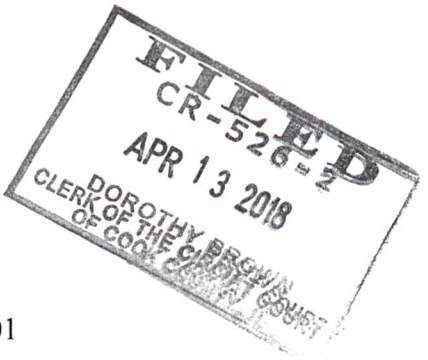

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, CRIMINAL DIVISION

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

NOTICE OF FILING

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PLEASE TAKE NOTICE that on **Friday, April 13, 2018**, Counsel filed the attached **Intervenors' Consolidated Response to Parties' Objections to Public Disclosure of Court File Documents** for Intervenors Chicago Public Media, Inc., The Associated Press, WLS Television, Inc., WGN Continental Broadcasting Co., LLC, WFLD Fox 32 Chicago, Reporters Committee for Freedom of the Press, Chicago Tribune Company, LLC, and Sun-Times Media, LLC, copies of which are hereby served upon you.

Dated: April 13, 2018

Respectfully submitted,

CHICAGO PUBLIC MEDIA, INC.

By: _____
One of Its Attorneys

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

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CERTIFICATE OF SERVICE

Gabriel A. Fuentes, an attorney, hereby certifies that on **Friday, April 13, 2018**, he caused the foregoing **Notice of Filing** and attached **Intervenors' Consolidated Response to Parties' Objections to Public Disclosure of Court File Documents** to be served upon counsel listed below via email:

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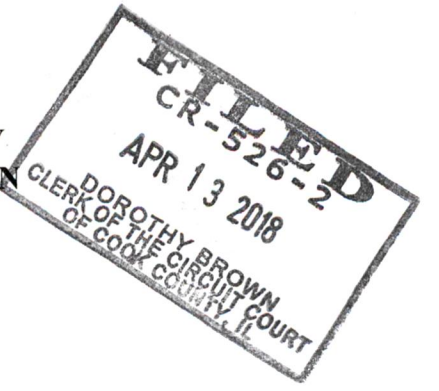
Filed In Room 500 Per Feb. 3, 2017 Decorum Order



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

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

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

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

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

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

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

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

(2) the prosecution's supplemental discovery answer;

(3) the prosecution witness list; and

(4) the defense witness list.

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

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

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

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

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

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

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

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

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

Id. at 14-15 (emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

P. Incident Narrative Report (No. 105).

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

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

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

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

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

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

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

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

T. Miscellaneous Other Documents

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Dated: April 13, 2018

Respectfully submitted,

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