petitions to Appt. Special Pros.	6/1/2016	Objection	Both		no objection
11	Agreed Memorandum Summarizing 6/30/2016		No objection	x		
12	Agreed Memorandum Summarizing 8/18/2016		No objection	x		
13	Motion for Bill of Particulars	8/18/2016	No objection	x		
14	Motion to Clarify Decorum Order (Oppenheimer)	8/30/2016	Objection	Defendant		
15	Reply to Petitioner Holmes Motion to Clarify Decorum Order	9/23/2016	Objection	Defendant		
16	AG Motion to Quash Subpoena to DCFS	9/27/2016	No objection	x		
17	People's Initial Garrity Team Disclosure to Defendant	9/29/2016	Objection	Both		contains *Garrity* information;
18	Agreed Memorandum Summarizing 11/2/2016		No objection	x		
19	People's 1st Supplemental Garrity Team Disclosure	11/2/2016	Objection	Both		contains *Garrity* information;
20	Agreed Memorandum Summarizing 12/8/2016		No objection	x		
21	*Motion by City for Protective Order & Clawback	12/8/2016	No objection	x		

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*Filing not on State's list

**Filing not on Defendant's list

People v. Van Dyke

Combined List of Filings and Objections

22	People's 2nd Supplemental Garrity Team Disclosure	1/10/2017	Objection	Both		contains *Garrity* information;
23	MTD Garrity	1/10/2017	No objection	x		
24	State Response for Motion for Bill of Particulars	1/10/2017	No objection	x		
25	Memo in Support MTS	1/10/2017	Objection	Both		It does not appear that this document was filed with the court.
26	Memo in Support MTS (Exposure to Compelled Statement)	1/18/2017	Objection	Both		contains Grand Jury information; contains identity of witnesses; contains information relating to the nature of evidence expected to be presented at trial;
27	Response to MTD Pursuant to Garrity	2/3/2017	Objection	Defendant	No objection upon the redaction of any reference to testimony at Grand Jury, identity of witnesses, and any substance of any testimony from witnesses.	
28	MTD Misconduct at GJ	2/3/2017	Objection	Both	No objection upon the redaction of any reference to testimony at Grand Jury, identity of witnesses, and any substance of any testimony from witnesses.	contains Grand Jury information;
29	Memo of Law in Support MTD GJ	2/3/2017	Objection	Both	No objection upon the redaction of any reference to testimony at Grand Jury, identity of witnesses, and any substance of any testimony from witnesses .	contains Grand Jury information; contains statements which relate to the character, credibility, reputation or criminal record of a party or witness; contains opinion as to the guilt or innocence of a defendant; contains information relating to the nature of evidence expected to be presented at trial;
30	CCSAO MTQ Subpoena	2/3/2017	No objection	x		
31	*People's Response to MTD (Garrity)	2/7/2017	No objection	x		

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**Filing not on Defendant's list

32	*Memo of law in Support MTD Indictment	2/7/2017	Objection	Defendant	No objection upon the redaction of any reference to testimony at Grand Jury, identity of witnesses, and any substance of any testimony from witnesses	
33	People Response to City Clawback Motion	2/23/2017	No objection	x		
34	People's Response to MTD Misconduct GJ	3/23/2017	Objection	Defendant	No objection upon the redaction of any reference to testimony at Grand Jury, identity of witnesses, and any substance of any testimony from witnesses.	
35	Memo of Law MTD Misconduct GJ	4/20/2017	Objection	Both	No objection upon the redaction of any reference to testimony at Grand Jury, identity of witnesses , and any substance of any testimony from witnesses.	contains statements which relate to the character, credibility, reputation or criminal record of a party or witness; contains opinion as to the guilt or innocence of a defendant; contains information relating to the nature of evidence expected to be presented at trial; contains information that would be inadmissible as evidence at trial;
36	MTD Indictment & Other Relief GJ	4/20/2017	Objection	Both	No objection upon the redaction of any reference to testimony at Grand Jury, identity of witnesses, and any substance of any testimony from witnesses.	contains Grand Jury information; contains statements which relate to the character, credibility, reputation or criminal record of a party or witness; contains opinion as to the guilt or innocence of a defendant;

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**Filing not on Defendant's list

People v. Van Dyke
Combined List of Filings and Objections

37	MTD Misconduct at GJ	4/20/2017	Objection	Both	No objection upon the redaction of any reference to testimony at Grand Jury, identity of witnesses, and any substance of any testimony from witnesses.	contains statements which relate to the character, credibility, reputation or criminal record of a party or witness; contains Grand Jury information;
38	2nd Motion for Bill of Particulars	4/20/2017	Objection	State		contains information relating to the nature of evidence expected to be presented at trial; contains opinion as to the guilt or innocence of a defendant
39	Defendant's Supplemental Motion to Waive Appear.	4/20/2017	Objection	Both	No objection upon the redaction of any arrest report exhibit	contains information that would be inadmissible as evidence at trial;
40	MIL Limit Scope of Kastigar Hearing	4/20/2017	Objection	Both	No objection upon the redaction of reference to witness names and contents of Garrity protected statements	contains *Garrity* information; contains information relating to the nature of evidence expected to be presented at trial;
41	MIL Bar Claim of Prejudice Failure to Stay PB Proceedings	4/20/2017	Objection	Defendant	Objection- Bar any reference to Police Board Proceedings.	
42	Reply M to Waive Appearance	4/27/2017	Objection	State		The People do not object to the release of this document.
43	Def. Resp. to MIL Bar Claim of Prejudice PB	5/11/2017	Objection	Both	Objection- Bar any reference to Police Board Proceedings	contains *Garrity* information;
44	Response to Motion to Limit Scope of Kastigar	5/11/2017	Objection	Both	No objection upon redaction of any witness names	contains *Garrity* information; contains information relating to the nature of evidence expected to be presented at trial; contains identity of witnesses;
45	Response to 2nd Bill of Particulars	5/11/2017	No objection	x		
46	Response to Supplemental Motion to Waive Appearance	5/11/2017	Objection	Defendant	No objection upon the redaction of any arrest report exhibit	

*Filing not on State's list
**Filing not on Defendant's list

People v. Van Dyke

Combined List of Filings and Objections

47	Combined Response to MTD & MTD & other relief	5/11/2017	Objection	Both	No objection upon the redaction of any reference to testimony at Grand Jury, identity of witnesses, and any substance of any testimony from witnesses.	contains information relating to the nature of evidence expected to be presented at trial; contains opinion as to the guilt or innocence of a defendant; contains information that would be inadmissible as evidence at trial; contains Grand Jury information.
48	Reply Motion to Limit Scope of Kastigar Hearing	5/25/2017	Objection	Defendant	Objection- or in the alternative redact names of any witnesses	
49	Reply MIL Bar Claim of Prejudice Failure to Stay PB Proceeding	5/25/2017	Objection	Defendant	Objection- Bar any reference to Police Board Proceedings	
50	Motion to Grant Immunity McNaughton	6/28/2017	Objection	Defendant	Objection	
51	Motion to Grant Immunity March	6/28/2017	Objection	Defendant	Objection	
52	Response in Opposition to Admission of Statements to FOP	7/18/2017	Objection	Defendant	Objection	
53	Agreed Memorandum Summarizing 8/11/2017		No objection	x		
54	Motion to Grant Immunity Kato	8/11/2017	Objection	Defendant		
55	Motion to Grant Immunity Harvey	8/11/2017	Objection	Defendant		
56	Motion to Grant Immunity Camden	8/11/2017	Objection	Defendant		
57	Motion to Reconsider (Statements to FOP)	9/7/2017	Objection	Defendant	No objection upon redaction of any witness names	
58	Brief in Support of People's Garrity/Kastigar Hearing Position	9/7/2017	Objection	Both		contains *Garrity* information;
59	Response to Motion to Determine Actual Conflict	9/27/2017	Objection	Both	No objection upon redaction of any witness names	contains identity of witnesses; contains information relating to the nature of evidence expected to be presented at trial;
60	Agreed Memorandum Summarizing 9/28/2017		No objection	x		

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**Filing not on Defendant's list

People v. Van Dyke

Combined List of Filings and Objections

61	Motion to Determine Actual Conflict	9/28/2017	Objection	Both	No objection upon redaction of any witness names	contains information relating to the nature of evidence expected to be presented at trial; contains Grand Jury information; contains identity of witnesses; contains the expected testimony of a party or witness;
62	Motion to Quash SDT to KCSAO	9/28/2017	No objection	x		
63	Motion to Dismiss (Speedy Trial)	9/28/2017	No objection	x		
64	**Motion for GJ Minutes	9/28/2017	No objection	x		
65	**Reply Motion to Determine Actual Conflict	9/28/2017	Objection	State		contains identity of witnesses;
66	Defendant's Offer of Proof Kastigar Witnesses	10/4/2017	Objection	Both	Objection, or in the alternative redact witness names and any Garrity statements and name of defense investigator	contains *Garrity* information;
67	People's Joint MTQ & Motion for More Definite Offer of Proof	10/11/2017	Objection	State	Reserved by Defendant	The State does not object to the release of this motion.
68	*Defendant Reply to MTD	10/16/2017	No objection	x		
69	Agreed Memorandum Summarizing 10/25/2017		No objection	x		
70	Response to Motion for GJ Minutes	10/25/2017	Objection	Defendant	No objection upon redaction of any witness names	
71	Motion to Quash SDT to CCSAO	10/25/2017	No objection	x		
72	Motion to Quash SDT to KCSAO 2nd	10/25/2017	No objection	x		
73	Response to MTD (Speedy Trial)	10/25/2017	No objection	x		
74	Jamie Kalven MTQ Subpoena	11/3/2017	Objection	Both		contains *Garrity* information;
75	Agreed Memorandum Summarizing 11/6/2017		No objection	x		

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76	MTD (Prosecutorial Misconduct)	11/6/2017	Objection	Both	No objection upon the redaction of witness names, trial witness names, names of officers in other shootings, and any Garrity statements	contains statements which relate to the character, credibility, reputation or criminal record of a party or witness; contains opinion as to the guilt or innocence of a defendant; contains information relating to the nature of evidence expected to be presented; contains information that would be inadmissible as evidence at trial;
77	MIL to Admit Lynch Material	11/6/2017	Objection	Both	No objection upon the redaction of any witness names	contains information that would be inadmissible as evidence at trial; contains statements which relate to the character, credibility, reputation or criminal record of a party or witness; contains the expected testimony of a party or witness; contains information relating to the nature of evidence expected to be presented at trial;
78	People's MTQ Subpoena to Jamie Kalven	11/6/2017	Objection	Both		contains *Garrity* information;
79	Answer to Discovery	11/6/2017	Objection	Both		contains identity of witnesses; contains information relating to the nature of evidence expected to be presented at trial;
80	Defendant Response in Opp. To MTQ Subpoena of Kalven	11/20/2017	Objection	Both	No objection upon the redaction of names of trial witnesses, redact contents of any Garrity statements, redact witness names, and redact exhibit 10	contains *Garrity* information;
81	J. Kalven Reply in Support of his MTQ	12/4/2017	Objection	Both		contains *Garrity* information;
82	Motion Reporter's Committee for Freedom of Press for Leave to File Amicus	12/5/2017	Objection	Defendant		
83	People's Supplemental Discovery Response 6	12/6/2017	Objection	Both		~~contains identity of~~ witnesses;

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84	Reply MTD (Prosecutorial Misconduct)	12/6/2017	Objection	State		contains information that would be inadmissible as evidence at trial; contains statements which relate to the character, credibility, reputation or criminal record of a party or witness; contains Grand Jury information;
85	Defense Offer of Proof Lynch	12/6/2017	Objection	Both	No objection upon the redaction of any witness names and/or any Garrity statements	contains information that would be inadmissible as evidence at trial; contains statements which relate to the character, credibility, reputation or criminal record of a party or witness; contains the expected testimony of a party or witness; contains information relating to the nature of evidence expected to be presented at trial;
86	Reply MIL Lynch	12/6/2017	Objection	Both	No objection upon the redaction of any witness names	contains information that would be inadmissible as evidence at trial; contains statements which relate to the character, credibility, reputation or criminal record of a party or witness; contains the expected testimony of a party or witness; contains information relating to the nature of evidence expected to be presented at trial;

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87	Response MIL to Admit Lynch Material	12/6/2017	Objection	Both	No objection upon the redaction of any witness names	contains information that would be inadmissible as evidence at trial; contains statements which relate to the character, credibility, reputation or criminal record of a party or witness; contains the expected testimony of a party or witness; contains information relating to the nature of evidence expected to be presented at trial;
88	Supplemental Motion for Discovery	12/11/2017	No objection	x		
89	Amended Offer of Proof Lynch	12/13/2017	Objection	Both	No objection upon the redaction of any witness names and/or any Garrity statements	contains information that would be inadmissible as evidence at trial; contains statements which relate to the character, credibility, reputation or criminal record of a party or witness; contains the expected testimony of a party or witness; contains information relating to the nature of evidence expected to be presented at trial
90	Supplemental MTD Prosecutorial Misconduct	12/15/2017	Objection	Both	No objection upon redaction of witness names, trial witness names, names of officers in other shootings, and any Garrity statements	contains statements which relate to the character, credibility, reputation or criminal record of a party or witness; contains opinion as to the guilt or innocence of a defendant; contains information that would be inadmissible as evidence at trial; contains Grand Jury information;
91	People's Supplemental Discovery Response 7	12/20/2017	Objection	Both		contains identity of witnesses;

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92	2nd Amended Offer of Proof Lynch	12/20/2017	Objection	Both	No objection upon the redaction of any witness names and/or any Garrity statements	contains information that would be inadmissible as evidence at trial; contains statements which relate to the character, credibility, reputation or criminal record of a party or witness; contains the expected testimony of a party or witness; contains information relating to the nature of evidence expected to be presented at trial
93	Response to MTD (Prosecutorial Misconduct)	12/20/2017	Objection	Both	No objection upon redaction of witness names, trial witness names, names of officers in other shootings, and any Garrity statements	We don't believe this document was filed. If it was, we have no objection to its release.
94	3rd Amended Offer of Proof Lynch	1/5/2018	Objection	Both	No objection upon the redaction of any witness names and/or any Garrity statements	contains information that would be inadmissible as evidence at trial; contains statements which relate to the character, credibility, reputation or criminal record of a party or witness; contains the expected testimony of a party or witness; contains information relating to the nature of evidence expected to be presented at trial
95	Defendant's Initial Expert Witness Disclosure	1/5/2018	Objection	Both		contains identity of witnesses; contains information relating to the nature of evidence expected to be presented at trial; contains information that would be inadmissible as evidence at trial;

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96	Reply to 3rd Amended Offer of Proof in Support of Lynch	1/12/2018	Objection	Both	No objection upon the redaction of any witness names and/or any Garrity statements	contains information that would be inadmissible as evidence at trial; contains statements which relate to the character, credibility, reputation or criminal record of a party or witness; contains the expected testimony of a party or witness; contains information relating to the nature of evidence expected to be presented at trial
97	*Memorandum in Support of Motion to Suppress Evidence (Def. Compelled Statement)	1/17/2018	Objection	Both	No objection upon the redaction offal witness names and any and all Garrity statements made by defendant	contains *Garrity* information;
98	Agreed Memorandum Summarizing 1/18/2018		No objection	x		
99	Agreed Memorandum Summarizing 2/1/2018		No objection	x		
100	Motion for Intervention and Access to Court	3/6/2018	No objection	x		
101	Memorandum in Support of M for Intervention and Access	3/6/2018	No objection	x		
102	Defendant's Memo Animation & Simulation	3/8/2018	No objection	x		
103	People's MIL Concerning Dr. Miller	3/8/2018	Objection	Defendant		
104	Motions to Adopt CCSAO Subpoenas	3/8/2018	No objection	x		
105	Incident Narrative Report (brief narrative)		Objection	Defendant		
X	Court Orders for all dates		Objection	Defendant	No objection with redaction of any witness named	
106	Defendant's Reply to the People's Response to Defendant's Motion to Dismiss Indictment	12/6/2017	Objection	State	Filed under the protection of the Decorum Order	contains statements which relate to the character, credibility, reputation or criminal record of a party or witness; contains information that would be inadmissible as evidence at trial; contains information relating to the nature of evidence expected to be presented at trial; contains opinion as to the guilt or innocence of a defendant;

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107	Defendant's Motion for Change of Place of Trial	3/28/2018	Objection	State		contains statements which relate to the character, credibility, reputation or criminal record of a party or witness; contains the expected testimony of a party or witness; contains information relating to the nature of evidence expected to be presented at trial; contains information that would be inadmissible as evidence at trial;
108	Intervenor's Status Report	3/28/2018	Objection	State		contains information that would be inadmissible as evidence at trial; contains opinion as to the guilt or innocence of a defendant;
109	Defendant's Supplemental list of Expert Witnesses	1/5/2008	Objection	State		contains identity of witnesses; contains the expected testimony of a party or witness; contains information that would be inadmissible as evidence at trial;
110	Report of a defense expert	2/1/2018	Objection	State		contains identity of witnesses; contains the expected testimony of a party or witness; contains information that would be inadmissible as evidence at trial;
111	Report of a second defense expert	2/1/2018	Objection	State		contains identity of witnesses; contains the expected testimony of a party or witness; contains information that would be inadmissible as evidence at trial;

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**Filing not on Defendant's list

Filed In Room 500 Per Feb. 3, 2017 Decorum Order

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

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

INTERVENORS' CONSOLIDATED RESPONSE TO PARTIES' OBJECTIONS TO PUBLIC DISCLOSURE OF COURT FILE DOCUMENTS

In seeking to bar public disclosure of all or most of the public court file in this case, the State and the Defendant (the "Parties") turn the First Amendment presumption of access on its head. Fundamentally unconstitutional, their April 6, 2018 objections are also unfounded and devoid of any adequate justifications for the required judicial findings that any court filing should be maintained under seal in order to protect Defendant's fair trial rights. Under the First Amendment, meaningful public access must be contemporaneous, not delayed, and the Parties cannot constitutionally foreclose public access to the court file here by rote incantation of the *Kelly* case and vague fears of a so-called "media circus." What is filed with and discussed in court is the people's business and must be open to the public, absent some extraordinary justification. The Parties' submissions are an invitation to constitutional error.

I. The First Amendment Presumption Of Public Access Applies Widely To The Court File And Proceedings In This Case.

Intervenors showed in their March 6 Memorandum of Law that court file documents meet the "experience and logic" test that triggers the First Amendment right of public access. *See* Intervenors' Memorandum in Support of Motion for Intervention and Access to Court File Documents ("Int. Mem.") at 9-12. The Parties utterly fail to rebut that showing. Although

materials adduced in pretrial "discovery" may be outside the presumption of public access, the Illinois Supreme Court has held that once a document is filed, the filing triggers the presumption of public access. *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 232 (2000).

In *People v. Kelly*, 397 Ill. App. 3d 232 (1st Dist. 2009), public access was denied as to four pretrial hearings and the following limited individual documents, which were not the entire court file, and not broad categories of entire documents within that file:

(1) a prosecution motion to allow evidence of other crimes;

(2) the prosecution's supplemental discovery answer;

(3) the prosecution witness list; and

(4) the defense witness list.

397 Ill. App. 3d at 256-57.

But as Your Honor well knows, *Kelly* was a highly unusual (if not *sui generis*) case involving salacious allegations of unlawful sexual conduct with children. In stark contrast, this case involves allegations of murder against a police officer, and the scope of the First Amendment presumption of public access is at its peak here and certainly far greater than the Parties represent in their submissions. Indeed, *Kelly* itself specifically distinguished cases like this one, noting that "the public has 'a strong interest in exposing substantial allegations of police conduct to the salutary effects of public scrutiny,'" and that "in the case at bar, the hearings did not concern" such allegations, "which carry a 'particularly strong' need for public scrutiny." *Kelly*, 397 Ill. App. 3d at 258-59 (quoting *Waller v. Georgia*, 467 U.S. 39, 47 (1984)).

The Parties' objections are a complete misapplication of *Kelly*. They try to bootstrap the "Decorum Order" in *Kelly* – and by extension, this case – into a rationale for keeping secret any of the Parties' partisan statements about the evidence, the defendant's guilt or innocence, or the prosecution's tactics. As the State acknowledges, the foundation of the *Kelly* Decorum Order is

Rule of Professional Conduct 3.6; however, RPC 3.6 governs *extrajudicial* statements. *See* State's Response to Intervenors' Motion for Access to Court Documents ("State Resp.") at 4. *There is nothing "extrajudicial" about court filings*. What happens in and is filed with the Court as the basis for decision is presumptively the people's business. *See, e.g., People v. Zimmerman*, 2017 IL App (4th) 170055, ¶¶ 10, 12, 16, *appeal allowed*, (Mar. 31, 2017) No. 122261, 2017 WL 4359033 (Ill. Sept. 27, 2017) ("Once documents are filed with the court, they lose their private nature and become part of the court file and 'public component[s]' of the judicial proceeding [citation] to which the right of access attaches") (quoting *In re Marriage of Johnson*, 232 Ill. App. 3d 1068, 1074 (1992)); *Skolnick*, 191 Ill. 2d at 232; *Union Oil Co. of Calif. v. Leavell*, 220 F.3d 562, 567-68 (7th Cir. 2000) ("What happens in the halls of government is presumptively public business"). Nothing in *Kelly* or the Decorum Order supports blanket sealing of pre-trial motion practice on file – and binding U.S. Supreme Court precedent forbids it.

For example, in *Press-Enterprise. Co. v. Superior Court of California for Riverside Cty.*, 478 U.S. 1 (1986) ("*Press-Enterprise II*"), the Supreme Court held that preliminary hearings are subject to the First Amendment presumption of public access, and that once the presumption applies: (1) the proceedings could not be closed unless specific, on-the-record findings are made to demonstrate that closure is essential to preserve a higher value; and (2) such findings must be narrowly tailored to serve that interest. *Id.* at 13-14. Similarly, the Supreme Court in *Waller* stated that circumstances justifying restriction "will be rare, however, and the balance of interests must be struck with special care," reiterating the nature of the required findings:

> The presumption of openness may be overcome *only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest*. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

467 U.S. at 45 (internal quotations omitted; emphasis added), quoting *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) ("*Press-Enterprise I*").

The Parties acknowledge *Press-Enterprise II* and *Waller*, but misread them. Contrary to what the Parties argue, the *Press-Enterprise II* court's reference to "special risks of unfairness" associated with pre-trial suppression hearings does not support a sweeping exclusion of nearly all pre-trial materials. *See* State Resp. at 3; Defendant's Jason Van Dyke's Response in Opposition to Media Intervenors' Motion for Access ("Def. Resp.") at 7-14, 16, 17. Just the opposite. First, suppression hearings are unquestionably within the presumption of public access, as the Supreme Court held in *Waller*. Second, the Supreme Court ruled in *Press-Enterprise II* that *even in that context*, assertions that publicity about a case could affect fair trial rights are subject to a stringent standard – specifically, access cannot be denied unless there is a "substantial probability" that fair trial rights will be prejudiced, and unless reasonable alternatives to closure cannot adequately protect those rights. *Press-Enterprise II*, 478 U.S. at 13-15. The Parties fail to mention that immediately after the comment they quote about "special risks of unfairness," the Supreme Court emphasized that a "*risk of prejudice does not automatically justify refusing public access to hearings on every motion to suppress*" and further stated:

> Through *voir dire*, cumbersome as it is in some circumstances, a court can identify those jurors whose prior knowledge of the case would disable them from rendering an impartial verdict . . . . *The First Amendment right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant of that right.*

Id. at 14-15 (emphasis added).

In short, the presumption mandated by *Press-Enterprise II* and *Waller* is squarely applicable to the court filings here, and that presumption is overcome in only the rarest of circumstances, and only when it is established that no reasonable alternative to non-disclosure will be effective. *See also In re Globe Newspaper Co.*, 920 F.2d 88, 93 (1st Cir. 1990) (holding that

withholding of identities of jurors "should occur only in an exceptional case"); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 554 (1976) ("[E]ven pervasive, adverse [pretrial] publicity does not inevitably lead to an unfair trial.").

As the Supreme Court recognized in *Press-Enterprise II*, *voir dire* and instructions to jurors can and should be an adequate alternative to wholesale denial of access. It is presumed that juries will obey the Court's instructions to limit themselves to the facts in evidence. *See, e.g., People v. Taylor*, 166 Ill. 2d 414, 438-39 (1995) (holding that jurors are presumed to follow the Court's instructions, even when they have been exposed to extraneous material); *Jonasson v. Lutheran Child & Family Servs.*, 115 F.3d 436, 439 (7th Cir. 1997). There is no basis for disregarding that presumption. *See also Skilling v. United States*, 130 S. Ct. 2896, 2918 n.21 (2010) ("in addition to focusing on the adequacy of *voir dire*, our decisions have also 'take[n] into account . . . other measures [that] were used to mitigate the adverse effects of publicity,' . . . for example, the prophylactic effect of 'emphatic and clear instructions on the sworn duty of each juror to decide the issues only on evidence presented in open court'") (quoting *Neb. Press Ass'n*, 427 U.S. at 564-65 (1976)).

Kelly, which cited *Press-Enterprise II* and *Waller* approvingly, 397 Ill. App. 3d at 261, should not – and cannot – be read to narrow the presumption enunciated by the Supreme Court. The State's brief cites to *Kelly* for the notion that the filings it objects to disclosing are not entitled to a presumption of access, but what the court held there is "the media intervenors did not have a right to discovery, other crimes' evidence, or a list of witnesses, because none of it had been introduced into evidence." 397 Ill. App. 3d at 259. To the extent *Kelly* concluded that "potential evidence" or a "potential exhibit" (not introduced into evidence) were not historically open to the public, extending that conclusion to a case where, as here, such material (or reference thereto) is part of a court filing is irreconcilable with controlling precedent of the U.S. Supreme Court and

the Illinois Supreme Court. *See Skolnick*, 191 Ill. 2d at 232 (documents are presumptively accessible to the public once they are filed with the court). The Parties' position is also contrary to the express mandate of the Illinois legislature, *see* Clerks of Courts Act, 705 ILCS 105/16(6).

The distinction between unfiled discovery materials and documents filed in the public court is a critical one. The Fourth District's reasoning on this point in *People v. Zimmerman* properly follows *Skolnick* and the Clerks of Court Act – as to documents actually filed. *Zimmerman,* 2017 IL App (4th) 170055, ¶¶ 10, 16 ("As in *Skolnick*, once the circuit court granted defendant leave to file the two legal documents, they became court records . . . . we disagree with the *Kelly* court's suggestion that motions *in limine* and their related hearings have traditionally not been accessible to the public. Despite the fact motions *in limine* address potential evidence for trial, they are contained in the general criminal case file and in the general record on appeal"). *See also People v. Henderson*, 2012 IL App (1st) 101494, ¶ 29 (2012) (following Fourth District opinion and noting that "[w]hile it is certainly true that the opinion of one district or panel of the appellate court is not binding on other districts or panels . . . . this court may follow the reasoning of a decision in another district when, as in the instant case, the facts are similar and the court's reasoning is persuasive.").

It bears repeating: Unlike in *Kelly*, the defendant in this case is a public officer, as are the State's prosecuting authorities. Their charges and counter-charges of misconduct are of the utmost public concern. As the Supreme Court wisely observed more than 75 years ago, the risk of even reckless allegations against public officials does not outweigh the public's interest in disclosure:

> While reckless assaults upon public men, and efforts to bring obloquy upon those who are endeavoring faithfully to discharge official duties, exert a baleful influence and deserve the severest condemnation in public opinion, it cannot be said that this abuse is greater, and it is believed to be less, than that which characterized the period in which our institutions took shape. Meanwhile, the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect,

> emphasizes the primary need of a vigilant and courageous press, especially in great cities.

Near v. Minnesota, 283 U.S. 697, 719-20 (1931). *See also New York Times Co. v. United States*, 403 U.S. 713, 723-24 (1971) (Douglas, J., concurring) ("The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information . . . . Secrecy in government is fundamentally anti-democratic").

The First Amendment presumption of public access applies broadly, not narrowly, to the court file in this case, and access should be granted unless the Court makes the required, specific findings set forth in *Press-Enterprise II* as to a particular document or portion thereof.[1] And as the Court held in that case, any putative prejudice to Defendant's fair trial rights – yet to be articulated and supported here – can be addressed through judicious use of *voir dire* and instructions to the jury.

II. The Parties' Specific Objections To Public Disclosure Do Not Support Broad Denial Of Access To The Court File Documents In Question.

The Parties recite a litany of objections to disclosure, but none of them establishes that entire documents (or, as Defendant contends, the entire court file) are outside the presumption of public access. Nor do any of the objections establish that as to any individual court file document, disclosure to the public poses a "substantial probability" of prejudicing the Defendant's fair trial right in a way that requires denial of access, or that no reasonable alternative measures would be adequate to protect that right. At most, the Parties' submissions suggest that as to some materials within court file documents – such as witness names – the required, specific findings might be made, which in turn might require redaction. But the law is that no document within the

[1] As set forth in the Intervenors' March 6 Memorandum of Law, the press and public's right of access also flows from the Illinois constitution, the common law, and the Illinois Clerks of the Courts Act, 705 ILCS 105/16. For all of the reasons set forth herein, the parties have failed to rebut these parallel presumptions of access.

presumption of access, and no portion thereof, may be withheld unless such narrowly tailored findings are made. *Press-Enterprise II*, 478 U.S. at 13-14; *A.P. v. M.E.E.*, 354 Ill. App. 3d 989, 1001 (1st Dist. 2004).

A. State's Factual Proffer In Support Of Bond (No. 1).

Defendant objects to release of this document on the ground that it is "one-sided" or states facts not admissible at trial or not to be proven at trial. Def. Resp. at 4-5. That does not justify withholding. One-sidedness is part of our advocacy system; the State takes one side, and the defense another. If "one-sidedness" justifies withholding filed documents from the public, the First Amendment is a dead letter. The Defendant cites no law in support of his position, and there is none. As the State concedes, the proffer simply summarizes the allegations of the indictment and are "facts that are already in the public record," having been already presented in open court. State Resp. at 7. Defendant fails to state a basis on which to conclude that withholding this document from the public would pose a substantial probability of prejudicing him, insofar as the information within the document already was disclosed. *See In re Continental Illinois Sec. Litig.*, 732 F.2d 1302, 1313 (7th Cir. 1985) ("Once the evidence has become known to members of the public, including representatives of the press, through their attendance at a public session of court, it would take the most extraordinary circumstance to justify restrictions on the opportunity of those not physically in attendance at the courtroom to see and hear the evidence . . . .").

B. Motions To Waive Appearance (Nos. 6, 7, 8, 39, 46).

Both Parties object to the release of these documents discussing the public and personal safety issues surrounding Defendant's personal appearance in Court. State Resp. at 8; Def. Resp. at 5. But neither party asserts a basis for concluding that the documents are outside the presumption or should be withheld from the public. There is no substantial probability that a story about threats Defendant has received, or about other reasons why he asked the Court to waive his

appearance, will affect his fair trial right, as Defendant claims (*see* Def. Resp. at 5), or influence the jury pool in his favor, as the State claims (*see* State Resp. at 8). Even if another news story were to appear about this aspect of the proceedings, the Court could easily determine on *voir dire* whether any jurors were exposed to the information or whether such exposure could affect their ability to be fair. *See Press-Enterprise II*, 478 U.S. at 15. Jurors are presumed to follow the Court's instructions, even when they have been exposed to extraneous material. *Taylor*, 166 Ill. 2d at 439. These publicly filed court documents are within the presumption of access, *Skolnick*, 191 Ill. 2d at 232, and no showing has been made that reasonable alternatives to a denial of public access are insufficient to protect Defendant's fair trial right. Furthermore, as the State notes, Defendant's reply submission on this motion attaches "numerous articles and postings in public comment boards," State Resp. at 8, and the previous publication of this information demonstrates why it should not be sealed now – this material already is in the public domain. *See In re Continental Illinois Sec. Litig.*, 732 F.2d at 1313.

C. State's Response In Opposition To Appointment Of Special Prosecutor (No. 10).

Defendant advances no specific reason why the public ought to be denied access to the document its elected state's attorney filed in opposition to the appointment of a special prosecutor. The State properly has withdrawn its objection to this document's release. *See* State Resp. at 8. This document ought to be withheld no longer, as the public is fully entitled to know why its representative opposed the special prosecutor's appointment, and as the State asserts, the document contains nothing that could interfere with Defendant's fair trial right. *Id.*

D. Motion To Clarify Decorum Order And State Response (Nos. 14, 15).

Intervenors have no idea how a motion to clarify the Decorum Order, apparently filed by a third party, could impact fair trial rights, and Defendant's submission advances none. Defendant speculates that public release of a document might result in a news story that "could" influence

public opinion of the Defendant, but that is not the standard. Def. Resp. at 5. Under the controlling law, public access may not be denied without a showing that there is a "substantial probability" that fair trial rights will be prejudiced. *See Press-Enterprise II*, 478 U.S. at 15. The Decorum Order and its application in this case are of great public concern. A motion filed with the Court to modify it is fully within the presumption of public access, and findings cannot be made to justify such a motion's continued secrecy. The State does not object to the release of these documents, and they should be disclosed.

E. *Garrity* Disclosure Documents And Related Motion Practice (Nos. 17, 19, 22, 40, 41, 43, 44, 48, 49, 57, 58, 66, 97).

The Parties err in stating that these documents and related motion papers constitute mere "discovery" that is outside the presumption of public access, because they are now documents filed with the Court. Our Supreme Court has rejected arguments that publicly filed court documents are not presumed to be publicly accessible. *See Skolnick*, 192 Ill. 2d at 232. However, even as documents within the presumption of public access, they may be sealed if the Court makes the necessary narrowly tailored findings that (a) withholding the information within them is essential to protecting Defendant's right to a fair trial, (b) release would create a substantial probability of prejudicing that right, and (c) reasonable alternatives to denial of public access would be ineffective. *Press-Enterprise II*, 478 U.S. at 13-15. The State notes that even its trial team has not had access to these documents (*see* State Resp. at 9), but nothing ought to preclude the trial team from access to documents that properly are released to the public, subject to the proper required findings as to any content that may lawfully be withheld from the public. The Parties and the Court should consider whether the foregoing required findings can be made and be narrowly tailored to justify the withholding of only the material giving rise to the findings, and not the documents as a whole. *See Press-Enterprise II*, 478 U.S. at 13-15; *A.P.*, 354 Ill. App. 3d at 1001.

F. Memorandum In Support Of Motion To Suppress (No. 25).

Defendant, but not the State, objects to release of this document. *See* Def. Resp. at 6-7; State Resp. at 9. Defendant's reasons for denying public access are unsustainable. The United States Supreme Court has ruled that motions to suppress generally do not warrant denial of public access. *See Waller*, 467 U.S. at 46-47. Again, as explained above in Part I, the mere fact that documents may contain evidence not yet admitted does not warrant sealing, because filing of the document has put the information in the public domain. *Skolnick*, 192 Ill. 2d at 232. No specific redactions have been proposed, but withholding any of this document would have to be limited only to information as to which the required findings could be made. *A.P.*, 354 Ill. App. 3d at 1001.

G. Memorandum In Support Of Motion To Suppress ("Exposure To Compelled Statement") (No. 26).

The Parties object to release of this document, claiming that its release might jeopardize the safety of potential witnesses or cause them to be intimidated. Def. Resp. at 7. Intervenors respectfully submit that the Parties and the Court should consider required, specific findings that would justify narrowly tailored redaction of witness names from the released document if redactions are necessary to protect witness safety or to prevent witness intimidation. The argument for withholding the remainder of the document fails, as the State's submission does not establish whether the document contains actual grand jury testimony or simply a summary of or argument about what witnesses have said, either inside or outside the grand jury. As is the case with all other materials sought to be withheld in this case, access cannot be denied without proper findings that denial is essential to protect a higher value, and without narrowly tailored findings. *Press-Enterprise II*, 478 U.S. at 13-15. Wholesale suppression of entire documents, where redaction is

would serve to protect the higher interest, is overbroad and unlawful. *A.P.*, 354 Ill. App. 3d at 1001.

H. Response To *Garrity* Motion To Dismiss (No. 27).

Defendant objects to release, arguing that the document discloses "some secret aspect of the grand jury's investigation," and Defendant further suggests redactions. Def. Resp. at 7. The State, by contrast, does not object to disclosure, and the grand jury secrecy statute in question provides for secrecy only of "matters occurring before the grand jury." 725 ILCS 5/112-6(c)(1). It is not clear to Intervenors whether findings could be made to justify denying the public access to this document, which is within the presumption of public access, but the lack of any objection by the State is telling. If any part of this document is to be withheld, the required findings must be made, and denial of access must be limited only to the portions of the document as to which they can be made. The impact of Section 5/112-6(c)(1) on public access is discussed further below in Part II(I).

I. Documents Concerning Motion(s) To Dismiss For Misconduct Before The Grand Jury, And Documents Containing References To Grand Jury Material (Nos. 28, 29, 32, 34, 35, 37, 47, 50-52, 54-56).

The motion to dismiss based on grand jury misconduct apparently concerns accusations that the prosecutor, in connection with use of the grand jury, committed misconduct so grave that the indictment of Defendant should be dismissed. The Parties claim that any court filing containing any reference to grand jury testimony must be maintained in secrecy per Section 112-6(c)(1). *See* State Resp. at 10-11, 13; Def. Resp. 8, 10-11. Intervenors respectfully disagree.

First, the fact that a publicly filed document contains a reference, or an exhibit, constituting matters before the grand jury does not mean that the entire document should be suppressed instead of partially redacted pursuant to proper judicial findings. *A.P.*, 354 Ill. App. 3d at 1001. The public is entitled to know the substance of Defendant's accusation that the public prosecutor abused the

grand jury, even if specific aspects of what transpired before the grand jury must be redacted upon appropriate findings. The same analysis holds for other documents claimed to be forever inaccessible to the public because they purportedly contain some element that might reveal what transpired before the grand jury.

Second, Section 112-6(c)(1) shields only "matters occurring before the grand jury," and thus "was designed to protect from disclosure only the essence of what takes place in the grand jury room, in order to preserve the freedom and integrity of the deliberative process." *Board of Educ. v. Verisario*, 143 Ill. App. 3d 1000, 1007 (1st Dist. 1986) (quoting *In re Grand Jury Investigation*, 630 F.2d 996, 1000, (3d Cir. 1980)). Grand jury secrecy under the Illinois statute, and Federal Rule of Procedure 6(e) upon which it is based, *id.* at 1005, "serves to protect the identity of witnesses or jurors, the substance of the testimony, the strategy or direction of the investigation, the deliberations or questions of jurors, and the like." *Id.* at 1007 (quoting *Securities & Exchange Com. v. Dresser Industries, Inc.*, 628 F.2d 1368, 1382 (D.C. Cir. 1980). The *Verisario* court acknowledged that some circumstances could exist wherein grand jury materials are not being sought "to learn what took place before a grand jury," making disclosure permissible if it "will not seriously compromise the secrecy of the grand jury investigation." *Id.* at 1008. In *In re Appointment of Special Prosecutor*, 2017 IL App (1st) 161376, ¶¶ 69-70, the First District remanded to the Circuit Court a Better Government Association FOIA request encompassing Illinois grand jury materials, instructing the Circuit Court to consider whether grand jury secrecy applied in light of whether the information sought included the identities of witnesses or jurors, the substance of testimony, the strategy or direction of the investigation, the deliberation or questions of grand jurors, and "anything which may tend to reveal what transpired by the grand jury." *Id.* Notably, the court added that interests in grand jury secrecy are reduced if the grand jury has ended its activities. *Id.*

Analysis of the intersection between grand jury secrecy of materials from the concluded grand jury investigation in this case and the public right of access to public court documents in this case is complex. Without access to the grand jury materials in question, Intervenors cannot analyze the question definitively. Nonetheless, while grand jury secrecy may be a factor in determining whether the required, specific, and narrowly tailored findings under *Press-Enterprise II* may be made to justify withholding a court file document, the withholding should be limited to materials (or redactions) whose publication would create a substantial probability of prejudicing fair trial rights where reasonable alternatives would not adequately protect those rights. To the extent Illinois grand jury secrecy is an independent interest upon which findings under *Press-Enterprise II* could be based, narrowly tailored findings still must be made that withholding is essential to protect that interest. The Court also should be mindful of the reduced interest in grand jury secrecy now that this grand jury investigation is concluded, *id.*, and should consider the extent to which the public is entitled to know of broad allegations about its prosecutors' supposed grand jury misconduct, even if the Court makes the required findings limited to information about what actually transpired in the grand jury. Moreover, the law cannot be that a litigant can place such allegations in the court file and then expect that they will be forever secret in their entirety. When a litigant places information in the public court file, the material is presumptively public. *Skolnick*, 192 Ill. 2d at 232.

In any event, it is not sufficient for the State to argue, as it does, that the motion to dismiss documents should be withheld because they contain allegations – "unfounded" or not – about the character and credibility, of a party to the case. *See* State Resp. at 11. Our Supreme Court already has held that "[t]he mere fact that a person may suffer embarrassment or damage to his reputation as a result of allegations in a pleading does not justify sealing the court file." *Skolnick*, 192 Ill. 2d at 234. The very nature of judicial proceedings involves the making of allegations by one party

against some other party or person; the State's concern about the public airing of those allegations, or about such allegations being "unfounded," does not come close to a lawful justification for denying public access.

J. Motion To Determine Actual Conflict (Nos. 59, 61, 65).

The Parties' objections to disclosure of these documents focus on the disclosure of the names of witnesses who made various statements before the Independent Police Review Authority or the grand jury. State Resp. at 14; Def. Resp. at 12. No basis is advanced for withholding the entire documents, and even Defendant suggests that redactions might be adequate to prevent harm or intimidation to witnesses. Def. Resp. at 12. Intervenors suggest that the Parties and the Court consider whether the required findings could be made to justify such redaction.

K. Motions To Quash Jamie Kalven Subpoena (Nos. 74, 78, 80, 81, 82).

Although the Parties seek to deny access to these entire documents, their contents and exhibits were disclosed to the public in open court on December 6, 2017, when the Parties argued the motions in open court and displayed multiple documents publicly in fine print on a television screen. *See* Int. Mem. at 6; 12/6/17 Tr. at 19, 21, 46-65, 71-72. Moreover, it was established at the hearing that the basis for Mr. Kalven's reporting was not *Garrity*-protected statements, but rather publicly disseminated press releases. 12/6/17 Tr. at 72-73. There is no basis for denying public access to these documents now, if there ever was, and the Parties' attempts to suppress them illustrate the depth of their misunderstanding about what is subject to denial of access under controlling First Amendment law. Defendant objected to the release of even the amicus brief by 18 media organizations filed in support of Mr. Kalven's motion to quash. Defendant states no grounds for this position (*see* Def. Resp. at 15), and there are none.

L. Motion To Dismiss The Indictment Based On Prosecutorial Misconduct (Nos. 76, 84, 90, 93).

In denying this motion, the Court stated clearly that it found no misconduct by the prosecutor or the special prosecutor in this case. 12/20/17 Tr. at 36. Nonetheless, the Parties seek to keep the motion papers from the public, largely because the papers contain attacks on the character and credibility of "a party to the case," presumably the former state's attorney of this county. These allegations too were fully aired in open court, as the State concedes. State Resp. at 16. The public saw and heard those allegations, and the press reported them. Also fully in the public domain are the news articles or other materials that Defendant obtained from public sources and attached to his filings, yet the State inexplicably cites these documents as a further basis to deny public access to these motion papers. *Id.* at 15. In addition, certain of the documents displayed at the December 20, 2017 hearing on this motion already were in the public domain. For example, the Court may take judicial notice that Exhibit 21 to Defendant's motion, a November 2013 letter from the State's Attorney's Office to the Superintendent of Police explaining why that Office was declining to file criminal charges against an officer in connection with the shooting of an individual named Flint Farmer, *see* 12/20/17 Tr. at 18-19, was provided to the Chicago Tribune by the State's Attorney's Office. *See* http://articles.chicagotribune.com/2013-11-06/news/ct-met-chicago-cop-fatal-shooting-1106-20131106_1_officer-gildardo-sierra-flint-farmer-previous-shootings.

Respectfully, the arguments to bar access to these motion papers describing and defending against allegations concerning the conduct of the prosecutor in this case, and concerning matters already in the public domain, are baseless. It bears restating that accusatory, or even embarrassing material about anyone, let alone the highest-ranking prosecutor in one of the country's largest court

systems, cannot be withheld simply because the information is accusatory or embarrassing. *See Skolnick*, 192 Ill. 2d at 234.

M. Motion Concerning Admissibility Of *Lynch* Material (Nos. 77, 85, 86, 87, 89, 92, 94, 96).

The Parties' objections to the release of this information proffered under *People v. Lynch*, 104 Ill. 2d 194 (1984), do not refute the applicability of the presumption of public access to witness accounts that already were aired in open court. *In re Continental Illinois Sec. Litig.*, 732 F.2d at 1313. The witness accounts associated with the *Lynch* motion were publicly summarized in open court here. *See* 1/18/18 Tr. at 11-58. The Parties and the Court have, however, expressed a concern about threats to safety and possible witness intimidation if identities of persons with information about the background of the decedent are revealed. Yet the Court's January 18 hearing on this motion arguably presented a model of how courts may balance those concerns with the right of public access. The Court ordered that individuals whose accounts were contained in the *Lynch* materials would not be identified in public by their names. *Id.* at 7-8. The names were not disclosed. *Id.* at 11-58. The Parties made their arguments in public about what evidence should and should not be provisionally admitted, *id.*, and the Court ruled – all in public. The same approach could and should be taken with regard to the *Lynch* motion papers. If indeed names need to be withheld to protect those persons or to avoid witness intimidation, Intervenors submit that the Court must make the required, specific findings as to witness identities.

N. Discovery Responses (Nos. 79, 83, 91).

The Parties' objections to release of these documents center on witness names. State Resp. at 17, 20; Def. Resp. at 15-16. Again, if concerns over safety or witness intimidation may validly be articulated, the Parties and the Court should consider whether the required, specific findings

may be entered to justify denial of public access to such names by way of specific, narrowly tailored redactions.

O. Expert Witness Disclosures And Related State Motion (Nos. 95, 98, 109, 110, 111).

Without having reviewed the expert disclosures or the State's motion directed at one of the defense experts, Intervenors cannot meaningfully respond to the Parties' objections to public disclosure. That said, Intervenors have difficulty imagining how the content of these court file documents could justify denial of public access, either to parts of the documents, the documents as a whole, or expert discovery as a whole. The court file documents, once again, are not mere "discovery" once filed with the Court. As of this date, no basis has been asserted to support the required findings that could support continued denial of access to these documents, which should be released. Nor has the State objected to release of its motion (No. 98, State Resp. at 21).

P. Incident Narrative Report (No. 105).

Intervenors have no idea what this document is, and Defendant's objection to its release does not contain a basis for denying public access to it. The document should be released absent entry of the required specific findings.

Q. Reply In Support Of Defendant's Motion To Dismiss Indictment (No. 106).

It was unclear from the State's objection precisely what grounds this motion to dismiss was asserting, but the State's grounds for denying public access are meritless. The State notes that in the document, Defendant "criticized the Prosecutor's reasoning," attempted to justify an attack on the credibility and character of a party to the case, opined as to Defendant's guilt or innocence, and commented on the evidence. State Resp. at 21. Respectfully, the State's description indicates that the document contains a substantial amount of a lawyer's argument, of the kind that might be found in most any motion to dismiss. No basis has been asserted to withhold this document.

R. Defendant's Change Of Venue Motion (No. 107).

This motion, directed as it apparently is at moving this trial to a venue outside Cook County, could hardly be of greater public interest. The closest the State comes to articulating a basis for denying public access is an argument that some witnesses' names are disclosed, but as noted above, names easily can be redacted pursuant to the required, specific findings. Otherwise, the State cites only publicly reported or publicly available information (in the press or online), along with public comments by Chicago's mayor and allegations that the charges against Defendant were politically motivated. State Resp. at 21-22. Regardless of whether the State is correct that the mayor's comments on the case are "irrelevant," or that charges of a politically motivated prosecution are unfounded, the State's mere disagreement with these statements or charges does not bar the release of the change-of-venue motion simply because it contains those already public statements. The motion must be released unless the required, specific findings can be made, and neither the State nor Defendant has given the Court any reason to believe such findings can be made with respect to this very significant motion.

S. Intervenors' Status Report (No. 108).

The State continues to assert a baseless objection to the Intervenors' March 26 report to the Court about the progress of Court-ordered discussions as to what documents in the file ought to be released to the public. The State's objection (State Resp. at 22) amounts to an effort to shield from public view the nature and extent of the special prosecutor's opposition to the public release of a huge portion of the court file, including positions the prosecutor has taken in letter and email correspondence. This information discloses nothing about "the thoughts and perspectives" of the Parties as to "the propriety of the prosecution of the case." *See id.* The document and its attached correspondence do not become a secret because the Defendant's correspondence opines that he has been the subject of "negative" publicity. *See id.* The public is entitled to learn what positions

its representative in this Court, and the Defendant, are taking with regard to denying public access to court documents. There was no basis to deny the public access to this document on March 28, and there is no basis to do so now.

T. Miscellaneous Other Documents

Defendant argues for redaction of witness names from various court orders that may not have been made public. Def. Resp. at 18. Such redactions may be appropriate if supported properly by the judicial findings required under *Press-Enterprise II*. In addition, numerous other court file documents appear to have gone unaddressed by the Parties' submissions, and the Court on March 28 refused Intervenors' request to review the full file in chambers for purpose of inventorying it and understanding its full contents.[2] For example, Intervenors note that the indictments in this case apparently are not public, yet no objections to their release have been made in the submissions, and there is no imaginable reason why the public should be denied access to the central charging instruments in this significant case. The Decorum Order (consisting of orders entered January 20, 2016, and February 3, 2017) too has not been made public, and no reason has been advanced to keep it secret.

Intervenors thus are respectfully requesting that a full and complete docket sheet be maintained and released to the public as required by Illinois law (*see* 705 ILCS 105/16(6)), that all documents as to which no mention or objection was made by the Parties be released immediately, and that going forward, the Decorum Order procedure should be dismantled and replaced with a

[2] While the Court has denied Intervenors' counsel the ability to see and assess the entire court file, Intervenors' reporters have continually been denied access to documents such as motions that are then discussed or argued in open court. The State assumes wrongly that being able to hear the motions argued at hearing is tantamount to having, "for all intents and purposes," a "redacted" version of every motion. State Resp. at 6. The State's contention that scattered references in public hearings to motions the public has never seen, read, or had the chance to understand fully, is for practical purposes the same as giving the public any form of access to the motions themselves is unsupported, incorrect, and inconsistent with any ordinary conception of what public access means.

procedure in which the Parties and others filing documents in this case in the ordinary course file them in the Clerk's Office, and, where appropriate, such filings take place under seal upon appropriate motions to seal that are considered properly by the Court and granted only if the requisite findings can be made.

III. Access To Public Documents And Proceedings Must Be Contemporaneous, And The Parties' Unfounded Fears Of A "Media Circus" Do Not Justify Denial Of Access.

The Parties have embraced a sweeping view that the moment a court file document contains any fact or assertion that is "inadmissible" as evidence or is "potential" evidence in the case, the entire document loses its public character and is either outside the presumption of public access or should be withheld from the public. As demonstrated above in Part I, however, that seemingly boundless rule is inconsistent with the controlling law. In addition to that unsustainable view of the First Amendment, the Parties are laboring under two other significant misconceptions.

First, supplying the press with transcripts or summaries of events at a later date, thereby denying access in a manner that is "not permanent," *see* State Resp. at 6, is not true access. True access is contemporaneous access. *In re Continental Illinois Sec. Litig.*, 732 F.2d at 1310. The ability of the press to obtain timely, accurate, and complete information is critical to its ability to promote public understanding of this case. *See Grove Fresh Distributors v. Everfresh Juice Co.*, 24 F.3d 893, 897-98 (7th Cir. 1994) ("each passing day [of denial of access] may constitute a separate and cognizable infringement of the First Amendment") (quoting *Nebraska Press Ass'n*, 423 U.S. at 1329; *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 127 (2d Cir. 2006) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976).). The public's interest in a story about a particular day's events can be "fleeting," so that delayed disclosure "undermines the benefits of public scrutiny and may have the same result as complete suppression." *Grove*

Fresh, 24 F.3d at 897. High-level summaries of closed hearings in this case have been provided weeks after the closed hearings.[3] *See, e.g.* 3/28/18 Tr. at 46-47 (summarizing closed hearing conducted on March 8, 2018). In addition, transcripts and summaries are no substitute for actual attendance at a proceeding. "[O]ne cannot transcribe an anguished look or a nervous tic. The ability to see and hear a proceeding as it unfolds is a vital component of the First Amendment right of access." *ABC, Inc. v. Stewart*, 360 F.3d 90, 99 (2d Cir. 2004); *see also Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1072 (3d Cir. 1984) ("As any experienced appellate judge can attest, the cold record is a very imperfect reproduction of events that transpire in the courtroom.").

Second, unfounded fears of a "media circus" (*see* Def. Rep. at 4) do not justify denial of public access to the court documents and proceedings in this case. "The mere fact that the suit has been the subject of intense media coverage is not . . . sufficient to justify closure. To hold otherwise would render the First Amendment right of access meaningless; the very demand for openness would paradoxically defeat its availability." *Stewart*, 360 F.3d at 1002. Put another way, it cannot be the case that the right to access is defeated any time there is public interest in a case. In addition, while Intervenors have disagreed with the Court's impoundment of the file and holding closed proceedings, even the State has noted that "[t]his Court and the Cook County sheriff have taken steps to maintain decorum inside and outside the courthouse." State Resp. at 8. The Court may take judicial notice of its use of pool video and audio feeds, a pool photographer, and regular

[3] The State's assertion that "[e]very minute of each proceeding in this case has been open to the public and recorded by not only verbatim transcription but also video and audio recording, as well as by still frame photography" (State Resp. at 5-6) applies only to proceedings held in open court in this matter, and not to all proceedings, as is evident by the practice of summarizing closed sessions weeks later. *See* 3/28/18 Tr. at 46-47. The Court may take judicial notice of the proceedings before it, Int. Mem. at 4 n.1, including the closed proceedings that are not open to the public, and that are not recorded by verbatim transcription or video recording, audio recording, or still photography. Intervenors objected on the record to this type of closure. 3/28/18 Tr. at 28-29. Respectfully, the media's access to this matter has not been, as the State contends, "extraordinary." *See* State Resp. at 6. Rather, public access to this matter, including the impounded court file as well as closed hearings, has been extraordinarily limited.

announcements by sheriff's deputies about how members of the public must not approach the Defendant or otherwise disrupt the proceedings. Fears of a "circus" atmosphere are unfounded, and what's more, supposition that intensive media coverage itself will necessarily be tantamount to a "circus" is unfair to Intervenors, to all of the working press, and to the public for which the press stands as surrogates. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980).

CONCLUSION

For the foregoing reasons, the objections to the release of the entire court file should be DENIED. The entire court file should be released, and Intervenors' motion for full access to that file should be GRANTED, absent the specific findings required under *Press-Enterprise II* justifying, under the well-established law supporting public access, that it is essential for protection of a higher interest to redact or withhold certain contents of particular documents pursuant to narrowly tailored findings that include findings that public disclosure would create a substantial probability that the fair trial right would be prejudiced, and that reasonable alternatives such as *voir dire* would be inadequate to protect that right. No legitimate basis for any such findings, as to any of the identified documents, has been advanced.

Dated: April 13, 2018

Respectfully submitted,

CHICAGO PUBLIC MEDIA, INC.

By: _____
One of Its Attorneys

THE ASSOCIATED PRESS
WLS TELEVISION, INC.
WGN CONTINENTAL BROADCASTING CO., LLC
WFLD FOX 32 CHICAGO
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

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Filed In Room 500 Per Feb. 3, 2017 Decorum Order

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

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

INTERVENORS' THIRD REQUEST FOR ACCESS
TO COURT FILE DOCUMENTS AND OTHER ACCESS-RELATED RELIEF

For more than five weeks now, Intervenors[1] have requested that Your Honor make rulings (1) requiring the creation of a publicly available docket sheet, (2) permitting the parties and Intervenors to file their motions and briefs openly and in the public record, (3) requiring that all court proceedings in this matter be conducted in open court in the absence of explicit findings consistent with the constitutional standard that they be held in chambers and that, if any proceedings are held in chambers, a court reporter be present, and (4) releasing to Intervenors and the public—again, absent specific on-the-record findings—the previously filed motions, briefs, orders, and other public filings. The Court has established a procedure for evaluating the Intervenors' fourth request, but the other three requests have been entered and continued without rulings.

Every passing day without a ruling constitutes a violation of the constitutional rights of the Intervenors and the public. *See Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327, 1329 (1975). Once again, therefore, we ask that the Court grant the following relief: (1) order the creation—and public

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

dissemination—of a publicly available docket sheet; (2) permit the parties and Intervenors to file their motions and briefs openly and in the public record; (3) conduct all hearings in open court or, if closed to the public based on specific findings that doing so is necessary to protect a higher interest, conduct the proceedings with a court reporter present; and (4) release to the public all filings for which Your Honor does not make specific findings that nondisclosure is necessary to preserve a higher interest.[2] In support of this requested relief, Intervenors state as follows:

1. Intervenors filed their Motion to Intervene and for Access to Court File Documents ("the Motion") on March 6, 2018. Intervenors' Mem. at 5. In their supporting Memorandum of Law, they sought access to the complete court file, which was inaccessible—and remains inaccessible—to the public. *Id.* at 5. In doing so, Intervenors demonstrated that there are documents in the court file that are presumed accessible to the public and that, while the presumption may be overcome, the Court has not made any findings that would, in fact, overcome the presumption. *Id.* at 8-13. Furthermore, Intervenors pointed out that there is no publicly available docket sheet memorializing the date and subject of filings and orders in this matter. Intervenors' Mem. at 5. Intervenors also asserted that court hearings in this matter should not be closed to the public absent findings that closure is necessary to preserve a higher interest. *Id.* at 14 n.6. Finally, Intervenors showed that the Court's orders entered January 20, 2016 and February 3, 2017 (collectively known as "the Decorum Order") have been applied in a manner that has resulted in the impoundment of the contents of the court file. *Id.* at 4-6.

2. On March 8, 2018, the Court convened a closed-door hearing at which the Court discussed the Intervenors' Motion. 3/8/18 Tr. at 4. The Court made no findings to support closure

[2] Intervenors also renew their request that the Court rule that Intervenors are not prohibited by the February 3, 2017 Decorum Order from publicly releasing correspondence between counsel for the Intervenors and the Parties.

of the March 8 hearing and no court reporter was present. *Id.* Following the closed hearing, the Court granted Intervenors' motion to intervene to seek access to the court file and to "comment upon any other issues implicating the rights of the public and the media to open access to these proceedings." 3/8/18 Order. The Court also granted Intervenors' request to publicly release their Motion and Memorandum of Law, but not to release the already public exhibits attached to their Motion. *Id.* The Court directed Intervenors and the Parties to confer regarding what items within the inaccessible court file should be accessible to the public. *Id.*

3. On March 26, 2018, Intervenors filed a Status Report and Requests for Relief ("Status Report"). The Status Report summarized and attached the written communications between the Parties and Intervenors concerning the Parties' objections to the release of court file documents. It also included Intervenors' second request for relief. Specifically, Intervenors requested the following:

(a) immediate release of the court file documents as to which the Parties did not object to disclosure;

(b) release of all other court file documents within seven days absent required specific findings justifying continued impoundment of any court file documents;

(c) permission to file the Status Report in the Clerk's Office for public release;

(d) modification of the February 3, 2017 Decorum Order to allow the Parties, Intervenors, or other parties to publicly file documents in the Clerk's Office rather than courtroom 500;

(e) an order that the Clerk of the Court maintain a proper docket sheet, listing all filings in this case by name and date;

(f) an order that correspondence between counsel in this case is not barred from public release under the Decorum Order; and

(g) that hearings in this matter be held in open court unless specific findings are made justifying closure, and use of a court reporter at any hearings that are closed.

4. At the hearing on March 28, over Intervenors' objection, the Court convened another closed hearing. 3/28/18 Tr. at 29-30. The Court stated that if Intervenors' counsel declined to attend the closed hearing, the Court would discuss intervention matters with the Parties outside the presence of Intervenors' counsel, and that any refusal to attend the closed hearing would mean that Intervenors would waive their right to "fully represent" their clients. *Id.* The closed hearing proceeded with Intervenors' counsel present. No court reporter was present.

5. After the closed hearing, the Court ordered the Parties to provide further briefing by April 6 on the issue of whether public access to particular court file documents should be denied, and if so, why. 3/28/18 Order. The Court directed Intervenors to respond to those submissions by April 13. *Id.* The Court also declined to grant any of the requests set forth in the Status Report as recited above in Paragraph 3(a)-(g), instead entering and continuing each request. 3/28/18 Order; 3/28/18 Tr. at 33-34, 36-38.

6. The Court also declined Intervenors' requests for an order compelling the State to provide a complete list of all court file documents and for permission to allow one of Intervenors' attorneys to review the complete file in chambers for the purposes of making a complete inventory of it. 3/28/18 Order; 3/28/18 Tr. at 38-41. Accordingly, the Court ordered Intervenors to file a brief by April 13 without permitting the Intervenors to even see a complete docket sheet or a complete list of court filed materials.

7. The Parties made their filings on April 6. For the reasons stated in Intervenors' separately filed Consolidated Response to Parties' Objections to Public Disclosure of Court File Documents, the Parties failed to establish that any of the court file documents in this matter are not subject to the First Amendment presumption of access, or that any of their specific objections to disclosure justify denial of access.

8. No proper basis has been asserted by the Parties or the Court to deny public access to documents filed by Intervenors in this matter in an effort to obtain public access to the court file and proceedings. *See A.P. v. M.E.E.*, 354 Ill. App. 3d 989, 993 (1st Dist. 2004) (holding that trial court abused its discretion by requiring media intervenor to file under seal its briefs challenging the sealing of court files).

9. No basis whatsoever has been asserted by the Parties or the Court to deny the public access to a comprehensive docket sheet, required by law to be kept in all court cases in Illinois. 705 ILCS 105/16(6).

REQUESTS FOR RELIEF

Accordingly, in an effort to avoid appellate review, Intervenors request that the Court grant the following relief:

(a) Order all documents in the court file to be released to the public immediately absent judicial findings as to any file documents or portions thereof that should be withheld on the ground that nondisclosure is essential to preserve a higher interest, based on findings narrowly tailored to preserve that interest, and where that interest is Defendant's fair trial right, findings that public disclosure would create a substantial probability of prejudicing that right, and that reasonable alternatives to denial of public access will not adequately protect the right.

(b) Order that Intervenors' Status Report and Requests for Relief, including exhibits, be unsealed and filed in the Clerk's Office.

(c) Replace the Court's order entered February 3, 2017 that requires the Parties and "any other party" to file documents or pleadings in room 500 of the George N. Leighton Criminal Courthouse, with a procedure in which the Parties, Intervenors and others filing documents in this matter file them in the Clerk's Office, and,

where appropriate, such filings take place under seal only upon appropriate motions to seal that are properly considered by the Court and granted only if appropriate findings requiring nondisclosure are made.

(d) Order that the Clerk of the Court or Your Honor's Clerk prepare and maintain a publicly available docket sheet that lists and identifies, by document title and date, each document filed in this matter and each Order entered by the Court.

(e) Order that correspondence between Intervenors and counsel for the Parties is not covered by the Decorum Order and not subject to any judicial restriction on public disclosure.

(f) Order that all hearings held by the Court will be held in open court with a court reporter present, unless the Court enters specific findings (stated on the record in open court) that closure of a particular hearing is essential to protect a higher interest, based on findings narrowly tailored to preserve that interest, and where that interest is Defendant's fair trial right, findings that a public hearing would create a substantial probability of prejudicing that right, and that reasonable alternatives to closure will not adequately protect the right.

(g) Order that closed proceedings, if any, take place in the presence of a court reporter.

Dated: April 13, 2018

Respectfully submitted,

CHICAGO PUBLIC MEDIA, INC.

By: _____
One of Its Attorneys

THE ASSOCIATED PRESS
WLS TELEVISION, INC.
WGN CONTINENTAL BROADCASTING CO., LLC
WFLD FOX 32 CHICAGO
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STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

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

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff,	
v.	No. 17-CR-04286-01
JASON VAN DYKE, Defendant.	

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

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

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

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

The press has not had access to a very large number of documents in that file.

THE COURT: When was the Decorum Order entered?

MR. FUENTES: February 3, 2017.

THE COURT: Okay. So, it's more than a year?

MR. FUENTES: Yes.

THE COURT: All right.

MR. FUENTES: And, Judge, what has happened is, we as intervenors, have come before the Court and said that that has to stop. We said that the Court has not made any findings that are required by Press-Enterprise or referenced in Kelly, that would justify the withholding of those documents.

You can't withhold a document that's within the Court file, from the public. If it's presumed to be --

THE COURT: Stop right there.

MR. FUENTES: Yes.

THE COURT: All right. Now, the Court file you're talking about is one that has -- not has -- had unlimited access to my lawyers and the public, is that correct?

MR. FUENTES: No, I wouldn't say that the Court file --

THE COURT: Well, your theory is --

MR. FUENTES: -- is --

THE COURT: Excuse me, right now, you know, give me a chance, all right?

Your theory is that if it's in the Court file, then the gate is opened; and the cat has ran out of the bag; but I'm telling you, you interrupt me again, you're not talking no more. You got that?

MR. FUENTES: Yes, sir.

THE COURT: All right. But the thing is, nothing has been opened up as of now; and I understand your point; and you're making some good points; but just to have this blanket thing, if it's in the file, then, there is no secrets or there is no -- a way that you can preserve anything, that you can't do damage control, or anything else like that.

I'm not accepting that principle, all right, because otherwise, you wouldn't be here if the file was open, all right?

Everybody would have access to it. So, your first premises or a hypothesis that it is open already, is not correct, okay?

So, I agree with, you know, some of the things that you're saying.

Go ahead.

MR. FUENTES: And respectfully, Judge, I think the Scholnick case says that when a document --

THE COURT: Is that the civil case?

MR. FUENTES: It was a civil case, Judge.

THE COURT: But you know, I'm not going to belabor this point, all right?

You know my position right now.

Have you seen the file?

MR. FUENTES: I have not seen the file.

THE COURT: Of course you have not. So, nobody in the public has seen the file. So, it is not open to the public.

So, your premise that it's open to the public, because it's in the file, now, is false, all right, because if it's now open, otherwise, you wouldn't be here.

Do you understand that?

MR. FUENTES: I do, Judge. I think --

THE COURT: Okay. Fine.

All right. All right. Proceed on different matters then.

Go on with your presentation.

MR. FUENTES: So, your Honor, what we have said is

transcripts?

MR. FUENTES: Yes, Judge.

THE COURT: You --

MR. FUENTES: I can discuss that further, if you would like.

THE COURT: I want you to do it immediately, right now.

So, you actually think that Grand Jury transcripts prior to Trial, are open to public scrutiny?

MR. FUENTES: Once they are contained in a document filed with the -- in the public --

THE COURT: You keep missing the point. You know, you're fixed on this --

MR. FUENTES: We disagree on that.

THE COURT: -- one point which undermines your logic, is that the file has not been opened to the public. This has not been disseminated to the public. That's the under -- you have to move on. Otherwise, you wouldn't be here.

Do you understand that you're --

MR. FUENTES: I do.

THE COURT: -- it's, like, you're a little iceberg that's starting to melt real quick. Otherwise, you

would not be here, Mr. Fuentes.

All right. Move on, all right?

MR. FUENTES: Well, I will tell you that if the Court believed that Grand Jury secrecy, under the statute, required the withholding of a document from the public, it would need to make the appropriate findings.

THE COURT: How about the statutes?

Have you looked at the statute?

MR. FUENTES: I have, your Honor.

THE COURT: Have you looked at Federal case law, where even after the Trial, they have not released Grand Jury testimony?

MR. FUENTES: I have, your Honor.

THE COURT: All right. Move on. All right. That's -- that's not a good argument.

MR. FUENTES: Well, I think if you made the findings, Judge --

THE COURT: All right. Move on.

MR. FUENTES: All right. So, Judge --

THE COURT: You want me to make the findings, and I don't think that's inappropriate. You have to pay attention to what I'm saying, too.

When you said that I should make the

the -- both attorney-client privilege, your Honor.

THE COURT: What are you -- I'm not asking what -- first of all, we have public disclosure; and I agree with Mr. Fuentes. Once it's out in the public, there is no privilege.

So, if you talked to them about what they've printed, and what their coverage was, and what they were denied, then, I would feel a lot more comfortable with your representation of your client's journalists, all right?

All right. Moving on, Mr. Fuentes.

MR. FUENTES: May I request permission to voir dire Mr. O'Connell?

THE COURT: Absolutely not.

MR. FUENTES: Thank you. Then, I will continue.

It's my understanding that there's no --

THE COURT: Have you counted the pages?

MR. FUENTES: I've not counted the pages, Judge. It's my understanding that there's no transcript of the proceeding that occurred in Court's chambers on March 28th, outside the presence of a Court Reporter, outside the presence of the public.

THE COURT: We understand that; and you know, if you read the transcripts, you know that these -- you

know that these case management conferences -- and they're the informal case management conferences -- have been held in chambers, as far as scheduling, and as far as resolving some matters so that when we come out in public, there would be efficient presentation; and then we articulate what happened at the conferences.

As you were at the March 28th conference, and you seen that, all right?

So, I mean, definitely, there's an absolute right of the judiciary to have issues conferences of case management -- informal case management conferences, and that's been throughout the State of Illinois.

I don't know exactly if it's done in Federal Court, but I'm not a -- we're not in Federal Court, anyway. This is a Court that maintains law and order. Federal Courts do not.

All right. Go ahead.

MR. FUENTES: Well, Judge, our view is that those hearings are sufficiently substantive, that they should be public, that they are not mere informal case management conferences.

THE COURT: That's your opinion. All right. But

then, you're entitled to your opinion.

MR. FUENTES: Judge, I request further that to the extent the Court holds any of those hearings in a closed fashion in chambers, that it be done pursuant to the findings that we've described; and that a Court Reporter be present for them, so that there may be some more complete record of what occurred during those hearings, Judge.

And then finally, we're also requesting that our March 26th status report which we considered to be a public document, we told the parties in the case, we believed it to be a public document, we received an email that said we were under threat of violating the Decorum Order if we provide --

THE COURT: Did they actually put threat in the document?

MR. FUENTES: They told us they would take the position that we had violated the Decorum Order.

THE COURT: They did not -- come on, now. It's nice that you talk a lot, but why don't you answer the question?

They actually put that they threatened you in the document?

The word threat was in there.

All right. So, let's move on.

MR. FUENTES: All right. So, we're asking the Court to follow Scholnick; and Scholnick says once it is filed publicly with the Court, whether it's in this room or some other room, it's public.

THE COURT: Will you get off -- this has not been filed publicly, otherwise, you wouldn't be here.

Do you understand how illogical your presentation is, when you say, once it's been filed publicly?

It has not been filed publicly, all right?

Thank you.

All right. Now, concerning your memorandum, intervenors consolidated response to parties' objections, page 6, and look at the last paragraph, and then, if you go up to -- two lines, and you have your little three dots there?

MR. FUENTES: Yes, Judge.

THE COURT: The full quote is up one more line, in the parentheses.

While it is certainly true that the opinion of one District Court or Panel of the Appellate Court is not blinding on the other Districts or Panels.

And then, there's a -- a break. This Court

so, you know, if there's 100 newspaper articles, you can do it 4 months in advance; and you'll have enough time.

If you wait -- like a case like this, if you did it a few months before Trial, you wouldn't be able to get through the analysis of the media coverage and all the other things this case involves.

Q. You are aware that there's a July Trial date for the three Police Officers charged?

THE COURT: Nobody said the exact date there, Counsel, all right?

So, it's a summer date.

MS. WENDT: No, no, no, the three Police Officers charged in connection with this case.

THE COURT: All right. Go ahead, I'm sorry, go ahead.

BY MS. WENDT:

Q. You're aware that there's a Trial date set with them in July, correct?

A. Yes.

Q. And in your opinion, would that -- would that fact impact your findings?

A. It potentially could if that Trial receives a lot of media attention and information, which it

God, you're very creative and everything else. I'm not going to be looking at this stuff unless it's printed, okay, because I really have -- and you make me work; and that's good, all right, because I had to write out that little thing about not paying attention to your own District, and looking some place else with the Appellate Court's opinion of why they're rational. They don't have to follow something.

No, that's very good there.

You know, so, get -- as soon as you can get that to me, and then you agreed to this?

MR. COLMAN: We reviewed it for content.

THE COURT: But what I would like you to do -- and we can expedite this before Friday.

If you could get it typed up, fax it over to Joe, and then, get me and everybody else involved. I'm not leaving anybody out; and then, get it back to me, so I can review it; and then, as soon as it gets over to us, then -- and it's okay, and it's okay with the parties, hearing no objections, then I'll sign it.

MR. FUENTES: Happy to do that, Judge.

The additional point that I had was with regard to the State's summary of the events at the last hearing, the March 28th informal case management

conference, so to speak, to which the intervenors had objected; and, Judge, I would just object to the summary, because I don't think the summary is complete.

It leaves out some statements that the Court made about the scope of the person and the presumption. It leaves out statements Mr. Healey made in response to that, about the press's need to be present, for the making of the sausage, so to speak, Judge.

And so, I think we've asked, obviously, and I've requested that it be entered and continued today for a Court Reporter to be present back there. We think that would be a good idea, and I just want to be sure the record reflects our objection to the incompleteness of this summary.

Thank you, Judge.

THE COURT: Thank you.

And if you could find a remedy for that, I will be glad to see it in some kind of petition, okay?

Yes -- no, come on, Jeff, get up here, because you're leaving for San Francisco tomorrow.

MR. COLMAN: No, I'm going to Italy.

THE COURT: Oh, Italy, God love you.

How long?

MR. COLMAN: Almost 3 weeks.

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

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

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

Gloria M Schuelke, CSR, RPR

Official Court Reporter
Illinois CSR License No. 084-001886

Dated this 20th of April, 2018.

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

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

Order

1. This Court orders the Clerk of the Court or the Clerk to prepare and maintain a publicly available docket sheet that lists and identifies, by document title and date, each document filed in this matter and each Order entered by the Court. The Clerk shall provide this docket sheet to the public by April 26, 2018.

2. Before April 26, 2018 the State shall file and serve a document containing the State's contentions as to which file documents in this case are and are not subject to the first amendment presumption of access.

3. This matter is set for further hearing on April 26, 2018, at 9 a.m.

Entered:

Vincent M Gaughan

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

Date: April 20, 2018

ENTERED
JUDGE VINCENT GAUGHAN - 1553
APR 20 2018
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

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

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

STATE'S SUPPLEMENTAL RESPONSE TO INTERVENORS' MOTION FOR ACCESS

NOW COME THE PEOPLE OF THE STATE OF ILLINOIS, by and through their Attorney, JOSEPH H. MCMAHON, Special Prosecutor and State's Attorney of Kane County, Illinois and further responds to the Intervenor's Motion for Access to Court Documents as follows:

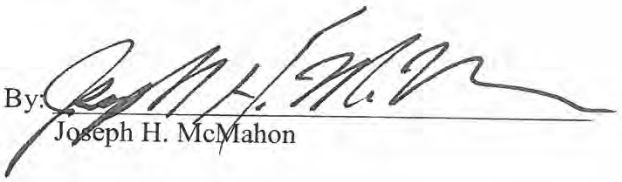
Attached to this filing are three exhibits which delineate the State's position on whether the presumption of public access applies to specific filings in this case. Exhibit A contains filings to which the State has taken a position that the presumption does not apply for reasons set forth in the State's original response and therefore are filings to which the State objects to the public release of at this time. Exhibit B is a list of filings to which the State has no objection to a finding that the presumption of public access applies. Attached as Exhibit C is the State's Response to Intervenors' Motion for Access to Court Documents which explains the basis for the State's objections.

WHEREFORE, the People of the State of Illinois respectfully request that this Court enter an order that the documents listed in Exhibit A remain sealed until the trial in this case is completed.

Filed under the protection of the Decorum Order
Only to Exhibit C

RESPECTFULLY SUBMITTED,

People of the State of Illinois
Joseph H. McMahon
Special Prosecutor
Kane County State's Attorney

By: 
Joseph H. McMahon

Date: April 25, 2018

Joseph H. McMahon ARDC No. 6209481
People of the State of Illinois
Kane County State's Attorney and Special Prosecutor
Office of the Kane County State's Attorney
Kane County Judicial Center
37 W 777 Route 38, Suite 300
St. Charles, Illinois 60175
Telephone: 630-232-3500

Exhibit A: Filings to which the State objects to their release in part becasuse the presumption of access does not apply

6	Defendant's Motion to Waive Appearance	3/23/2016	No presumption
8	Defendant's Reply to Motion to Waive Appearance	4/27/2016	No presumption
17	People's Initial Garrity Team Disclosure to Defendant	9/29/2016	No presumption
19	People's 1st Supplemental Garrity Team Disclosure	11/2/2016	No presumption
22	People's 2nd Supplemental Garrity Team Disclosure	1/10/2017	No presumption
26	Memo in Support MTS (Exposure to Compelled Statement)	1/18/2017	No presumption
28	MTD Misconduct at GJ	2/3/2017	No presumption
29	Memo of Law in Support MTD GJ	2/3/2017	No presumption
35	Memo of Law MTD Misconduct GJ	4/20/2017	No presumption
36	MTD Indictment & Other Relief GJ	4/20/2017	No presumption
37	MTD Misconduct at GJ	4/20/2017	No presumption
38	2nd Motion for Bill of Particulars	4/20/2017	No presumption
39	Defendant's Supplemental Motion to Waive Appear.	4/20/2017	No presumption
40	MIL Limit Scope of Kastigar Hearing	4/20/2017	No presumption
43	Def. Resp. to MIL Bar Claim of Prejudice PB	5/11/2017	No presumption
44	Response to Motion to Limit Scope of Kastigar	5/11/2017	No presumption
47	Combined Response to MTD & MTD & other relief	5/11/2017	No presumption
58	Brief in Support of People's Garrity/Kastigar Hearing Position	9/7/2017	No presumption
59	Response to Motion to Determine Actual Conflict	9/27/2017	No presumption
61	Motion to Determine Actual Conflict	9/28/2017	No presumption
65	**Reply Motion to Determine Actual Conflict	9/28/2017	No presumption

Exhibit A: Filings to which the State objects to their release in part becasuse the presumption of access does not apply

66	Defendant's Offer of Proof Kastigar Witnesses	10/4/2017	No presumption
74	Jamie Kalven MTQ Subpoena	11/3/2017	No presumption
76	MTD (Prosecutorial Misconduct)	11/6/2017	No presumption
77	MIL to Admit Lynch Material	11/6/2017	No presumption
78	People's MTQ Subpoena to Jamie Kalven	11/6/2017	No presumption
79	Answer to Discovery	11/6/2017	No presumption
80	Defendant Response in Opp. To MTQ Subpoena of Kalven	11/20/2017	No presumption
81	J. Kalven Reply in Support of his MTQ	12/4/2017	No presumption
83	People's Supplemental Discovery Response 6	12/6/2017	No presumption
84	Reply MTD (Prosecutorial Misconduct)	12/6/2017	No presumption
85	Defense Offer of Proof Lynch	12/6/2017	No presumption
86	Reply MIL Lynch	12/6/2017	No presumption
87	Response MIL to Admit Lynch Material	12/6/2017	No presumption
89	Amended Offer of Proof Lynch	12/13/2017	No presumption
90	Supplemental MTD Prosecutorial Misconduct	12/15/2017	No presumption
91	People's Supplemental Discovery Response 7	12/20/2017	No presumption
92	2nd Amended Offer of Proof Lynch	12/20/2017	No presumption
93	Response to MTD (Prosecutorial Misconduct)	12/20/2017??	No presumption
94	3rd Amended Offer of Proof Lynch	1/5/2018	No presumption
95	Defendant's Initial Expert Witness Disclosure	1/5/2018	No presumption
96	Reply to 3rd Amended Offer of Proof in Support of Lynch	1/12/2018	No presumption
97	*Memorandum in Support of Motion to Suppress Evidence (Def. Compelled Statement)	1/17/2018	No presumption

Exhibit A: Filings to which the State objects to their release in part becasuse the presumption of access does not apply

106	Defendant's Reply to the People's Response to Defendant's Motion to Dismiss the Indictment	12/6/2017	no presumption
107	Defendant's Motion to Change Place of Trial	3/28/2018	No presumption
108	Intervenor's Status Report	3/28/2018	no presumption
109	Defendant's Supplemental list of Expert Witnesses	1/5/2018	No presumption
110	Report of a Defense Expert	2/1/2018	No presumption
111	Report of a Second Defense Expert	2/1/2018	No presumption

Exhibit B: List of filings to which the State does not object to a finding that the presumption of public access exists.

1	People's Factual Proffer in Support of Setting Bond	7/24/2015	Presumption
2	Motion for Pre-Trial Discovery	12/29/2015	Presumption
3	Agreed memorandum Summarizing 1/29/2016		Presumption
4	*Motion to Consolidate	3/15/2016	Presumption
5	Agreed Memorandum Summarizing 3/23/2016		Presumption
7	People's Response to Defendant's Motion to Waive Appearance	4/13/2016	Presumption
9	Agreed Memorandum Summarizing 5/5/2016		Presumption
10	People's Response in Opposition to Petitions to Appt. Special Pros.	6/1/2016	Presumption

Exhibit B: List of filings to which the State does not object to a finding that the presumption of public access exists.

11	Agreed Memorandum Summarizing 6/30/2016		Presumption
12	Agreed Memorandum Summarizing 8/18/2016		Presumption
13	Motion for Bill of Particulars	8/18/2016	Presumption
14	Motion to Clarify Decorum Order (Oppenheimer)	8/30/2016	Presumption
15	Reply to Petitioner Holmes Motion to Clarify Decorum Order	9/23/2016	Presumption
16	AG Motion to Quash Subpoena to DCFS	9/27/2016	Presumption
18	Agreed Memorandum Summarizing 11/2/2016		Presumption
20	Agreed Memorandum Summarizing 12/8/2016		Presumption
21	*Motion by City for Protective Order & Clawback	12/8/2016	Presumption

Exhibit B: List of filings to which the State does not object to a finding that the presumption of public access exists.

23	MTD Garrity	1/10/2017	Presumption
24	State Response for Motion for Bill of Particulars	1/10/2017	Presumption
25	Memo in Support MTS	1/10/2017	Presumption
27	Response to MTD Pursuant to Garrity	2/3/2017	Presumption
30	CCSAO MTQ Subpoena	2/3/2017	Presumption
31	*People's Response to MTD (Garrity)	2/7/2017	Presumption
32	*Memo of law in Support MTD Indictment	2/7/2017	Presumption
33	People Response to City Clawback Motion	2/23/2017	Presumption
34	People's Response to MTD Misconduct GJ	3/23/2017	Presumption
41	MIL Bar Claim of Prejudice Failure to Stay PB Proceedings	4/20/2017	Presumption
42	Reply M to Waive Appearance	4/27/2017	Presumption
45	Response to 2nd Bill of Particulars	5/11/2017	Presumption

Exhibit B: List of filings to which the State does not object to a finding that the presumption of public access exists.

46	Response to Supplemental Motion to Waive Appearance	5/11/2017	Presumption
48	Reply Motion to Limit Scope of Kastigar Hearing	5/25/2017	Presumption
49	Reply MIL Bar Claim of Prejudice Failure to Stay PB Proceeding	5/25/2017	Presumption
50	Motion to Grant Immunity McNaughton	6/28/2017	Presumption
51	Motion to Grant Immunity March	6/28/2017	Presumption
52	Response in Opposition to Admission of Statements to FOP	7/18/2017	Presumption
53	Agreed Memorandum Summarizing 8/11/2017		Presumption
54	Motion to Grant Immunity Kato	8/11/2017	Presumption
55	Motion to Grant Immunity Harvey	8/11/2017	Presumption

Exhibit B: List of filings to which the State does not object to a finding that the presumption of public access exists.

56	Motion to Grant Immunity Camden	8/11/2017	Presumption
57	Motion to Reconsider (Statements to FOP)	9/7/2017	Presumption
60	Agreed Memorandum Summarizing 9/28/2017		Presumption
62	Motion to Quash SDT to KCSAO	9/28/2017	Presumption
63	Motion to Dismiss (Speedy Trial)	9/28/2017	Presumption
64	**Motion for GJ Minutes	9/28/2017	Presumption
67	People's Joint MTQ & Motion for More Definite Offer of Proof	10/11/2017	Presumption
68	*Defendant Reply to MTD	10/16/2017	Presumption
69	Agreed Memorandum Summarizing 10/25/2017		Presumption
70	Response to Motion for GJ Minutes	10/25/2017	Presumption
71	Motion to Quash SDT to CCSAO	10/25/2017	Presumption

Exhibit B: List of filings to which the State does not object to a finding that the presumption of public access exists.

72	Motion to Quash SDT to KCSAO 2nd	10/25/2017	Presumption
73	Response to MTD (Speedy Trial)	10/25/2017	Presumption
75	Agreed Memorandum Summarizing 11/6/2017		Presumption
82	Motion Reporter's Committee for Freedom of Press for Leave to File Amicus	12/5/2017	Presumption
88	Supplemental Motion for Discovery	12/11/2017	Presumption
98	Agreed Memorandum Summarizing 1/18/2018		Presumption
99	Agreed Memorandum Summarizing 2/1/2018		Presumption
100	Motion for Intervention and Access to Court	3/6/2018	Presumption

Exhibit B: List of filings to which the State does not object to a finding that the presumption of public access exists.

101	Memorandum in Support of M for Intervention and Access	3/6/2018	Presumption
102	Defendant's Memo Animation & Simulation	3/8/2018	Presumption
103	People's MIL Concerning Dr. Miller	3/8/2018	Presumption
104	Motions to Adopt CCSAO Subpoenas	3/8/2018	Presumption
105	Incident Narrative Report (brief narrative)		Presumption
X	Court Orders for all dates		Presumption

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

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

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

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

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

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

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

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

list here.

All right. The first one on the list that we're going to be using is, it's nomenclature -- excuse me -- it's numeric number six, Defendant's Motion to Waive Appearance. All right. And that was filed -- so we'll get the dates in here too -- on May 23, 2016. Is that correct?

MR. WEILER: March 23rd.

THE COURT: March 23rd. Thank you. All right. Any objections to this?

MR. WEILER: Yes, Judge. The State would object to the release of this document. As your Honor knows, Judge, there is this presumption that we've discussed, but this presumption only applies if two things are met; that it is a document that's been historically open to the public, and it's function is actually furthered by disclosure.

This, both 6 and 8, Judge, have to do with the defendant attempting to waive his appearance here. And when you look at whether these have been -- these types of documents have been historically open to the public, Judge, I think you do have to look at the context of this case. These are both documents, 6 and 8, that both sides in this case, at least at some point, have marked as objecting to their release because they -- the parties feel they could interfere with the parties right to a fair trial. You've

made the findings about the publicity surrounding this case. So it certainly is an extraordinary case. So that does need to be taken into account in looking at prong number 1.

But when you look at prong number 2, as well, Judge, whether the purpose of these documents would be furthered by disclosure, it's clear that they wouldn't, Judge. Because the purpose of these documents is to ensure that the defendant gets to court fairly and safely and there are -- there is material in there that could -- there's accusations that could inflame the passions of the protestors, that could effect his ability to get to court fairly. There's also the potential that there's inadmissible evidence in there that could sway potential triers of fact in this case. And so based on that, Judge, we would ask that it not be released.

THE COURT: All right. Mr. Herbert?

MR. HERBERT: Judge, this document, quite frankly, has to come in. The Court the other day allowed for People's response to this document to come in. So therefore, in the interest of justice, there is no reason to exclude it. The State just proffered some reasons -- and as the Court notes, in its motion they didn't argue it -- in its motion the reason was because this motion that was filed by the

defendant might have the effect of creating sympathy toward the defendant. God forbid we create a little sympathy for this defendant who has been threatened for three years. Regardless of creating sympathy, it's not a valid basis, Judge. There's no valid basis whatsoever to not allow this document in.

THE COURT: All right. I will allow this to be made public.

All right. Number eight, Defendant's Reply To Motion to Waive Appearance.

MR. HERBERT: Your Honor, it would be the same argument.

MR. WEILER: Your Honor, we'd object for the same reasons.

In addition, to defense counsel's accusation that we are picking and choosing here, Judge. It's based on the content of what's in the filing. It's not who filed. You went through our list. In Exhibit B, there were defense motions on there. There were State motions on there. It's our position still, Judge, this could potentially effect the parties' rights to a fair trial, and the purpose is not furthered by disclosure.

THE COURT: Thank you. Again, this motion was filed on April 27, 2016. I will allow public access to that.

That will be allowed.

Next one number 17, People's Initial Garrity Team Disclosure to Defendant. And that was filed on December 29, 2016.

MR. WEILER: Yes, your Honor, we would object to this. Judge, these next several documents have sort of a special place in that this trial team here in front of your Honor has not had access to these documents at all because of special protections that relate to compelled statements under Garrity. And, additionally, Judge, this would be discovery essentially, a discovery document that would not traditionally or ordinarily be subject to disclosure. Its purpose would certainly not be furthered by disclosure, and as with all the Garrity filings, Judge, your Honor has taken, and this trial team has taken, extraordinary steps to ensure that the defendant's rights under the Garrity case are respected. And the release of any of these Garrity-type materials could effect the parties' rights to a fair trial, and could potentially taint a trier of fact. And for those reasons, Judge, we would ask that this and the Garrity-related documents, again, that have the content that could effect the parties' rights to a fair trial, be withheld.

THE COURT: Thank you. Mr. Herbert?

MR. HERBERT: I'll start by saying too, if the State doesn't want this document to come in, I'm fine with that. And we can move on.

THE COURT: That's good enough for me. All right, Mr. Fuentes?

MR. FUENTES: Your Honor, it's not --

THE COURT: Mr. Healey, are you going to adopt Mr. Fuentes' arguments?

MR. FUENTES: I'm sorry, Judge, I couldn't hear you.

THE COURT: This is only important if Mr. Healey knows.

MR. FUENTES: Absolutely.

MR. HEALEY: Yes, your Honor.

THE COURT: Okay. Thank you. He's adopting your presentation.

MR. FUENTES: Thank you, Judge.

It's not discovery once it's filed with the Court. It's discovery material when it is unfiled, and that's the treatment of these cases.

THE COURT: Are these on file?

MR. FUENTES: These are unfiled documents, Judge --

THE COURT: Listen to me. If these are unfiled, you have no purpose here today. I mean, they are not disclosed. They have been held. So you can't argue that.

That is illogical to say that they are in the file, otherwise you wouldn't be here. You wouldn't be wasting your time and your talent --

MR. FUENTES: This was the discussion --

THE COURT: No, move on from that. No, I'm not going to listen to an irrational discussion. That's the purpose of this whole hearing today, to see if they are going to be disclosed. I need some consensus now. Do you agree that these are not disclosed at this time --

MR. FUENTES: No, Judge, this is an official document subject to the presumption --

THE COURT: -- whether this is disclosed or isn't?

MR. FUENTES: It's subject to presumption --

THE COURT: Excuse me. I'm asking a yes or no question. You are not getting paid by the hour right now. All right. You are saying that these, everything in these motions are already disclosed?

MR. FUENTES: I'm not saying they are disclosed.

THE COURT: Well, you have to say something. Are they disclosed or not disclosed?

MR. FUENTES: I am saying they should. They are not disclosed and they should be.

THE COURT: I understand should be. So if we're going to go on bickering back and forth, I'm going to limit your

presentation. All right. So can you give me some -- come on, let's keep this thing intellectually honest. Are these subject to the inspection of our wonderful journalists here today?

MR. FUENTES: At this time, no.

THE COURT: Okay. That's all I wanted -- so they are not disclosed. That's the illogical point that you keep presenting, that they are already in the file so therefore there is no presumption of protection. That's not true. And I don't want to hear that argument any more or I'll sit you down, concerning that they are already disclosed. All right. Move on. Any other presentation?

MR. FUENTES: Your Honor, they most certainly do further the Court's interest. Disclosure does further the Court's interest. We are not talking about furthering the interesting in a document in a Garrity motion. We are talking about the press and the public's right to examine, understand and evaluate the Court's resolution of any disputes that are put before it, of arguments that attempt to influence the Court's handling of a very important case.

THE COURT: Almost like Justice Black, the First Amendment is absolute. So what you are basically saying is that you are going to say that everything should be disclosed?

MR. FUENTES: I haven't said that, Judge. I have said --

THE COURT: Well, you have come close to it.

MR. FUENTES: -- because it meets these theories of logic tests, it's subject to presumption. If it's subject to presumption, the Court may not withhold unless it makes findings that release of the documents is somehow harmful.

THE COURT: So we are on common ground. What is the purpose of a Garrity hearing?

MR. FUENTES: As I understand it, it is to determine what evidence the jury would or could hear from statements made to law enforcement under compelled circumstances which Garrity provided shouldn't be admitted.

THE COURT: That is some of the reason. It's an end to see if the statement is involuntarily. If it's an involuntarily statement in criminal law -- I know you don't practice that much -- but any involuntary statement has no credibility. Therefore, my concern is if these statements are protected by Garrity, they have no credibility, they should not, they will never come into a trial, so the public should not be exposed to them. Thank you.

All right. As far as the Garrity material, those motions -- which are those -- the first one we are looking

at is the one that was filed on November 2, 2016. Then the State filed one on January 10 -- but then we're going back and forth. It should be, and I know you didn't get a chance to take a look at the filings so -- 17 should have been the one on September 29, 200- -- this is 2016, right?

MR. WEILER: Correct, Judge, 2016.

THE COURT: Okay. Yeah. And then there's the first supplemental is November 10, 2016, and your second supplemental, meaning the Garrity team's supplemental, is January 10, 2017.

All right. Then The Defendant's Memorandum of Law in Support of Motion to Suppress Evidence Tainted By Exposure to the Defendant's Compelled Statement and/or Motion to Dismiss. And that's --

MR. WEILER: Your Honor --

THE COURT: Go ahead, Mr. Weiler.

MR. WEILER: That was filed on January 18th of 2017.

THE COURT: I'm sorry, what?

MR. WEILER: That relates directly again to Garrity. It is --

THE COURT: That would be -- so you are adopting your --

MR. WEILER: I'm adopting my previous argument.

THE COURT: All right. And, Mr. Herbert, you are

adopting yours?

MR. HERBERT: No, Judge.

THE COURT: Specifically, let's go on then.

All right. Which one are you going to further present argument on, which motion?

MR. HERBERT: You mean throughout Exhibit A?

THE COURT: Well, if you don't have them, look it up --

MR. HERBERT: Exhibit A? I don't know what I can present argument on --

THE COURT: If you don't have any --

MR. HERBERT: -- I don't know what they are going to object to.

THE COURT: I certainly just asked. Sometimes, I'll try to explain myself. You have some papers in your hand. What are they?

MR. HERBERT: This is what we are talking about, Exhibit 26.

THE COURT: Well, just read them then, so we all know what we are talking about.

MR. HERBERT: Just so we're clear, we are talking about No. Exhibit 26; is that what the Court is on at this point?

THE COURT: No. I mentioned the ones -- one would be

number 17. The other one 19. And number 22. Because those are three filed by the Garrity team.

MR. HERBERT: Right. If the State does not want to put them in. I'm fine with the State not having those accessible. But I thought we were on the next one, Defendant's one.

THE COURT: All right. Have a seat.

MR. HERBERT: Okay.

THE COURT: Mr. Fuentes, you expressed -- this is pertaining to Garrity material. And this is -- again, this is articulated as some of the statements that may or may not be used. So it's evidence that may or may not be used. So this will not, and there's no other way of getting around this, by redacting or using pseudonyms, et cetera, so this will not given to the public or the press.

MR. FUENTES: Request of the Court, Judge?

THE COURT: We did already. So we are moving on to -- and then I'll allow you on the next one.

All right, Mr. Weiler, number --

MR. WEILER: Judge, do you want to me to address 26 or 28?

THE COURT: 26 first.

MR. WEILER: It's the State's position that that also relates to Garrity statements, and because of that has the

same danger as the previously agreed to 17 through 22, that the factual findings are there for your Honor to make that they could effect the parties' rights to a fair trial, it has the substantial probability of doing that, so we would ask that that not be disclosed.

THE COURT: Mr. Herbert?

MR. HERBERT: Unfortunately in this case, as a lot of the things the State argues, it's already been disclosed. We know that. First of all, this motion was litigated --

THE COURT: So then why are you objecting to anything else being held and not given access to the public or press, if that's your argument?

MR. HERBERT: I'm objecting to things that are harmful to my client's due process rights. But if you are inclined to put this document in, I'll sit down and we can move on to the next document.

THE COURT: All right. The first, you know, one of the -- have a seat.

One of the reasons why the press is entitled to exposure, and also the People are entitled to evidence presented at some types of constitutional motions, is to show where there might be police misconduct. What we have to do is look at this charge and this Indictment. It alleges police misconduct. So the motion, if you compare

why the motion would be important, you have to say that that is miniscule as compared to the trial itself. So the whole purpose of the trial would be consistent with that at a motion. Again, this is evidence that would not or may not be allowed in. It goes to involuntary statements. So this will not be allowed to be seen.

MR. HERBERT: Judge, if I could address that, please?

THE COURT: Go ahead, and don't -- cut down on some of the arguments pertaining to, you know the general arguments, and pertain it to the motion itself, Mr. Herbert.

MR. HERBERT: Judge, this document -- first of all, as I said earlier, all of these documents have been --

THE COURT: Just pertain it to this motion, please.

MR. HERBERT: That's what I'm talking about.

THE COURT: You just said all of the documents. You want me to have the court reporter read it back?

MR. HERBERT: All the documents contained within this motion --

THE COURT: All right. Good.

MR. HERBERT: -- have been aired publicly. The Garrity statements at issue that we are so concerned, the prosecutors are so concerned about revealing, those have been revealed by the prosecution, by the City --

MR. WEILER: Objection.

MR. HERBERT: -- in this case.

THE COURT: It has not been by the special prosecutor.

MR. HERBERT: That's a difference without a distinction.

THE COURT: You are going to tell me the Garrity team, it doesn't have a distinction from the special prosecution unit here?

MR. HERBERT: They do. The release of Garrity statements, and your Honor talked about how these motions --

THE COURT: All right. Show me in the transcript where there is a statement pertaining to Garrity that's been released? All right.

MR. HERBERT: It's in this memorandum.

THE COURT: No, show me in the transcript.

MR. HERBERT: I'll show it to you right now. Do you have the document there?

THE COURT: Read it --

MR. HERBERT: I'm sorry?

THE COURT: Read it from -- wait a minute. You are saying it's already been -- how has it been exposed? You said in the hearing?

MR. HERBERT: The hearing exposed --

THE COURT: Do you have an excerpt of the hearing attached to that?

MR. HERBERT: Attached to the motion, no, because the motion was done prior to the hearing.

THE COURT: All right. Then I said show me in the transcript of the hearing where a statement was presented?

MR. HERBERT: I can do that if you give me a time.

THE COURT: Well, go ahead and do it.

MR. HERBERT: If the Court could give me the transcript, I'll be --

THE COURT: You didn't order the transcript and this is --

MR. HERBERT: We have the transcript, Judge. You are telling me to do it right now --

THE COURT: I'm telling you to do it right now. You are the one saying it. Support your allegation with facts.

MR. HERBERT: Well, then we need to take a break.

THE COURT: No, I need to watch what's going on. Go ahead. You've got two other people. We can go on with the other motions. Show me in the transcript.

MR. HERBERT: Judge, I'm arguing this motion, which there was not a transcript associated with this motion.

THE COURT: Then it wasn't exposed in court. It wasn't exposed in court. All right, if that's your

motion --

MR. HERBERT: No, it's just part of it, Judge.

THE COURT: All right. Fine. Sit down. All right. Go ahead.

MR. HERBERT: Judge, I'm not finished with my argument.

THE COURT: I said sit down. All right. John, why don't you get over there.

MR. HERBERT: The Court is not allowing me to finish my argument.

THE COURT: All right. Go ahead.

MR. FUENTES: Do I understand the Court's ruling to be, that the motion at issue, No. 26, is not subject to the presumption of public access or that it is, but the Court is making findings that there is a substantial probability of harming the defendant's fair trial right, as the State argued, and that reasonable alternatives to closure may not -- will not protect that right. Because, Judge, there's no basis in the record for those findings, and the State has presented only a conclusionary argument to your Honor. If in fact Garrity materials have been discussed publicly, in fact the press --

THE COURT: Did you order the transcripts, Mr. Fuentes? We are not in a vacuum here. You are an

outstanding attorney. Why would you even come into a courtroom when you know there have been proceedings and they have been transcribed and they have been opened to the public, without having the documentation to support your wonderful argument?

MR. FUENTES: Well, I will move on from that then, Judge --

THE COURT: The next person that says it's been exposed in a public hearing better have the transcript and the page. Otherwise, really that's like ineffective assistance of counsel, no matter what side you represent.

MR. FUENTES: Thank you, Judge.

Our position then is this document in fact is covered by the presumption, as are 17, 19 and 22, and it can't be withheld absent the specific Garrity tailored findings that the courts have required, and we have not heard any basis for any of those findings, Judge.

THE COURT: Thank you. And that was well articulated. I appreciate that.

At this time concerning No. 26, again, this is allegations concerning Garrity, which could lead on to other factors that Garrity protects. It's not evidence. The Garrity findings, again, were made public, but not this document. And this is the most precise way that we can

narrowly construe this exposure. All right. So that will not be allowed.

All right. Moving on to No. 28.

MR. WEILER: Your Honor, that's the Motion to Dismiss For Misconduct at the Grand Jury, filed February 3, 2017. Quite fairly, Judge, that relates to Grand Jury testimony that's referenced and cited to in these motions. Again, Judge, you have crafted a system where the press was allowed to be in and hear arguments on this. However, I don't believe that any transcript was admitted into evidence at the hearing or any specific statements made at the Grand Jury were made. And so that is essentially a redacted version of this document, so it is narrowly tailored. Grand Jury testimony does have special protections. And so this is not the type of document that is historically open to the public. It has not been publicly filed at this point. Additionally, its purpose would not be furthered by disclosure, and as such, we would ask that the protection remain.

THE COURT: All right. Mr. Herbert?

MR. HERBERT: Judge, we would agree to a certain extent. We would agree that the transcripts from the Grand Jury absolutely should not be released. We would agree that the names of the witnesses that testified at the Grand

Jury should not be released. We would agree that the subject matter contained within the motion and the memorandum, which relates specifically to the testimony, should not be released. However, the remainder of the document must be released because, as the Court mentioned, the Court -- the defendant is entitled to present evidence of misconduct during the charging phase, the prosecution phase, and as with the last memorandum that we talked about with Garrity, which I know we reserved, this document in particular speaks to misconduct done by the prosecuting agency and their agents, and that information is necessary for the defendant to be able to have his due process rights guaranteed.

THE COURT: Mr. Fuentes, I've got to ask you a question now. Documents that are allowed and presumed to have access to have a qualified privilege concerning liable, trade disparagement and slander; is that correct?

MR. FUENTES: It is a qualified right, Judge, and it may be overcome with the entry of specific findings, as I've described.

THE COURT: No. Qualified right to -- qualified right -- qualified privilege concerning liable and slander and trade disparagement, if documents are filed in open court and the media and the press quote them; is that correct?

MR. FUENTES: I'm not sure I agree with the Court's characterization there.

THE COURT: I'm asking you a question. You don't agree with me asking you a question? Shame on you.

MR. FUENTES: I thought your Honor was characterizing --

THE COURT: Read it back to him, please. He seems to be having trouble understanding me or hearing me. One of them. All right. Could you read back what I was asking him?

THE COURT REPORTER: (Reading as requested) --

THE COURT: All right. Listen, pay attention. You didn't listen when I was talking. Brendan, don't be doing that when she's reading things back. That distracts from Mr. Fuentes understanding what's going on. And shame on you. All right. Read it so Mr. Fuentes gets a chance to understand what I said.

THE REPORTER: (Reading as requested) --

THE COURT: All right. Freeze frame right there. You understand that I asked you, "I have to ask you a question right now" do you understand that was the beginning of that colloquy?

MR. FUENTES: Yes, sir.

THE COURT: All right. Go ahead, read the rest of the

sentence.

THE COURT REPORTER: (Reading as requested) --

THE COURT: -- all right. Freeze frame right there. That's my question. You are representing the media. Come on, you should know this.

MR. FUENTES: There is a qualified privilege with respect to some documents. As to, if you file a document in court, you have an absolute privilege against being sued for liable, if that's what the Court --

THE COURT: No, you don't have an absolute -- there are very few things in life that are absolute. I'm asking is the qualified privilege against, for the press or the media, if they grant a motion or a filing that has already been filed and access to the public and printed in the paper?

MR FUENTES: I don't think there's any qualifications to --

THE COURT: Brendan, do you have personal knowledge on that?

MR. FUENTES: -- I would say no.

MR. HEALEY: I think what your Honor is asking about is The Fair Report Privilege, which is the privilege in Illinois and many other states to report on items of public record that were spoken by a public official or in a

document filed in a court filing, for example.

THE COURT: Thank you. Are either one of you in a position to waive that privilege in case the information contained in the proceedings are false, slanderous or liable?

MR. FUENTES: Our clients would waive no privileges here today.

THE COURT: Okay. All right.

Proceed then, Mr. Fuentes, concerning your argument.

MR. FUENTES: Your Honor, Document 28 is a motion by the defense. It's a request of the Court to exercise the Court's power to throw out the charges --

THE COURT: I understand that. Let's get down to the gist of the materials, why you want this allowed to be given to the public and to the press.

MR. FUENTES: It is subject to the presumption of public access, because it's asking the Court to do something. Something very influential. Something effecting the charges in this case. And it is relying on matters that occurred before the Grand Jury as a basis to influence the Court's decision on that critical question. So by putting it in front of the Court, by asking the Court to act based on what occurred before the Grand Jury, and

the Government's brief here characterizes the Grand Jury's reference in the motion as a characterization of Grand Jury testimony, it's subject to presumption, Judge, whether it's Grand Jury material or not --

THE COURT: Wait, wait. You are going far afield. You are actually saying now that Grand Jury testimony can be given to the public prior to a trial?

MR. FUENTES: Yes, sir.

THE COURT: All right. That's nonsense.

MR. FUENTES: I'm happy to explain it to the Court.

THE COURT: No, thank you. The federal courts don't allow it even after trial. And certainly that does not -- in this jurisdiction as long as I've been practicing. I don't want to hear that Grand Jury testimony -- all right. But the other thing is, I'm going to deny access to this.

Mr. Fuentes, and also I assume Mr. Healey, would not waive that qualified privilege against slander, liable and trade disparagement if some of these statements are false by some of the allegations in here. And I understand them protecting their client's rights without consulting with them. But there has been no proof that I have found that supported these allegations, and they would be harmful. There's no way to get anybody's reputation back once these allegations would become public. So I'm denying

access.

MR. HERBERT: Judge, if I could add just briefly on that.

THE COURT: You can on the memorandum. How is that?

MR. HERBERT: Judge, I understand concern about reputations of people, however, at this trial, there is no more --

THE COURT: This is not a trial. Okay. Move on. Let's move on to --

MR. HERBERT: The defendant's reputation --

THE COURT: Excuse me, right now. Pay attention. All right --

MR. HERBERT: -- is paramount --

THE COURT: We are going on to No. 29, The Defendant's Motion to Dismiss the Grand Jury.

MR. WEILER: Yes, your Honor. That was filed also on February 3, 2017. For the same reasons, we would object to the release, as the last document.

THE COURT: All right. Mr. Herbert, please.

MR. HERBERT: Judge, this document alleges misconduct on the part --

THE COURT: I'm sorry, Mr. Weiler, you don't want to deal with -- this document contains Grand Jury document, is that correct?

MR. WEILER: Yes.

THE COURT: You don't want to answer some of Mr. Fuentes statements that this Grand Jury testimony can be given to the public prior to a trial?

MR. WEILER: Judge, it's the State's position that by statute it cannot be and that it shouldn't be specifically because of that, as well as because of the ability for it to effect the parties' rights to a fair trial. So we would ask this not be released.

THE COURT: And the purpose of the Grand jury too.

MR. WEILER: And the secrecy of the Grand Jury, correct.

MR. HERBERT: We'll rest on the same arguments that we made.

THE COURT: Go ahead, Mr. Fuentes.

MR. FUENTES: Your Honor, once a document is subject to presumption, it can only be withheld if withholding is essential to protecting a higher interest. If that higher interest, as should adhere --

THE COURT: Mr. Fuentes, God love you, and I do appreciate your legal expertise, give me a case where it says that Grand Jury testimony can be distributed before a trial.

MR. FUENTES: I do not have such a case at my

fingertips, Judge. Other than to rely on the very, very critical principles that you can only withhold if it's essential to protect the higher interest. If the higher interest is Grand Jury secrecy, I would cite to you the case in our brief, In Re the of Appointment Special Prosecutor, in which that Court said that interest in Grand Jury secrecy is reduced, not eliminated, but reduced if the investigation is over as the Grand jury proceedings were long ago, as is the case here. So I don't think there is a case you can find --

THE COURT: I'm sorry to interrupt again. So I can just get a clarification. How long after -- in that decision, was the trial over?

MR. FUENTES: I don't remember how long after that decision it was opened. My understanding is --

THE COURT: No, was the trial was over after they let -- you said they let the Grand Jury testimony open to the public?

MR. FUENTES: No, I didn't say that, Judge. I said that the Court stated -- in fact, I think in that Court -- in that decision, they didn't release the Grand Jury testimony, but they stated that the interest in secrecy is reduced. So when we're dealing with the federal constitutional --

THE COURT: So that would be sort of dicta.

MR. FUENTES: It's informative as to whether or not this is essential to protect that right. And it's not essential if this Grand Jury testimony was long ago, and if it's sent to a Court in support of a --

THE COURT: I got the gist. Thank you very much. Okay. All right.

This contains Grand Jury testimony. It's prior to trial. It's evidence that may or may not be heard at trial, and the other thing is, the secrecy of the Grand Jury. So this will not be allowed public access.

MR. FUENTES: Brief request, your Honor?

THE COURT: No. You are very eloquent. Honest to God, I'm learning what you are saying. And put your hand down. Someone is going to think you are a protestor. I don't want Jessica securing you.

MR. FUENTES: Redaction, Judge, an option?

THE COURT: No, you are going to say the same thing, again. All right. So moving on to number 35.

MR. WEILER: Judge, again this is a filing that relates to the same issue of Grand Jury testimony --

THE COURT: And, again, when I say this, could you help me out a little bit, if I don't mention a date -- this was filed on April 20, 2017.

MR. WEILER: That's correct, Judge. It's entitled Memo of Law, Motion to Dismiss For Misconduct in Front of the Grand Jury. For the same reasons as articulated for the two prior ones, we would ask that this not be released and be subject to the protections.

THE COURT: Mr. Herbert?

MR. HERBERT: We'll rest on our previous arguments.

THE COURT: Thank you very much.

This has reference to Grand Jury testimony, again. If it was redacted or pseudonyms, it wouldn't make sense, and for the privacy of and secrecy of the Grand jury. And, Gabriel, we will follow this up with a written order, and I'm going to incorporate maybe some of your arguments and presentations too. Thank you.

Moving on to 36, Motion to Dismiss Indictment and Other Relief, which was again filed on April 20, 2017.

MR. WEILER: Yes, Judge. Again, the same arguments, as it again relates to Grand Jury testimony, and for those same reasons would we would ask for protections.

THE COURT: Mr. Herbert?

MR. HERBERT: We would ask that -- barring the entire document is much too drastic of a measure. We would ask that this document be available because it again alleges misconduct of the government in this case, and it was

litigated in open court. And we could redact this simply by redacting the names and the -- and if there is an FBI 302, that should be redacted as well. But other than that --

THE COURT: Well, I don't know what the agreement was over in federal court. But they issued some protections also, haven't they, of what you shouldn't disclose, Mr. Herbert?

MR. HERBERT: Was there a question, Judge?

THE COURT: Read it back to him.

THE COURT REPORTER: (Record read as requested.)

MR. HERBERT: Yes.

THE COURT: All right. Mr. Fuentes?

MR. FUENTES: Thanks, Judge. We adopt those arguments, Judge. And we think that withholding the document would mean that the public would not hear why the defense believes that the top prosecutor in this county has misconduct in the Grand Jury so grand that the case should be dismissed. We think it's very much under the presumption, those types of allegations.

Secondly, the State in the briefings have been very concerned about the characterizations of parties to the case, damaging statements about people's reputations, statements by the defendant about his opinion, of his guilt

or innocence. Those are all the kind of things we find in criminal court filings very commonly, Judge. And the cases very clearly say they are not a reason to withhold allegations from the public, because somebody's reputation might be hurt. That's just unlawful.

THE COURT: All right. I don't know how much criminal law you practice in the State of Illinois, but very seldom do you find defendant's opinions in filings. All right. Even confessions are not allowed to be filed.

Okay. So -- but thank you.

All right. I will not allow public access on that.

What's the difference between the next motion to dismiss on the same date?

MR. HERBERT: It's a memorandum of it.

THE COURT: Not if it says "Motion to Dismiss the Indictment." This is your document, Mr. Herbert.

MR. HERBERT: We are talking about what the State prepared.

THE COURT: Do you have them both? There's two filings here, two motions to dismiss.

MR. HERBERT: I'm not sure what your Honor is looking at. I'm looking at what the State prepared.

THE COURT: I am looking at the documents filed on

April 20, 2017. There's two of them. They are different first paragraphs. They are different. One is signed by Mr. Rueckert and the other signed by you.

MR. HERBERT: Well, they are two separate motions.

THE COURT: That's what I said. Now I'm asking what the difference is.

MR. HERBERT: You are right. We will have the same argument.

THE COURT: All right. So you stand on your argument?

MR. HERBERT: Yes.

THE COURT: State?

MR. WEILER: Judge, I would only like to add in response to Mr. Fuentes, in their brief, I believe it was their Reply, they said that your treatment of the Lynch motion was a potential model of how it should be handled. This is how every hearing has been handled, that the parties have been allowed to file what's to be in front of your Honor, and essentially a redacted version is presented in open court. So the reason why the top prosecutor did not, and your findings were that they did not engage in misconduct, are all of record. We'd just like to point that out and stand on our previous argument.

THE COURT: Mr. Fuentes?

MR. FUENTES: Yes, sir. It's not the same thing at

all. For a reporter to cover a Lynch motion or a Grand Jury motion, not a motion in front of her --

THE COURT: Come on. Please. You guys are wondering all over the place. You are very articulate, and you are nice to listen to, but we do have a time restriction on this. We should get this done before Sunday morning. So let's not talk about things that are not germane to the topic of this hearing. Okay?

MR. FUENTES: Briefly, responding to the State.

THE COURT: They did not mention -- I sorry, you are entitled to mention Lynch. Go ahead.

MR. FUENTES: Thank you.

THE COURT: My fault.

MR. FUENTES: It's okay.

It's not the same. Actual presence, contemporaneous presence at the proceeding, at the hearing, is not a substitute for access to a sealed document where reporters don't even know what motions many times are being argued. They are trying to figure out what's being said in Court. It effects the ability to help the public understand what those motions are.

THE COURT: And God love you. And I agree with you as a general principle of law and also trial tactics, but have you compared the transcripts for the hearing on this with

the document itself. And I know they titled the document --

MR. FUENTES: I've been barred from seeing the document, Judge.

THE COURT: You have not been barred from the transcripts. If they have paragraph 1, paragraph 2, paragraph 3, that were argued orally, the one and one correspondence between one and one is not that difficult.

MR. FUENTES: It's all been argued orally and set forth in open court. All the more reason for the public to see the document. All the more reason, Judge. It's already public then.

THE COURT: All right. Fine.

The access is not allowed. And, again, there's materials in there that are not to be considered as evidence and some of those are not supported by evidence. So that's not allowed.

Moving on to No. 38, which is a second motion for a Bill of Particulars.

MR. WEILER: That was filed April 20th.

THE COURT: Thanks. I appreciate that. I'm sorry. Go ahead.

MR. WEILER: April 20th of 2017 that was filed. Judge, these again largely relate to discovery issues.

They also present a potential defense that the defendant will raise. As such, Judge, at this critical juncture in the case, we would ask that they not be released as they would have a probability of effecting the parties' rights to a fair trial, and so we would ask that they not be released.

THE COURT: All right. Mr. Herbert?

MR. HERBERT: Judge, first and foremost, it's important to note that the People's response to our Bill of Particulars was not objected to by the State, ironically, in light of that argument, and this Court allowed that access. So that fact alone absolutely warrants the release of this document.

And, second of all, I'm not sure how the prosecutor knows the defendant's defense. But certainly asserting our defense as a reason not to include this document is certainly of no merit.

And thirdly, this is a document that contains nothing but legal argument and it has to come in, in light of the earlier rulings. Thank you.

THE COURT: All right. Mr. Fuentes?

MR. FUENTES: I adopt the defendant's argument. And I'd add that in the State's brief it said the reason to withhold this information was set forth in the defendant's

legal argument and defenses that were being claimed that will be based on testimony. Judge, that's an insufficient basis to say it's outside the presumption or to make any findings in this case, and they already released Document 13. It's fundamentally inconsistent to say this is not within the presumption of 38 while 13 was. I'd say it's been waived.

THE COURT: I got a mix up in the stack here. Let's go on while Tony grabs that document.

I'm looking at 39, Defendant's Supplemental Motion to Waive Appearance.

MR. WEILER: Judge, that was filed April 20, 2017. It's similar to Document 6 and 8, which you have allowed in, but we would stand on our argument on those motions.

THE COURT: Mr. Herbert?

MR. HERBERT: We will stand on the argument we made, which you allowed the documents in.

MR. FUENTES: No reason not to allow in 39, if you allowed in 6 and 8.

THE COURT: Why don't you agree with them and say, Judge, you made a wonderful motion and decision?

All right. Here -- I'm sorry you can't video this -- but these are -- well, with the exception of the police report -- they are mostly attachments from the

media. So the media actually has absolute control over what they have produced. So, I mean, this is out in the public already. So certainly, as far as The Supplemental Motion to Waive the Defendant's Appearance, as far as the police reports -- and then I'd like the attorneys -- and you all are professionals -- to dedact the police reports, and any information -- the press papers go in already, because they are published by the press. And that's just about it. I just wanted the police reports out of there. So that is allowed with the dedactions, as I said. So we'll put that over here. I'll put that in a special pile.

All right. Getting back to The Bill of Particulars. Let me take a look at this. All right. The Defendant's Motion For Second Bill of Particulars is allowed public access to that, and then 39 is allowed with the dedacted portion.

Mr. Weiler, No. 40?

MR. WEILER: Yes, your Honor. That's a motion in limine to limit the scope of the Kastigar hearing filed April 20, 2017.

Again, Judge, this relates to the careful litigation of these compelled statements under Garrity. The document does list potential trial witnesses, as well as potential evidence that has not been ruled as

admissible. Any redaction would leave an unintelligible document. These matters were litigated in a public hearing. The reasons for your findings are of record. We would ask that the protections remain.

THE COURT: Mr. Herbert?

MR. HERBERT: I am fine if the State doesn't want to release this. If the Court wants to -- chooses to release --

THE COURT: Let's hear legal argument about this. That's what you are representing your client.

MR. HERBERT: We're fine with that. However, the State's reasoning, I don't think, with all due respect --

THE COURT: Well, then give me some legal arguments why you think that isn't pertinent.

MR. HERBERT: Because first and foremost, the prosecutor indicated that these matters were litigated in open court. So what would be the basis of barring this document if it was litigated in open court?

Second of all, limiting an entire document under the umbrella of Garrity is certainly not what the courts have reasoned an appropriate restriction. There are certainly many ways there can be redactions. But like I said, if the State doesn't want this to go back, I don't care whether it goes back or not.

THE COURT: Mr. Fuentes?

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

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

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

All right, Mr. Weiler?

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

apply to the extrajudicial statements. However, your Honor, they are a guide to what types of materials could be harmful to the parties' rights to a fair trial. So we did utilize those as a guide. And we would ask that you deny access to that document.

THE COURT: Mr. Herbert?

MR. HERBERT: Judge, when we're talking about harm to a party because one party is being critical, that is the most -- with all due respect --

THE COURT: Be civil, Mr. Herbert.

MR. HERBERT: I'm going to. But that is not an appropriate argument when we are talking about a criminal case in which a criminal defendant is authorized or is entitled to a Sixth Amendment right --

THE COURT: Not a criminal defendant. A defendant charged with a criminal offense. All right. Go ahead.

MR. HERBERT: Judge, we have to be looking at the rights of the criminal defendant here, and if we're concerned about -- the prosecutor is concerned about us making allegations against them. Yes, we did. Those should be public. We did that because the prosecutors made allegations and filed charges against our defendant. But with respect to this document, Judge, you allowed the prosecutor's document to go in that related to this

document, so I don't see why we need to argue at this point.

THE COURT: All right. That logic is sometimes good, sometimes bad. Certainly if a prior document provides a segue in which rebuttal should be handled or a counter point should be handled, just because somebody files a document, that doesn't mean that someone can go off on a tangent on something that's not germane.

All right. I will allow this in. No. 47 is allowed --

MR. HERBERT: 43, right, Judge?

THE COURT: I'm sorry, my mistake. Yes, 43, correct.

All right. Number 44?

MR. WEILER: Your Honor, that is a response to a motion to limit scope of Kastigar hearing filed May 11, 2017. Again, we would object to the release of this document as it relates to the sensitive issues surrounding Garrity and the statements. It lists potential witnesses and potential evidence that has not been ruled as admissible. There are discovery documents that are attached that have not been released to the public.

THE COURT: Well, Mr. Weiler, can you be more specific when you say that?

MR. WEILER: I believe that there's --

THE COURT: What exhibits?

MR. WEILER: Judge, there's General Orders from the Chicago Police Department.

THE COURT: There's what, I'm sorry?

MR. WEILER: General Orders from the Chicago Police Department.

THE COURT: Yes, but those are online. Why don't we do this, let's pass this and we'll come back to it later. Okay?

All right. Moving on to -- we're moving on to the next one, Dan. We'll come back on this one.

My understanding, this would the one filed on May 11th, People's Combined Response to Defendant's Motion to Dismiss the Indictment and Motion to Dismiss the Indictment and/Or Other Relief.

MR. WEILER: Judge, again, the State would object to the release of this document. There are -- you did have to address factual allegations made by the defendant that could be potential evidence but has not been ruled as admissible at this point. There is a quote from the Grand Jury transcript, as well as comments on the Grand Jury testimony. Based on your earlier rulings about Grand Jury testimony, we would ask that these be subject to protections as they cannot be actually -- they can't be

redacted in a way that would leave an intelligible document. As such, we would ask for the protections to remain.

THE COURT: All right. Mr. Herbert?

MR. HERBERT: Judge, again, there was no legal basis whatsoever presented in that argument that would allow this document to be withheld from the press. Certainly the fact that our motion was withheld, that implied the same argument applies. Judge, this document, it's -- this is not potential evidence like the State said. What we have here, Judge, and I'm seeing a trend, and I'm seeing --

THE COURT: How about paragraph 10? Without articulating it, take a look at it.

MR. HERBERT: Do you want me to --

THE COURT: No, I told you don't articulate it. This pertains to misconduct by a federal agent. All right. And you've got the name in there.

MR. HERBERT: Right. And that's more of a reason why -- our motion absolutely should be allowed to be presented. It seems like the Court is denying the introduction of our motions challenging the sufficiency of Indictments and evidence and misconduct of the parties, the Court's denying it because it may prejudice the prosecutors.

THE COURT: Maybe the Court's denied it because I've heard the motions and I've heard the arguments on it, and there are allegations in here not supported by evidence. And you had a right to call witnesses and you didn't.

MR. HERBERT: Judge, we were prevented, first of all, from putting in our arguments on this, Judge. And you could look at the record on that.

THE COURT: I could. Tell me what page on that one because that's another one you have mentioned.

MR. HERBERT: Judge, I have them all highlighted so --

THE COURT: Who is going to do this? Delegate this while you are talking. When you say these things, you have to be able to present facts that support these conclusions. All right. So who is going to look up that page?

MR. HERBERT: I don't know, Judge. I'll have somebody do it.

THE COURT: Go ahead. If it's not supported by fact, it's not a fact.

MR. HERBERT: Judge, the point is, that the defendant was not given a full opportunity to argue his motions. The Court denied the motions with very little analysis, and it seems now that the Court and the prosecutors want to bar that information from being seen by the press for any number of reasons, but one of which may be that they

actually -- they presented facts that certainly would cause conduct into question. And, Judge, with all due respect, I don't think it's enough for the Court to say, well, I didn't find any evidence. Well, we did, and we attached it.

THE COURT: Well, it better be appropriate for me to find out when I make rulings or what will I make my rulings on?

MR. HERBERT: It's all in there, Judge. But we haven't been allowed to present it all. That's our point.

THE COURT: Well, this was submitted under seal and I did get a chance to look at it.

MR. HERBERT: I would hope you got a chance to look at it.

THE COURT: Well, then you saying I didn't, you know, there wasn't a chance to present it, you filed it. It was presented.

MR. HERBERT: Presented, but we didn't get a chance to argue it.

THE COURT: Excuse me. I'm listening to what you are saying, and maybe I'm reading too much into it. It has been presented to the Court. That's why it's been filed.

All right. Mr. Fuentes?

MR. FUENTES: To the extent we heard an argument, and

on page 13 of the State's brief, that the defendant's allegations in that document were baseless, that they were irrelevant, or at least characterized as such, that there was an analysis of statutes and caselaw, all of that is lawyers' arguments, Judge. All of that is subject to presumption and can't be withheld absence of finding. And if there is specific Grand Jury material, I think the Judge was maybe referring to paragraph 10 of that document, I respectfully request permission to review it because I have not seen it.

THE COURT: All right. Just so long as -- it was a Motion to Dismiss the Indictment and/Or Other Relief Under Section B, Paragraph 10.

All right. With the dedaction of -- redaction -- excuse me -- of the names of the witnesses and of statements supposed to be made by those witnesses, I will allow that to be access given, but it has to be redacted. The defense and prosecution will do that.

MR. HERBERT: Judge, if I may?

THE COURT: About what?

MR. HERBERT: About your ruling. We're not questioning that ruling. But in light of what the Court just said, we would renew our motion to have our Motions to Dismiss the Indictment released subject to the same

redactions that the Court just mentioned. It's completely prejudicial --

THE COURT: And you are right, I should be consistent. All right, I'm not allowing it. Thank you.

MR. HERBERT: Thank you.

MR. FUENTES: Your Honor --

THE COURT: No, we are moving on. Thank you, Mr. Fuentes. Thank you Mr. Herbert for throwing it out --

MR. FUENTES: I was wondering if my request was denied? For the record the request to review paragraph 10.

THE COURT: Oh, yes, denied.

MR. HERBERT: Judge, just so the record is clear, our motions to dismiss the Indictment based upon memorandum --

THE COURT: I'm not repeating this. If you have problems retaining information over a period of time, even over a short period of time, let me know, I'll give you some assistance. Otherwise, talk to your colleagues. What do you think they are there for.

All right. There will be a short recess.

(Whereupon a recess was taken, after which the following proceedings were had:)

THE CLERK: Recalling Jason Van Dyke.

THE COURT: All right. Are we all set? All right. Proceed.

MR. WEILER: Judge, I believe we are on document No. 58, a brief in support of People's Garrity/Kastigar hearing position, filed December 7, 2017. Your Honor, this is a document the State's trial team has not had access to so we haven't been able to review it. Based on the title of it, Judge, it again relates to the compelled statements under Garrity, which do need to be carefully litigated and carefully protected. Based on that, we would ask that the protections remain in place.

THE COURT: Mr. Herbert?

MR. HERBERT: Judge, we'll rest on our previous arguments on the Garrity motions.

THE COURT: Mr. Fuentes, I know you are in a little bit of the black, not being able to see what these things are, but go ahead and present your input.

MR. FUENTES: Judge, yes, with regard to Document 58, Judge, according to my outline here, we do adopt the position we set forth earlier as to Garrity materials. We think all of those motions are subject to presumption and that no basis exists to find that any of them should be withheld.

THE COURT: Thank you very much.

I just want to enlighten everybody. This is what the brief looks like (indicating). It's approximately a

half-inch thick, but if we delve down into it, then it becomes maybe about 3/16th of an inch or an 8th of an inch thick. Most of this is caselaw concerning this. The other thing is a timeline concerning IPRA and their statements. This could be very influential because it could or could not be evidence. I'm not going to allow public access to that.

All right. No. 59, please?

MR. WEILER: Yes, your Honor. This is the Response to the Motion to Determine Actual Conflict. There is a mistake on our exhibit, your Honor. That should have been -- the real filing date on that is December 7, 2017.

THE COURT: Hold on a minute. Do you have that, Mr. Fuentes?

MR. FUENTES: Yes, Judge.

THE COURT: I mean, the change of the date?

MR. FUENTES: Yes, Judge.

THE COURT: You got a copy of this, as far as the list?

MR. FUENTES: I do, Judge.

THE COURT: Okay, good. All right. I just wanted to make sure.

Proceed, Mr. Weiler.

MR. WEILER: This does list potential witnesses and

relates to potential conflict with defense attorney. It also discusses potential IPRA interviews. Based on that, we would ask that the protections remain in place.

THE COURT: Mr. Herbert?

MR. HERBERT: Judge, I'll adopt my previous arguments and just add additionally for consistency sake, this motion was litigated in open court and the Court obviously used that as a basis to allow many of the State's documents in over our objection.

THE COURT: All right. Mr. Fuentes, please?

MR. FUENTES: Your Honor, just to drive this point home, as to this document and several others, the defense counsel representing the defendant and the tip of the spear as to the defendant's right to a fair trial, doesn't object to the release of any of these documents. And I think the Court should consider that in terms of whether or not the Fair Trial Right is at risk here. Because the finding the Court has to make, you have the presumption applying as it does here, is that there is a substantial probability that the defendant's rights will be prejudiced and that reasonable alternative, including voir dire, wouldn't cure it. And, again, there's just no basis even been articulated for the Court to make those kinds of findings. The document should be released.

THE COURT: All right. Mr. Herbert, Exhibit A, why don't you give us a little insight as to what that is -- I'm sorry, Exhibit B.

MR. HERBERT: It would be Exhibit B?

THE COURT: Exhibit B, please.

MR. HERBERT: Exhibit B looks like, appears to be the Collective Bargaining Agreement between the City of Chicago and the Fraternal Order of Police that was in effect during the time frame.

THE COURT: All right, you have no objection to that being released, right? You pled it.

MR. HERBERT: The entire document?

THE COURT: You are talking B.

MR. HERBERT: B, no, it's a public record.

THE COURT: Okay. That part I have no problems with being given access to.

These are all concerning -- not most -- all of this in Exhibit B is the Bargaining Agreement and some of the negotiations that went on there, is that correct?

MR. HERBERT: Yes.

THE COURT: Okay. That is about an inch thick. Certainly that will be an enthusiastic reading. That will be released.

State, again, reiterate, are there any specific

parts of this document that you really object to?

MR. WEILER: Judge, Exhibit A is a communication between Mr. Herbert and his client. I would assume that he wouldn't want that to be released, and we do have a duty to protect the accused's rights as well, as well as the parties' right to a fair trial. I don't have specific spots where there are witnesses's names.

MR. HERBERT: We would object to Exhibit A coming in obviously.

THE COURT: What is the basis?

MR. HERBERT: It's attorney-client.

THE COURT: All right. I will allow access to everything except Exhibit A.

MR. FUENTES: Your Honor, may I be heard briefly?

THE COURT: Yes.

MR. FUENTES: As to Exhibit A, any attorney-client privilege is limited to a confidential communication between an attorney and client. Once that communication is disclosed to the Court, outside the privilege, it's waived and no longer applies. It should be released.

THE COURT: Mr. Herbert?

MR. HERBERT: I make my same argument, Judge. I still believe it's attorney-client.

THE COURT: All right. It is pled. But in this

specific case, it will be, for the whole document.

THE COURT REPORTER: I'm sorry, your Honor. I couldn't hear you.

THE COURT: All right. Both documents will be released with no exceptions.

MR. HERBERT: Over defendant's objection to Exhibit A?

THE COURT: You shouldn't have pled it then.

MR. HERBERT: If that's the case then, why aren't my other pleadings coming in?

THE COURT: Oh, come on. We are dealing with one thing at a time. I don't want to get you too confused. I have a feeling we're going to go back on a motion to change of venue.

All right, Mr. Weiler?

MR. WEILER: Your Honor, we are now on to document No. 61, Motion to Determine Actual Conflict. Again, the date is wrong on that document, Judge. It should be September 7, 2017. That document does list witnesses' names --

THE COURT: I'm sorry, read this again, 61. November is it?

MR. WEILER: No, I'm sorry, Judge, September 7th.

THE COURT: Okay, September 7th instead of September 21?

MR. WEILER: Right.

THE COURT: Okay. Go ahead, proceed, please. Thank you.

MR. WEILER: Yes, Judge. It includes witness names and statements, witness testimony before the Federal Grand Jury and the specific dates where transcripts from those proceedings were attached as documents, as exhibits, I should say. Based on that, Judge, we would argue under the Grand Jury protection, the Federal Grand Jury protection, we would ask that this document be protected.

THE COURT: Mr. Herbert?

MR. HERBERT: We'll rest on our previous argument.

THE COURT: State, you can't argue about the Indictment, can you, because that's certainly been released already, right?

MR. WEILER: No, Judge. They already have that. That's been released.

MR. FUENTES: If the objection is, and if I'm understanding --

THE COURT: No, no. I'm just inquiring right now. That is certainly going to be released as part of that. So I want to examine the rest.

Go ahead, Mr. Fuentes.

MR. FUENTES: We believe this document, like 59,

should be released. As to the prosecution's statement that there are three Grand Jury transcripts, June 24th, June 25 and July 1 of 2015, our position is the same, and we think those get put in the public realm. They become subject to public disclosure. I know the Court disagrees with that. So our plea to the Court is, if the Court releases the document and is inclined to withhold anything, that they could redact those three transcripts from release without withholding the rest of the material. The AT case supports that, Judge.

THE COURT: Anything else? All right.

I agree with Mr. Fuentes, those specific references will be dedacted. The rest of the documents will be allowed access.

Mr. Weiler?

MR. WEILER: Your Honor, 65 is Reply to a Motion to Determine Actual Conflict, filed September 28, 2017. Again, Judge, this lists potential witnesses. It associates defense counsel with these potential witnesses. It could effect the parties' rights to a fair trial the more information about those associations that are out there. So we ask that it be protected.

THE COURT: Mr. Herbert?

MR. HERBERT: I'll rest on my previous argument.

THE COURT: All right. Mr. Fuentes?

MR. FUENTES: It should be released as were 59 and 61, Judge.

THE COURT: Exhibit A is, again, Grand Jury.

All right. Concerning the Reply to the Motion to Determine Actual -- the State's Reply to the Motion to Determine Actual Conflict, again, Exhibit A, the Grand Jury Indictment and the charging document and also the list of charges, that certainly -- that's already out there. But that would be capable of public access. As to the other exhibits, there's testimony which may or may not be used there. Then going on, there's also caselaw which certainly anybody can have access to that, because these are published opinions and they cite different cases.

All right. The pleadings themselves, too, mention names of potential witnesses and references. So I am not going to allow the rest of the document to be accessed by the public or the press. The reason being, list of witnesses, potential testimony, which may or may not be evidence at the trial. So 65 is allowed in part, access denied in part.

All right. Going to the next page.

MR. WEILER: Your Honor, there's one more, 66.

THE COURT: That's the next page.

MR. WEILER: Oh, I'm sorry.

THE COURT: All right. Articulate what that is.

MR. WEILER: 66 is defendant's offer of proof of Kastigar witnesses, that was filed on October 4, 2017. Again, Judge, this is a Garrity document, so the trial team has not had access to this document so it's hard for me to speak to the contents. But it certainly sounds like an offer of proof to witnesses who could testify at trial. Additionally, it's the sensitive subject of Garrity, which has been carefully litigated for the defendant's protection.

THE COURT: Mr. Herbert?

MR. HERBERT: Judge, I'm not sure I need to argue much on this. The Court has already argued the People's motions related to Kastigar into evidence. So based on that, there's no justification why this document should not be given the same access, otherwise it would prejudice the defense additionally.

THE COURT: I'm sorry, Mr. Fuentes, go ahead.

MR. FUENTES: We also adopt our earlier arguments, Judge. At least as I understand Kastigar, the issue is whether certain persons may have been tainted with Garrity information. I haven't seen the motion documents so I don't know, but those are issues that are legal issues.

Yes, they contain some factual discussion, but those are fully within the presumption. There's no showing that the release of those, that information is going to create a substantial probability, that's the high standard, of effecting the defendant's trial rights or there's something like voir dire or other tools at the Court's disposal would have addressed that, and those findings are necessary before this stuff can be withheld. So we object.

THE COURT: Thank you.

All right. There's conclusions and opinions in here concerning evidence. I'm not going to allow access to the public and press.

MR. HERBERT: If I could briefly be heard?

THE COURT: You just said something. Sit down.

MR. HERBERT: I would like to make a record, Judge. Based on the ruling, Judge.

THE COURT: Well, do that in writing, please.

MR. HERBERT: Will that be open to the public as well, the writing?

THE COURT: You want to violate the Decorum Order again, go ahead. I will go back to the January 18th day where we still have a Rule to Show Cause. Go ahead.

MR. HERB: Judge, my concern here is --

THE COURT: All right. Come on. Sit down. I told

you to respond in writing. Of course it's under the Decorum Order. This is under the Decorum Order.

Moving on, please.

MR. WEILER: Your Honor, filing 74 is a motion to quash subpoena to a witness. That was filed on November 3rd of 2017. Again, Judge, this was handled by our Garrity team. We don't have access to this particular document. We are going to take, as we have, we are taking a very careful approach to Garrity-related statements. They do have a substantial probability of effecting the defendant's rights.

THE COURT: Mr. Weiler, at this time you have all your independent evidence of Garrity preserved and documented, is that correct? Meaning there is no possibility of contaminations of your case in chief by any Garrity material, right?

MR. WEILER: Yes, Judge.

THE COURT: Go ahead, Mr. Herbert.

MR. HERBERT: We -- first of all, we would agree or we would disagree with that statement.

THE COURT: Could you just clarify what you said.

MR. HERBERT: Sure. We disagree with what the prosecutor said when they said there's no evidence that there was a tainted investigation. As we've laid out in

our Garrity motion, which is not being allowed in, we've laid out several factors which indicate that there clearly was prejudice.

THE COURT: You made all of your objections concerning your Garrity motions, and they will be duly noted. Go ahead.

MR. HERBERT: I guess I have nothing else to argue.

THE COURT: Come on, about this. Pay attention. What's your position on this?

MR. HERBERT: We take no position -- Judge, you denied our subpoena, so I -- we don't take a position on it.

THE COURT: Thank you. Mr. Fuentes?

MR. FUENTES: Judge, I believe 74 was a motion that journalist Jamie Kalven filed. There's no basis to say that that's outside the presumption or to withhold it. Trying to quash a subpoena upon a journalist to appear in a criminal case --

THE COURT: Actually we should have Brendan argue this one. He was there.

MR. FUENTES: He certainly was.

MR. HEALEY: Thank you, your Honor. I would agree with Mr. Fuentes, this is Mr. Kalven's motion, so I don't see how it could contain material that would be subject to the presumption in any way. Obviously the defense hasn't

objected. So on that basis, I believe there should be access. It should come in.

THE COURT: All right. Access is allowed.

THE COURT REPORTER: I'm sorry, your Honor?

THE COURT: Access is allowed.

Okay, moving on to 76.

MR. WEILER: Yes, your Honor. 76 is a Motion to Dismiss For Prosecutorial Misconduct. It was filed on November 6, 2017. We would be objecting to the release of this document as there are unsupported factual claims that have not been ruled as admissible evidence interspersed throughout this document, as well as the type of material that has been identified by the Rules of Professional Responsibility of having a substantial likelihood of effecting the parties' right to a fair trial. As such, we would ask that this document be protected.

THE COURT: Mr. Herbert?

MR. HERBERT: Judge, this document -- first of all, the basis that the State gave does not even come close to supporting a reason why it should be withheld. This document --

THE COURT: Mr. Herbert, so we can cut to the chase. A tremendous amount of this stuff is what's been in the press, isn't it?

MR. HERBERT: Some is. Some isn't.

THE COURT: Then you tell me -- I characterize it as a tremendous amount. You tell me how much is and how much isn't.

MR. HERBERT: I'll go through every exhibit. Exhibit 1 was in the press. Exhibit 2 --

THE COURT: If there's 1 through 5, you don't have to articulate each number.

MR. HERBERT: Exhibit 2 was not in the press. Exhibit 3 was on a public website, but not in the press, as far as I know.

THE COURT: Well, public websites are considered, if they are proper persons, to be journalists also.

MR. HERBERT: Exhibit 4 was not in the press. Exhibit 5 was not in the press. Exhibit 6, 7, 8, 9, 10, were not in the press. Exhibit 11, I don't know if this was in the press or not, Judge. It's the newest release. Exhibit 12 was not in the press. Exhibit 13 not in the press. 14, not in the press. 15, not in the press. 16, not in the press. 17, not in the press. 18, not in the press, but it is a campaign propaganda article sent out by Anita Alvarez to various voters. I don't know if that was in the press. 19 was not in the press. 20, not in the press. 21, not in the press. 22, not in the press. 23,

not in the press. 24, not in the press. 25, not in the press. 26, not in the press. 27, not in the press. 28, not in the press. 29, not in the press.

So based on that, Judge, we would say that this document certainly has not been reported on, because the press has been precluded from seeing these documents. Moreover, this motion was litigated in open court. So based on the Court's previous rulings with respect to the People's motions that were allowed in over the defendant's objections, this document has to come in based on that analysis. But more to the point, Judge, this is the type of document that is absolutely required to come in to protect the defendant's Sixth Amendment rights. In this case, the prosecutor said that there was unsupported factual claims made in here. That's the opinion of the prosecutor. We are allowed to get out our supported claims for our arguments. The State also stated that the Court ruled that some evidence was inadmissible. That was not the ruling of the Court. The Court simply denied our motion and said there wasn't a scintilla of evidence that this prosecutor engaged in misconduct. We would say that it's irrelevant whether or not this prosecutor engaged in misconduct. But more to the point, Judge, this document pertains to the State's Attorney's analysis in how it did

not warrant first degree charges. Certainly that is information that the defendant is allowed to have public access to. It contains opinions and misstatements by the prosecutor in this case with respect --

THE COURT: Now, here, this is a 2017-case, this is 17-4286. So you are saying the prosecutor -- you are alleging -- you did allege -- which I found there wasn't a scintilla of evidence of prosecutorial misconduct. When you say this prosecutor, are you talking about Mr. McMahon?

MR. HERBERT: No, I'm talking about Anita Alvarez.

THE COURT: Well, that's not that clear because I had to clarify it.

MR. HERBERT: It's clear in the motion though, Judge.

THE COURT: Pardon?

MR. HERBERT: It's certainly clear in the motion who we're referring to. I mean, I understand --

THE COURT: You are up there talking right now, and the press doesn't have the motion. Come on.

MR. HERBERT: So then, Judge, can I continue briefly?

THE COURT: Go ahead. Please.

MR. HERBERT: My point is that this document shows that THE PROSECUTOR continually aired publicly her opinions and, quite frankly, misstatements of the evidence with respect to my client's actions in this case, Judge. We had

not --

THE COURT: Not this case. You are talking about -- Ms. Alvarez did not bring this Indictment.

MR. HERBERT: Judge, it doesn't matter. That's a difference without a distinction. It's a distinction without a difference.

THE COURT: Sure, it is.

MR. HERBERT: Judge, Mr. Van Dyke has been precluded from responding to any of the negative opinions, misstatements of the evidence, and how this document shows that THE PROSECUTOR committed unethical acts in finding --

THE COURT: You better start naming the people when you say "the prosecutor" or I am going to sit you down. All right. Because there could be a misinterpretation, and you shouldn't slander someone's reputation. Are you saying that Mr. McMahon made any statements after the Decorum Order was issued?

MR. HERBERT: No.

THE COURT: All right. Then start saying who you alleged made these statements.

MR. HERBERT: The first prosecutor in this --

THE COURT: They don't have a name?

MR. HERBERT: Yes, Anita Alvarez, which is clearly laid out in the motion, Judge. We presented substantial

evidence that the prosecutor committed unethical acts by bringing out information, reporting it in the press, some of it false, many of it opinions and misstatements, and that is the basis for our motion, Judge.

THE COURT: Thank you. Have a seat. We're talking about whether it should be disclosed or not.

Mr. McMahon, all right, did you credit now -- you've heard this, and we're relitigating this -- this would be the fourth motion to dismiss the Indictment -- you brought a separate Grand Jury; is that correct?

MR. MCMAHON: I did, Judge, yes.

THE COURT: You have nothing to do with that, the State's Attorney, Ms. Alvarez, who was the State's Attorney prior to this; is that correct?

MR. MCMAHON: That's absolutely correct, Judge.

THE COURT: So this motion to dismiss the Indictment of something that's not before the Grand Jury is really baseless. Not allowed.

I'm sorry, Mr. Fuentes. We are moving on.

MR. FUENTES: So your Honor --

THE COURT: I said we are moving on. All right.

There was not one scintilla of evidence of prosecutorial misconduct. That has been reported by your outstanding clients/journalists that are here today.

There's things that can be slanderous and you don't want to waive rebuttal or privilege. All right. Move on to 71 -- 77.

MR. HERBERT: Judge, if I could --

THE COURT: 77, please. 77, Mr. Weiler --

MR. HERBERT: Judge, if I could respond --

THE COURT: 77, Mr. Weiler.

MR. HERBERT: Judge, if I could respond --

THE COURT: You can sit down right now. You are not on the Appellate Court. You are not responding to me. Sit down -- John -- you want to sit down?

MR. HERBERT: I am going to make a record. I'm being precluded from arguing.

THE COURT: Sit down right now. What's the matter with you? Show some respect. I'm serious. You are on the edge right now.

MR. WEILER: Your Honor, Motion 77 --

THE COURT: John, get over there. All right.

MR. WEILER: -- is a motion in limine to admit Lynch material. It was filed on November 6th, 2017. All of these motions related to Lynch, I did file multiple proffers on it, Judge. It is an example of when they have filed stuff that they know is not admissible, so they narrowed it down as they got closer to the actual motion,

but, again, your Honor --

THE COURT: Again, Mr. Weiler, you are still saying this is potential testimony that may or may not be evidence and also there's names -- the names of the witnesses were presented on the motion, is that correct?

MR. WEILER: That's correct, your Honor. And as the intervenors have indicated, the way that you handled this, is the way that you have handled every motion, is that the protected material was not released in the public, but the --

THE COURT: Mr. Weiler, if they agree with me once, don't hold it against them.

MR. WEILER: All right. Yes, Judge.

THE COURT: I'll bar that from now on.

All right. Mr. Herbert?

MR. HERBERT: Judge, with respect to your previous rulings you indicated that --

THE COURT: Mr. Herbert, please on 77, either pay attention or I'm going to have one of your colleagues start arguing this stuff. All right.

MR. HERBERT: Judge, with respect to 77, in light of your previous rulings where you've allowed the State's motions --

THE COURT: You want the Lynch witnesses to be

published, the names of them?

MR. HERBERT: Judge, I'm going to explain all that. No, the Lynch witness' names absolutely should not be published, but the testimony was aired in the proffered testimony --

THE COURT: There was no testimony. There was proffers.

MR. HERBERT: Proffers --

THE COURT: Are not testimony.

MR. HERBERT: -- they were aired in open court. So I'm just saying if the Court is going to be consistent on its rulings with respect to the State's positions that have already been litigated, it should certainly be consistent with the defendant's positions on issues that have already been litigated.

THE COURT: Mr. Fuentes?

MR. FUENTES: Your Honor, as far as the Lynch material is concerned, we had a court hearing in which the public heard about all of the substance of those allegations the People made against Laquan McDonald.

THE COURT: Not on this motion, though.

MR. FUENTES: Well, Judge, I haven't seen the motion, so it's difficult to argue about it.

THE COURT: It's still in the record, and there's

thousands of pages, more than a thousand pages of transcript. So that's there. If you haven't seen it or not is because you haven't looked. You do have the transcript?

MR. FUENTES: I have a transcript of a hearing, Judge.

THE COURT: You have all -- you have all -- more than a thousand pages of transcript?

MR. FUENTES: I think particular hearing was only maybe a hundred or so.

THE COURT: What date was that?

MR. FUENTES: It was January 18th of 2018, Judge. It begins "Lynch Motion."

THE COURT: And then number 77 was filed on November 6, 2017. All right. Was this the last subsequent amended Lynch motion -- no.

MR. WEILER: No, Judge. There's many more.

THE COURT: Right. So we didn't have a hearing on that because they had the list of witnesses out in the open. It wasn't followed, the Decorum Order, and these people could have gotten in major trouble if I didn't catch that, or they could have even been physically harmed. All right. So that has not been litigated. My understanding there could be a misdirection on this.

MR. FUENTES: All right. If I'm understanding the

Court correctly, my understanding is that there were 48-some witnesses in the beginning. Then there were 25 --

THE COURT: We can get to the substantive arguments when we get down to where you are talking about, and you have documentation, which I do appreciate. This was -- listen. You didn't file it under the Decorum Order. There's names of witnesses. There's proffers. And if you looked at the proffers, which you didn't get a chance, it was somebody else told somebody this. There was no direct contact. That's why that was not allowed. All right. It was completely almost hearsay on hearsay. So that's one of the other reasons.

We'll move on, and I'll give you extra time on the real one when we have the presentations.

MR. FUENTES: Thank you, Judge.

Our point briefly on this as well?

THE COURT: Yeah.

MR. FUENTES: Is that the remedy is not to deny news coverage. It's to make the appropriate narrowly tailored findings.

THE COURT: Nobody is denying news coverage. It's kind of frustrating when it looks like there's different languages here, and there's over a thousand pages. And Megan has reported on this, outstanding article, and so has

Andy before he hurt his back and the broadcast media. So nobody has been holding anything back.

Again, now, let's go back to 8,100 articles by major newspapers written on this. 1,120,000 Google hits. So your interpretation of stifling the press is a lot different than mine. So that's not allowed. Because we didn't even get to that point.

All right. Moving on.

MR. WEILER: Your Honor, filing 78 is the People's Motion to Quash Subpoena of Jamie Kalven. Again, that was filed by the Garrity team. We have not had access to that document. You've ruled on documents relating to it.

THE COURT: Go ahead.

MR. WEILER: And so to be consistent with our position, Judge, we would be objecting, but we don't know the exact contents of that document.

THE COURT: All right. Mr. Herbert?

MR. HERBERT: Judge, just briefly. The Court denied our response to this and our subpoena and I don't know how this can come in.

THE COURT: All right. Mr. Fuentes?

MR. FUENTES: I'm deferring this to Mr. Healey.

THE COURT: Thank you. Good, Brendan, you were there.

MR. HEALEY: Your Honor, you did allow access on 74.

This is also part of the subpoena. So the tangential relation to Garrity is not a basis for denying this. This was argued extensively in open court on December 7th.

THE COURT: Thank you, Brendan. That's what I was trying to get across to everybody. Stay here. I like what you are saying.

MR. HEALEY: I was going to quit while I was ahead. It was argued extensively in court. Your Honor also granted the motion to quash. Consistent with what you decided on 74, 78 should come in as well.

THE COURT: All right. I would allow access to this. Mr. Kalven wrote his own story being the individual witness. There's caselaw involved in this. It has been litigated in open court. So that's allowed.

79?

MR. WEILER: Your Honor, 79 is our answer to discovery. It's essentially a list of potential witnesses and potential physical evidence by the State. The Court in Kelly made it very clear that a witness list and discovery is not subject to presumption, and so we would ask for protections of that.

THE COURT: Mr. Herbert?

MR. HERBERT: We do not object to this document remaining under seal.

THE COURT: Thank you. Mr. Fuentes?

MR. FUENTES: Our position is again, it's not discovery once it has been filed publicly with the Court as it has been done here.

THE COURT: Okay. Thank you.

All right. It is not filed publicly. Access is denied. This is discovery. And this is on all four points of People versus Kelly.

Moving on.

MR. WEILER: Your Honor, would it be all right to take 80 and 81 together?

THE COURT: Any objections?

MR. FUENTES: Not on behalf of the intervenors.

THE COURT: Okay, catch up on it. Go ahead.

Dan, what about you, can we take those together?

MR. HERBERT: No objection.

THE COURT: And then Gabriel, let me know when you are ready.

MR. FUENTES: We don't have any objection to discussing 80 and 81 together. I'd like to defer to Mr. Healey.

THE COURT: Thank you. Proceed.

MR. WEILER: Your Honor, those again relate to the motion to quash subpoena to Jamie Kalven. 80 was filed

November 7, 2017. 81 was filed on December 4, 2017. Again, Judge, we don't know the content of these filings as they were handled by our Garrity team, so we listed them in abundance of caution.

THE COURT: Thank you. Mr. Herbert?

MR. HERBERT: Judge, I don't know if I need to argue it based on the Court's previous rulings where the Court has allowed all the motions by the People and the journalists to come in. I don't know how this document could not come in. But I would state that Exhibit No. 9 should be redacted as it contains an FBI report. But other than that, this document should come in.

THE COURT: It's marked unclassified.

MR. HERBERT: It is, Judge. But I believe there's a protective order from the Government in that case.

THE COURT: Mr. McMahon, do you think this would be covered by that?

MR. MCMAHON: It would be -- yes, Judge, it would be protected by that protective order.

THE COURT: Okay. We'll abide by that. The Federal Government has been helpful after the initial thing.

All right. So with the exception of index No. 9, that would be allowed. And then, Mr. Kalven -- I'm sorry, Brendan, come on. You are on a roll. Go ahead.

MR. HEALEY: Your Honor, if I may, just one question with regard to Exhibit No. 9, was that one of the ones that was shown on the screen by Mr. Herbert in the December 7th hearing?

MR. HERBERT: I can't answer that question. I don't know.

THE COURT: Well, here is the whole thing, if he was under that agreement with the Federal Government not to disclose that and it was under the Decorum Order, I don't think -- I don't know if you were able to use this at that time. I am not in recollection of that. I don't want to compound, then he might get charged twice, all right, Brendan, with a violation of the federal law, the protection order.

MR. HEALEY: We are not looking to get Mr. Herbert in trouble, your Honor, but if it were shown, then we would just preserve our rights that that should come in as well because it was displayed in open court.

THE COURT: Well, the only thing I can say is, if it was displayed in open court, which I don't actually recall, you can use it at your own risk, and the Federal Government is in charge. But I am not going to allow it. Okay. But everything else will.

Brendan, you really had a roll going here.

81, we argued both of those together then; is that correct?

MR. WEILER: Yes, Judge.

THE COURT: Then with only the exception of No. 9, 80 -- both of them are allowed.

All right, moving on, Mr. Weiler.

MR. WEILER: Judge, the next document is filing 83, People's Supplemental Discovery Response 6, filed on December 6, 2017.

Your Honor, that outlines discovery that was tendered. It does list several witnesses by name, and so we would ask for the protection of those witnesses.

THE COURT: All right. Mr. Herbert?

MR. HERBERT: We would not object, and we would actually agree with the prosecutor that this document should be properly sealed or at the very least heavily redacted.

THE COURT: All right. Mr. Fuentes?

MR. FUENTES: Same position, Judge. It became public once it hit the Court file no matter where in the building that file happens to be maintained.

THE COURT: I've got to stop you. If it was public, come on, these wonderful people wouldn't have taken away their weekend -- professional journalists, outstanding

attorneys such as yourself, Brendan and his associates, these wonderful people here. It's not public. Otherwise if we're here, we're crazy. And if we ain't crazy, somebody would think that you are. I would never say that. This is under discovery, not allowed. Proceed.

MR. WEILER: Your Honor, filing 84 is the Reply to a Motion to Dismiss For Prosecutorial Misconduct. Again, Judge, this deals with the same allegations as the filings that you did not allow. So for those same reasons, we would ask that this be given the same protection.

THE COURT: Mr. Herbert?

MR. HERBERT: Judge, we would ask that this document be released. There's no legal basis for it not to be published. And for all the reasons expressed earlier with respect to document No. 76, we'll adopt the argument for that.

THE COURT: Mr. Fuentes?

MR. FUENTES: You Honor, again, the intervenors don't understand what higher interest is being protected when the defense itself says that his fair trial rights are not at play as to some documents. These should be released. Judge, I read the objection the State put in for 84 and relatedly to 76, Judge, and what they said was the document contained allegations against people attacking their

character, statements about the defendant's guilt or innocence, unsupported or false or biased statements, and, Judge, I don't know of a court anywhere in this country that has said that material like that can be withheld from the public on that basis.

THE COURT: Thank you.

All right. Again, these were -- my determinations are these allegations were either not material or relevant and unfounded, so I'm not going to allow it. And they would hurt People's reputations. Again, where do you go to get your reputation back? And, again, you are not waiving your clients' qualified privilege against slander, trade disparagement and liable. Not allowed.

Number 87?

MR. WEILER: Judge, I show 85 was the next one.

THE COURT: 85, I'm sorry.

MR. WEILER: That's Defense's Offer of Proof related to Lynch filed on December 6, 2017. This is a list of witnesses, as well as a proffer. Some of those were not ruled to be admissible, and they do list witnesses. And so for the same reasons as the other Lynch motions, we would ask that the protections remain in place.

THE COURT: Mr. Herbert?

MR. HERBERT: I'll adopt the previous arguments. I would say this was litigated in open court. We had exhibits. We had power point that the Court prevented us from --

THE COURT: What about 89 then?

MR. HERBERT: Document 89?

THE COURT: Yeah. Now that was litigated, right?

MR. HERBERT: Judge, they --

THE COURT: Not this one.

MR. HERBERT: They are the same documents essentially.

THE COURT: They are not the same because you keep putting witness's names on these in open court.

MR. HERBERT: No, I didn't put anyone's names in open court, Judge.

THE COURT: All right. Thank you. I'm sorry, Mr. Fuentes, go ahead.

MR. FUENTES: We adopt the same arguments we did with regard to 77, and with respect to the Lynch material. Again, we think you can redact the witness's names and protect the witness's identities, but the substance of their story should come in and legal argument should come in.

THE COURT: Again, thank you. We don't know whether this is going to be evidence or not evidence, something can

effect what the State and Defense's right to a fair trial. Again, the list of witnesses are there. So with due respect, that's not allowed.

All right. Moving on. Which one, Mr. Weiler?

MR. WEILER: Your Honor, 86 is the next filing, Reply To Motion in Limine For Lynch. This argument is based on the list of witnesses. Again it's the same list of witnesses. It has the same proffered evidence, and so we'd make the same arguments.

THE COURT: Mr. Herbert?

MR. HERBERT: Judge, consistent with your previous rulings, this document was litigated in open court, and again it alleges misconduct by Ms. Alvarez, the prosecutor, and it also alleges an important public interest that there was no investigation of -

THE COURT: What is this number?

MR. HERBERT: 90.

MR. WEILER: I was on 86.

MR. HERBERT: Then we'll rest on the same argument for Lynch.

THE COURT: Mr. Fuentes?

MR. FUENTES: Your Honor, there would be great public interest in the legal arguments surrounding Lynch. Many people in the Illinois don't know, but the law is, if the

victim performed some earlier act of violence or bad act that the defendant asserting a self-defense defense didn't even know about at the time, that it, under some circumstances, can still comes in. And the circumstances under which it comes in and why it comes in and why the Court thinks it should come in are all things the public may have a great interest in. There's no reason to withhold any of it without the appropriate findings. How is it that material that gets discussed here in the well of this courtroom on January 18th is going to now through republication of the motion papers create a substantial probability that the fair trial record will be effected. The question has not been answered, Judge. There is no basis for a finding.

THE COURT: Mr. Fuentes, thank you for two things. First of all, a lot of people that are in the business of litigation and the practice of law start these entitled, which really have great legal concepts, and thank you for defining the Lynch material.

Now, the other thing is, thank you too for agreeing with what I've been saying for quite a while since you filed your petition for an intervention, the press has not been deprived of anything as you keep reiterating. This litigation has over a thousand pages of transcript.

That won't be allowed. Move on.

MR. WEILER: 87, Judge, is just a response to that.

THE COURT: Same argument?

MR. WEILER: Same Lynch motion. Same argument. Thank you.

THE COURT: Mr. Herbert?

MR. HERBERT: Same argument.

THE COURT: Mr. Fuentes?

MR. FUENTES: Except that the public is deprived in the motion --

THE COURT: Well, didn't you say that on the last one?

MR. FUENTES: Slightly different, Judge.

THE COURT: My apologies. Thank you. That won't be allowed.

All right. Moving on to 89.

MR. WEILER: 89 is proof on Lynch. Same argument as the other Lynch filings.

THE COURT: Mr. Herbert?

MR. HERBERT: Same arguments.

THE COURT: Mr. Fuentes?

MR. FUENTES: Same arguments, your Honor.

THE COURT: You can't leave me without an addendum. You have to say something.

MR. FUENTES: Okay.

THE COURT: I'm sorry. That was a rhetorical statement. I apologize. Thank you.

All right. Then No. 90?

MR. WEILER: Your Honor, this is a Supplemental Motion to Dismiss Prosecutorial Misconduct. It's another filing by the defense doing the same thing as, I think it was 76. For the same reasons argued there, we would ask that the protections stay in place.

THE COURT: Mr. Herbert?

MR. HERBERT: Judge, we would ask that this document be released obviously for the primary reason that it applies to our defendant's Sixth Amendment right, which is the overriding constitutional right that should be looked at when we're discussing all these motions. This was litigated in open court. So consistent with the Court's rulings on the People's documents that were allowed in, based on that reason, we would ask that the defendant's filings be allowed accessible for the same reasons. But, here, Judge, this is additional allegations and proof of misconduct by the prosecutor in bringing this charge, Anita Alvarez, and it also talks about an important public interest in how there was a criminal act committed by a governmental agency that was compounded with the problem that it was never investigated. And all those facts

were --

THE COURT: Now, who should you say should investigate -- you are talking about a leak; is that correct?

MR. HERBERT: Yes.

THE COURT: Who would be the proper persons to investigate that?

MR. HERBERT: Judge, I would defer to any one of our fine prosecuting agencies to take that up.

THE COURT: Well, Mr. McMahon was appointed for a specific purpose. This isn't like the federal special counsel. We have a limited purpose here. I mean, all right. So you are saying somebody else, some other prosecutorial agency should have investigated this leak?

MR. HERBERT: Well, some law enforcement agency absolutely should have.

THE COURT: Okay. Then I agree. It could be law enforcement too at the basic level of patrol or state police, et cetera?

MR. HERBERT: Right. And you know, as the Courts say, when there's allegations of misconduct by law enforcement with respect to evidence or towards an Indictment or towards a charging decision that that is paramount information that the public is entitled to know about. And

it's certainly -- it's certainly relevant to the defendant's Sixth Amendment right to speak to all of the opinions and mischaracterizations that have been presented by the first prosecutor Ms. Anita Alvarez in this case. In which the defendant had no opportunity to respond to, Judge.

THE COURT: I couldn't even find your client not guilty on the first Indictment because it don't exist any more. There's no charges against your client, you understand that, right? He is not being held on the first Indictment. That's been nolle-prossed by the State. That's not here any more. All right.

MR. HERBERT: I am aware of that. I don't see any distinction between that.

THE COURT: Okay. Thank you.

All right now, Mr. Fuentes?

MR. FUENTES: Your Honor, this is another document. The State's objection to its release on page 19 of their brief refers to -- 18 and 19 -- I'm sorry, Judge, one moment.

THE COURT: Take your time. Take your time.

MR. FUENTES: It's these double-sided copies. I apologize. It actually is on page 19 of the brief, and the objection is that the document articulates an opinion

challenging the integrity of the investigation by attacking actions and motives of members of the media and investigators. I understand that the Court found that those allegations didn't have any merit, but that doesn't mean the public doesn't get access to them, Judge. I was asked earlier to cite a case to the Court. I would like the same case cited to me.

THE COURT: Thank you for pointing out what they said. Now, does it challenge the integrity of investigation by attacking the actions and motives and members of the media to the investigations? Now, are you saying that -- you are admitting that there was violations of integrity by the media?

MR. FUENTES: No, absolutely not. I'm saying the public is entitled to see what those allegations are. It's entitled to get access to that kind of document. I will cite a case to the Court. The Skollman (phonetic) case. It specifically says that material that may embarrass someone is not --

THE COURT: Was that a criminal or civil case?

MR. FUENTES: It was a civil case by the Illinois Supreme Court, and it is most certainly applicable to criminal matters, if not more so, where the public's interest and access is even greater.

THE COURT: All right. I'm not going to allow that to be given access to the press or the public. Again, there's damaging allegations concerning the press and other people. And, again, where can they get their reputation back? So that's not going to be allowed.

All right, Mr. Weiler.

MR. WEILER: Your Honor, No. 91 is People's Supplemental Discovery Response 7 filed on December 20, 2017. Again, Judge, this is a discovery document that lists evidence, and it also lists witness names. As was pointed out by the Appellate Court in Kelly, that this is not covered by the --

THE COURT: All right. It's discovery. Thank you. All right, Mr. Herbert?

MR. HERBERT: We don't object to the Court sealing this document.

THE COURT: Thank you. All right, Mr. Fuentes?

MR. FUENTES: Still not hearing any case in which that's not allowed. I cite to the Court Skollman, 192 IL 2d --

THE COURT: Skollman didn't have criminal discovery. All right. Not allowed, but thank you.

Number 92.

MR. WEILER: 92 is a Second Amended Offer on Lynch

December 20, 2017. Again, the same Lynch arguments.

THE COURT: Thank you. Mr. Herbert?

MR. HERBERT: Rest on the previous arguments.

THE COURT: Mr. Fuentes?

MR. FUENTES: We will rest on our previous arguments, Judge.

THE COURT: Thank you very much. And I'll rest on my previous decision, not allowed.

Again, Mr. Weiler?

MR. WEILER: 93 is a response to motion to dismiss for the prosecutorial misconduct filed on December 6, 2017. Judge, this is our response to that. For the same reasons, we would ask that that be protected as well.

THE COURT: Mr. Herbert?

MR. HERBERT: Judge, if our documents are not allowed to be released, then I don't see any need to argue this point. I would assume the Court is not going to release these.

THE COURT: Mr. Fuentes?

MR. FUENTES: We object to not gaining access to Lynch material documents, Judge, for the same reason.

THE COURT: Thank you.

All right, that will not be allowed. My same reasons. All right.

Next, Mr. Weiler.

MR. WEILER: 94 is Third Amended Offer of Proof For Lynch. Same argument related to Lynch that was filed on January 5, 2018.

THE COURT: Mr. Herbert?

MR. HERBERT: Same argument.

THE COURT: Mr. Fuentes?

MR. FUENTES: Same argument. Just to put a fine point on it. I'm not using the word "public." These materials were filed in the Court file, and they are therefore accessible to the public no matter where in the building they are maintained.

THE COURT: Thank you. All right. For the same reasoning, they will not be allowed to have access to the press or public. Thank you.

95?

MR. WEILER: No. 95 is Defendant's Initial Expert Witness Disclosure, filed January 5, 2018. This is a list of witnesses and has discovery, and so not -- the presumption does not apply.

THE COURT: Mr. Herbert?

MR. HERBERT: We would not object to the sealing of this document.

THE COURT: And, Mr. Fuentes?

MR. FUENTES: Documents were filed with the Court, Judge.

THE COURT: Thank you. These are, again, potential witnesses and potential evidence. So at this time People versus Kelly covers this. They will not -- the public will not be allowed to have access.

All right, Mr. Weiler?

MR. WEILER: No. 96 is Reply to Third Amended Offer of Proof in Support of Lynch, filed January 12, 2018. We adopt our Lynch arguments.

THE COURT: All right, Mr. Herbert?

MR. HERBERT: Rest on our previous argument.

THE COURT: Mr. Fuentes?

MR. FUENTES: We stand on ours as well, Judge.

THE COURT: Thank you very much. That won't be allowed. Same reasoning.

Number 97?

MR. WEILER: Judge, number 97 is actually the same as No. 26. So that's been addressed.

THE COURT: All right. So same ruling as 26.

All right, going to the last page. Proceed then.

MR. WEILER: 106 is the next document, People's Reply to the Defendant's Motion to Dismiss The Indictment, that was filed on December 6, 2017. That again relates to the

same motions to dismiss that you have not allowed. We would adopt our argument to those motions.

THE COURT: Mr. Herbert?

MR. HERBERT: Judge, we'll adopt our arguments, and just add that in our reply we talk about how certain information was concealed from the Grand Jurors, and we believe that's an important basis for our motion and certainly something that should be made available for the defendant to exercise his ability to respond to false and misleading characterizations that have been presented by the prosecution and its agents throughout this case.

THE COURT: Thank you. Mr. Fuentes?

MR. FUENTES: Judge, again, if the defense doesn't want it withheld, the defense's fair trial right is not an issue. If the Grand Jury secrecy is an issue, now we are talking about things that were not put in the Grand Jury. Grand Jury secrecy doesn't apply. And, finally, with regard to the document associated with the motion, again, my colleague with Mr. Healey recalled that there was a TV screen put up here in court and documents were put up on that TV screen. I remember it being very difficult to read them, but I remember being able to read them well enough to find out at least Defense Exhibit 21, which the defense mentioned has not been in the press, there's a news story

about the State's Attorney's office handing it to the Tribune, so all of this is public, Judge. All of it should come in.

THE COURT: My reasoning again is there's allegations in there concerning misconduct that is not supported by evidence. So I'm not going to allow access to 106.

107?

MR. WEILER: 107 is Defendant's Motion to Change the Place of Trial. That was filed on December 6, 2017 -- I'm sorry, Judge, March 26, 2018 --

THE COURT: Is it March 28th or 26th?

MR. WEILER: 28th.

THE COURT: Okay. All right, concerning -- right now, maybe Mr. Herbert can enlighten us, you are still in the process of getting supportive data for your motion; is that correct?

MR. HERBERT: That's correct.

THE COURT: Okay. So that would be entered and continued.

All right, number 8 -- I'm sorry, 108.

MR. WEILER: Your Honor, 108 is the Intervenor's Status Report filed March 28, 2018. In that, Judge, there's communications that the lawyers made in this case trying to resolve these issues. And, Judge, part of the

issue with the intervenor's argument is that, you know, once something hits the file, it becomes public, then anything could be filed and there could be circumvented rules of professional responsibility and things of that nature. So we would ask that protections apply to that filing as well.

THE COURT: Mr. Herbert?

MR. HERBERT: Judge, I don't see any legal basis to challenge the intervenor's status report.

THE COURT: So none of your e-mails are on there?

MR. HERBERT: I'm sorry?

THE COURT: None of your e-mails are on there?

MR. HERBERT: I don't see a legal basis to challenge it.

THE COURT: Mr. Fuentes?

MR. FUENTES: Judge, these were very polite, professional e-mails in which the parties discussed their positions as to which documents could and could not be released. So, yes, when you p ut something in the public file, there is a chance the world might see it. We put this in our document to tell the Court what was going on. There's no basis to withhold it. The only basis I could think of is the State just doesn't want its e-mails in public. There's nothing embarrassing about them. The

Court has the document. This document should have been released the day it was filed.

THE COURT: It's just the communications between lawyers that are not in court to me have -- you know, maybe I could be wrong -- have a certain degree of confidentiality and respect for privacy. So on those bases there might not be any help, and I am looking for guidance, from the Court's review, I'll not allow that.

MR. FUENTES: May the document itself be released without the exhibits?

THE COURT: No.

All right. We've concluded -- let me express my appreciation today. If you look around this whole courtroom -- I mean -- and it's really -- I'd like to thank everyone for letting me participate in this. We have journalists that are here that I know aren't getting paid. We have outstanding attorneys that have taken time out of their weekend. We have outstanding prosecutors and outstanding defense attorneys. And I really want to thank, you know, Sheriff Dart for the additional expense that he has put forth for this hearing here today. So it's just a pleasure. I want to thank my people. And, Mr. Sullivan, we have to thank him too. Otherwise, I'll hear about it later. So God love you all. Go ahead --

MR. WEILER: Judge, I am sorry we still have 109, 110 and 111 and we skipped over 44.

THE COURT: I'm sorry, lost my last sheet. Okay. Go ahead.

MR. WEILER: Judge, 109 is a Defendant's Supplemental List of Expert Witnesses filed on January 5th of 2018. Again, this is a list of witnesses, not subject to presumption based on Kelly.

THE COURT: All right. Thank you.

MR. HERBERT: We do not object to the sealing of this document.

THE COURT: Okay. Mr. Fuentes?

MR. FUENTES: With no objection from the defense, no fair trial right at issue, these were filed with the Court no matter where in the building.

THE COURT: All right. This is still a list of expert witnesses. So, again, that comes under the discovery exception in People versus Kelly. So access denied.

110 is the next one?

MR. WEILER: 110 and 11 are both reports of experts filed by the defense in court file. These are discovery documents. There's no reason for them to be filed in the court file. We would ask that the presumption is not applied.

THE COURT: Mr. Herbert?

MR. HERBERT: We would not object to the sealing of these documents.

THE COURT: Thank you. Mr. Fuentes?

MR FUENTES: Judge, if we are on 44, I thought the Court the release of 40.

MR. HERBERT: We are not on 44.

MR. FUENTES: Then I misheard. I'm sorry.

110, our objection is it is filed with the Court, and is therefore accessible. Thank you.

THE COURT: Thank you. Again it comes under discovery. So these are potential witnesses, and there's reports of potential witnesses, so access is denied. Anything else?

MR. WEILER: 44 we addressed and then passed.

THE COURT: Okay. Let's go back to 44. Go ahead.

MR. WEILER: You had asked us to look at the exhibits on those. There is a disciplinary proceeding as Exhibit B, and then Exhibit C, D and E are FBI 302's, so we would argue that those should not be released.

THE COURT: Mr. Herbert, do you have familiarity with the federal government and what they release? Are the 302's part of their protective order?

MR. HERBERT: Yes. We would agree with the prosecutor

on that point.

MR. FUENTES: Your Honor, we haven't seen the document. We have take the position that given it was filed with the Court, it should be released. No basis for not doing so has been asserted.

THE COURT: No, there is a Federal Court order. Besides that, there's still, similar to police reports and state jurisdiction, access is denied.

Again, what I said earlier, I am not going to reiterate it, but I am thinking in my mind, I really appreciate everybody being very professional here today. Anything else?

MR. FUENTES: Judge, we do have a few questions for you. The first is, on Document 107, which is the change of venue motion, the intervenors object to its release being entered and continued on the grounds that there's additional data the defense is collecting. If they are collecting more data, they can file their document with more data, but they filed a motion asking the Court to move this very significant matter out of the county --

THE COURT: They filed a motion -- let them tell on me, Mr. Fuentes. They filed a motion because I ordered them to do it. They were saying they were not ready to. So it's still premature. They might want to do additional

work on it. Because they accommodated me and filed my court order, I am not going to release it. Because again, the whole premise of the change of venue, besides the newspaper articles, et cetera, and the conclusions, is the expert witness who flew in from California and we had an evidentiary hearing on that. That's still a work in progress.

MR. FUENTES: Thank you, Judge.

Additionally, and I don't have a number for it, it's not on Exhibit A, but there was a motion for continuance, which occurred here on April 18th. My colleague Mr. Coleman made a specific request of the Court that because it had be been aired here in court, that the motion itself should be released. We'd like that to be released.

MR. MCMAHON: Judge, I am not sure what motion --

THE COURT: This was your motion for continuance or whose motion?

MR. FUENTES: It's not an intervention motion for a continuance, Judge. And I don't have the details because I don't have the motion, and I could only try to absorb from the discussion in court what it was. And I found that discussion to be very inadequate to my understanding of who was asking for what and when.

housekeeping. Today the special prosecutor filed a motion to seal the hearing on May 4th, and we have discussed that with the special prosecutor. We agreed that that document is not a secret document. That it may be provided to the news department --

THE COURT: We don't use the word secret. We use sealed. In Washington DC where they leak everything, they can use "seal".

MR. FUENTES: Judge, we just want absolute clarity that there's not issue with providing that to our client's news departments.

MR. MCMAHON: No objection, Judge. It's a legal argument.

THE COURT: That's a good thing. I am glad you brought it up. Good. Then maybe you can present, you know, something that might persuade me to open that hearing up. That's fine. By Wednesday before 12:00.

MR. FUENTES: Thank you. We presume also that filing will also be a publicly available filing --

THE COURT: No, no. You are very artful and creative. I am not going to unseal anything before I see it. That's a compliment.

MR. FUENTES: Fair enough, Judge. We disagree on that, but fair enough, we will abide by that.

THE COURT: You disagree that you are artful and creative?

MR. FUENTES: No, no, I'm very artful and creative.

THE COURT: You failed that one.

MR. FUENTES: The news media in attempting to unseal things and attempting to gain access should never be required to file those documents under subpoena. There's a case that says so.

THE COURT: You know what, these are wonderful people, they want to go home. No filibusters here.

MR. FUENTES: We made our record.

The final question we wanted to present to the Court today, Judge, is the Court has been wonderfully attentive, listening to our arguments, and there's been a lot of effort from the part of the staff and the attorneys, and we, the intervenors, are wondering where do we go from here? Shouldn't the Decorum Order be vacated?

THE COURT: Absolutely. I can answer that real quick. You and Brendan and Brendan's co-counsel are under the Decorum Order. It's not going to be vacated. That's it. Thank you.

MR. FUENTES: Your Honor, may I present a proposed order to the Court?

THE COURT: No. First of all, Rodney -- I forget his

name -- but he was an outstanding judge. He was the judge in the Michael Jackson trial. All right. They appealed his Decorum Order. He was gracious enough to let us use this Decorum Order. Our Decorum Order has been appealed and been laid out and also incorporates the conduct of professional responsibility. It's not going to be modified.

MR. FUENTES: Thank you, Judge.

We are only referring to February 3, 2017, order which requires all documents to be filed here in chambers. We'd like the order to be that everything is filed in the Clerk's office, and if somebody wants to seal something, they can file a motion to seal. And we can all understand that there's a request to seal. The Court can rule on that motion. A little different procedure, but the first Decorum Order we are --

THE COURT: I appreciate what you are saying, and I like your nomenclature of sealing rather than secret, but that order will still stand. That way we don't loose anything in transition. The number of documents that have to be filed in this building is tremendous. So this way we can keep and make sure that we get these in a timely manner. That's one of the other things. It's just to make sure we get those. I want to compliment the intervenors.

You are doing an outstanding job. God love you. Keep up the good work in another courtroom.

MR. FUENTES: May I be heard further briefly on the Decorum Order issue?

THE COURT: No, they have got to go home. I've got to go home. Listen, can we make the courtroom available for Mr. Fuentes if he wants to continue on while we all leave? Okay. No, that's great. Thank you.

MR. FUENTES: Thank you, your Honor.

(The above-entitled cause was continued to May 4, 2018, at 9:000 a.m.)

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

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT - CRIMINAL DIVISION

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

Denise A. Gross

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

Dated this 30th day of April, 2018.

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

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

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff,	
v.	No. 17-CR-04286-01
JASON VAN DYKE, Defendant.	

REPORT OF PROCEEDINGS had at the hearing of the above-entitled cause, before the HONORABLE VINCENT M. GAUGHAN, one of the Judges of said Division, on the 4th day of May, 2018.

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

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

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

Has all sides been given copies of that?

MS. GLEASON: Your, your Honor.

THE COURT: All right. Is there any objection to that?

MS. GLEASON: Judge, there was an objection that, I believe, Mr. Fuentes outlined in there.

Mr. McMahon had asked that one sentence be excluded under 107. Let me --

THE COURT: Okay. Good.

MS. GLEASON: It was under paragraph, actually, three, your Honor.

THE COURT: All right. What is the proposed --

MS. GLEASON: Judge, our position was on No. 3, after entered and continued, was at the Intervenors' request, to get public release of Document 107 was denied, was not necessary.

THE COURT: Exactly. Well, first of all, it's not denied, because it's entered and continued. It's a work in progress.

All right.

MR. FUENTES: Your Honor?

THE COURT: Go ahead, Mr. Fuentes.

MR. FUENTES: What happened is, as I recall and upon reviewing the transcript, was that it was entered

and continued.

THE COURT: Quoted that.

MR. FUENTES: I'm sorry, Judge?

THE COURT: Quote the transcript.

Do you have -- no, no.

MR. FUENTES: Entered and continued is what the Judge said; and then, I went back to it; and I said, Judge, the Motion for Change of Venue is very important to the Intervenors; and we wanted it released immediately.

That Mr. -- Mr. Herbert could provide his data at a subsequent time, and that could be released at a subsequent time. It was not a ground to withhold that document.

THE COURT: Okay. It was taken out of context -- excuse me, right now, all right?

Maybe that's why you should not be coming up a little bit later or anything else like this, and I could see your understanding that, and misinterpreting it, and it could be my fault.

All right. It's entered and continued. That's not denied, all right.

MR. FUENTES: Okay.

THE COURT: And that's what I'm saying right now,

and that's what I meant before -- before you came back in, and demanded immediate release.

So, when it's entered and continued -- that's good lawyering. I understand.

All right. So, that part will be stricken.

MR. FUENTES: Thank you, Judge; and for the record, we may not have that document today, is that right?

THE COURT: Entered and continued.

MR. FUENTES: Okay.

THE COURT: I don't want any misinterpretation, all right?

MR. FUENTES: So, the answer to my question is no, right, your Honor?

THE COURT: The answer to my question is entered and continued.

No cross more examination of the Judge.

MR. FUENTES: Fair enough.

THE COURT: But it's good for you to try, all right?

All right. That would be stricken.

Everything else is okay, then?

MS. GLEASON: That's correct, from the State's point of view, yes, your Honor.

Then he said, that when they do get it, you can address that in voir dire, Judge. You can ask those Jurors, whether they received or got information from the media.

If they did, do they think they can fair; and in every Trial I know this Court has done, when a Juror says he or she can be fair, usually, that Juror is not going to be excused for cause.

So, Judge, voir dire is an adequate remedial measure. It is an alternative to closing the hearing, and there's been very little discussion of that in -- as to this Motion. It's not mentioned at all in the State Motion.

So, they can't meet their burden to close it; and they have not presented the Court with a proper lawful basis to close this hearing.

The hearing should be open, Judge.

Thank you.

THE COURT: Thank you very much, Mr. Fuentes.

And, again, the mindset here is really, you know, everybody -- and I think I'm speaking on behalf of all the parties, here, really have a firm belief in the First Amendment, and the cleansing properties that it has enforcing the other articles and amendments to

our Constitution by scrutiny by both private and public investigation.

So, again, this is not an easy job; and I'm not complaining about it; but I have to be here -- my thing, if I had a personal preference, everything comes out; but I don't have a personal preference, because I took an oath to uphold the Constitution.

So, I'm in the middle; and that's where I should be. I have to balance the rights of Mr. Van Dyke to a fair Trial; and also, the right to public access of the information and evidence, that are the People's evidence and, also, the media's right to access.

First of all, just saying some of the points that Mr. Fuentes has brought up about dissemination of any information, we did have a Motion, where Lynch material was presented; but it was presented in an informal offer of proof, not a formal offer of proof.

So, again, that was the gate -- that was the enabling stage where I determined whether some of the witnesses would be or would not be under the auspices of the doctrine of Lynch material, and that was the starting point .

Now, we're at the stage where we're going to

see what evidence may be admitted and what evidence may not be admitted.

One of the elements where presumption is not presumed, would be a deposition.

We're going to have testimony under oath, by witnesses who may have competent evidence, who may not have competent evidence. The only difference between this and the civil deposition, is that I will be present.

Depositions are not accessible until they've been filed in court. So, that is one of the reasons why we have to look at this.

Concerning the privacy of minors, that has been -- the State Attorney General came in here and argued against the release of the DCFS records; and even said that, even a deceased minor has rights of privacy; and that was their presentation about why the records should not be released.

There are other factors here; and what we have to look at, we're not living in a vacuum right now; and if these individuals are called as witnesses on behalf of Mr. Van Dyke, some of them may live in the community; and for us not to anticipate what would be happening, and what might not be happening, is putting

our head in the sand, and not protecting the rights of people.

Part of the Constitution, people have a right to life, liberty, and the pursuant of happiness; and this applies to witnesses, too. So, if you're a witness in the community, and someone finds out that you're going to be called as a witness in the Jason Van Dyke Trial, it is not beyond the realm of possibility that you're either going to be ostracized, that you'll be intimidated, or you might be harmed; and I know that our First Amendment -- advocates would not want harm to any of these individuals.

So, that's one of considerations that have to be taken into effect at this time; and the main thing here, again, is Doctor Edelson [sic] did not take a look at all the factors about pretrial publicity.

Even since the last time that our outstanding Staff Attorney, Joel O'Connell, had presented that there was 8100 articles written, and that was just last week by major news organizations, it is now up to 8163; and it could be still moving as I move my lips.

So, again -- and we have 1,120,000 hits on Google, if not more at this time. I haven't checked that out, and Mr. O'Connell hasn't looked that up.

So, there's immense media coverage; and we have our wonderful journalists here today, who have been reporting, and who have done an outstanding; and I want to compliment them on that.

So, these are all the factors that I have to be looking at; and certainly, is there a less restrictive manner?

Changing names of the witnesses, that wouldn't do any good. Nobody has even asked that the witnesses not be videoed under the extended media coverage Supreme Court Rules.

So, I have to look into those things. Changing the names for pseudonyms, or other matters like that, these are matters that I have to address, and has been pointed out by Mr. Fuentes.

And so, there is no alternative to this; and certainly, what I am going to do, that I'm going to -- as to the Lynch witnesses today, this hearing will be sealed; and it will be recorded by the Court Reporter; and also, again, I have to emphasize, nobody is going to deprive anybody this evidence, all right?

And that's not the purpose of this sealing of this hearing. The purpose of this sealing is to try and also to hope that we can ensure that Mr. Van Dyke

will get a fair Trial.

But the other purpose of the sealing is not to prevent the evidence from being -- or the testimony from being presented to the public, but when it is going to be public.

So, that's -- it's not a matter of if. It's a matter of when this information will be made public.

So, that's another thing.

So, right now, what I'm going to do is, issue an Order closing the Lynch material and also the expert witness hearing.

So, I have a copy of -- not a copy. I'm signing the order; and then ask I Toni to stamp that, please.

All right. Anything else -- what about next Thursday?

What else do we have to do next Thursday, all right, besides the expert witness?

MS. GLEASON: Judge, we will need to set a -- I guess a hearing after next Wednesday for that general Motion In Limine which we filed.

THE COURT: I'm sorry, Jody, I can't hear you.

MS. GLEASON: We'll need to set a hearing date after that date, for the general Motion in Limine. I

were to unseal it.

We would like that to happen to today, is our first request, Judge.

THE COURT: State?

MR. WEILER: No objection, your Honor.

THE COURT: Defense?

MS. WENDT: No objection.

THE COURT: Absolutely, that document can be released.

MR. FUENTES: Thank you, Judge.

Item two relates to the Motion in Limine response, that I have not seen and defense Counsel mentioned that was filed, I believe, yesterday.

The Intervenors had that document. That document --

THE COURT: What are you talking about right now?

MR. FUENTES: Okay.

THE COURT: Response to what?

MR. FUENTES: It's a response to a Motion in Limine.

THE COURT: No, see, I mean, you know -- that's -- you have to be specific. You're an outstanding attorney, come on now.

You know you can't just say, a Motion In

Limine. That would pertain to every Motion In Limine that they filed.

MR. FUENTES: Judge, the --

THE COURT: Let me know and see if I can help you.

MR. FUENTES: Thank you.

The one that Defense Counsel today, stated she filed on May 3rd; and I believe the Court chided Defense Counsel because the Court --

THE COURT: And you brought it up, even though you know I quote, in your words, chided her.

There was not anything useful in that.

MR. FUENTES: Then, I withdrawal that, Judge.

THE COURT: Come on now.

Thank you.

MR. FUENTES: There was a discussion of when it should have been filed. It was filed on May 3rd. I have not seen it. I have no idea what it is, and we are -- just as Intervenors, we're requesting that that be released. That's all.

THE COURT: All right. Here's -- this is a pending Motion in Limine and response to the Motion in Limine.

This is pertaining to the expert witnesses, is that correct?

MS. WENDT: Correct.

THE COURT: All right. That still is -- that hearing is postponed to next week, because I didn't get a chance to look at it myself.

So, on Thursday, May 10th, I'll make a determination, once I get to examine the documents; but thank you for bringing that up.

MR. FUENTES: Thank you, Judge.

The third housekeeping matter --

THE COURT: Dan, could you put that in there, too?

MR. WEILER: Yes, Judge.

THE COURT: Thank you.

MR. FUENTES: The third housekeeping matter is, as I understood what the Court said earlier in ruling on the Motion to Close, I think I understood the Court to say that, the Court was going to enter its own Order.

If the Court wanted the parties to work together to propose an Order, we can do that; but if the Court doesn't want us to do that, we don't --

THE COURT: No, I appreciate your help; but we got one.

MR. FUENTES: Okay.

THE COURT: Okay. Thank you.

MR. FUENTES: Thank you, Judge.

THE COURT: Come on up, go ahead.

MS. SPEARS: Your Honor, Natalie Spears, on behalf of the Chicago Tribune.

I have one question, you indicated that there will be a Court Reporter present at the hearings that are going to be under seal, that transcripts will be made.

When will that transcript be released, because --

THE COURT: When I release it.

MS. SPEARS: Is there a -- we have -- obviously --

THE COURT: I understand what you're talking about.

Pardon?

MS. SPEARS: We've asked the Court, obviously, that they be released immediately; and our position is --

THE COURT: But it's going to be released immediately, why have a sealed Hearing?

MS. SPEARS: Well, within --

THE COURT: No, I asked you a question.

Now, come on, you want me to answer your question. Answer my question.

Why have a sealed hearing if the transcripts

going to be released immediately?

MS. SPEARS: So that they can be released immediately after the hearing.

THE COURT: No, the inconsistency --

MS. SPEARS: So that --

THE COURT: Sit down there, Mr. Fuentes. I gave you your time. Come one, now, don't be taking Natalie's spot. Shame on you.

MS. SPEARS: So that portions of it, to the extent necessary, to --

THE COURT: I understand, but it's a paradox you're talking about. You're talking about a sealed hearing, and then you want the transcripts released immediately, and it's not a sealed hearing any more.

MS. SPEARS: Well, when will the Court release the transcripts, then?

THE COURT: Once they come into evidence in the Trial.

MS. SPEARS: But not until Trial?

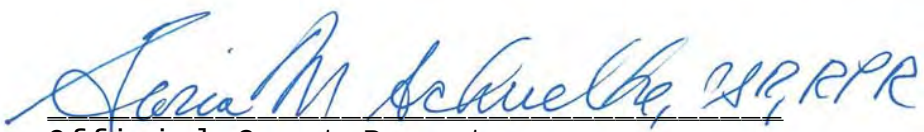
THE COURT: You know, if you don't understand my -- I'm not allowing -- you know, I said, once the evidence has been presented at Trial, those things will be released.

So, that's it.

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

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

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



Official Court Reporter
Illinois CSR License No. 084-001886

Dated this 7th of May, 2018.

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

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

ORDER

This cause coming to be heard on the Intervenors'[1] Motion for Intervention and Access to Court Documents (the "Motion"), filed on March 6, 2018, requesting relief as set forth specifically in Intervenors' Third Request for Access to Court File Documents and Other Access-Related Relief, filed on April 13, 2018 ("Third Request"), the Court having reviewed all filings concerning the Motion, listened to the arguments of counsel, and being fully advised in the premises, IT IS HEREBY ORDERED:

1. For the reasons stated on the record, Intervenors' request for public release of the documents listed on Exhibit A attached hereto is GRANTED as to Document Nos. 6, 8, 38, 39, 40, 43, 59, 61, 65, 74, 78, 80, and 81, with the following redactions:

   a. From Document No. 39, the police reports attached as exhibits.

   b. From Document No. 61, the three grand jury transcripts attached as exhibits.

   c. From Document No. 65, the entire document and exhibits, except for Exhibit A and any case law attached to the document.

   d. From Document No. 80, Exhibit No. 9.

2. For the reasons stated on the record, Intervenors' request for public release of the documents listed on Exhibit A attached hereto is DENIED as to Document Nos. 17, 19, 22, 26, 28, 29, 35, 36, 37, 44, 47, 58, 66, 76, 77, 79, 83-87, 89-97, 106, and 108-111.

3. For the reasons stated on the record, Intervenors' request for public release of Document No. 107 (from Exhibit A) is ENTERED AND CONTINUED.

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[1] The Intervenors are the Chicago Tribune Company, LLC; Sun-Times Media, LLC; the Associated Press; WLS Television, Inc.; WGN Continental Broadcasting Company, LLC; WFLD Fox 32 Chicago; Chicago Public Media, Inc.; and the Reporters Committee for Freedom of the Press. This Court granted the request for intervention on March 8.

4. Intervenors' request for public release of the following additional documents, not listed on Exhibit A, is GRANTED:

a. State's Response to Intervenors' Motion for Access to Court Documents, filed on April 6, 2018;

b. Defendant Jason Van Dyke's Response in Opposition to Media Intervenors' Motion for Access, filed on April 6, 2018, with the redaction of Paragraph 98 on page 18 of this document;

c. Intervenors' Third Request for Access to Court File Documents and Other Access-Related Relief ("Third Request"), filed on April 13, 2018; and

d. Intervenors' Consolidated Response to Parties' Objections to Public Disclosure of Court File Documents, filed on April 13, 2018.

5. By agreement of the Parties and Intervenors, the State's Supplemental Response to Intervenors' Motion for Access (filed April 26, 2018) and the State's Motion to Close [] the Public Hearings Scheduled to be Litigated on May 4, 2018 ("State's Motion to Close Hearing," filed April 28, 2018) are released to the public.

6. Intervenors' request to modify or vacate the Court's February 3, 2017 Decorum Order to require the public filing of all documents in this matter in the clerk's office is DENIED for the reasons stated on the record.

7. Intervenors' request to file publicly in the clerk's office their response to the State's Motion to Close Hearing is DENIED. Intervenors shall file their response to this motion before noon on May 2, 2018, and Intervenors' requests concerning other closed proceedings in this matter (subparagraphs (f) and (g) of Intervenors' Third Request) are ENTERED AND CONTINUED to May 4, 2018. This matter is set for further hearing on May 4, 2018, at 9 a.m. concerning the matters discussed in this paragraph.

DATED: May 4, 2018

ENTERED: Vincent M. Gaughan
The Hon. Vincent M. Gaughan
1553

Order prepared by:
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Gabriel A. Fuentes
Patrick E. Cordova
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Counsel for Chicago Public Media, Inc.

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

Exhibit A: Filings to which the State objects to their release in part becasuse the presumption of access does not apply

6	Defendant's Motion to Waive Appearance	3/23/2016	No presumption
8	Defendant's Reply to Motion to Waive Appearance	4/27/2016	No presumption
17	People's Initial Garrity Team Disclosure to Defendant	9/29/2016	No presumption
19	People's 1st Supplemental Garrity Team Disclosure	11/2/2016	No presumption
22	People's 2nd Supplemental Garrity Team Disclosure	1/10/2017	No presumption
26	Memo in Support MTS (Exposure to Compelled Statement)	1/18/2017	No presumption
28	MTD Misconduct at GJ	2/3/2017	No presumption
29	Memo of Law in Support MTD GJ	2/3/2017	No presumption
35	Memo of Law MTD Misconduct GJ	4/20/2017	No presumption
36	MTD Indictment & Other Relief GJ	4/20/2017	No presumption
37	MTD Misconduct at GJ	4/20/2017	No presumption
38	2nd Motion for Bill of Particulars	4/20/2017	No presumption
39	Defendant's Supplemental Motion to Waive Appear	4/20/2017	No presumption
40	MIL Limit Scope of Kastigar Hearing	4/20/2017	No presumption
43	Def. Resp. to MIL Bar Claim of Prejudice PB	5/11/2017	No presumption
44	Response to Motion to Limit Scope of Kastigar	5/11/2017	No presumption
47	Combined Response to MTD & MTD & other relief	5/11/2017	No presumption
58	Brief in Support of People's Garrity/Kastigar Hearing Position	9/7/2017	No presumption
59	Response to Motion to Determine Actual Conflict	9/27/2017	No presumption
61	Motion to Determine Actual Conflict	9/28/2017	No presumption
65	**Reply Motion to Determine Actual Conflict	9/28/2017	No presumption

Exhibit A: Filings to which the State objects to their release in part becasuse the presumption of access does not apply

66	Defendant's Offer of Proof Kastigar Witnesses	10/4/2017	No presumption
74	Jamie Kalven MTQ Subpoena	11/3/2017	No presumption
76	MTD (Prosecutorial Misconduct)	11/6/2017	No presumption
77	MIL to Admit Lynch Material	11/6/2017	No presumption
78	People's MTQ Subpoena to Jamie Kalven	11/6/2017	No presumption
79	Answer to Discovery	11/6/2017	No presumption
80	Defendant Response in Opp. To MTQ Subpoena of Kalven	11/20/2017	No presumption
81	J. Kalven Reply in Support of his MTQ	12/4/2017	No presumption
83	People's Supplemental Discovery Response 6	12/6/2017	No presumption
84	Reply MTD (Prosecutorial Misconduct)	12/6/2017	No presumption
85	Defense Offer of Proof Lynch	12/6/2017	No presumption
86	Reply MIL Lynch	12/6/2017	No presumption
87	Response MIL to Admit Lynch Material	12/6/2017	No presumption
89	Amended Offer of Proof Lynch	12/13/2017	No presumption
90	Supplemental MTD Prosecutorial Misconduct	12/15/2017	No presumption
91	People's Supplemental Discovery Response 7	12/20/2017	No presumption
92	2nd Amended Offer of Proof Lynch	12/20/2017	No presumption
93	Response to MTD (Prosecutorial Misconduct)	12/20/2017??	No presumption
94	3rd Amended Offer of Proof Lynch	1/5/2018	No presumption
95	Defendant's Initial Expert Witness Disclosure	1/5/2018	No presumption
96	Reply to 3rd Amended Offer of Proof in Support of Lynch	1/12/2018	No presumption
97	*Memorandum in Support of Motion to Suppress Evidence (Def. Compelled Statement)	1/17/2018	No presumption

Exhibit A: Filings to which the State objects to their release in part becasuse the presumption of access does not apply

106	Defendant's Reply to the People's Response to Defendant's Motion to Dismiss the Indictment	12/6/2017	no presumption
107	Defendant's Motion to Change Place of Trial	3/28/2018	No presumption
108	Intervenor's Status Report	3/28/2018	no presumption
109	Defendant's Supplemental list of Expert Witnesses	1/5/2018	No presumption
110	Report of a Defense Expert	2/1/2018	No presumption
111	Report of a Second Defense Expert	2/1/2018	No presumption

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

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

Order Closing May 4, 2018 Proceedings

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

Legal Standard

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

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

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

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

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

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

Analysis

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

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

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

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

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

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

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

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

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

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

[2] As of April 24, 2018
[3] Report of Proceedings, Apr. 8, 2018, at 89-90.

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

Entered:

Vincent M. Gaughan

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

Date: May 4, 2018

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

No. _____

IN THE SUPREME COURT OF ILLINOIS

Chicago Public Media, Inc., Reporters Committee For Freedom Of The Press, WGN Continental Broadcasting Co., LLC, WFLD Fox 32 Chicago, The Associated Press, WLS Television, Inc., Chicago Tribune Co., LLC, Sun-Times Media, LLC,	)	Appeal from the Circuit Court of Cook County, Illinois, County Department, Criminal Division
Movants,	)	Circuit Court No. 17 CR 0428601
v.	)	
The Hon. Vincent M. Gaughan,	)	The Honorable Vincent M. Gaughan,
Respondent.	)	Judge Presiding.

NOTICE OF FILING

To: See Certificate of Service

PLEASE TAKE NOTICE that on May 11, 2018, I caused the foregoing **Motion For Supervisory Order And Movants' Explanatory Suggestions In Support Of Their Motion For Supervisory Order, Supporting Record** and [**Proposed**] **Supervisory Order** to be electronically submitted with the Clerk of the Supreme Court of Illinois by using the Odyssey eFileIL system.

Dated: May 11, 2018

CHICAGO PUBLIC MEDIA, INC.

By: s/ Gabriel A. Fuentes
One of Its Attorneys

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No. _____

IN THE SUPREME COURT OF ILLINOIS

Chicago Public Media, Inc., Reporters Committee For Freedom Of The Press, WGN Continental Broadcasting Co., LLC, WFLD Fox 32 Chicago, The Associated Press, WLS Television, Inc., Chicago Tribune Co., LLC, Sun-Times Media, LLC,	)	Appeal from the Circuit Court of Cook County, Illinois, County Department, Criminal Division
Movants,	)	Circuit Court No. 17 CR 0428601
v.	)	
The Hon. Vincent M. Gaughan,	)	The Honorable Vincent M. Gaughan,
Respondent.	)	Judge Presiding.

CERTIFICATE OF SERVICE

Gabriel A. Fuentes, an attorney, certifies that on May 11, 2018, he caused the **Notice of Filing, Motion For Supervisory Order And Movants' Explanatory Suggestions In Support Of Their Motion For Supervisory Order, Supporting Record** and [**Proposed**] **Supervisory Order** to be electronically submitted to the Clerk of the Supreme Court of Illinois, by using the Odyssey eFileIL system.

He further certifies that on May 11, 2018, he caused the above-named filings to be served on the following parties as indicated below.

The Hon. Vincent M. Gaughan
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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

s/ Gabriel A. Fuentes
Gabriel A. Fuentes

No. _____

IN THE
SUPREME COURT OF ILLINOIS

CHICAGO PUBLIC MEDIA, INC., REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, WGN CONTINENTAL BROADCASTING CO., LLC, WFLD FOX 32 CHICAGO, THE ASSOCIATED PRESS, WLS TELEVISION, INC., CHICAGO TRIBUNE CO., LLC, SUN-TIMES MEDIA, LLC,	)	Appeal from the Circuit Court of Cook County, Illinois, County Department, Criminal Division
Movants,	)	Circuit Court No. 17 CR 0428601
v.	)	
THE HON. VINCENT M. GAUGHAN,	)	The Honorable Vincent M. Gaughan,
Respondent.	)	Judge Presiding.

SUPERVISORY ORDER

This matter coming to be heard on Movants' Motion for Supervisory Order, and the Court having been fully advised in the premises, IT IS HERBY ORDERED:

(1) That the February 2017 Decorum Order is vacated;

(2) That going forward, all motions, briefs, pleadings, and other judicial documents in this case shall be filed publicly in the Circuit Court Clerk's Office, subject to any properly supported motion to seal; and

(3) That in ruling on any such future motion to seal judicial records, or any motion to reconsider Respondent's earlier sealing of any previously filed judicial records, Respondent shall adhere to the governing First Amendment standards and enter specific, on-the-record judicial findings supporting suppression under those

standards, or release such records in whole or in part, consistent with consideration of the least restrictive alternatives to complete suppression.

Hereby entered the _____th Day of May, 2018:

_____	_____
JUSTICE	JUSTICE
_____	_____
JUSTICE	JUSTICE
_____	_____
JUSTICE	JUSTICE
_____	
JUSTICE	

Prepared By:

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