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

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MOTION FOR SUPPLEMENTAL SUPERVISORY ORDER

Movants return to this Court to ask for emergency relief that will restore the press and the public's First Amendment right of access in one of the most closely watched criminal cases in Illinois history. Without this Court's assistance, the murder prosecution of Chicago police officer Jason Van Dyke for the shooting of Laquan McDonald will continue to proceed under a cloak of secrecy, without the benefit of constitutionally required public scrutiny. Denying the public transparency in this critically important case will erode trust in the court system and threatens to undermine the legitimacy of the outcome. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980).

Movants first came to this Court in May, seeking a Supervisory Order vacating the trial court's requirement that all documents be filed only in chambers and under seal. This Court granted that request on May 23 and ordered that "all documents and pleadings" in this case be filed in the Clerk's Office, subject to any party filing a motion to seal. (SR113-14, Ex. A, May 23 Supervisory Order.) But since this Court's order, the trial court has continued to deny the public access to the proceedings and records in this case, in violation of well-established First Amendment principles. In particular:

1. *Respondent has not complied with this Court's May 23 Supervisory Order:* Instead of requiring that "all documents and pleadings" be filed publicly in the Clerk's Office, as this Court ordered (subject to a party's motion to seal), the trial court determined that this Court's order was prospective only and, as a result, continues to keep 35 documents under seal. Yet, the trial court sealed these 35 documents, in substantial part based upon its now-vacated order and its erroneous presumption of secrecy, and it has failed to apply the proper First Amendment standards, despite Movants' repeated requests.

2. *Respondent has adopted an impermissible sealing protocol*: On May 24, Respondent *sua sponte* created a sealing procedure, (SR115, Ex. B, May 24 Order), that denies Movants an opportunity to be heard on motions to seal and

allows the parties to file documents under seal indefinitely – and in practice for weeks – based only on one party's mere contemplation of filing a motion to seal. Like the trial court's now vacated "file-everything-in-chambers" order, this protocol violates the First Amendment and the common law presumption of access and is the inverse of how litigation is conducted in this state or anywhere else.

3. *Respondent holds secret adjudicative hearings and issues secret rulings:* Respondent has held many lengthy, adjudicative hearings in chambers and, on three occasions, in a closed courtroom. Respondent has not provided constitutionally appropriate findings to justify these closed hearings; and has issued secret rulings during these hearings. Additionally, the in-chambers hearings are conducted off the record, without a court reporter present, so the public will never know what occurred, and reviewing courts will be left with a grossly incomplete record.

4. *Respondent has improperly barred one of Movants' counsel from speaking in the courtroom:* On July 17, in a wholly unprecedented and unlawful order, Respondent prohibited attorney Gabriel A. Fuentes from speaking in court for the duration of this case, citing purported "interruptions" – which represented counsel's efforts to make a record on improper closures or were otherwise inconsequential. This unauthorized and illegal gag order hampers Movants' ability to advance the public's interests in openness in this important case.

These actions, individually and collectively, are an extraordinary departure from well-established constitutional and common law rules and normal practice in Illinois courts. Indeed, "[t]he availability of court files for public scrutiny is essential to the public's right to monitor the functioning of our courts, thereby insuring quality, honesty, and respect for our legal system." *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 230 (2000). "When courts are open, their work is observed and understood, and understanding leads to respect." *In re Marriage of Johnson*, 232 Ill. App. 3d 1068, 1074 (4th Dist. 1992). "Public scrutiny of a criminal trial" is particularly important as it "fosters an appearance of fairness, thereby heightening public respect for the judicial process." *Globe Newspaper Co. v. Superior Court of Norfolk Cty.*, 457 U.S. 596, 606 (1982).

The trial in this case is now scheduled to start on September 5, 2018, yet key aspects of the proceedings remain shrouded in secrecy. This Court's intervention is thus urgently needed to remedy the ongoing and repeated violations of the First Amendment and the public's right to know. For the reasons set forth in this Motion and its accompanying Explanatory Suggestions, this Court should restore transparency to this important case and vindicate the basic constitutional mandate that public trials be conducted in the sunshine of public scrutiny. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 305 (1964) ("As Mr. Justice Brandeis correctly observed, 'sunlight is the most powerful of all disinfectants.'") (citation omitted).

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

a. Confirm that the May 23 Supervisory Order applies to all documents and pleadings filed in the case, so that Respondent must: (1) unseal the court filings made before May 23; or (2) allow the continued sealing of these documents only upon the filing of a motion to seal (as contemplated by the May 23 Supervisory Order), to be decided openly and on the record with explicit application of the requisite constitutional and common law standards.[1]

b. Direct Respondent to vacate the sealing protocol entered on May 24 and: (1) allow parties to file documents under seal only when accompanied by a publicly filed motion to seal; (2) require the parties

[1] With trial now set for September 5, in the interest of limiting the potential amount of litigation if any party wishes to keep documents under seal, upon remand, Movants intend to seek the immediate release of only six of the 35 previously sealed documents, listed as follows by title and filing date as disclosed to Movants:

- Motion to Dismiss (Prosecutorial Misconduct) (11/6/17)
- Reply on Motion To Dismiss (Prosecutorial Misconduct) (12/6/17)
- Response to Motion to Dismiss (Prosecutorial Misconduct) (12/20/17)
- Third Amended Offer of Proof *Lynch* (1/5/18)
- Report of a Defense Expert (2/1/18)
- Report of a Second Defense Expert (2/1/18).

to serve Movants with any motions to seal at the time of filing; (3) afford Movants an opportunity to respond to any motions to seal; (4) rule on motions to seal using the standards set forth in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) ("*Press-Enterprise II*"); and (5) rule on motions to seal *before* ruling on the matters sought to be sealed.

c. Require that no adjudicative proceedings take place in closed "conferences" and closed public hearings, unless Respondent first makes on-the-record findings justifying such closures and after Movants receive advance notice and an opportunity to be heard. Respondent should also be directed to immediately release all judicial rulings, including any discussed during or arising out of such closed proceedings.

d. Direct Respondent to vacate the July 17 order barring Mr. Fuentes from speaking in court.

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

Movants reluctantly return to this Court because, since this Court entered its May 23 Supervisory Order, the trial court has repeatedly and unlawfully disregarded this Court's May 23 Supervisory Order and the unequivocal principles of the First Amendment itself. Respondent has done so in myriad ways, but most egregiously by: (1) maintaining under seal 35 court records improperly filed in chambers before the May 23 Order was issued based in large part on Respondent's now-vacated February 2017 Order, without applying the requisite constitutional standards; (2) employing a procedure for motions to seal that effectively replaces Respondent's now-vacated method of shielding judicial documents from the public with another, equally unlawful method of denying contemporaneous access to those documents; (3) holding secret hearings in which motions are heard and orders are issued, two of which were then sealed, without giving the public notice or an opportunity to object and without first making the constitutionally mandated

findings; and (4) unlawfully ordering that one of Movants' attorneys not be permitted to speak in the courtroom for the remainder of this case.

Movants respectfully submit that this Court's intervention is required because the trial court has not honored the First Amendment and common law presumptions of public access in this case, both before and after this Court's May 23 Supervisory Order. Our courts must maintain their strong history of being open to the public and the press. And it is critical that the public is meaningfully informed about this case and has assurance that justice is being served. With trial scheduled to begin on September 5, 2018 (SR268), direct appeal to the Illinois Appellate Court would not afford Movants and the public adequate relief, necessitating Movants' return to this Court.

FACTUAL BACKGROUND

A. *This Court's May 23 Supervisory Order And Its Immediate Aftermath*

1. In their initial Motion for Supervisory Order filed on May 11, Movants set forth the factual background concerning the events leading to their intervention in the pending criminal murder prosecution of Chicago Police Officer Jason Van Dyke in the fatal shooting of teenager Laquan McDonald in an October 2014 incident recorded by a police video camera. (SR92-93.) The Van Dyke prosecution, which is now being brought by the State's Attorney of Kane County under a court appointment as special prosecutor, in lieu of the Cook County State's Attorney, remains a matter of intense local and national interest.

2. Movants explained how Respondent repeatedly insisted, over their objections, that the February 2017 Order complied with all applicable legal standards

because under that order, all documents and pleadings were filed in chambers and thus were not public and therefore were exempt from public scrutiny. (SR93-97.) Movants showed that under basic constitutional and common law principles enunciated by this Court and the U.S. Supreme Court, Respondent was in error. It is well established that judicial documents and records filed in civil and criminal proceedings are presumed to be available to the public. *Skolnick*, 191 Ill. 2d at 230-33; *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*, 448 U.S. at 572; *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978).

3. In allowing Movants' initial supervisory order motion, this Court's May 23 Supervisory Order directed that the February 3, 2017 Order be vacated, that "[a]ll documents and pleadings shall be filed in the circuit clerk's office," and that "[t]he parties may move to file any document under seal." (SR114, Ex. A, May 23 Supervisory Order.)

4. The next day, May 24, without notice to or input from Movants, Respondent "terminated" the February 3, 2017 Order, but did not permit unrestricted filing of documents in the Clerk's Office; instead, the trial court prohibited the parties from filing documents in the Clerk's Office until after giving the other party advance notice of the filing (to enable the non-filing party to move to seal the filing if the filing party did not do so) and receiving the non-filing party's acknowledgement of the notice, with parties to act "promptly and in good faith." (SR115, Ex. B, May 24 Order.) The May 24 Order was not served on Movants and was not filed in the Clerk's Office.

5. Unaware of the May 24 Order, on May 29 Movants filed a Supplemental Motion for Access to Court Filings (the "Supplemental Access Motion"). In the Supplemental Access Motion, Movants sought access to the 35 court filings that had been sealed by Respondent, at least in part based on the erroneous view that materials filed in chambers were not entitled to the constitutional and common law presumptions of public access. (SR116-21.) Movants also proposed a constitutionally compliant sealing protocol. (*Id.;* SR290-93.)

B. *Respondent's Ruling That The May 23 Supervisory Order Does Not Apply To "All Documents And Pleadings" In The Case*

6. On May 31, when Movants first presented their Supplemental Access Motion, Respondent announced that the May 23 Supervisory Order does not apply to "all" documents in the case including the 35 he previously sealed after hearings but without any motion to seal, because, the trial court said, the Supervisory Order "doesn't say it's retroactive." (SR130-31.)[2]

[2] The trial court's reasons for sealing the 35 court documents per its May 4 order began with the incorrect premise that none of the judicial documents could be presumptively public because the (now-vacated) February 2017 Order (requiring in-chambers filing) meant that none of them was "public." (SR19-21; SR27-29.) In addition, during an April 28 hearing, Respondent cited differing reasons for sealing various court documents, including Respondent's belief that allegations of prosecutorial misconduct in some documents were "unfounded" or not supported by evidence, that prosecutors' reputations might be harmed by public disclosure of those allegations, and that Movants as media organizations would have fair-report privileges available to them if such reputational harm were raised in potential defamation suits – presumably by the aggrieved public prosecutors. (SR30-38.) A motion to seal raising any of these concerns could not overcome the presumption of public access, *see, e.g.*, *Waller v. Georgia*, 467 U.S. 39, 45-47 (1984); *Skolnick*, 191 Ill. 2d at 234, but no party ever raised these concerns, let alone incorporated them in a motion subjected to proper constitutional analysis.

7. Respondent did not rule on Movant's May 29 Supplemental Access Motion for more than two months. The timeline for Respondent's delayed consideration of this Motion is as follows:

a. **May 31:** Respondent gave the parties time to respond, and the matter was set for hearing on June 14. (SR129, 132.) In addition, Respondent for the first time insisted – we submit, improperly – that Movants not refer, in their court filings, to the February 2017 Order as a "decorum" order. Movants agreed not to do so. (SR126-28.)

b. **June 7:** Both the prosecution and the defense filed responses asserting that this Court's May 23 Supervisory Order is not retroactive. (SR135; SR140.)

c. **June 11:** Movants filed their reply memorandum. (SR145-56.)

d. **June 14:** Instead of hearing Movants' public access issues, Respondent announced (after a closed in-chambers conference) that the issue of public access would be "split" off from "the case in chief" and heard two weeks later on June 29. (SR173.) Respondent also repeated his complaint that Movants had called the vacated order a "decorum" order, even in documents filed before the parties and Movants were asked not to use the term. Respondent then invited the State to move to strike the Supplemental Access Motion for using the term "Decorum Order." (SR174, 176.)

e. **June 26:** Following Respondent's suggestion, the State filed a Motion to Strike Movants' Supplemental Access Motion for calling the February 2017 order a "decorum" order. (SR180-81.)

f. **June 27**: Movants responded to the State's Motion to Strike demonstrating that for months, Respondent and the parties repeatedly had called the February 2017 Order a "decorum" order. (SR182-85.)

g. **June 29:** Respondent struck – without prejudice – the Supplemental Access Motion instead of hearing it, setting the next court date for July 10. (SR197-98, 204-06.)

h. **July 3**: Movants refiled a redacted version of their Supplemental Access Motion (omitting the term "Decorum Order") and reply memorandum in order to have their motion heard. (SR208-19; SR220-25.)

i. **July 10:** No hearing was held because Respondent was ill.

j. **July 17:** Respondent started the hearing by criticizing one of Movants' attorneys, Mr. Fuentes, barring him from speaking further in court, and stating that Respondent would not hear any oral response or objection to the silencing of Mr. Fuentes. (SR262-66.) Respondent set July 31 for hearing on Movants' Supplemental Access Motion. (SR269-70.)

k. **July 31:** More than two months after Movants filed their Supplemental Access Motion seeking proper implementation of this Court's May 23 Supervisory Order, Respondent ruled upon that motion, summarily denying it as to the 35 improperly sealed documents. Respondent ruled that this Court's May

23 Supervisory Order did not apply to judicial documents filed in chambers before that date, and Respondent left in place the previous ruling sealing 35 documents filed before May 23 with no requirement that any party file a motion to seal and without making constitutionally required findings. (SR297-300; SR306.)

C. ***Respondent's Procedure For Motions To Seal***

8. On May 31 and June 7, respectively, the State moved to seal: (1) a defense motion to reconsider Respondent's earlier, non-public ruling on the admissibility of Mr. McDonald's alleged past violent acts under *People v. Lynch*, 104 Ill. 2d 94 (1984), and (2) a brief the State had filed on the admissibility of testimony from a defense expert about Defendant's state of mind at the time of the shooting. (*See* SR123; SR143.) The State did not contemporaneously serve Movants with these two motions to seal, and the May 24 Order did not require them to serve Movants at all. Upon Movants' request, the State served Movants with the motions on June 8. (SR144.) Movants filed objections on June 12. (SR157-69.)

9. At the June 14 hearing, Respondent delayed rulings on the two motions to seal until June 29. But at the June 14 hearing, Respondent *ruled on* the underlying substantive motions. Respondent denied, without comment, the defense's *Lynch* reconsideration motion and announced he was amending his earlier (also non-public) ruling so that the defense expert could testify as to "the ultimate issue," which he did not define or describe publicly. (SR176-78.) So while keeping the reconsideration motion and the expert brief under seal on June 14, Respondent nonetheless ruled on the *Lynch*

reconsideration motion and the scope of the defense expert testimony, thus denying the press and public access to the documents illuminating the issues surrounding the rulings.

10. Respondent's improper sealing protocol also was used to withhold from the public for three weeks some 6,000 pages of exhibits to a supplemental brief filed by Defendant on July 10 in support of his motion to move the trial outside of Cook County, a matter of significant public interest. Apparently based on the State communicating to Defendant the possibility that the State was contemplating filing a motion to seal the exhibits, Defendant, per the May 24 Order's sealing protocol, did not file the exhibits publicly, submitting instead a single page stating that the exhibits were "temporarily filed under seal per the Prosecutor's request." (SR259.) On July 31, when Movants noted the withholding of these exhibits for three weeks as a prime example of the unlawful consequences of Respondent's sealing protocol, defense counsel stated in open court that the defense was filing the exhibits that were withheld since July 10 "per the Prosecutor's request," the State apparently having decided not to move to seal. (SR302-03.)

11. In view of Respondent's impermissible May 24 sealing protocol, Movants requested that Respondent adopt a protocol in which Movants would receive contemporaneous service of any motions to seal, respond to them in a reasonable time, and receive rulings on the motions to seal before Respondent ruled on the underlying motions. (SR291-93, 295-96.) On July 31, Respondent denied these requests, refusing to vacate the May 24 Order, and ruling only that Movants would receive "notice" of motions to seal. (SR297-99; SR306.) Respondent left the May 24 order intact in all other respects, thus declining to grant Movants' requests for: (1) contemporaneous service of motions to

seal, (2) an opportunity to be heard, (3) hearings on motions to seal, (4) assurance that Respondent would not delay ruling on motions to seal until after deciding the issues underlying the documents affected by such motions, and (5) relief from how Respondent's protocol allows documents to be withheld from the public for an indefinite time based on one party's stated intention to file a motion to seal. (SR291-93, 297-301; SR306.) In addition, in granting only Movants' request for notice of motions to seal, Respondent stated that notice is "[n]ot the right to speak." (SR295.)

D. *Respondent's Repeated And Substantive Closed "Conferences"*

12. At least 12 times in 2018 alone, Respondent has conducted "informal case management conferences," in chambers and with no court reporter present. (SR3; SR6; SR10; SR14-15; SR23-24; SR80; SR127-28; SR173; SR187-88; SR267; SR283-85; SR288-89.) Movants made contemporaneous objections to many of the conferences, but Respondent chided them for objecting. (SR127-28; SR262-66.)

13. Respondent asserts an "absolute right" to hold closed conferences for the purposes of "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." (SR22.)[3] The record shows that the conferences have lasted as long as one hour (SR206-07), and although the absence of a court reporter at these in-chambers conferences prevents Movants, the parties, or the trial court from communicating

[3] Respondent also has cited Illinois Supreme Court Rule 402 as permitting such closed conferences. (SR263-64.) But that rule simply authorizes circuit court judges to participate in criminal plea discussions. *See* Ill. Sup. Ct. R. 402(d)(1).

precisely what occurred during the conferences, the available on-the-record summaries of the conferences show that they have addressed far more than scheduling, including:

(a) On June 14, Respondent made at least two still-secret rulings, one on what evidence of Mr. McDonald's alleged past violent acts may be admitted at trial, and the second on what Defendant's psychological expert may say about what Defendant was thinking at the time of the shooting (SR176-78);

(b) On June 14, Respondent discussed and delayed a decision on Movants' intervention rights by announcing, immediately upon return from a closed in-chambers conference, that Movants' intervention would be "split" or severed from the rest of the case, a decision that resulted in Movants' inability to object to an unannounced closure of the courtroom on June 28 (SR173; SR187-88);

(c) On June 14, Respondent instructed the special prosecutor in a closed in-chambers conference to file a motion to strike Movants' then fully briefed Supplemental Access Motion (SR176), a decision that contributed to the delay of the trial court's formal denial of the Supplemental Access Motion – and thus prolonged the denial of Movants' right of contemporaneous public access – for another month and a half;

(d) During a June 28 conference that lasted a full hour, at a minimum,[4] Respondent discussed with the parties the form and content of written questions to be posed to prospective jurors. (SR187-88, SR206-07); and

(e) Going back to at least January 2018, the parties and the trial court have discussed the development and progress of Defendant's motion (later filed on March 28, 2018) to move the trial out of Cook County, an issue of enormous public interest, and in a closed in-chambers conference on January 18, they discussed that motion, including Defendant's gathering of "poll [data]" to support his motion. (SR3.)

14. The June 14 in-chambers conference presents perhaps the most illustrative example of how Respondent took adjudicative action during these conferences. On June 14, Respondent disclosed that during that day's closed in-chambers conference,

[4] Respondent keeps no public record of the duration of the in-chambers conferences, as far as Movants are aware.

Respondent entertained a defense motion to "change[] my ruling" on the scope of testimony Defendant's expert would be allowed to offer. (SR176-77.) Respondent further announced that during the June 14 closed case management conference, he decided to deny the defense's motion to reconsider his earlier rulings under *People v. Lynch*, 104 Ill. 2d 94 (1984). (SR177-78.) No explanation was given for the ruling, nor did the trial court disclose which of the motion's eight witness accounts of Mr. McDonald's alleged past violent acts would be admitted. (*Id.;* SR176-77.) All Respondent said in open court about his denial of Defendant's *Lynch* reconsideration motion, in his after-the-fact summary of what happened during the in-chambers conference, was that the motion was "denied," and that "the State has decided not to file a written consideration on that – I mean, a written reply." (SR178.) All Respondent said in open court about the admissible defense expert testimony was that the expert could testify as to the "ultimate issue." (SR176-78.)

15. This year, in conducting at least twelve conferences in chambers, Respondent has entered no findings to support holding court proceedings out of public view. On July 31, Respondent denied Movants' request to stop closing adjudicative case management conferences without the proper findings, stating, "[t]hat's not happening." (SR293-94.)

E. *Respondent's Closure Of The Courtroom Without Notice Or Hearing*

16. Respondent has closed the courtroom at least three times: on May 4 and 10, and on June 28. (SR77; SR81-83; SR192-93.)

17. The May 4 and May 10 closures took place after the State moved to close those hearings. Movants were allowed to file a brief in opposition to the closures (SR43-58), and Respondent held a hearing before issuing a written ruling dated May 4. (SR64-73). But the June 28 closure occurred without any motion, notice, hearing, or opportunity for Movants to be heard. (SR192-93.) In fact, it occurred after Respondent had instructed Movants that they would not appear or be heard that day (saying Movants were "split" from the main case). (SR173-74.) When Movants attended the public court session on June 28 and attempted to raise a question, Respondent told Movants' counsel to "sit down" because "[y]ou're not a party to this." (SR191.) In support of the trial court's closure of the courtroom to all members of the public, including reporters, on June 28, Respondent said only: "The reason for it is because this would effect [sic] the jury pool and also effect [sic] the answers that may be given and whether their [sic] candid in this trial. And it's pursuant to *People of the State of Illinois vs. Robert Kelly*." (SR192-93.) On July 31, Respondent did not specifically address Movants' request to stop closing the courtroom in this impromptu fashion. (SR293-301.)

F. *The July 17 Order Prohibiting Mr. Fuentes From Speaking In The Courtroom*

18. On July 17, Respondent took the extraordinary step of barring Mr. Fuentes from speaking in court for the duration of this case. This unprecedented order was based on Mr. Fuentes' attempts to effectively advocate on behalf of Movants' interests in transparency.

19. The trial court explained that it was barring Mr. Fuentes from speaking, based on four matters:[5] (1) on May 4, Mr. Fuentes said nothing, but approached co-counsel while she addressed the court (SR262-66; SR76, Ex. C), (2) on June 14, Mr. Fuentes made a contemporaneous objection to the trial court's holding an informal case management conference in chambers (SR262-66; SR172-73, Ex. C), (3) on June 28, outside of the formal court proceedings, Mr. Fuentes allegedly told a deputy sheriff that he brought a toothbrush with him (SR262-66, Ex. C), and (4) on June 29, Mr. Fuentes made a statement about wanting to abide by this Court's Supervisory Order himself, at a time when "nothing was pending" during the hearing and "as the special prosecutor and the defense team were putting their legal documents into their cases" (SR262-66; SR203-04, Ex. C). Respondent indicated that this June 29 "interrupt[ion]" by Mr. Fuentes explained why Respondent then instructed the court reporter as follows: "Whatever he is saying, don't take that down." (SR203-04; SR264-66, Ex. C.)

ARGUMENT

The trial court violated this Court's Supervisory Order – and the First Amendment and common law – by repeatedly denying access to the media and the public, most obviously by:

- keeping 35 court documents under seal improperly;
- imposing a sealing procedure that allows the press and public to be shut out of motions to seal altogether and that permits documents to be kept under seal indefinitely without a motion to seal ever being filed; and

[5] Attached as Exhibit C are the transcript excerpts containing Respondent's July 17 criticism of Mr. Fuentes and the proceedings to which Respondent referred.

- holding closed hearings in chambers and in the closed courtroom, in which Respondent adjudicates important issues and makes sealed rulings without giving Movants notice and an opportunity to object to closure, and without making the necessary findings.

In addition, on July 17, Respondent improperly barred Mr. Fuentes from speaking on the Movants' behalf in the courtroom. Given that these actions post-date this Court's May 23 Supervisory Order, it is obvious that absent a clear, unequivocal directive, the trial court will not abide by this Court's Order and the constitutional and common law requirements of public access it was intended to vindicate. The public interest requires more, not less, transparency in this important criminal case. Accordingly, Respondents respectfully request that this Court grant the relief sought in this motion.

I. A Supplemental Supervisory Order Is Needed To Make Clear That No Judicial Document In This Case May Be Kept Sealed Unless Respondent Applies The Proper First Amendment And Common Law Standards.

This Court's May 23 Supervisory Order directed that "all documents and pleadings" in this case must be filed in the Clerk's Office and that any party may move to seal a document filed in the Clerk's Office. As the case law and the Illinois Clerks of Court Act make clear, a presumption of access applies to documents filed with the Clerk's Office. *Skolnick*, 191 Ill. 2d at 230-33; 705 ILCS 105/16(6). Thus, the Supervisory Order properly sought to correct the error in the trial court's wholesale sealing of this court file and to encourage compliance with the *Press-Enterprise II* test for sealing documents as required by this Court and the U.S. Supreme Court. *Skolnick*, 191 Ill. 2d at 230-33; *Press-Enterprise II*, 478 U.S. at 13-15.

Despite the clear import of this Court's order, Respondent held that it did not apply "retroactive[ly]"[6] to 35 court documents filed in chambers before May 23. (SR130-31, SR297-300.) Notably, the parties filed these documents in reliance on the improper and now-vacated February 2017 order, without filing motions to seal (and thus depriving the public of notice) and without any specific findings or narrow tailoring by Respondent. (SR305.) When Movants sought to unseal these documents in March and April 2018, Respondent failed to apply the proper presumption of access to them. The trial court relied on its "file-everything-in-chambers" rule to support its reasoning that these court filings were not accessible, and it made no effort to narrowly tailor the sealing order to achieve a higher purpose. (SR19-21, SR27-29.) Movants filed a supplemental motion with the trial court after this Court issued its Supervisory Order, giving Respondent an opportunity to correct these errors, but to no avail.

Not only is the withholding of these documents constructed on the faulty foundation of a now-vacated order, but Respondent's stated reasons for withholding them simply cannot pass muster under the First Amendment and common law presumptions of public access. For example, with regard to basic court filings like Defendant's motion to dismiss the indictment based on prosecutorial misconduct, the trial court improperly, and with no legal precedent, justified withholding the court filings based on its conclusions that the motions failed to establish prosecutorial misconduct or might harm the prosecutors' reputations, and that Movants, as media organizations, could avail

[6] As a preliminary matter, "a judicial decision is presumed to apply both retroactively and prospectively." *Harris v. Thompson*, 2012 IL 112525, ¶ 29.

themselves of privileges or defenses to counter theoretical defamation suits, presumably by such public prosecutors. (SR35.) Indeed, there is a compelling public interest in knowing what the allegations are against these public prosecutors (then from the Cook County State's Attorney's Office, before appointment of the special prosecutor), how the public's current representative in court (the special prosecutor who serves as the state's attorney in Kane County) in this case responded to them, and other details about these allegations contained in judicial documents filed in this case. *See Waller v. Georgia*, 467 U.S. 39, 45-47 (1984).

It cannot be true that this Court intended, in issuing the May 23 Supervisory Order, to allow Respondent's earlier, flawed sealing rulings – based largely on a now-vacated, discredited order – to stand, so that constitutional violations dating back to at least February 2017 are allowed to continue with no correction at all. But that is precisely how Respondent has parsed this Court's order. Movants ask this Court to confirm that its May 23 Order restores the First Amendment presumption of access to "*all* documents and pleadings. At the same time, Movants do not wish to cause any delay of the trial, scheduled for September 5, and therefore, on remand, are willing to limit their request for access (from among the 35 documents kept under seal by Respondent's order of May 4) to the six documents identified above. *See supra* n.1. These six filings should be made publicly available in the Clerk's Office unless a party moves to seal them.

II. A Supplemental Supervisory Order Is Necessary To Prevent Respondent's Sealing Mechanism From Wrongfully Denying The Public Contemporaneous Access To Judicial Documents And An Opportunity To Object To Such Secrecy.

The trial court reacted to this Court's May 23 directive, *sua sponte*, by implementing sealing procedures that set up a new unconstitutional obstacle to the First Amendment right of public access. Under the May 24 sealing protocol, the press and public do *not* have a right to respond to motions to seal, or to be heard by the court. While Respondent agreed to allow Movants "notice" of motions to seal, he did not guarantee Movants a right to "speak" against such motions. (SR295.) Meanwhile, Respondent has delayed ruling on motions to seal documents until after he has decided the substantive matters raised by the underlying documents. (SR176-78; SR199.) Respondent's procedure also allows – and has allowed – either party to keep court file documents from the public indefinitely while that party contemplates filing a motion to seal or merely states an intention to do so. (SR115, Ex. B May 24 Order.) These procedures frustrate the right to contemporaneous and meaningful access and are contrary to this Court's stated intent of requiring all documents in this case to be filed publicly, subject to any party's actual filing of a motion to seal.

Notably, Respondent's procedure does not require any party to even file a motion to seal in order to have a filing kept secret with the court; a party simply needs to express an intent to file such a motion in the future, or even a desire to consider whether it might file such a motion that is never filed at all. (*Id.*) This aberrant protocol – which turns normal practice and procedure on its head – contravenes the command in this Court's May 23 Supervisory Order that all documents be publicly filed in the Clerk's Office, unless

a party files a motion to seal, to say nothing of the foundational First Amendment principles that support this Court's Order. Further, the objecting party under this protocol can cause judicial documents to be sealed without advancing a factual and legal basis to meet the high standard required to overcome the public's presumptive right of access, and no court is required to make findings justifying the sealing. For example, the State dropped its "request" to "temporarily" seal 11 exhibits to Defendant's July 10 supplemental change of venue brief, but that happened 21 days after Defendant filed the brief and only after Movants called Respondent's attention to the withholding of these exhibits as an example of how Respondent's sealing protocol allows each party to block public access to documents indefinitely. (SR292-93.) The 21-day sealing of these exhibits presents a textbook example of why Respondent's sealing mechanism is constitutionally defective by denying the public and press contemporaneous access to public documents. When specifically asked to remedy this problem on July 31, Respondent refused. (*See* SR292-93, SR299.) Respondent's sealing protocol is unconstitutional for three reasons:

First, the trial court's May 24 sealing protocol denies the public its right to *contemporaneous* access. To inform the public, the press needs timely, accurate, and complete information relating to court filings. *See Grove Fresh*, 24 F.3d at 897-98 ("each passing day [of denial of access] may constitute a separate and cognizable infringement of the First Amendment"); *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 news reports can be "fleeting," so delayed disclosure

"undermines the benefits of public scrutiny and may have the same result as complete suppression." *Grove Fresh*, 24 F.3d at 897. That is why the Second Circuit in *Lugosch* held that a trial court could not hold a news media intervention motion in abeyance until after it had ruled on a motion for summary judgment – the delay imposed "was a delay that was effectively a denial of any right to contemporaneous access." 435 F.3d at 126.

Second, Respondent has only granted Movants "notice" of motions to seal without allowing them to "speak" concerning these motions, rendering notice meaningless. (SR295, 7/31/18 Tr. at 13.) This ignores the constitutional guarantee that the public will have notice *and an opportunity to be heard* before a court will close hearings or seal documents. "If the constitutional right of the press and public to access is to have substance, representatives of these groups must be given an opportunity to be heard on the question of their exclusion." *Gannett Co. v. DePasquale*, 443 U.S. 368, 400-01 (1979) (Powell, J., concurring); *see also Globe Newspaper*, 457 U.S. at 609 & n.25. For that reason the news media must be given an opportunity to be heard before they can be denied public access. As the Seventh Circuit explained in *In re Associated Press*, 162 F.3d 503 (7th Cir. 1998), in order to ensure the media's right of contemporaneous access, "our case law has recognized that those who seek access to such material have a right to be heard in a manner that gives full protection of the asserted right," including "adequate notice of any limitation of public access to judicial proceedings or documents" and an adequate opportunity to "challenge that limitation" by arguing to a court that the material should be subject to public scrutiny. *Id.* at 507; *see also Jessup v. Luther*, 227 F.3d 993, 997 (7th

Cir. 2000) (quoting *In re Associated Press* for proposition that newspaper had right to be heard and to challenge proposed limitations on public access).[7] Moreover, the public and press cannot meaningfully oppose the sealing of a document when Respondent allows a party to seal it unilaterally without actually filing a motion to seal.[8]

Third, the trial court's procedure, employed on June 14, (SR176-78; SR199), of holding documents under seal without ruling on the motion to seal until after it decides the underlying motion or issue, denies public access to judicial documents at the time the public needs access the most. This protocol denies the press and the public an opportunity to fully understand what the trial court is deciding at the time it makes and announces its substantive rulings. The result of this procedure is the shielding of judicial decisions from public view, in a manner that, if it continues, threatens to have a corrosive effect on trust in the judicial system. *Richmond Newspapers*, 448 U.S. at 572 ("People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.").

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[7] Other federal courts of appeal are in accord. *See In re Hearst Newspapers, L.L.C.*, 641 F.3d 168, 182-83 (5th Cir. 2011) *as revised* (June 9, 2011); *Phoenix Newspapers, Inc. v. U.S. Dist. Court*, 156 F.3d 940, 949 (9th Cir. 1998); *In re Washington Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986); *In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 475-76 (6th Cir. 1983).

[8] Respondent's May 24 Order purports to limit the indefinite period during which such documents would remain in limbo by requiring the parties to act "promptly and in good faith" (SR115, Ex. B May 24 Order), but the episode involving the 11 exhibits to Defendant's change-of-venue brief demonstrates that however well-intentioned this attempt at limitation may have been, in practice it is insufficient to protect Movants' First Amendment right to contemporaneous access.

A supplemental supervisory order is thus essential to ensure that the sealing procedures and practices in this case do not operate as an unlawful substitute for the earlier procedure – set forth in the now-vacated February 2017 Order – that this Court set aside. Movants ask this Court to make clear, in a supplemental supervisory order, that: (1) the May 24 Order is vacated and the parties may file documents under seal only when accompanied by a publicly filed motion to seal,[9] (2) the parties must serve Movants with any motion to seal at the time of filing, (3) Movants must receive an opportunity to respond within a reasonably short time frame, (4) rulings on the motions to seal must be made on the record, based on the standards set forth in *Press-Enterprise II*, and (5) rulings on motions to seal must be made *before* rulings upon the matters sought to be sealed.

[9] Movants' requested procedure would mean that the filing party is responsible for moving to seal the documents it wishes the trial court to seal, and for justifying its proposed sealing under the proper constitutional standards. This procedure is consistent with common judicial practice placing the burden on the filing party to move to seal documents proposed to be sealed. *See, e.g.*, U.S. Dist. Ct. Rules N.D. Ill. LR 26.2(c) ("[a]ny party wishing to file a document or portion of a document electronically under seal in connection with a motion, brief or other submission must . . . move the court for leave to file the document under seal"). Courts have been wary even of protective orders that allow either party "carte blanche to decide what portions of the record shall be kept secret," reasoning that judicial documents subject to a presumption of public access may not be sealed without a determination by the court. *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945-46 (7th Cir. 1999). Under Movants' proposed procedure, one party simply would not be allowed to bar the other from filing judicial documents in this case in the Clerk's Office.

III. This Court Should Direct That Hearings In This Case Should Not Be Closed Without Providing Movants With Notice And An Opportunity To Be Heard And Without Making Constitutionally Adequate Findings.

Generally, holding certain case management conferences, or in-chambers conferences, is within a court's discretion. *See United States v. Murphy*, 768 F.2d 1518, 1536 (7th Cir. 1985). But the record shows that the trial court in this critically important case has abused its discretion and the First Amendment, particularly following this Court's May 23 Supervisory Order. Respondent is hearing matters in his chambers for the same reason court filings were required to be filed in chambers – to keep them secret and out of the public arena. The public deserves more. This Court should stop Respondent's continuing practice of conducting the public's business in secret, unreported sessions in chambers. Respondent has conducted substantive hearings and adjudicated important issues in this case during closed sessions in chambers, without providing notice or an opportunity to object to such closure, without making specific findings, and without even including a court reporter to transcribe the proceedings. These closed hearings last as long as a full hour. (SR206-07.)

Respondent thus is abusing what is meant to be a practical and narrow housekeeping exception to the First Amendment presumption of access. The result has been a lack of public scrutiny of substantive motions – and rulings on those motions. That is not constitutionally permissible.[10] Public access to a proceeding does not turn on

[10] Subsequent on-the-record summaries of judicial rulings or of other substantive issues are an insufficient substitute for public access, as courts repeatedly have held. "The ability to see and to hear a proceeding as i[t] 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

whether a court calls that proceeding a "conference." Rather, the critical question is whether the *process* has historically been open – a question that can be resolved only by looking to the function of the process at issue. *See Press-Enterprise II*, 478 U.S. at 7 ("[T]he First Amendment question cannot be resolved solely on the label we give the event, *i.e.*, 'trial' or otherwise, particularly where the preliminary hearing functions much like a full-scale trial."); *N.Y. Civ. Liberties Union v. N.Y. City Transit Auth.*, 684 F.3d 286, 301-02 (2d Cir. 2012) (rejecting administrative agency's argument that its history of conducting closed hearings precluded finding of historical openness, explaining that the *Press-Enterprise II* test focused on whether the *process* was open).

In applying the "experience and logic" tests discussed in *Press-Enterprise II*, courts have recognized that proceedings in which the court *adjudicates* the substantive rights of a party should be open to the public. *See, e.g.*, *N.Y. Civ. Liberties Union*, 684 F.3d at 290 (applying First Amendment presumption of access to administrative hearing, explaining that "[t]he public's right of access to an *adjudicatory* proceeding does not depend on which branch of government houses that proceeding") (emphasis added); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 696 (6th Cir. 2002) (finding right of access to immigration hearings that were adjudicatory in nature); *B.H. v. Ryder*, 856 F. Supp. 1285, 1291-92 (N.D. Ill. 1994) ("The hallmark of a proceeding traditionally open to the public is

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appellate judge can attest, the 'cold' record is a very imperfect reproduction of events that transpire in the courtroom."); *United States v. Alcantara*, 396 F.3d 189, 201-02 (2d Cir. 2005) (finding First Amendment implicated even though transcript of robing room plea was made available to public).

that the proceeding is one in which the court will adjudicate a party's substantive rights.").

In this case, Respondent has held "conferences" in which he has adjudicated the substantive rights of the Parties and the Movants in secret. Respondent determined what evidence Defendant will or will not be able to offer about Mr. McDonald's alleged past violent acts under *Lynch*, and about Defendant's state of mind at the time of the shooting – evidentiary decisions that have a significant potential to influence the outcome of the case. (*See supra* ¶13.) Respondent also has sealed the orders themselves in which he made his rulings about admissibility of the *Lynch* issues and of the defense expert psychologist testimony. (SR176-78; SR189-90; SR200-02.) Further, Respondent adjudicated Movants' intervention rights during closed in-chambers conferences, determining that Movants' public access issues – which included litigation of fully briefed motions to seal and Movants' ability to attend relevant hearings in the case – would be severed from the rest of the case in a manner that ultimately deprived the public of contemporaneous access to judicial documents and of the ability to object to being excluded from the closed June 28 court hearing. (SR172-74.) Respondent on June 14 even instructed the State to file a motion to strike Movants' Supplemental Access motion (SR176), a step tantamount to denial of that motion, as Respondent later struck the motion, (SR197-98), contributing to an additional month of delay before Respondent acted on the issues Movants now have been forced to place before this Court in their motion for a Supplemental Supervisory Order (SR297-301; SR306).

The June 28 in-chambers conference lasted a full hour (SR206-07), and the length of this conference is at least circumstantial evidence of its substantive content. The June 28 conference also occurred on the court date immediately after the adjudicative in-chambers conference Respondent held on June 14, as described above.

On July 31, Respondent refused, without explanation, Movants' request to stop conducting adjudicative hearings in chambers without the on-the-record findings required by *Press-Enterprise II*. (SR293-94.)

Accordingly, Movants seek a supplemental supervisory order directing that any adjudicative proceedings, particularly those including the trial court's rulings, must not occur in closed "conferences" or hearings absent the necessary findings under *Press-Enterprise II*, and that Respondent's judicial orders entered during or arising out of any of these conferences or hearings – including but not limited to the two orders Respondent discussed on the record on June 14 – be released to the public.[11] Movants' request also extends to closed courtroom hearings such as the recent June 28 hearing that was closed without notice, motion, hearing, or opportunity for Movants to oppose such a closure, and in the absence of any disruption or disturbance. Specifically, on June 28, the courtroom

[11] Movants have never asserted that the identities or identifying information of the *Lynch* witnesses must be disclosed, or that no findings could ever be made to justify suppression of that information. But there is no basis for suppression of the trial court's legal rulings, which are the property of the public, which underwrites the judicial system that produces them. *See A.P. v. M.E.E.*, 354 Ill. App. 3d 989, 997 (1st Dist. 2004), citing *Pepsico, Inc. v. Redmond*, 46 F.3d 29, 31 (7th Cir. 1995). Courts repeatedly have said that sealing an entire document is inappropriate where the public may be provided with an appropriately redacted version of that document. *See United States v. Andreas*, 150 F.3d 766, 768 (7th Cir. 1998); *In re Krynicki*, 983 F.2d 74, 75 (7th Cir. 1992).

was closed to discuss "jury trial questionnaires" with no notice or opportunity for Movants to be heard, violating the longstanding principle that the public needs to be told when a court intends to take such a step and must have an opportunity to oppose it. (SR187-88.)

Respondent is certainly capable of entertaining motions to close hearings, to allow Movants to respond, and to enter written findings, as Respondent did as to the closed *Lynch* and expert hearings. (SR64-73.) Movants request a supplemental supervisory order to ensure that: Respondent does not close another public hearing without notice; Movants receive an opportunity to respond; Respondent makes specific, on-the-record, judicial findings as required by *Press-Enterprise II*; and all judicial rulings be released publicly, including any discussed during or arising out of closed proceedings.

IV. This Court Should Order Respondent To Vacate The July 17 Order Prohibiting Mr. Fuentes From Speaking In The Courtroom.

To advocate effectively on behalf of Movants' interests in transparency, Mr. Fuentes has professionally and politely objected to a variety of matters in the trial court. On July 17, Respondent took the extraordinary step of barring Mr. Fuentes from speaking in court for the duration of this case because of these past objections. The trial court lacked legal authority to enter this "gag" order, and the order is punitive, factually baseless, and legally wrong. This Court should vacate it.

The trial court usurped this Court's disciplinary authority and improperly barred Mr. Fuentes from speaking in court based on four findings. First, Mr. Fuentes approached his co-counsel while she was addressing the court but did not interrupt her statements or say anything to her, the court, or anyone. (SR262-66; SR76, Ex. C.)

Second, Mr. Fuentes made a contemporaneous objection as Respondent was directing the parties to leave the courtroom for his chambers. (SR262-66; SR172-73, Ex. C.) Third, Mr. Fuentes engaged in an ordinary exchange with Respondent about Movants' desire to submit a redacted courtesy copy of their motion after Respondent had stricken it. (SR262-66; SR203-04, Ex. C.) Fourth, Mr. Fuentes allegedly made an inconsequential statement (the reference to the toothbrush) to a court bailiff in an out-of-court conversation. (SR262-66, Ex. C.)

Movants' research has located no decision – anywhere in our country – that supports "gagging" (or otherwise disciplining) a lawyer based on the kinds of alleged conduct and statements cited by the trial court. To the contrary, precedent from this Court and other courts confirms that the trial court exceeded its authority in disciplining Movants' counsel in this fashion.

In the first instance, Respondent lacked legal authority to impose such a gag order on counsel. Where, as here, a judge is not exercising the power to hold an attorney in contempt, the judge cannot regulate an attorney's practice of law; that is the exclusive province of the Illinois Supreme Court and its Attorney Registration and Disciplinary Commission. *See* Ill. Sup. Ct. R. 751. In *In re General Order of March 15, 1993*, the trial court barred a lawyer from appearing in the courtroom. The appellate court reversed, finding that, "[t]he trial court's inherent power to control the courtroom and maintain the proper decorum extends no further than its ability to find someone in contempt." 258 Ill. App. 3d 13, 17 (1st Dist. 1994). Similarly, in *Burnette v. Terrell*, 232 Ill. 2d 522, 542 (2009) this Court used its supervisory power to reverse a circuit court judge's order barring an

assistant public defender from appearing in the courtroom. This Court cited with approval *In re General Order of March 15, 1993*, and found that the circuit court judge lacked authority to prohibit the lawyer from practicing in the courtroom. "In the absence of a finding of contempt or other cause, the actions taken by respondent [of repeatedly barring an assistant public defender from representing clients in his courtroom] were not within his inherent power to manage his courtroom and calendar." 232 Ill. 2d at 542. *See also People v. Camden*, 210 Ill. App. 3d 921, 925-26 (5th Dist. 1991) (rejecting a trial court's fine of a prosecutor not held in contempt, as "an impermissible infringement on the exclusive power of the supreme court, acting through the Attorney Registration and Disciplinary Commission (ARDC), to adjudicate attorney disciplinary matters").

Second, even if Respondent had the legal authority – through contempt power or otherwise – to bar Mr. Fuentes from speaking in court, that authority was grossly abused in this case. For instance, in *People v. Miller*, this Court reversed a circuit court's contempt order against a lawyer based on a finding that, in front of the jury, counsel made "gratuitous comments" that had a "tendency to cast an improper reflection upon the integrity of the State's Attorney and the court." 51 Ill. 2d 76, 78-79 (1972). This Court explained that although counsel's conduct "may have been overzealous or improperly sarcastic at times," his conduct in the courtroom "constituted a good faith attempt to represent his clients without hindering the court's functions or dignity . . . ." *Id.* at 79. Similarly, in *People v. Pearson*, the appellate court reversed a contempt finding against a lawyer whose conduct at trial "while not exemplary, was not shown to have been more than a lawyer's strenuous and persistent presentation of his client's case." 98 Ill. App. 2d

203, 212 (1st Dist. 1968). And, in *In re McConnell*, the United States Supreme Court reversed a summary contempt order finding that "[t]he arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty." 370 U.S. 230, 236 (1962).

Respectfully, if the Court reviews the transcripts in this matter, Movants are confident the Court will conclude that Mr. Fuentes has done nothing that could remotely be construed as improper. Respondent had no authority to silence Mr. Fuentes, who has done nothing more than attempt to make objections with the goal of advancing the press and the public's interest in transparency and openness in this case. That is Mr. Fuentes' right and his obligation to his clients. Respondent's silencing of Mr. Fuentes is wholly unwarranted, unlawful and improper.

V. 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 and quotations 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). Again, Respondent has set a September 5 trial date; time is running short.

As was true of Movants' initial motion for a supervisory order, the process of appellate review will not take place in time for Movants to obtain meaningful relief. A supplemental supervisory order thus is needed to vindicate Movants' First Amendment and common law rights of public access to the filings and proceedings in this case.

CONCLUSION

This is a fundamentally important case not only for the parties, but also for the press and the public. For the foregoing reasons, Movants respectfully request that the Court grant this motion and provide relief from Respondent's improper actions to restrict public access to documents and proceedings in the wake of the May 23 Supervisory Order.

Dated: August 7, 2018

Respectfully submitted,

CHICAGO PUBLIC MEDIA, INC.

By: /s/ Jeffrey D. Colman
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
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EXHIBIT A

State of Illinois
Supreme Court

I, Carolyn Taft Grosboll, Clerk of the Supreme Court of the State of Illinois, and keeper of the records, files and Seal thereof do hereby certify the following to be a true copy of an order entered May 23, 2018, in a certain cause entitled:

123569	)	
	)	
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 Company, LLC, and Sun-Times Media, LLC,	)	
	)	
Movant	)	Motion for Supervisory Order
	)	Cook County Circuit Court
v.	)	15CR20622
	)	17CR4286
Hon. Vincent M. Gaughan, Judge of the Circuit Court of Cook County,	)	
	)	
Respondent	)	
	)	
People State of Illinois	)	
	)	
Jason Van Dyke	)	

Filed in this office on the 11th day of May A.D. 2018.

SEAL OF THE SUPREME COURT
STATE OF ILLINOIS
AUG. 26, 1818

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Supreme Court, in Springfield, in said State, this 23rd day of May, 2018.

Carolyn Taft Grosboll *Clerk,*
Supreme Court of the State of Illinois

123569

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 Company, LLC, and Sun-Times Media, LLC,	)	Motion for Supervisory Order Cook County Circuit Court 15CR20622 17CR4286
Movant	)	
v.	)	
Hon. Vincent M. Gaughan, Judge of the Circuit Court of Cook County,	)	
Respondent	)	
People State of Illinois	)	
Jason Van Dyke	)	

CORRECTED ORDER

This cause coming to be heard on the motion of movants, Chicago Public Media, Inc., et al., due notice having been given to respondent, and the Court being fully advised in the premises:

IT IS ORDERED: Motion by Movants for a supervisory order. Allowed. The Circuit Court of Cook County is directed to vacate its February 3, 2017, order, directing that all documents and pleadings shall be filed in Room 500 of the George N. Leighton Criminal Courthouse only. All documents and pleadings shall be filed in the circuit clerk's office. The parties may move to file any document under seal.

Order entered by the Court.

Thomas and Theis, JJ., took no part.

FILED
May 23, 2018
SUPREME COURT
CLERK

EXHIBIT B

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

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

This Court's order dated February 3, 2017 is terminated instanter pursuant to the Illinois Supreme Court's order of May 23, 2018.

All motions or other filings shall be filed with the Clerk of Court on the fifth floor of the administrative building, 2650 S. California. Courtesy copies shall be submitted to the Court in Room 500 on the same date.

Prior to submission to the Clerk, the filing party shall first notify the opposing party of its intention to do so and the nature of the document to afford the other party fair opportunity to request the document be sealed. No party shall file any document with the Clerk until receiving a reply from the other party indicating receipt of notice. The Court expects the parties to act promptly and in good faith.

So ordered.

ENTERED
JUDGE VINCENT GAUGHAN-1553
MAY 24 2018
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Vincent M. Gaughan

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

Date: May 24, 2018

EXHIBIT C

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.) No. 17-CR-04286-01
JASON VAN DYKE,)
Defendant.)

REPORT OF PROCEEDINGS had of the above-entitled cause, before the HONORABLE VINCENT M. GAUGHAN, one of the judges of said Court, on the 17th day of July, A.D., 2018.

APPEARANCES:

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

MR. RANDY RUECKERT,
MS. TAMMY WENDT,
appeared on behalf of the Defendant;

KATHY SZOTEK
Official Court Reporter
Criminal Division
CSR: #084-004657

APPEARANCES: (Continued.)

MR. GABRIEL FUENTES,
MR. JEFFREY COLMAN,
MR. PATRICK CORDOVA,
MS. LIZA SCOTT (law student),
on behalf of Chicago Public Radio;

HON. KIMBERLY M. FOXX,
State's Attorney of Cook County, by:
MR. JAYMAN AVERY,
on behalf of the Clerk of the Circuit Court
of Cook County;

MS. LAUREN RAYMOND,
on behalf of the Clerk of the Circuit Court
of Cook County.

I think, additional clarity from this Court as to the scope of that order. And the position of the intervenors is --

THE COURT: Yes, we'll get to that --

MR. FUENTES: -- that it affects all orders in the file.

THE COURT: All right. Gabriel, I appreciate that. We'll get to that later.

Okay. All right. Now, here comes something very unpleasant for me. There's been a course of conduct that's been happening and it's been created by Mr. Fuentes. I'm going to issue my findings and I'm going to issue an order. All right. And I don't want anybody to do anything orally. You certainly have all your rights to do whatever you want to do in writing. But if you want to contest the order and the findings, you do that in the Appellate Court or else on a motion to reconsider.

All right. First off, there's been a series of interruptions in this courtroom and it's very unpleasant for me and I don't even like to do any of this stuff. All right. But first off, we're going to start with on May 4, 2018, Ms. Natalie Spears was -- and this is on page 50 -- was in front

of this Court making her presentation concerning about when the transcripts for the sealed hearings would be released. And it starts off:

"THE COURT: No. The inconsistencies --"

And then:

"MS. SPEARS: So that --"

And then:

"THE COURT: Sit down there, Mr. Fuentes. I gave you your time. Come on now. Don't be taking Natalie's spot. Shame on you."

All right. That's the first interruption that took place.

All right. All right. Then on June 14th, at that time the proceedings were at a point where I was going to say that we're going to have an informal case management conference. And it starts on page 5:

"At this time, we're going to have an informal case management conference. Let me have the special prosecutors and the defense back, please.

MR. FUENTES. Objection, for the record, Judge."

First of all, there are -- judges in any

courtroom are allowed to have informal case management conferences, issues conferences. Supreme Court Rule 402 also allows these to be taking place. This is a gratuitous interruption of the Court, and it starts to show a course of conduct.

Then on June 28, 2018 -- Deputy Keehan, come out here. All right. Did Mr. Fuentes make a statement to you on that date?

THE SHERIFF: He did, Judge.

THE COURT: All right. I'm sorry. Identify yourself, please. State your name.

THE SHERIFF: Deputy John Keehan, K E E H A N.

THE COURT: What did Mr. Fuentes say to you?

THE SHERIFF: He informed me he had a toothbrush with him.

THE COURT: Meaning that he might be taken into custody; is that your interpretation?

THE SHERIFF: Yes, Judge.

THE COURT: All right. This gives us a little insight into what Mr. Fuentes thought of his conduct also.

Then on June 29th, as the proceedings were coming to a close, Mr. Fuentes started to make a statement when nothing was pending, as the special

prosecutor and the defense team were putting their legal documents into their cases. This Court had to shut Mr. Fuentes down and admonish the court reporter to stop taking the court proceedings. And I was complimenting Mr. Fuentes -- and it goes on the top of page 25:

> "Trouble like you're violating the supervisory order that you successfully got. I have to congratulate you on that too."

And then I was interrupted and then you started making these gratuitous statements about what you're spreading of record. I had admonished the court reporter to stop taking this down.

These are very unpleasant things for me. All right. And it shouldn't be happening in any courtroom.

All right. Here's my findings. There were gratuitous interruptions which hindered the administration of justice in this courtroom. Also, these interruptions by Mr. Fuentes derogates the dignity of this Court. They only can be characterized as attempts either to embarrass or provoke this Court. These gratuitous interruptions

reflect on the court proceedings in a derogatory manner and may encourage others to make outbursts in this courtroom. All right. These interruptions are also inconsistent with the due process of law by not giving the special prosecutor and the defense team notice to prepare a response to what has been gratuitously put before this Court.

I have arrived at the least intrusive solution to preserve the dignity and decorum of this Court. It's not my intention to hold Mr. Fuentes in direct contempt or indirect contempt. I want to cut off that type of conduct so that that unpleasantry does never happen. So at this time, Mr. Fuentes is an intelligent and gifted lawyer, he will be allowed to contribute in every manner with his client and the other intervenors, but with the exception that he will not be allowed to make any oral presentations concerning this case that is before us, the Jason Van Dyke case.

All right. To the -- Are there any other attorneys from the intervenors here?

MR. COLMAN: I am.

MR. CORDOVA: I am.

THE COURT: Sure. Okay. Jeff, Patrick, you

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

I, KATHY SZOTEK, an Official Court Reporter within and for the Circuit Court of Cook County, Criminal Division, do hereby certify that I have reported in shorthand in the report of proceedings had in the above-entitled cause; that I thereafter caused the foregoing to be transcribed into typewriting, which I hereby certify is a true and accurate transcript of the proceedings had before the Honorable Vincent M. Gaughan, Judge of said court.

Kathy Szotek
Official Shorthand Reporter
Circuit Court of Cook County
County Department - Criminal Division
Certification No. 084-004657

Dated this 18th day of
July, 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

APPEARANCES: (Continued)

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

MR. GABRIEL A. FUENTES,
on behalf of Chicago Media;

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

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.

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

Dated this 7th of May, 2018.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

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

REPORT OF PROCEEDINGS had at the matter in the above-entitled cause before the Honorable VINCENT M. GAUGHAN, Judge of said Court on the 14th day of June, A.D. 2018.

APPEARANCES:

HONORABLE JOSEPH MCMAHON,
State's Attorney of Kane County,
Court-Appointed Special Prosecutor, and, by
MR. JOSEPH MCMAHON,
MS. JODY GLEASON, and
MR. DAN WEILER,
Assistant Special Prosecutors
appeared for the People;

Sherry L. Jones, RPR, CSR, CRR, FCRR, RMR, CRC
Criminal Court
Official Court Reporter
License No. 084-004024

APPEARANCES:

MR. DANIEL HERBERT,
MS. TAMMY WENDT, and
MS. ELIZABETH FLEMING,
appeared for the Defendant.

MS. SCOTT: Liza Scott.

THE COURT: Gabriel, move back a little bit. Let her get some T.V. time. No, you're upstaging her.

Jeff, watch him.

Go ahead. Say it again.

MS. SCOTT: Liza Scott.

MR. FUENTES: Law student.

MS. SCOTT: Law student.

THE COURT: Outstanding. First of all, there was a document filed yesterday at 4:00 p.m.

THE CLERK: Yes, your Honor.

THE COURT: By -- how come? It was suppose to be filed at least two days before, all right?

MR. HERBERT: I don't believe that was -- I don't believe that was what the Court ordered. I don't think we had a time frame on it.

THE COURT: We always have time frames on these things. Come on. Get somebody to help you remember, all right? I want them done 48 hours before so we have time to look at them, and they have to be filed before 12:00 o'clock. You don't remember -- you guys have got to look at the transcripts if you can't remember stuff, all right?

I'm considering whether I'm going to allow it to be filed anyway because you're not in compliance.

At this time we're going to have an informal case management conference. Let me have the Special Prosecutors and the Defense back, please.

MR. FUENTES: Objection for the record, Judge.

(Whereupon, a recess was taken.)

THE CLERK: Sheet six, recalling Jason Van Dyke.

THE COURT: Can I have the intervenors up here, please.

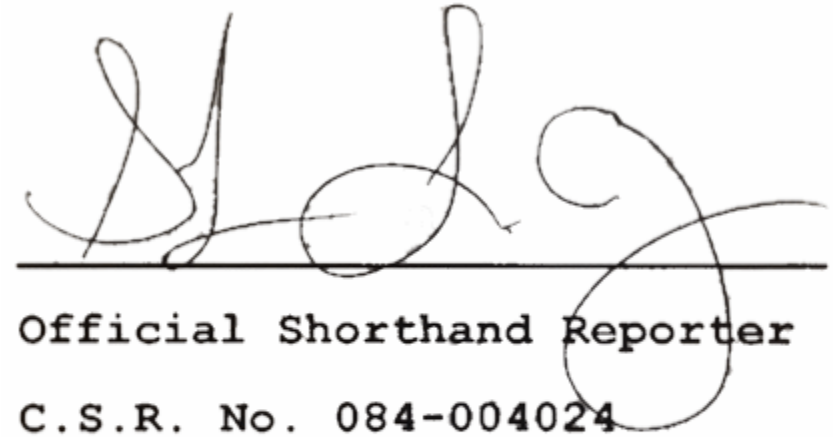
MR. FUENTES: Gabriel Fuentes on behalf of Chicago Public Media.

THE COURT: Excuse me. My court reporter does not have dementia. You just said your name about five minutes ago.

Here is what we're going to do. So we have adequate time for the petitions and filings by the intervenors I'm going to split this off from the case in chief. Our next court date on the intervenor's petition, the matters that they are filing, will be June 29th at 9:00 a.m. There will be no extended

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

I, SHERRY L. JONES, Official Court Reporter of the Circuit Court of Cook County, County Department, Criminal Division, do hereby certify that I reported the proceedings had in the above-entitled 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 on this date.



Official Shorthand Reporter
C.S.R. No. 084-004024
Circuit Court of Cook County
County Department
Criminal Division

DATE 6/15/2018

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,

vs. Case No. 17 CR 4286

JASON VAN DYKE,

Defendant.

REPORT OF PROCEEDINGS had at the hearing had before the Honorable VINCENT M. GAUGHAN, one of the judges of said court, on the 29th day of June, 2018.

APPEARANCES:

HON. JOSEPH McMAHON, State's Attorney of Kane County,
Court-Appointed Special Prosecutor, and
MR. DANIEL WEILER,
Assistant State's Attorneys,
on behalf of the People;

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

Dorothy M. Nagle, CSR
Official Court Reporter
Criminal Division
CSR #084-003564

APPEARANCES: (Cont'd.)

MESSRS. GABRIEL FUENTES,
JEFFREY COLMAN and
PATRICK CORDOVA,
on behalf of Chicago Public Radio;

MR. BRENDAN HEALEY,
on behalf of Associated Press, et al;

MS. NATALIE SPEARS,
on behalf of the Tribune;

HON. KIMBERLY FOXX, State's Attorney of Cook County, by:
MR. JASON AVERY,
on behalf of the Circuit Court Clerk;

MS. LAUREN RAYMOND,
on behalf of the Circuit Court Clerk;

ALSO PRESENT:

MR. JOEL O'CONNELL,

THE COURT: I can't hear you.

MR. FUENTES: Additional records made on behalf of the intervenors.

THE COURT: No. You can plead that. Thank you.

MR. FUENTES: Thank you, Judge.

THE COURT: Do we have anything else?

MR. FUENTES: We do. Judge, the intervenors would like to tender to the court redacted versions, copies --

THE COURT: I'm sorry?

MR. FUENTES: Copies instanter so the case may be heard.

THE COURT: Mr. Fuentes, stop it for a second. God love you too. All right. Anything that's going to be tendered better be filed on the fifth floor pursuant to the Supreme Court supervisory order.

MR. FUENTES: That will happen. We wanted to tender the courtesy copy.

THE COURT: You didn't say courtesy copy.

MR. FUENTES: I'm tendering copies. We're filing copies in the clerk's office.

THE COURT: I didn't want you to get in

trouble like you're violating the supervisory order that you successfully got it. I have to congratulate you on that too --

MR. FUENTES: Last thing I want to do, Judge. I gather from the court's ruling today on the motion to strike that the request for relief in the supplemental motion, including the release of the 35 documents sealed under the May 4th order, included adjustments to the sealing procedures --

THE COURT: Whatever he is saying, don't take that down.

You're exactly heard what happened today. There was a motion to strike your petition. I said that is true. I gave you a reason for it. It's dismissed without prejudice. That's it. Come on. All you're doing is back and forth. I'm not here in a debate. Listen to what I said. If it's wrong, you have access to make the remedies right. Thank you very much.

Anything else?

MR. McMAHON: No, Judge. That's all we have this morning.

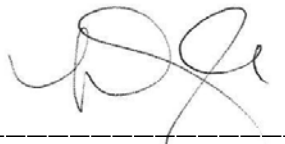
THE COURT: Then we will be --

MR. CORDOVA: Your Honor, before that. We

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

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

I, DOROTHY M. NAGLE, Official Court Reporter of the Circuit Court of Cook County, 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 on a computer, which I hereby certify to be a true and accurate transcript of the Proceedings had before the Hon. [!JUDGE], Judge of said court.



_____
Dorothy M. Nagle, CSR
CSR #084-003564

Dated this 1st day of July, 2018.