

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

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff,)
)
vs.)
)
DAVID MARCH, JOSEPH WALSH, and)
THOMAS GAFFNEY)
)
Defendants.)

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

Hon. Domenica A. Stephenson

FILED
2018 SEP 20 PM 12:22
CRIMINAL DIVISION

**INTERVENORS' STATUS REPORT AND SUPPLEMENTAL MEMORANDUM IN
SUPPORT OF THEIR JULY 6 MOTION FOR INTERVENTION, ACCESS TO SEALED
COURT FILINGS, AND RELATED RELIEF**

Intervenors¹ respectfully submit this status report and supplemental memorandum in support of their motion for intervention and access filed on July 6, 2018 (the "July 6 Motion"). As an initial matter, Intervenors write to inform this Court that on September 12, 2018, the Illinois Supreme Court dismissed Intervenors' motion for a supervisory order in *Chicago Public Media v. Gaughan*. The Court explained that after two recusals, it was "divided" on the matter and did not have "the constitutionally required concurrence of four judges for a decision." (See Ex. A.) Accordingly, any question about whether this Court should abstain from ruling on Intervenors' July 6 Motion until resolution of the *Chicago Public Media* motion in the Supreme Court is now moot.

In addition, Intervenors seek to supplement their July 6 Motion to ensure that it also requests disclosure of additional documents filed under seal in this matter, specifically, this Court's

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

August 14 order, as well as two attorneys' fee petitions presumably resolved by this order. The parties have represented that they take no position on these requests to unseal.

Finally, Intervenors respectfully urge the Court to rule promptly on their unopposed July 6 Motion, which has now been pending for two and a half months and considered at four separate hearings. Every passing day that the public is denied access to the court filings in this high-profile case constitutes a First Amendment harm that can never fully be remedied. *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994).

FACTS

On July 6, Intervenors filed a Motion for Intervention, Access to Sealed Court Filings, and Related Relief with this Court. Intervenors sought leave to intervene and to unseal the Special Prosecutor's proffer to admit co-conspirator hearsay testimony and the defendants' motion to dismiss as well as any related briefing filed subsequently under seal. These documents were filed with the Court under seal and, to Intervenors' knowledge, without any specific judicial findings on the record justifying the sealing. Intervenors also sought to receive notice and an opportunity to be heard on the sealing of any additional court filings or proceedings. The parties took "no position" on the Intervenors' requests (Hr'g Tr. 05:09-21, Jul. 10, 2018, Ex. B), so there is no opposition to the July 6 Motion.

Intervenors presented their July 6 Motion at a hearing on July 10. The Court deferred ruling at that hearing and at subsequent hearings on July 31, August 14, and September 5. In the most recent hearing on September 5, the Court entered and continued the July 6 Motion to a fifth hearing on September 24, though it is unclear whether the Court will rule on this date. (Hr'g Tr. 20:10-12, Sept. 5, 2018, Ex. C.) The Court explained that it was awaiting direction from the Illinois Supreme Court on Intervenors' motion for a supplemental supervisory order filed on

August 7, 2018, in connection with the ongoing criminal matter *People v. Van Dyke*, 17 CR 0428601 (Cir. Ct. Cook Cnty.). (Hr'g Tr. 20:21–23, Ex. C.) The Court stated that it believed this appeal in the *Van Dyke* case (known as *Chicago Public Media v. Gaughan*, No. 123880) pertained to the sealing of grand jury transcripts, suggesting that it would be relevant to the Court's decision in this case. (Hr'g Tr. 15:22–16:2, Ex. C.)

On September 12, the Illinois Supreme Court issued a one-page order dismissing Intervenors' motion for a supplemental supervisory order in *Chicago Public Media*. (Ex. A.)

ARGUMENT

I. There is no need for this Court to continue to abstain from ruling on Intervenors' July 6 Motion.

The Illinois Supreme Court dismissed Intervenors' motion in the *Chicago Public Media* matter on September 12, without issuing a decision. That Court explained that with two recusals and the remaining members “divided,” it was “not possible to secure the constitutionally required concurrence of four judges for a decision.” (Ex. A; Ill. Const. art. VI, § 3 (“The Supreme Court shall consist of seven Judges. . . . Four Judges constitute a quorum and the concurrence of four is necessary for a decision.”).) The Supreme Court thus resolved this matter without weighing in on the merits of Intervenors' motion, and its one-page order has no bearing on this case. It is well established in Illinois that the Supreme Court's decision to decline an appeal has no precedential value. *See Mattis v. State Univ. Ret. Sys.*, 212 Ill. 2d 58, 75 (2004) (“The denial of a petition for leave to appeal has no precedential effect and in no way amounts to a consideration of the merits of the case. Nor does it indicate approval of the appellate court's action.”) (internal quotations and citations omitted).

Thus, this Court should no longer abstain from ruling on Intervenors' July 6 Motion.

II. This Court should unseal its August 14 order and two attorneys' fee petitions.

For all the reasons previously stated in the July 6 Motion, this Court should also unseal its August 14 order regarding attorneys' fees, as well as the two fee petitions that this order presumably resolved, filed by the Special Prosecutor on March 6 and April 11, 2018, respectively. To Intervenors' knowledge, all three of these court documents are entirely under seal, and the Court has not made the required specific findings to justify secrecy.

As Intervenors understand it, Cook County is paying the attorneys' fees and expenses of the Special Prosecutor. Consequently, there is a particularly strong public interest in disclosure of this court order and fee petitions because they concern how taxpayer dollars are spent. Indeed, the Illinois Constitution mandates disclosure of these documents: "Reports and records of the obligation, receipt and use of public funds of the State, units of local government and school districts are public records available for inspection by the public according to law." Ill. Const. art. VIII, § 1(c). In addition, court orders in particular "should not be kept under seal," for they "are not the litigants' property; they belong to the public, which underwrites the judicial system that produces them." *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)).

Accordingly, given the public's substantial interest in this court order and fee petitions concerning taxpayer dollars, the Court should unseal these filings immediately.

III. Delaying access to the court records here violates the public's First Amendment right of contemporaneous access and irreparably harms its ability to monitor this important case.

As set forth in Intervenors' July 6 Motion, the news media has a right to intervene in these proceedings, and the public has a right of access under the First Amendment to the court filings at issue here. None of the parties dispute this. Courts have long recognized that when this right of

access applies, as it does here, access must be “immediate and contemporaneous.” *In re Associated Press*, 162 F.3d 503, 506–07 (7th Cir. 1998) (quoting *Grove Fresh*, 24 F.3d at 897); *see also Associated Press v. Dist. Court*, 705 F.2d 1143, 1147 (9th Cir. 1983) (holding that a 48-hour delay in unsealing judicial records is improper, because the effect of the delay acts as a “total restraint on the public’s first amendment right of access” during that time). As the First District has recognized, “even a temporary denial of access to court proceedings . . . raises important first amendment concerns.” *People v. Kelly*, 397 Ill. App. 3d 232, 247 (1st Dist. 2009). Courts must therefore act “expeditiously” in adjudicating motions to unseal. *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 120–21 (2d Cir. 2006) (finding that district court erred in delaying ruling on motion to intervene and unseal court records). According to the U.S. Supreme Court, a loss of First Amendment rights, “for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). Indeed, “each passing day may constitute a separate and cognizable infringement of the First Amendment.” *Neb. Press Ass’n v. Stuart*, 423 U.S. 1327, 1329 (1975) (Blackmun, Circuit Justice).

Delayed access to court records forever deprives the public of its ability to monitor cases as they proceed and assess whether justice is being served. *Grove Fresh*, 24 F.3d at 897 (“To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression.”); *see also Co. Doe v. Pub. Citizen*, 749 F.3d 246, 272 (4th Cir. 2014) (recognizing that “the public benefits attendant with open proceedings are compromised by delayed disclosure”). This is particularly true in this high-profile criminal prosecution that has garnered not only the close attention of Chicago residents but also a national spotlight.² In fact,

² *See, e.g.,* Monica Davey & Mitch Smith, *Three Chicago Officers Charged With Conspiracy in Laquan McDonald Case*, N.Y. Times (June 27, 2017), <https://www.nytimes.com/2017/06/27/us/chicago-officers-indicted-laquan-mcdonald-shooting.html>.

the continued lack of access to court records undermines the historic purpose of “open trials,” to serve as “bulwarks of our free and democratic government.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 592 (1980) (Brennan, J., concurring). “[P]ublic access to court proceedings is one of the numerous ‘checks and balances’ of our system, because ‘contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.’” *Id.* (emphasis added).

Contemporaneous access to court records ensures that the public learns about cases while they are newsworthy. Prompt access also promotes accuracy in reporting and leads to more informed, meaningful public debate and discussion about case proceedings. Delay has consequences. If the press cannot report on a motion to dismiss, *Santiago* proffer, or fee petition until months after they were filed, the public may never learn what those filings said, particularly if they are no longer newsworthy when they finally become available. *See Grove Fresh*, 24 F.3d at 897 (“The newsworthiness of a particular story is often fleeting.”). Delaying access to these filings thus stifles the flow of information to the public and chills public debate at the moment these filings are most newsworthy.

Finally, if the Court continues to permit dispositive motions and its own orders to be kept secret, the public will have no opportunity to understand important issues in this case, such as *what* this Court is adjudicating and *how*, and *why* this case is either permitted to proceed or be dismissed. Given the heightened public interest in this important case, keeping the public in the dark on these matters creates a dangerous risk of eroding public trust in the courts and this prosecution in particular.

CONCLUSION

For the foregoing reasons, Intervenor respectfully request that the Court promptly grant Intervenor's July 6 Motion, permit intervention, and unseal the court records at issue here, including the Court's August 14 order and related fee petitions.

Dated: September 20, 2018

Respectfully submitted,

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

By: 
Attorney for Chicago Public Media, Inc.

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Counsel for Sun-Times Media, LLC

EXHIBIT A



SUPREME COURT OF ILLINOIS

SUPREME COURT BUILDING
200 East Capitol Avenue
SPRINGFIELD, ILLINOIS 62701-1721

CAROLYN TAFT GROSBOLL
Clerk of the Court

(217) 782-2035
TDD: (217) 524-8132

September 12, 2018

FIRST DISTRICT OFFICE
160 North LaSalle Street, 20th Floor
Chicago, IL 60601-3103
(312) 793-1332
TDD: (312) 793-6185

Jeffrey David Colman
Jenner & Block, LLP
353 N. Clark St.
Chicago, IL 60654

In re: Chicago Public Media v. Gaughan
123880

Today the following order was entered in the captioned case:

Motion by Movants for a supervisory order. In this case, two Justices of this Court have recused themselves and the remaining members of the Court are divided so that it is not possible to secure the constitutionally required concurrence of four judges for a decision (Ill. Const. 1970, art. IV, sec. 3). Accordingly, the motion for supervisory order is dismissed.

Order entered by the Court.

Thomas and Theis, JJ., took no part.

Very truly yours,

A handwritten signature in cursive script that reads "Carolyn Taft Grosboll".

Clerk of the Supreme Court

cc: Attorney General of Illinois - Criminal Division
Brendan John Healey
Brett Emerson Legner
Damon E. Dunn
Daniel Q. Herbert
Evan Gregg Safran Siegel
Gopi Kashyap
Joseph Henry McMahon
Hon. Vincent Michael Gaughan

EXHIBIT B

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

3 THE PEOPLE OF THE)
4 STATE OF ILLINOIS,)
5)
6 Plaintiff,)
7 vs.) No. 17 CR 09700-01
8) No. 17 CR 09700-02
9 DAVID MARCH, JOSEPH WALSH) No. 17 CR 09700-03
10 and THOMAS GAFFNEY,)
11)
12 Defendants.)

13 REPORT OF PROCEEDINGS at the hearing of the
14 above-entitled cause before the HONORABLE DOMENICA A.
15 STEPHENSON, Judge of said Court, on the 10th day of
16 July, 2018.

17 APPEARANCES:

18 HON. PATRICIA BROWN HOLMES (Ret.),
19 Special State's Attorney of Cook County,
20 By: MR. BRIAN WATSON and
21 MS. KELLY WARNER,
22 Assistant State's Attorneys,
23 on behalf of the People;

24 MR. JAMES MCKAY,
on behalf of Defendant March;

MR. ROBERT STANLEY,
on behalf of Defendant Walsh;

MR. WILL FAHY,
on behalf of Defendant Gaffney.

Mary Ellen Kusibab
Official Court Reporter
CSR License No. 084-004348

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ALSO PRESENT:

JENNER & BLOCK
By: MS. VAISHALEE V. YELDANDI and
MR. JEFFREY COLMAN,
on behalf of Chicago Public Media;

MR. BRENDAN HEALEY,
on behalf of Reporters Committee for
Freedom of the Press, The Associated
Press, WGN Continental Broadcasting
Company, LLC, and WFLD Fox 32 Chicago.

1 have discussed the potential interveners presenting
2 their motion to intervene first.

3 THE COURT: I haven't even had a chance to read it,
4 so -- and it's very lengthy. So I don't want to hear
5 argument until I read it or -- I don't know if the
6 parties want an opportunity to respond. I'm not going
7 to hear argument if the parties want an opportunity to
8 respond.

9 MR. WATSON: The State takes no position in
10 response to the motion to intervene.

11 THE COURT: Defense?

12 MR. MCKAY: David March takes no position. We will
13 not be responding in writing.

14 THE COURT: Okay.

15 MR. STANLEY: Mr. Walsh takes no position.

16 MR. FAHY: And, Judge, Mr. Gaffney does not take
17 any position.

18 THE COURT: Okay. Does this have to do with my
19 sealing of the defense motion to dismiss on the last
20 court date?

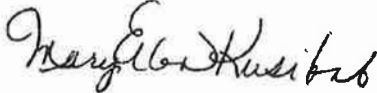
21 MS. YELDANDI: Yes, Your Honor.

22 THE COURT: I said I was going to seal it until I
23 had an opportunity to read it. I have read the motion,
24 and I'm going to take a little bit more time to decide

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

I, MARY ELLEN KUSIBAB, an Official Court Reporter for the Circuit Court of Cook County, Illinois, County Department, Criminal Division, do hereby certify that I reported in shorthand the proceedings had on the hearing 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.



Mary Ellen Kusibab
C.S.R. No. 084-004348
Circuit Court of Cook County, IL
County Department - Criminal Division

Dated July 23, 2018.

EXHIBIT C

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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 09700
)
DAVID MARCH, JOSEPH WALSH,)
and THOMAS GAFFNEY,)
)
Defendant.)

REPORT OF PROCEEDINGS had before the
HONORABLE DOMENICA A. STEPHENSON, on the 5th day of
September, 2018, in Chicago, Illinois.

APPEARANCES:
MS. PATRICIA BROWN HOLMES,
Special Prosecutor of Cook County, by:
MR. BRIAN WATSON,
MS. KELLY WARNER,
Assistant Special Prosecutors,
appeared on behalf of the People;

MR. JAMES MCKAY,
Attorney at Law,
appeared on behalf of Defendant March;

MR. THOMAS BREEN,
MR. TODD PUGH,
MR. ROBERT STANLEY,
Attorneys at Law,
appeared on behalf of Defendant Walsh;

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APPEARANCES - (Continued)

MR. WILLIAM FAHY,
Attorney at Law,
appeared on behalf of Defendant Gaffney;

MS. VAISHALEE YELDANDI,
MR. JEFFREY COLMAN,
Attorneys at Law,
appeared on behalf of Chicago Public
Media;

MR. BRENDAN HEALY,
Attorney at Law,
appeared on behalf of Reporter's Committee
for Freedom of the Press, The Associated
Press, WGN Continental Broadcasting
Company, LLC, and WFLD Fox 32 Chicago

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

1 sealed, did not implicate the rights of the media, that's
2 being challenged.

3 Number three, unlike your Honor, Judge Gaughan
4 has been holding what he calls informal case management
5 conferences, and on three occasions at least, he has
6 sealed the courtroom, and we are challenging his
7 conducting the Court's business outside the presence of
8 the public and the media.

9 Number four, Judge Gaughan issued what I would
10 call a gag order against one of our partners and
11 precluded him from speaking in court because Judge
12 Gaughan found that he had been making improper remarks.

13 Those are the four issues. If your Honor
14 doesn't have a copy of our Supreme Court papers and the
15 responses, I'd be happy to give them to you.

16 But in this case, your Honor has under seal a
17 motion --

18 THE COURT: I know what I have -- I know exactly
19 what I have under seal.

20 MR. COLMAN: It's a very different set of issues
21 here.

22 THE COURT: That's not -- I don't know because I
23 don't -- I don't know. My understanding was, and again
24 the parties can correct me if I'm wrong, I thought that

1 one of the issues was the sealing of filings that
2 included grand jury transcripts.

3 Does anybody know that or not?

4 MR. COLMAN: Your Honor, I can tell you that prior
5 to May 23rd, Judge Gaughan held some hearings in which he
6 ordered sealed certain grand jury materials, that's
7 correct.

8 THE COURT: So it is a similar issue.

9 MR. COLMAN: No, no, but --

10 THE COURT: It is.

11 MR. COLMAN: But in our supervisory papers that are
12 pending before the Supreme Court, we tell the Supreme
13 Court that we are looking to have unsealed -- I forget if
14 it's five documents or six documents, and, your Honor, to
15 the best of my recollection, those do not involve grand
16 jury materials. That is not, to the best of my
17 recollection, an issue that is pending currently before
18 the Illinois Supreme Court.

19 Mr. Healy reminded me of something. Your
20 Honor, to the extent that any of the materials in this
21 case that are currently under seal implicate grand jury
22 testimony, at least as of today, we're willing to have
23 that redacted. We're not seeking grand jury testimony
24 here, we're seeking Santiago proffer and response, a

1 THE COURT: Is that a good day for you?

2 MR. HEALY: I'll have to check my calendar, but we
3 pointed out previously we did file this motion on
4 July 6th, and it will now be nearly three months in
5 without resolution.

6 THE COURT: So noted.

7 See you September 24th. Thank you.

8 MR. COLMAN: Could we come back earlier, your Honor,
9 please?

10 THE COURT: September 24th.

11 MR. COLMAN: Will you rule that day?

12 THE COURT: Possibly.

13 MR. COLMAN: Do we need to go to the Illinois
14 Supreme Court to ask them --

15 THE COURT: Are you threatening the Court?

16 MR. COLMAN: No. You said you're deferring this
17 because you think the issue are pending before the
18 Illinois Supreme Court. Are you saying that we need to
19 seek clarification from the Illinois Supreme Court to get
20 a ruling in this court?

21 THE COURT: I'm not saying anything, Counsel; but I
22 believe it's my understanding that there are similar
23 issues and I'm waiting for direction.

24 Thank you.

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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

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 DOMENICA A.
STEPHENSON, Judge of said court.

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

Date: September 6, 2018