

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

FILED

JUL 10 2018

Judge Domenica Stephenson-1967

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
v.	)	17-CR-09700-01
	)	17-CR-09700-02
DAVID MARCH,	)	17-CR-09700-03
JOSEPH WALSH,	)	
THOMAS GAFFNEY,	)	Hon. Domenica A. Stephenson
	)	
Defendants.	)	

**PEOPLE OF THE STATE OF ILLINOIS' RESPONSE TO  
DEFENDANTS' MOTION TO DISMISS INDICTMENT**

The People of the State of Illinois, by their attorney, Special Prosecutor Patricia Brown Holmes, submit this response to oppose the Defendants' Motion to Dismiss Indictment.

**I. INTRODUCTION**

The defendants' motion is remarkable. Without a single shred of evidence of misconduct, the defendants urge this Court to take the dramatic step of dismissing the indictment. The record is clear: the Special Prosecutor advised the Special Grand Jury of its rights properly and repeatedly under 725 ILCS 5/112-4(b); the Special Grand Jury heard evidence as to the charges; and no prosecutorial misconduct ever occurred. This type of accuse-first, investigate-later approach to serious allegations is irresponsible and prohibited under Illinois law.

In fact, there was no misconduct. The defendants' motion and exhibits show the Special Grand Jury had the opportunity to watch the videos, read the reports, hear the testimony, and draw its own conclusions. The defendants' incorrect assumptions about the

Special Grand Jury proceedings—and their baseless claim of misconduct by the Special Prosecutor—are not valid reasons for challenging the indictment. Therefore, the motion should be denied without a hearing.

## **II. RELEVANT BACKGROUND**

In July 2016, Cook County Presiding Judge LeRoy K. Martin, Jr. appointed the Special Prosecutor to investigate and determine whether charges should be proposed against any Chicago Police Department personnel involved in connection with the shooting incident that killed Laquan McDonald, including but not limited to, their participating in the providing of reports, handling of evidence, and interviewing of witnesses. After that appointment, Presiding Judge Martin found that public justice required the Special Grand Jury to be convened and impaneled under the Jury Act, 705 ILCS 305/19, and the Grand Jury Act, 725 ILCS 5/112-1.

The Special Grand Jury was sworn in and impaneled before Presiding Judge Martin and the Special Prosecutor in November 2016. Throughout 2016 and 2017, the Special Grand Jury reconvened and performed its duties. The Special Grand Jury authorized and issued more than 150 subpoenas for documents and testimony, obtained hundreds of thousands of documents and records, and both heard and questioned witnesses.

On June 26, 2017, the Special Grand Jury voted a true bill on an 11-page indictment, charging defendants David March, Joseph Walsh, and Thomas Gaffney with conspiracy,

official misconduct, and obstructing justice.<sup>1</sup> The indictment included more than eight pages of detailed information about the conduct underlying the charges—along with the names of the offenses, the statutory provisions violated, the nature and elements of the offenses, the date and county of the offenses, and the names of the accused under the charging requirements. Due to the late hour, the Special Prosecutor filed the bill of indictment with this Court on June 27, 2017, and served copies of the indictment on the defendants’ attorneys. The defendants made their initial appearances and were arraigned on July 10, 2017. Now, nearly a year later, the defendants filed their motion to dismiss the indictment.<sup>2</sup>

### III. ARGUMENT

The defendants’ motion fails to challenge the validity of the 11-page indictment that was voted by the Special Grand Jury. The defendants’ accusations of grand jury misconduct are based on bald speculation that directly contravenes the facts and the law. *See People v. Boston*, 2016 IL 118661, ¶ 33 (affirming denial of motion to dismiss where grand jury misconduct “claim is mere speculation and cannot be established in the record”).

Grand jury proceedings and resulting indictments carry with them a presumption of validity. *People v. DiVincenzo*, 183 Ill. 2d 239, 258 (1998). To overcome this presumption,

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<sup>1</sup> After voting the indictment, the Special Grand Jury continued to perform its duties and investigate the conduct of other Chicago Police Department personnel. In November 2017, the Special Grand Jury was discharged without returning any further indictments.

<sup>2</sup> Although it is within the trial court’s discretion to deny the defendants’ motion to dismiss as untimely and not within a reasonable time, *see* 5 ILCS 5/114-1(b), the State does not press that ground for denial and instead provides the substantive reasons for the Court to deny the defendants’ motion.

defendants must satisfy the high standard of establishing “that the prosecutors prevented the grand jury from returning a meaningful indictment by misleading or coercing it.” *Id.* Indeed, as defendants note in their motion, the misconduct “must rise to the level of a deprivation of due process or a miscarriage of justice.” *Id.* Under this high standard, defendants must prove the misconduct was “unequivocally clear” and resulted in “actual and substantial” prejudice against them. *People v. Oliver*, 368 Ill. App. 3d 690, 694-95 (2d Dist. 2006).

The defendants’ motion fails to approach those exacting requirements. The motion establishes not a single act of misconduct, let alone misconduct so severe that it deprived the defendants of due process or constituted a miscarriage of justice. There was no misconduct. Contrary to defense counsel’s unsupported assertions, the Special Prosecutor advised the Special Grand Jury of its rights repeatedly under section 112-4(b), the Special Grand Jury heard evidence as to the charges, and no prosecutorial misconduct occurred.

A. **The Special Prosecutor Advised the Special Grand Jury of Its Rights Properly and Repeatedly Under 725 ILCS 5/112-4(b).**

The defendants ask the Court to dismiss the indictment based on their repeated assertion, without proof, that the Special Prosecutor did not comply with section 112-4(b). Defs.’ Mot. 1, 5-7, 10-12, 16.<sup>3</sup> Their assumption is belied by the record: the Special Prosecutor

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<sup>3</sup> The motion incorrectly cites to section 112-5(b). Section 112-4(b) provides that, “The Grand Jury has the right to subpoena and question any person against whom the State’s Attorney is seeking a Bill of Indictment, or any other person, and to obtain and examine any documents or transcripts relevant to the matter being prosecuted by the State’s Attorney. Prior to the commencement of its duties and, again, before the consideration of each matter

advised the Special Grand Jury of its rights repeatedly on the record. The defendants' unsupported assumption does not warrant dismissal of the indictment. *See Boston*, 2016 IL 118661, ¶ 33; *People v. Haag*, 80 Ill. App. 3d 135, 138 (2d Dist. 1979) ("The burden of showing an irregularity in the proceedings of the Grand Jury rests upon defendant and may not be based upon speculation.")<sup>4</sup>

And even if the defendants' assumption were correct, dismissal is not appropriate. *Haag*, 80 Ill. App. 3d at 139. The Appellate Court has held that while section 112-4(b) imposes a duty upon the State's Attorney to advise the grand jury, it does not authorize dismissal of an indictment and is not a clear denial of due process. *Id.* at 139-40. Thus, under *Haag*, the defendants' motion fails to present any proof of misconduct in the grand jury process and any proof of actual and substantial prejudice. *Id.* (reversing the trial court's dismissal for alleged noncompliance with section 112-4(b)).

**B. The Special Prosecutor Presented Evidence as to the Charges.**

The defendants next ask the Court to dismiss the indictment based on their assertion that the Special Prosecutor presented no law on the charges and no evidence in support of them. Defs.' Mot. 1-5. Neither is correct. The indictment voted by the Special Grand Jury includes the elements of conspiracy, obstructing justice, and official misconduct. Indictment

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or charge before the Grand Jury, the State's Attorney shall inform the Grand Jury of these rights." 725 ILCS 5/112-4(b).

<sup>4</sup> The defendants base this assumption on their review of transcripts of witness testimony. Consistent with long-standing public policy on grand jury secrecy, 725 ILCS 5/112-6 and 5/112-7, and binding case law, the State produced in discovery transcripts of witness testimony and not transcripts of all grand jury proceedings. If so ordered, the State will provide the transcripts to the Court for *in camera* review. *See Haag*, 80 Ill. App. 3d at 137.

at 1, 10, 11. The indictment also includes more than eight pages of detailed information based on the evidence that was presented to the Special Grand Jury. *Id.* at 2-9. Thus, the indictment itself establishes the baselessness of defendants' claim.

To support an indictment, Illinois courts require only "some evidence relative to the charge." *People v. Rodgers*, 92 Ill. 2d 283, 292 (1982) (holding trial court erred in dismissing conspiracy count where "some evidence" was presented to the grand jury). "Some evidence" does not require evidence as to all elements of the offense, but rather means the evidence "tends to connect the accused to the offense charged." *Id.* at 290. That includes "any direct or circumstantial evidence from which an inference of criminal conduct can be derived." *People v. Williams*, 383 Ill. App. 3d 596, 631 (1st Dist. 2008); accord *People v. Whitlow*, 89 Ill. 2d 322, 331 (1982) (holding that if there is "some evidence" to infer illegal conduct, courts will not inquire into the "adequacy of the evidence").

The notion that the Special Grand Jury heard no evidence is wrong. Defs.' Mot. 1-5. In fact, the defendants' own motion shows that the Special Grand Jury watched the videos, read the reports, and heard the testimony.<sup>5</sup> According to the videos and testimony, Laquan McDonald did not batter, attack, assault, and use force likely to cause death and great bodily harm against three Chicago police officers, but the defendants submitted consistently false information in their official police reports—including that Laquan

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<sup>5</sup> What the defendants' motion does not discuss is the Special Grand Jury also issued more than 150 subpoenas for documents and testimony and obtained hundreds of thousands of documents and records. If so ordered, the State will provide the transcripts and records—already produced to the defendants—to the Court for *in camera* review. 725 ILCS 5/112-6; *Rodgers*, 92 Ill. 2d at 290.

McDonald had done so against Officer Individual A, defendant Walsh, and defendant Gaffney. Those official police reports are both false and contrary to the Chicago Police Department ("CPD") rules and regulations, directives, orders, and training, which were also presented to the Special Grand Jury.

The defendants' motion tries to avoid the evidence of their violating CPD's rules and regulations, general orders, and special orders. Defs.' Mot. 5. But that evidence is directly relevant to their intent and actions. Under the Municipal Code of Chicago, the rules and regulations are enforced as law and are binding on all members, *see* Municipal Code of Chicago § 2-84-290, and the rules and regulations specifically incorporate the general and special orders, *see id.* at § 2-84-050.<sup>6</sup> The Municipal Code also makes it a criminal offense for "any member of the police department who shall neglect or refuse to perform any duty required of him by the provisions of this Code or the rules and regulations of the department of police." *Id.* at § 2-84-290.

Similarly, the defendants' motion tries to defend their false police reports by arguing that, unlike the objective facts in the videos, "human beings perceive things differently from devices like cameras." Defs.' Mot. 14, 16. Despite that argument, defendant March

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<sup>6</sup> The Municipal Code authorizes by law the Police Board "to adopt rules and regulations for the governance of the police department of the city." Municipal Code of Chicago § 2-84-030. The Municipal Code also authorizes by law the Police Superintendent to administer the affairs of the department. *Id.* at § 2-84-050. *See also Williams v. Jaglowski*, 269 F.3d 778, 784 (7th Cir. 2001) (finding § 2-84-290 to be a state law and a criminal offense); *Br. City of Chicago, Edwards v. City of Chicago*, No. 07-0741, 2008 WL 8479211 (1st Dist. 2008) (stating the City's position that, "under the Municipal Code, the Rules and Regulations of the CPD are binding on all police officers and enforced as law, and the Rules and Regulations incorporate the CPD's General Orders." (citation omitted)).

documented in his official police report that the video “was viewed and found to be consistent with the accounts of all of the witnesses.” In that report, defendant March also documented that Laquan McDonald had “continued to advance toward” defendant Walsh and Officer Individual A, defendant Walsh “backed up” from McDonald, and Officer Individual A “backpedaled and fired his handgun at MCDONALD, to stop the attack.” Each of these assertions is patently false. Defendant March further attributed false statements to Officer Individual C, including that McDonald “raised his right arm toward Officer [Individual A], as if attacking [Officer Individual A].” The Special Grand Jury examined the police report, watched the videos, and heard the testimony of Officer Individual C that she did not make that statement and that the information was false.<sup>7</sup>

More to the point, the defendants’ argument fails because they “may not challenge an indictment on the ground that it is not supported by sufficient evidence where there is *any* evidence to support the indictment.” *People v. Fassler*, 153 Ill. 2d 49, 61 (1992) (emphasis added). Since the Special Prosecutor presented evidence as to the charges and the defendants may argue the evidence bearing upon their guilt or innocence at a trial on the merits, dismissal is not appropriate. *Id.* (“Guilt or innocence is to be determined at a fair trial.”); *Rodgers*, 92 Ill. 2d at 292 (similar); *DiVincenzo*, 183 Ill. 2d at 255 (similar).

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<sup>7</sup> This response, of course, does not detail all the evidence presented to the Special Grand Jury. Rather, this response highlights for the Court only “some evidence relative to the charge.” *Rodgers*, 92 Ill. 2d at 292 (trial court erred in dismissing conspiracy count because “it is unnecessary to present evidence before the grand jury for each element of the offense charged in the indictment, as long as there is some evidence relative to the charge”). Further, the Court has available for its review the State’s coconspirator proffer, which details conspiracy-related evidence presented to the Special Grand Jury.



**C. The Special Prosecutor Did Not Commit Misconduct.**

The defendants ask this Court to dismiss the indictment based on their unsupported and irresponsible accusation of prosecutorial misconduct. No misconduct ever occurred. The defendants' motion offers no proof of prosecutorial misconduct in the grand jury process, let alone misconduct that would allegedly rise to a deprivation of due process or a miscarriage of justice. Moreover, the defendants' baseless personal attacks on the Special Prosecutor are unwarranted and incorrect as a matter of law. *DiVincenzo*, 183 Ill. 2d at 258; *see also United States v. Agurs*, 427 U.S. 97, 110 (1976) (constitutional due process error "is because of the character of the evidence, not the character of the prosecutor").

**1. No Misconduct Under Section 112-4(b).**

The defendants' main accusation is that the Special Prosecutor allegedly did not comply with section 112-4(b). Defs.' Mot. 7-8. As discussed above, their accusation is wrong. The Special Prosecutor advised the Special Grand Jury repeatedly under section 112-4(b), and the Special Grand Jury exercised its rights and performed its duties. The defendants' accusation that the Special Prosecutor concealed from the Special Grand Jury its rights, and that members of the Special Grand Jury only "accepted what was force-fed to them by the Special Prosecutor," could not be further from the truth. *Id.* Indeed, as the record shows, the Special Grand Jury issued more than 150 subpoenas for documents and testimony, obtained hundreds of thousands of documents and records, and both heard and questioned the witnesses who appeared before the Special Grand Jury.

2. No Misconduct with Witness E.

The defendants next assert that the Special Grand Jury was misled by witness testimony. First, the defendants claim that during the testimony of Witness E, the Special Prosecutor “left a false inference” that defendant March had interviewed Witness E. Defs.’ Mot. 9. There is a reason defendants provide nothing to support this assertion; it is untrue. The Special Grand Jury subpoenaed and obtained the police reports that identified Witness E’s interviewers and the police report written by detective March with Witness E’s statement. Clearly, the Special Prosecutor did not mislead the Special Grand Jury.

The defendants also claim that the Special Prosecutor knowingly presented alleged perjured testimony of Witness E. Defs.’ Mot. 9-10. They make this inflammatory argument without identifying any perjured testimony. *Id.* They also ignore that Witness E described to the Special Grand Jury her prior inaccurate statements and her later truthful statements to federal law enforcement. *Id.* at Ex. A, 11:12-12:2. The members of the Special Grand Jury also had the opportunity to question Witness E, just as the Special Prosecutor had instructed the Special Grand Jury to question any person who testified before them. *Id.* at Ex. A, 12:12-14.

Moreover, the “mere fact of inconsistency does not constitute proof” of perjured testimony, “[m]uch less does it support the charge that the prosecutor knew of perjured testimony but nevertheless willfully and intentionally used it.” *People v. Lamon*, 346 Ill. App. 3d 1082, 1094 (3d Dist. 2004); accord *People v. Craig*, 334 Ill. App. 3d 426, 439 (1st Dist. 2002) (“inconsistencies in testimony cannot be equated with perjury, nor does it establish or show

that the State knowingly used perjured testimony”); *People v. Amos*, 204 Ill. App. 3d 75, 85 (1st Dist. 1990) (same). As the record shows, the Special Prosecutor engaged in no misconduct during the testimony of Witness E. To the contrary, the Special Prosecutor elicited a fulsome description of Witness E’s various statements, so the Special Grand Jury could consider them.

### 3. No Misconduct with Officer Individual C.

The defendants next claim that the Special Grand Jury was misled by the testimony of Officer Individual C. Defs.’ Mot. 10-13. According to the defendants’ motion, “the most egregious acts of prosecutorial misconduct” occurred when the Special Prosecutor limited a question to Officer Individual C. *Id.* at 11.

As the transcript shows, the Special Prosecutor did not “scold” anyone. *Id.* at Ex. B, 97:10-17. The Special Prosecutor appropriately limited the question to relevant matters and did not allow testimony as to which officers were being disciplined or not being disciplined. *Id.*; see also *Garrity v. New Jersey*, 385 U.S. 493 (1967); *Kastigar v. United States*, 406 U.S. 441, 453, 460 (1972) (derivative-use immunity “prohibits the prosecutorial authorities from using the compelled testimony in any respect,” including “barring the use of compelled testimony as an ‘investigatory lead’”). Indeed, the Special Prosecutor shielded the Special Grand Jury from information that might have unfairly prejudiced the defendants. The defense counsel’s attempt to twist this entirely proper conduct into something that is sinister is beneath the dignity of an officer of this Court.

The defendants next accuse the Special Prosecutor of knowingly presenting perjured testimony of Officer Individual C. Defs.' Mot. 10-11. Again, the defendants fail to identify any allegedly perjured testimony in their motion. *Lamon*, 346 Ill. App. 3d at 1094; *Craig*, 334 Ill. App. 3d at 439. The defendants also allege that, based on their erroneous assumption that the Special Prosecutor failed to comply with section 112-4(b), prior statements of Officer Individual C were intentionally withheld from the Special Grand Jury. Defs.' Mot. 10. As explained above, the Special Prosecutor properly advised and did not mislead the Special Grand Jury of its rights. Further, the Special Prosecutor took steps to avoid any use and derivative use of *Garrity*-protected material in the investigation.

Additionally, the defendants claim that the Special Grand Jury was misled when Officer Individual C testified about the "victims" and "injuries" in a false police report. Defs.' Mot. 12. The defendants ignore that the Special Grand Jury subpoenaed and obtained this police report, which falsely documented Officer Individual A as "injured by offender" and falsely documented Officer Individual A, defendant Walsh, and defendant Gaffney as "victims." The Special Grand Jury also heard the testimony of Officer Individual A that defendant March directed her to write this false information. *Id.* at Ex. B, 89:14-91:13. As the record shows, the Special Prosecutor engaged in no misconduct during the testimony of Officer Individual C.

4. No Misconduct with Vincent Williams.

The defendants finally argue that the Special Grand Jury was misled with the testimony of former federal agent Vincent Williams.<sup>8</sup> No misleading occurred. The defendants' motion ignores that the Special Grand Jury did obtain and review the police reports, videos and recordings, and other evidence summarized by Mr. Williams, and in doing so reached its own conclusions on probable cause. Defs.' Mot. 14-15.

The defendants provide no proof to support their accusations and those accusations are contravened by the record. For example, the Special Grand Jury heard testimony from witnesses that police officers failed to collect all the surveillance videos from Dunkin' Donuts. *Id.* at 14. The Special Grand Jury also heard testimony from witnesses who were waived from the scene and were not identified by police officers, including Witnesses A, B, and C. *Id.* at 15. Likewise, the Special Grand Jury had CPD's general orders and special orders, including on the use of force, the use of deadly force, the use of force to prevent escape, and forcible felonies under Illinois law. *Id.* at 5, 15. And contrary to the defendants' assertions, the Special Grand Jury had the reports and recordings from the 911 caller who reported Laquan McDonald allegedly was stealing radios, as well as the pictures and reports of the "popped" tire. *Id.* at 15. None of this evidence was ever concealed by the

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<sup>8</sup> Contrary to the defendants' motion (Defs.' Mot. 13), Mr. Williams is a former federal Special Agent and Supervisory Special Agent assigned to Chicago, Illinois, Special Agent in Charge assigned to Cleveland, Ohio, and Assistant Special Agent in Charge assigned to Houston, Texas, and has investigated violent crime, murders, and organized crime. Defs.' Mot. at Ex. C, 2:19-4:24.

Special Prosecutor, and the Special Prosecutor engaged in no misconduct during the testimony of Vincent Williams.

Illinois law also makes clear that neither Mr. Williams' status as an investigator nor the reliability of his testimony is a basis for dismissal. The quality of the evidence does not affect the validity of an indictment. In fact, an indictment returned by a grand jury is unassailable on a claim that it was based on inadequate or unqualified testimony. *Fassler*, 153 Ill. 2d at 60 ("an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence" (citations omitted)); *People v. Jones*, 19 Ill. 2d 37, 42 (1960) ("if the witness is competent, his testimony before the grand jury is competent").

5. **No Actual and Substantial Prejudice.**

Ultimately, the defendants' motion fails to present any proof of misconduct, let alone misconduct that deprived them of due process or constituted a miscarriage of justice. As their motion concedes (Defs.' Mot. 13), the Special Prosecutor had no duty to inform the Special Grand Jury of the existence of additional evidence or to present exculpatory evidence for the defense. *People v. Torres*, 245 Ill. App. 3d 297, 300-01 (2d Dist. 1993). The proceedings were "not intended to approximate a trial on the merits," *Fassler*, 153 Ill. 2d at 59, and the Special Prosecutor's duty was to present evidence that tends to establish probable cause, *id.* at 60. *Accord United States v. Williams*, 504 U.S. 36, 52 (1992) ("It is axiomatic that the grand jury sits not to determine guilt or innocence, but to assess whether there is adequate basis for bringing a criminal charge.").

In presenting the evidence, there was no misconduct by the Special Prosecutor and no actual and substantial prejudice to the defendants. Instead, the defendants' motion attempts to distract from the substance of evidence by making false accusations against the Special Prosecutor—without the slightest foundation in law or fact. But the record makes clear that the Special Grand Jury properly heard sufficient evidence as to the charges and voted on the indictment to establish probable cause. Therefore, dismissal of the indictment is not appropriate. *Rodgers*, 92 Ill. 2d at 292.

IV. CONCLUSION

For these reasons, the People of the State of Illinois request that the Court deny the Defendants' Motion to Dismiss the Indictment.

Dated: July 10, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that on July 10, 2018, these papers were served by hand delivery to the attorneys of record.

  
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Brian O. Watson