

**IN THE CIRCUIT COURT OF COOK COUNTY
DEPARTMENT OF JUVENILE JUSTICE AND CHILD PROTECTION
CHILD PROTECTION DIVISION**

IN THE INTEREST OF THREE)	No. 14 JA 00852
(SUPPRESSED) MINORS,)	No. 17 JA 1251
)	No. 19 JA 209
)	
)	Hon. Patricia A. Martin

NOTICE OF MOTION

PLEASE TAKE NOTICE that on **April 5, 2019**, at **11:00 a.m.** (the time noticed for presentation of ProPublica's Motion to Vacate the Court's March 14 Order) or as soon thereafter as counsel may be heard, we will appear before the Honorable Patricia Martin or any judge presiding in the courtroom usually occupied by her in Room 800 of the Juvenile Court Building, 1100 S. Hamilton Avenue, Chicago, Illinois 60612, and then and there present the **Motion of the Reporters Committee for Freedom of the Press and 39 Media Organizations for Leave to File an Amici Letter**.

Dated: April 3, 2019

Respectfully submitted,

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CHILD PROTECTION DIVISION

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IN THE INTEREST OF THREE)	No. 14 JA 00852
(SUPPRESSED) MINORS,)	No. 17 JA 1251
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)	Hon. Patricia A. Martin

**MOTION OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND
39 MEDIA ORGANIZATIONS FOR LEAVE TO FILE AN *AMICI* LETTER**

The Reporters Committee for Freedom of the Press, American Society of News Editors, The Associated Press, Associated Press Media Editors, Association of Alternative Newsmedia, Boston Globe Media Partners, LLC, California News Publishers Association, Californians Aware, Chicago Public Media, Chicago Tribune Company LLC, The E.W. Scripps Company, First Look Media Works, Inc., Fox Television Stations, LLC, Freedom of the Press Foundation, Gannett Co., Inc., Hearst Corporation, Illinois Broadcasters Association, Illinois Press Association, Inter American Press Association, Investigative Reporting Program, Investigative Reporting Workshop at American University, The Marshall Project, The Media Institute, National Newspaper Association, The National Press Club, National Press Club Journalism Institute, National Press Photographers Association, National Public Radio, Inc., The New York Times Company, News Media Alliance, The NewsGuild - CWA, POLITICO LLC, Radio Television Digital News Association, Reporters Without Borders, Reveal from The Center for Investigative Reporting, Society of Professional Journalists, Sun-Times Media, LLC, Tully Center for Free Speech, and The Washington Post (collectively, the “*amici*”) respectfully request that this Court grant leave to file the attached *amici* letter (Exhibit A) in support of ProPublica’s

Motion to Vacate the Court's March 14 Order.¹ A proposed order is attached as Exhibit B. The Reporters Committee has informed all parties to this matter of its intent to submit the attached *amici* letter. ProPublica has consented to its filing. The biological father, Jorge Matias, has no objection to its filing and does not oppose any news media attending any of the court proceedings or publishing any news articles, though he prefers that the children's names not be published and that initials or first names be used when publishing any news stories about his children. The state has no objection to the filing of this *amici* letter. Counsel for the mother indicated that her client takes no position on this matter. Guardian ad Litem Bruce Boyer and the Department of Child and Family Services do not consent to the filing of this *amici* letter.

The Reporters Committee is an unincorporated nonprofit association that was founded by leading journalists and media lawyers in 1970, when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide *pro bono* legal representation, *amicus curiae* support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

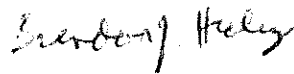
The Reporters Committee and 39 media organizations submit the attached letter to highlight their concerns over the constitutionality of the Court's March 14 Order, which operates as a prior restraint. As news organizations and organizations that advocate on behalf of the news media and the public, *amici* have a direct interest in ensuring that journalists and news organizations remain free from unconstitutional restrictions on their ability to publish information lawfully in their possession. The attached letter will be valuable to this Court because of *amici*'s extensive knowledge of First Amendment precedent concerning prior restraints and because of *amici*'s direct interest in protecting freedom of the press.

¹ A full list of the *amici* is attached hereto as Appendix 1. Statements of interest for each of the *amici* are attached hereto as Appendix 2.

Amici understand that *amici* briefs are unusual in Circuit Court, but they are not unprecedented. *See Roanoke Agency, Inc. v. Edgar*, 101 Ill. 2d 315, 317 (1984) (noting that “[t]he Attorney General of Illinois, as *amicus curiae*, participated in the circuit court proceedings in support of Roanoke’s position”). Cook County courts have previously granted motions to file *amicus* briefs by the Reporters Committee. *See* Hrg. Tr. 33:21–34:1, *Illinois v. Van Dyke*, No. 17-CR-428601 (Dec. 6, 2017), https://www.rcfp.org/sites/default/files/litigation/Van%20Dyke_2017-12-06_transcript_of_hearing_re_motion_to_quash.pdf (attached as Exhibit C) (granting motion for leave to file an *amici* brief by the Reporters Committee and 19 media organizations, including many of the proposed *amici* in this matter); *see also Better Government Ass’n v. Bd. of Educ.*, No. 17 CH 12403 (Ill. Cir. Ct. Feb. 7, 2019) (attached as Exhibit D). Given the importance of the issue to *amici* and the public in general, *amici* respectfully request leave to file the attached *amici* letter in support of ProPublica’s Motion to Vacate the Court’s March 14 Order.

Dated: April 3, 2019

Respectfully submitted,

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APPENDIX 1

The Reporters Committee for Freedom of the Press
American Society of News Editors
The Associated Press
Associated Press Media Editors
Association of Alternative Newsmedia
Boston Globe Media Partners, LLC
California News Publishers Association
Californians Aware
Chicago Public Media
Chicago Tribune Company LLC
The E.W. Scripps Company
First Amendment Coalition
First Look Media Works, Inc.
Fox Television Stations, LLC
Freedom of the Press Foundation
Gannett Co., Inc.
Hearst Corporation
Illinois Broadcasters Association
Illinois Press Association
Inter American Press Association
Investigative Reporting Program
Investigative Reporting Workshop at American University
The Marshall Project
The Media Institute
National Newspaper Association
The National Press Club
National Press Club Journalism Institute
National Press Photographers Association
National Public Radio, Inc.
The New York Times Company
News Media Alliance
The NewsGuild - CWA
POLITICO LLC
Radio Television Digital News Association
Reporters Without Borders
Reveal from The Center for Investigative Reporting
Society of Professional Journalists
Sun-Times Media, LLC
Tully Center for Free Speech
The Washington Post

APPENDIX 2

With some 500 members, **American Society of News Editors** (“ASNE”) is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

The Associated Press (“AP”) is a news cooperative organized under the Not-for-Profit Corporation Law of New York. The AP’s members and subscribers include the nation’s newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 280 locations in more than 100 countries. On any given day, AP’s content can reach more than half of the world’s population.

The Associated Press Media Editors is a nonprofit, tax-exempt organization of newsroom leaders and journalism educators that works closely with The Associated Press to promote journalism excellence. APME advances the principles and practices of responsible journalism; supports and mentors a diverse network of current and emerging newsroom leaders; and champions the First Amendment and promotes freedom of information.

Association of Alternative Newsmedia (“AAN”) is a not-for-profit trade association for approximately 110 alternative newspapers in North America. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

Boston Globe Media Partners, LLC publishes The Boston Globe, the largest daily newspaper in New England.

The California News Publishers Association (“CNPA”) is a nonprofit trade association representing the interests of over 1300 daily, weekly and student newspapers and news websites throughout California.

Californians Aware is a nonpartisan nonprofit corporation organized under the laws of California and eligible for tax exempt contributions as a 501(c)(3) charity pursuant to the Internal Revenue Code. Its mission is to foster the improvement of, compliance with and public understanding and use of, the California Public Records Act and other guarantees of the public’s rights to find out what citizens need to know to be truly self-governing, and to share what they know and believe without fear or loss.

Chicago Public Media, Inc. is a not-for-profit public broadcasting company that operates WBEZ 91.5 FM Chicago, which is an NPR news station that provides local news coverage to its radio audience and to users of wbez.org and produces internationally known podcasts.

Chicago Tribune Company, LLC, publishes the Chicago Tribune, one of the largest daily newspapers in the United States. Its popular news and information website, www.chicagotribune.com, attracts a national audience.

The E.W. Scripps Company serves audiences and businesses through television, radio and digital media brands, with 33 television stations in 24 markets. Scripps also owns 33 radio stations in eight markets, as well as local and national digital journalism and information businesses, including mobile video news service Newsy and weather app developer WeatherSphere. Scripps owns and operates an award-winning investigative reporting newsroom in Washington, D.C. and serves as the long-time steward of the nation's largest, most successful and longest-running educational program, the Scripps National Spelling Bee.

First Amendment Coalition is a nonprofit public interest organization dedicated to defending free speech, free press, and open government rights in order to make government, at all levels, more accountable to the people. The Coalition's mission assumes that government transparency and an informed electorate are essential to a self-governing democracy. To that end, we resist excessive government secrecy (while recognizing the need to protect legitimate state secrets) and censorship of all kinds.

First Look Media Works, Inc. is a new nonprofit digital media venture that produces The Intercept, a digital magazine focused on national security reporting.

Directly and through affiliated companies, **Fox Television Stations, LLC**, owns and operates 28 local television stations throughout the United States. The 28 stations have a collective market reach of 37 percent of U.S. households. Each of the 28 stations also operates Internet websites offering news and information for its local market.

Freedom of the Press Foundation is a non-profit organization that supports and defends public-interest journalism focused on transparency and accountability. The organization works to preserve and strengthen First and Fourth Amendment rights guaranteed to the press through a variety of avenues, including public advocacy, legal advocacy, the promotion of digital security tools, and crowd-funding.

Gannett Co., Inc. is a leading news and information company which publishes USA TODAY and more than 100 local media properties. Each month more than 125 million unique visitors access content from USA TODAY and Gannett's local media organizations, putting the company squarely in the Top 10 U.S. news and information category.

Hearst is one of the nation's largest diversified media, information and services companies with more than 360 businesses. Its major interests include ownership of 15 daily and more than 30 weekly newspapers, including the San Francisco Chronicle, Houston Chronicle, and Albany Times Union; hundreds of magazines around the world, including Cosmopolitan, Good Housekeeping, ELLE, Harper's BAZAAR and O, The Oprah Magazine; 31 television stations such as KCRA-TV in Sacramento, Calif. and KSBW-TV in Monterey/Salinas, CA, which reach a combined 19 percent of U.S. viewers; ownership in leading cable television networks such as A&E, HISTORY, Lifetime and ESPN; global ratings agency Fitch Group; Hearst Health;

significant holdings in automotive, electronic and medical/pharmaceutical business information companies; Internet and marketing services businesses; television production; newspaper features distribution; and real estate.

The Illinois Broadcasters Association (“IBA”) is the leading advocate for the Illinois broadcast industry and is actively engaged in shaping public policy to create positive legal and regulatory environments for its radio and television station members. For over 60 years, the IBA has been Illinois’ sole trade association providing broadcast news, advertising and content to metropolitan areas and rural communities alike.

The Illinois Press Association (“IPA”) is the largest state press organization in the United States. Founded in 1865 near the end of the Civil War, the IPA’s members include nearly all of the more than 600-plus newspapers in Illinois. Throughout its long history, the IPA has been dedicated to promoting and protecting the First Amendment interests of newspapers and citizens before the Illinois legislature and Illinois courts.

The Inter American Press Association (“IAPA”) is a not-for-profit organization dedicated to the defense and promotion of freedom of the press and of expression in the Americas. It is made up of more than 1,300 publications from throughout the Western Hemisphere and is based in Miami, Florida.

The Investigative Reporting Program (“IRP”) at UC Berkeley’s Graduate School of Journalism is dedicated to promoting and protecting the practice of investigative reporting. Evolving from a single seminar, the IRP now encompasses a nonprofit newsroom, a seminar for undergraduate reporters and a post-graduate fellowship program, among other initiatives. Through its various projects, students have opportunities to gain mentorship and practical experience in breaking major stories for some of the nation’s foremost print and broadcast outlets. The IRP also works closely with students to develop and publish their own investigative pieces. The IRP’s work has appeared on PBS Frontline, Univision, Frontline/WORLD, NPR and PBS NewsHour and in publications such as Mother Jones, The New York Times, Los Angeles Times, Time magazine and the San Francisco Chronicle, among others.

The Investigative Reporting Workshop, a project of the School of Communication (SOC) at American University, is a nonprofit, professional newsroom. The Workshop publishes in-depth stories at investigativereportingworkshop.org about government and corporate accountability, ranging widely from the environment and health to national security and the economy.

The Marshall Project is a nonpartisan, nonprofit news organization that seeks to create and sustain a sense of national urgency about the United States criminal justice system. The Marshall Project publishes prize-winning original reporting about the criminal justice system on its website, www.themarshallproject.com, and in partnership with other news organizations.

The Media Institute is a nonprofit research foundation specializing in communications policy issues founded in 1979. The Media Institute exists to foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. Its program

agenda encompasses all sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

National Newspaper Association is a 2,400 member organization of community newspapers founded in 1885. Its members include weekly and small daily newspapers across the United States. It is based in Missouri.

The National Press Club is the world's leading professional organization for journalists. Founded in 1908, the Club has 3,100 members representing most major news organizations. The Club defends a free press worldwide. Each year, the Club holds over 2,000 events, including news conferences, luncheons and panels, and more than 250,000 guests come through its doors.

The National Press Club Journalism Institute is the non-profit affiliate of the National Press Club, founded to advance journalistic excellence for a transparent society. A free and independent press is the cornerstone of public life, empowering engaged citizens to shape democracy. The Institute promotes and defends press freedom worldwide, while training journalists in best practices, professional standards and ethical conduct to foster credibility and integrity.

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

National Public Radio, Inc. ("NPR") is an award-winning producer and distributor of noncommercial news, information, and cultural programming. A privately supported, not-for-profit membership organization, NPR serves an audience of 30 million people who listen to NPR programming and newscasts each week via more than 1000 noncommercial, independently operated radio stations, licensed to more than 260 NPR Members and numerous other NPR-affiliated entities. In addition, NPR is reaching an expanding audience via its digital properties, including podcasts (which see about 19 million unique users each month), social media, mobile applications, and NPR.org (which sees about 37 million unique visitors each month).

The New York Times Company is the publisher of The New York Times and The International Times, and operates the news website nytimes.com.

The News Media Alliance is a nonprofit organization representing the interests of online, mobile and print news publishers in the United States and Canada. Alliance members account for nearly 90% of the daily newspaper circulation in the United States, as well as a wide range of online, mobile and non-daily print publications. The Alliance focuses on the major issues that affect today's news publishing industry, including protecting the ability of a free and independent media to provide the public with news and information on matters of public concern.

The News Guild – CWA is a labor organization representing more than 30,000 employees of newspapers, newsmagazines, news services and related media enterprises. Guild representation comprises, in the main, the editorial and online departments of these media outlets. The News Guild is a sector of the Communications Workers of America. CWA is America's largest communications and media union, representing over 700,000 men and women in both private and public sectors.

POLITICO is a global news and information company at the intersection of politics and policy. Since its launch in 2007, POLITICO has grown to more than 350 reporters, editors and producers. It distributes 30,000 copies of its Washington newspaper on each publishing day, publishes POLITICO Magazine, with a circulation of 33,000 six times a year, and maintains a U.S. website with an average of 26 million unique visitors per month.

Radio Television Digital News Association ("RTDNA") is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

Reporters Without Borders has been fighting censorship and supporting and protecting journalists since 1985. Activities are carried out on five continents through its network of over 130 correspondents, its national sections, and its close collaboration with local and regional press freedom groups. Reporters Without Borders currently has 15 offices and sections worldwide.

Reveal from The Center for Investigative Reporting, founded in 1977, is the nation's oldest nonprofit investigative newsroom. Reveal produces investigative journalism for its website <https://www.revealnews.org/>, the Reveal national public radio show and podcast, and various documentary projects. Reveal often works in collaboration with other newsrooms across the country.

Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

Sun-Times Media, LLC (the "Sun-Times") is the publisher of the Chicago Sun-Times daily newspaper as well as weekly newspapers and internet news sites. The Chicago Sun-Times, formed in 1948, is circulated throughout the City of Chicago and suburbs. The newspaper has won eight Pulitzer Prizes and has a tradition of fostering in-depth investigative reporting. Consequently, the freedom of speech and the press in Illinois is a core interest of the Sun-Times, and it seeks to participate as amicus curiae to defend important First Amendment free speech principles.

The Tully Center for Free Speech began in Fall, 2006, at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.

The Washington Post (formally, WP Company LLC d/b/a The Washington Post) is a news organization based in Washington, D.C. It publishes The Washington Post newspaper and the website www.washingtonpost.com, and produces a variety of digital and mobile news applications. The Post has won 47 Pulitzer Prizes for journalism, including awards in 2018 for national and investigative reporting.

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that he caused a true and correct copy of the foregoing **MOTION OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 39 MEDIA ORGANIZATIONS FOR LEAVE TO FILE AN AMICI LETTER** to be served upon:

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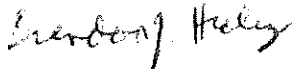
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Brendan J. Healey

EXHIBIT A

REPORTERS COMMITTEE

FOR FREEDOM OF THE PRESS

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SCOTT APPLEWHITE
The Associated Press
WOLF BLITZER
CNN

DAVID BOARDMAN
Temple University

CHIP BOK
Creators Syndicate

MASSIMO CALABRESI
Time Magazine

MANNY GARCIA
USA TODAY NETWORK

EMILIO GARCIA-RUIZ
The Washington Post

JOSH GERSTEIN
POLITICO

ALEX GIBNEY
Jigsaw Productions

SUSAN GOLDBERG
National Geographic

JAMES GRIMALDI
The Wall Street Journal

LAURA HANDMAN
Davis Wright Tremaine

JOHN C. HENRY
Freelance

KAREN KAISER
The Associated Press

DAVID LAUTER
Los Angeles Times

DAHLIA LITHWICK
Slate

MARGARET LOW
The Atlantic

TONY MAURO
National Law Journal

JANE MAYER
The New Yorker

ANDREA MITCHELL
NBC News

MAGGIE MULVIHILL
Boston University

JAMES NEFF
Philadelphia Media Network

CAROL ROSENBERG
The Miami Herald

THOMAS C. RUBIN
Quinn Emanuel

CHARLIE SAVAGE
The New York Times

BEN SMITH
BuzzFeed

JENNIFER SONDAG
Bloomberg News

PIERRE THOMAS
ABC News

SAUNDRA TORRY
USA TODAY

VICKIE WALTON-JAMES
NPR

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Senior Advisor:
PAUL STEIGER
ProPublica

*Affiliations appear only
for purposes of identification.*

April 3, 2019

The Honorable Patricia M. Martin
Courtroom 800
Juvenile Court Building
1100 S. Hamilton Avenue
Chicago, IL 60612

**Re: *In the Interest of Three (Suppressed) Minors*, Case Nos. 14 JA 00852,
17 JA 1251, 19 JA 209**

Dear Judge Martin,

The Reporters Committee for Freedom of the Press (the “Reporters Committee”) and 39 media organizations respectfully submit this letter in support of ProPublica’s Motion to Vacate the Court’s March 14, 2019 Order, which seeks to vacate an order of this Court prohibiting disclosure of the names of minors and “any other information” that would permit identification of the minors or their foster parents by ProPublica and “any and all other media.”

Amici are members of the news media and organizations that advocate on behalf of the press and the public. Many of the *amici* regularly report on court proceedings and therefore have a direct interest in ensuring that journalists and news organizations remain free from unconstitutional restrictions on their ability to publish lawfully-obtained information. *Amici* also have a special interest in this matter because the sweeping order at issue is an unconstitutional prior restraint not only on ProPublica, but also on all other news media organizations.

As an initial matter, *amici* request that further proceedings related to these cases be public. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607–08 (1982) (holding that courts must consider “on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim” based on the following factors: “the minor victim’s age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives”). Here, the Court has not made any on-the-record findings demonstrating that compelling interests necessitate closure, nor has it narrowly tailored its closure order, as the First Amendment requires. *Id.*

This matter arises from the motion of three minors (the “Minors”) for an order restraining ProPublica, specifically, and other news media, generally, from disclosing their names. On March 14, 2019, the Court granted that motion and entered an order (the “Order”) restraining

“ProPublica and any and all other media” from “disclos[ing] the names and/or any other information that would permit the ready identification of either above Minors, including specific address[es] or other demographic information, including school names.” ProPublica learned the names of the Minors through its usual, lawful journalistic practices. (ProPublica Mot. to Vacate, Ex. 2, 3/7/19 Tr. at 6.) Barring any disclosure of the information covered by this Order hampers ProPublica’s ability to report on matters of significant public concern—namely, potential systemic failures in the Illinois child welfare system. *See, e.g., Stuck Kids*, ProPublica Illinois, <https://bit.ly/2U4W85R> (last visited Apr. 3, 2019) (reporting on Illinois Department of Children and Family Services’ overuse of psychiatric hospitals).

The Order is an unconstitutional prior restraint. *See Alexander v. United States*, 509 U.S. 544, 550 (1993) (“The term prior restraint is used ‘to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.’”) (quoting M. Nimmer, *Nimmer on Freedom of Speech* § 4.03, p. 4–14 (1984)). Prior restraints are “the most serious and the least tolerable infringement on First Amendment rights” because they act as “an immediate and irreversible sanction,” not only “chilling” speech but “freezing” it, at least for a time. *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976). Prior restraints are particularly oppressive because they prevent the restricted information from being heard or published at all and are therefore the most direct attack on the marketplace of ideas. *Id.* The damage done by a prior restraint is “particularly great” where, as here, it “falls upon the communication of news and commentary on current events.” *Id.*

“[T]he Supreme Court has never upheld a prior restraint, even faced with the competing interest of national security or the Sixth Amendment right to a fair trial.” *See Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996). Rather, beginning in 1931 with *Near v. Minnesota*, the Supreme Court has without fail rejected all prior restraints on the press. 283 U.S. 697, 716–18 (1931) (invalidating prior restraint against defamatory and racist publication that allegedly disturbed the “public peace”); *Stuart*, 427 U.S. at 570 (rejecting prior restraint intended to protect Sixth Amendment rights of criminal defendant); *CBS, Inc. v. Davis*, 510 U.S. 1315 at 1316 (rejecting prior restraint intended to protect “confidential and proprietary” business information); *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (rejecting prior restraint despite the government’s claim that an injunction was necessary to prevent a “grave and immediate danger” to national security); *see also Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 104 (1979) (invalidating a state law prohibiting a newspaper from publishing the identity of a juvenile defendant and stating that “if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information” absent an extraordinary countervailing state interest).

It appears that the Court here may have entered its Order in an attempt to protect the privacy of the Minors. However, potential revelation of sensitive information related to minors does not automatically create a state interest “of the highest order” such that a prior restraint would pass constitutional muster. *N.Y. Times Co.*, 403 U.S. at 714. In *Globe Newspaper*, the Supreme Court determined that “safeguarding the physical and

psychological well-being of a minor” is not always a significant enough interest to overcome the First Amendment right of public access to trials; thus, a similar interest in minor privacy is certainly not an interest “of the highest order” needed to constitutionally impose a prior restraint. *See* 457 U.S. at 607–08.

Similarly, in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), the Supreme Court held that it was unconstitutional to criminally prosecute a newspaper for publishing information about confidential judicial disciplinary proceedings. As Justice Stewart explained in his opinion concurring with the Court’s judgment, the “government cannot take it upon itself to decide what a newspaper may and may not publish”; although “government may deny access to information and punish its theft, government may not prohibit or punish the publication of that information once it falls into the hands of the press, unless the need for secrecy is manifestly overwhelming.” 435 U.S. at 849 (Stewart, J., concurring).

“The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties.” *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558–59 (1975); *see also Stuart*, 427 U.S. at 589 (Brennan, J., concurring in the judgment) (“The First Amendment thus accords greater protection against prior restraints than it does against subsequent punishment for a particular speech.”) (citing *Carroll v. Princess Anne*, 393 U.S. 175, 180–81 (1968)). Accordingly, just as the Constitution would protect ProPublica from punishment for publishing information about the Minors, it surely protects ProPublica from being enjoined from publishing that information in the first place.

For these reasons, *amici* urge this Court to grant ProPublica’s motion and vacate the March 14, 2019 Order.

Respectfully submitted,

The Reporters Committee for Freedom of the Press (Additional *amici* listed on following page)

By counsel:



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The Associated Press
Associated Press Media Editors
Association of Alternative Newsmedia
Boston Globe Media Partners, LLC
California News Publishers Association
Californians Aware
Chicago Public Media
Chicago Tribune Company LLC
The E.W. Scripps Company
First Amendment Coalition
First Look Media Works, Inc.
Fox Television Stations, LLC
Freedom of the Press Foundation
Gannett Co., Inc.
Hearst Corporation
Illinois Broadcasters Association
Illinois Press Association
Inter American Press Association
Investigative Reporting Program
Investigative Reporting Workshop at
American University
The Marshall Project
The Media Institute
National Newspaper Association
The National Press Club
National Press Club Journalism Institute
National Press Photographers
Association
National Public Radio, Inc.
The New York Times Company
News Media Alliance

The NewsGuild - CWA
POLITICO LLC
Radio Television Digital News
Association
Reporters Without Borders
Reveal from The Center for
Investigative Reporting
Society of Professional Journalists
Sun-Times Media, LLC
Tully Center for Free Speech
The Washington Post

EXHIBIT B

**IN THE CIRCUIT COURT OF COOK COUNTY
DEPARTMENT OF JUVENILE JUSTICE AND CHILD PROTECTION
CHILD PROTECTION DIVISION**

IN THE INTEREST OF THREE)	No. 14 JA 00852
(SUPPRESSED) MINORS,)	No. 17 JA 1251
)	No. 19 JA 209
)	
)	Hon. Patricia A. Martin

**[PROPOSED] ORDER GRANTING MOTION OF
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
AND 39 MEDIA ORGANIZATIONS FOR LEAVE TO FILE AN *AMICI* LETTER**

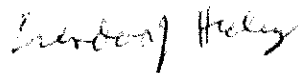
THIS MATTER comes before the Court on the motion (“Motion”) of the Reporters Committee for Freedom of the Press and 39 media organizations for leave to file an *amici* letter in support of ProPublica’s Motion to Vacate the Court’s March 14 Order.

THE COURT, having considered the Motion, hereby ORDERS that the Motion is GRANTED, and the *amici* letter attached to the Motion is DEEMED FILED.

DATED this ____ day of _____, 2019.

The Honorable Patricia A. Martin

Presented by:



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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 0428601
)
JASON VAN DYKE,)
)
 Defendant.)

REPORT OF PROCEEDINGS had at the hearing of
the above-entitled cause, before the Honorable
VINCENT M. GAUGHAN, Judge of said Court, on Wednesday,
December 6, 2017.

APPEARANCES:
HON. JOSEPH McMAHON, State's Attorney of
Kane County,
Court-Appointed Special Prosecutor, and,
MS. JODY GLEASON,
MR. JOSEPH CULLEN,
MR. DANIEL WEILER,
MS. MARILYN HITE ROSS,
MR. GREG SAMS,
MR. VINCENT COYLE,
MS. SARAH SERBERGER,
MS. KATY KARAYANNIS,
Assistant Special Prosecutors,
on behalf of the People;

1 APPEARANCES CONTINUED:

2 MR. DANIEL HERBERT,
3 MR. RANDY RUECKERT,
4 MS. TAMMY WENDT,
5 MS. ELIZABETH FLEMING,
6 on behalf of the Defendant;

7
8 MR. BRENDAN HEALEY,
9 on behalf of the Reporters Committee for
10 Freedom of the Press;

11
12 MR. MATTHEW TOPIC,
13 MR. JOSH BURDAY,
14 on behalf of Jamie Kalven.

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SABRINA M. TOMICKI, CSR
Official Court Reporter
Criminal Division
License No. 084-004755

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I N D E X

Case: PEOPLE VS. JASON VAN DYKE
Case No.: 17 CR 0482601
Date: 12-6-17
Pages: 1 through 104

<u>WITNESS</u>	<u>DX</u>	<u>CX</u>	<u>RDX</u>	<u>RCX</u>
JAMIE KALVEN				
By Mr. Topic	11			

Reporter's Certificate ----- 104

1 THE CLERK: Sheet 7, Jason Van Dyke.

2 THE COURT: First off, I only want the parties that
3 are involved to approach.

4 Will the attorneys state their names.

5 MR. MCMAHON: Good morning, Judge. Joe McMahon for
6 the People of the State of Illinois.

7 MS. GLEASON: Jody Gleason on behalf of the State.

8 MS. HITE ROSS: Marilyn Hite Ross for the State.

9 MR. WEILER: Dan Weiler for the State.

10 MR. CULLEN: Joseph Cullen for the State.

11 THE COURT: Introducing the Garrity team.

12 MR. SAMS: Greg Sams for the special prosecutor and
13 for the People of the State of Illinois.

14 MR. COYLE: Vincent Coyle on behalf of the State of
15 Illinois, Garrity team.

16 MS. SEBERGER: Sarah Seberger, People, Garrity team.

17 MS. KARAYANNIS: Katy Karayannis, People, Garrity
18 team.

19 MR. HERBERT: Good morning, Dan Herbert on behalf of
20 Jason Van Dyke who is present.

21 MR. RUECKERT: Randy Rueckert on behalf of Jason Van
22 Dyke.

23 MS. FLEMING: Elizabeth Fleming on behalf of Jason
24 Van Dyke.

1 MS. WENDT: Tammy Wendt for Mr. Van Dyke.

2 THE COURT: Elizabeth, you're filing your appearance
3 now, today, on this?

4 MS. FLEMING: My appearance was filed, I believe two
5 court dates ago.

6 THE COURT: Okay, thank you. Brendan?

7 MR. HEALEY: And Brendan Healey here on behalf of
8 Proposed Amicus and other Amici, Reporters Committee for
9 Freedom of the Press.

10 THE COURT: And your Amicus brief has allowed to be
11 filed, so certainly. Matthew?

12 MR. TOPIC: Matt Topic on behalf of Jamie Kalven.

13 MR. BURDAY: Josh Burday on behalf of Jamie Kalven.

14 THE COURT: And Mr. Kalven is here today?

15 MR. TOPIC: He is.

16 THE COURT: Here's what I propose to do, to lay out
17 what we're going to do today.

18 First off, the first order of business will be
19 to determine the motion to quash the subpoena on
20 Mr. Kalven, then after that, we have the Lynch material.
21 And are there any other things on the agenda?

22 MR. MCMAHON: Judge, we filed a supplemental
23 discovery response, I filed that this morning. I
24 tendered that to Mr. Herbert earlier, and that's all

1 that we have this morning.

2 THE COURT: Mr. Herbert, are you going to be
3 employing any expert witnesses?

4 MR. HERBERT: Yes, and we will seek leave to file a
5 list of our expert witnesses today.

6 THE COURT: All right. And what they're going to
7 testify to. Do you have their curriculum vitae with
8 that?

9 MR. HERBERT: We have the CV, and we have a brief
10 disclosure of what they're going to testify to, which
11 we'll follow up pursuant to law with the required
12 disclosure.

13 THE COURT: Okay, great.

14 Then, Mr. Sams, you're going to be proceeding
15 on your motion to quash the subpoena also; is that
16 correct?

17 MR. SAMS: That's correct.

18 THE COURT: And then, Mr. Topic, you're also on
19 that, so your client -- I'm going to let you proceed
20 first because it's your client. And then the order of
21 business will be the special prosecutors, Garrity team,
22 and then, Brendan, you can make your presentation also,
23 and then, Mr. Herbert, you can respond.

24 MR. MCMAHON: Judge, with your permission, my trial

1 team, we're going to step out of the courtroom.

2 THE COURT: If you want, just go in chambers, that's
3 all right.

4 MR. MCMAHON: Thank you, Judge.

5 THE COURT: Will everybody please be seated. Thank
6 you.

7 Also, I just want to restate an order that was
8 issued on September 7th, 2017. It is hereby ordered
9 that Kelly Barnicle of WGN TV, Megan Crepeau of the
10 Chicago Tribune, and Andy Grimm of the Chicago Sun Times
11 will serve as co-chairs of the Media Coordinating
12 Committee in the matter People of the State of Illinois
13 versus Jason Van Dyke until and unless otherwise ordered
14 by the Court.

15 At this time, I'd like Mr. Sullivan to give
16 them duplicate originals of the order.

17 (Pause.)

18 THE COURT: All right. Mr. Topic, will you proceed
19 please?

20 MR. TOPIC: Yes, thank you, your Honor. Let me
21 start here. The entire underpinning for what
22 Mr. Van Dyke is trying to do here is based on a
23 representation that he has repeatedly made to this Court
24 that Mr. Kalven received copies of Garrity-protected

1 statements. That's the only thing that would be
2 arguably of any relevance, he represented it improperly,
3 there is nothing that supports it, and it is flat out
4 not true, as Mr. Kalven has said multiple times.

5 THE COURT: You know, I'm -- probably the first
6 thing we should do is have Mr. Kalven get on the stand
7 and establish that he is a journalist.

8 MR. TOPIC: So let me respond to that. Under the
9 Special Witness Doctrine, he is not required to take the
10 stand.

11 THE COURT: That's fine. You can appeal that real
12 quick.

13 The Special Witness Doctrine, how many times
14 has that applied in the First District of the State of
15 Illinois?

16 MR. TOPIC: To my knowledge, it's not been addressed
17 in the First District.

18 THE COURT: Well, to my knowledge, the People of the
19 State of Illinois versus Willis, yes, it has. And
20 Justice Margaret Stanton was the justice that did that,
21 and it only pertained to a judicial officer, not to a
22 reporter.

23 So get Mr. Kalven on the stand or your motion
24 to quash the subpoena is denied.

1 MR. TOPIC: And the scope of the testimony that --

2 THE COURT: Well, you'll find out about it. All
3 right, come on. First of all, you're telling me you're
4 not going to do it, so I want him up here and we're
5 going to swear him. I'll limit the scope of the
6 testimony.

7 MR. TOPIC: Your Honor, the issue is --

8 THE COURT: Either, Mr. Topic, you comply, or you're
9 showing disrespect for this Court.

10 MR. TOPIC: Your Honor, I mean no disrespect.

11 THE COURT: Then call your client please. Part of
12 my job is to protect witnesses against
13 self-incrimination, which hasn't even arose yet. So
14 nothing is going to happen to your client, he will not
15 be harassed, he will not be embarrassed. Call him or
16 you're out of here.

17 MR. TOPIC: Okay. Let me confer with my client on
18 whether he's going to respectfully --

19 THE COURT: If he takes any privilege, the Fifth
20 Amendment, the right of First Amendment, then he has not
21 established that he is a reporter. So your standing
22 here is not appropriate at this time.

23 MR. TOPIC: The argument --

24 THE COURT: I'm just telling you what I'm doing, I'm

1 not discussing this with you, all right. You either
2 comply or you're out, so go ahead.

3 MR. TOPIC: May I have a moment to confer with my
4 client?

5 THE COURT: Absolutely, Matthew, go ahead.

6 (A short break was taken.)

7 MR. TOPIC: Your Honor, Mr. Kalven will take the
8 stand to testify.

9 THE COURT: Thank you. And I didn't mean to -- I'm
10 not abrupt, it's just that we have a lot to do today.
11 Mr. Topic, we have different rules here, you can't
12 interrupt me until I take a breath.

13 Here's the case that I cited, People versus
14 Willis, W-I-L-L-I-S, it's at 349 Illinois Appellate
15 Third, and it was decided in 2004.

16 I'm sorry, go ahead now.

17 MR. TOPIC: Mr. Kalven will take the stand to
18 testify that he is a reporter. That's the extent to
19 which he will testify. He will otherwise --

20 THE COURT: You know, take a breath, all right,
21 relax a little bit.

22 Mr. Kalven, get up here please.

23 (Witness sworn.)

24 THE COURT: Mr. Kalven, the seat is adjustable, the

1 mic is live, so if you adjust yourself -- and you can
2 adjust the mic so everybody can hear your testimony, it
3 would be very important and very appreciated, so thank
4 you. Proceed, Mr. Topic.

5 JAMIE KALVEN,
6 called as a witness herein, having been first duly
7 sworn, was examined and testified as follows:

8 DIRECT EXAMINATION

9 BY MR. TOPIC:

10 Q. Can you just state your name?

11 A. Jamie Kalven.

12 Q. Mr. Kalven, what is your occupation?

13 A. I'm a writer, a journalist.

14 Q. How long have you been a reporter?

15 A. My entire adult life.

16 Q. Are you regularly engaged in the business of
17 collecting, writing, or editing news or publication in
18 newspapers or periodicals?

19 A. Yes, I am.

20 Q. Are those newspapers and periodicals issued at
21 regular intervals in print or electronic format?

22 A. They are.

23 Q. Do they have general circulations?

24 A. Yes.

1 Q. Were you so engaged as a reporter during the
2 time period of October 2014 to present?

3 A. I was.

4 MR. TOPIC: Your Honor, I can proceed further with
5 copies of awards Mr. Kalven as won as a reporter, I can
6 put forth --

7 THE COURT: Mr. Kalven is under oath, so his word is
8 good right now. Any cross examination by the special
9 Garrity prosecution team?

10 MR. SAMS: Nothing, your Honor.

11 THE COURT: Anything by the defense?

12 MR. HERBERT: Judge, based on that limited direct, I
13 don't have any examination. However, I would believe
14 that I should inform the Court that there's a chance
15 that Mr. Kalven should be advised of his criminal rights
16 here if testimony were to go on further, there is a
17 statute --

18 THE COURT: You know, that's a judicial duty, so
19 relax a little bit, do your own work and I'll do mine,
20 okay?

21 MR. HERBERT: I'm just making a record, Judge.

22 THE COURT: What's a record, who's the record for?
23 Mr. Kalven? Are you representing him now?

24 MR. HERBERT: No, I'm not representing Mr. Kalven.

1 THE COURT: Well, then why are you telling me to
2 tell him about his constitution -- sit down,
3 Mr. Herbert.

4 MR. HERBERT: Judge, the whole purpose that I'm
5 doing this is for my client.

6 THE COURT: This is not anything to do with
7 Mr. Kalven at this time. I know my duties, just relax a
8 little bit too, all right.

9 Thank you very much, you can have a seat.

10 I find that Mr. Kalven does come under the
11 purview of the Illinois Reporter's Act. Proceed,
12 Mr. Topic.

13 MR. TOPIC: Thank you, your Honor. As to the motion
14 to quash the issues that are independent of the fact
15 that Mr. Kalven is a reporter, as I had alluded to, as
16 is in our brief, the basis for bringing Mr. Kalven here
17 was a proffer that he received Garrity-protected
18 statements, and there is no basis for that proffer.

19 The materials that have been put forth by the
20 defense in their brief don't show that to be true, and
21 we had made very clear in our brief that it isn't true.
22 We think on that basis alone you should quash the
23 subpoena.

24 If that is the only reason that anything would

1 be relevant and there's no basis for that, then the
2 subpoena simply shouldn't go forward regardless of
3 whether Mr. Kalven is a reporter or anyone else. So
4 that would be our first reason why we think the subpoena
5 should be quashed.

6 In addition, we don't think there's any
7 relevance to the claim even if it was true. Even if
8 Mr. Kalven received Garrity statements, even in -- it's
9 our belief that there is no Garrity problem. I will
10 defer to the State on that issue because we have not had
11 access to all the information with respect to the
12 State's case, I will let them make that argument.

13 I just want to reiterate the point on whether
14 Mr. Kalven is a reporter or is not a reporter. I guess
15 one other thing I will make is the point that the
16 argument seems to be that Mr. Kalven got
17 Garrity-protected statements and they used them to shape
18 Mr. Torres's testimony, and what that completely
19 overlooks is that Mr. Torres gave a statement to IPRA
20 before any time period which he claimed to receive any
21 Garrity-protected statements from Mr. Kalven.

22 The Special Witness Doctrine I understand you
23 ruled on already, I'll stand on our briefs on why that
24 doctrine would reply.

1 That would take us to the reporter issue. It
2 has now been established that Mr. Kalven is a reporter.
3 The next question would be whether any of the
4 information that they're seeking from him is a source.

5 There have been shifting arguments from the
6 defense about exactly what it is they want to get from
7 Mr. Kalven. If they want to know the identity of the
8 person who gave him the information, that is clearly a
9 source under the statute. I don't think there's really
10 any legitimate argument to the contrary.

11 If they want to know what information he
12 received, that too, is within the scope of source, which
13 has been broadly defined in the Slager (phonetic) case,
14 to include things like photographs, and includes any
15 means that are used by reporters to gather the news.
16 That's why we often see divestiture proceedings in cases
17 that are getting reporter's notes. It's the same idea.
18 Anything that Mr. Kalven was told, anything that he
19 mentally recalls about what he was told, those are all
20 the means by which he engaged in the reporting process,
21 and that's clearly within the scope of the source.

22 That takes us to the point of whether
23 divestiture had been shown. There hasn't been any
24 effort to divest in the privilege, and the defense has

1 expressly said they will file something in the future if
2 you determine that they need to file that. They've had
3 plenty of opportunities to do that. From the very
4 beginning, Mr. Kalven has made clear that he is a
5 reporter, this is a source, and that he is asserting his
6 rights.

7 THE COURT: Mr. Topic, I am going to interrupt at
8 this time. First of all, that they file an application
9 for divestiture contemporaneous with this motion that is
10 pending right now is a little premature. Because first
11 of all, if I quash the subpoena on other grounds, then
12 they would not -- the reporter privilege, even though
13 Mr. Kalven has been established as a reporter, would not
14 apply.

15 And the other thing is if they file that
16 application, that would be presumed that I'm not going
17 to quash the subpoena and made a pre-judgment on it. So
18 I'm going to allow you to make your presentation, but
19 they would not file that application.

20 We had this in the R. Kelly case, we've gone
21 through this where there's been about 80 depositions
22 taken to show that they have exhausted all means to find
23 the information.

24 So the procedure is whether I make a

1 determination that the subpoena is not quashed, then if
2 I don't quash the subpoena, then I make a determination
3 that Mr. Kalven is a reporter, then they would apply for
4 the application to divest.

5 But go ahead, your presentation is very
6 insightful, so proceed.

7 MR. TOPIC: Understood.

8 So, your Honor, I think there's no dispute that
9 because Mr. Kalven is a reporter, if you agree with us
10 that the information they're seeking is a source, they
11 have to file a petition to divest, so we would have to
12 deal with that at such time that they file that written
13 petition, and if you give them leave to do that, then
14 we'll respond to that.

15 They haven't done that at this point, they
16 admitted they haven't done that at this point. So
17 there's really nothing further we need to cover under
18 the reporter's privilege at this point.

19 I'm happy to answer any questions, but I have
20 nothing further to present on this, and leave it to the
21 State to argue why none of this is relevant in this case
22 regardless of whether Mr. Kalven is a reporter or
23 whether it is source material.

24 THE COURT: Mr. Topic, certainly I'll allow you

1 rebuttal, but thank you for your presentation.

2 The next thing, I'd like the Garrity team and
3 the special prosecution unit to make their presentation
4 please.

5 MR. SAMS: Thank you, your Honor. Before I begin,
6 may I approach? I have a binder that's got my exhibits
7 and case law that I'm referring to.

8 THE COURT: Thank you very much.

9 MR. SAMS: And I do have a copy for Mr. Herbert as
10 well.

11 THE COURT: Thank you.

12 MR. SAMS: May I begin, your Honor?

13 THE COURT: Please. Thank you, Mr. Sams.

14 MR. SAMS: Thank you, your Honor. The People have a
15 two-part motion to quash the subpoena of Jamie Kalven.
16 The first part, your Honor, can be considered more of a
17 motion to reconsider from the Court's earlier granting
18 of the defense permission to call Mr. Kalven. And
19 it's -- it is fashioned somewhat as a motion to
20 reconsider, but it's also kind of fashioned, Judge, as a
21 motion to get the defense to kind of reconfirm things
22 that they told the Court in the proffer that they gave
23 to the Court on October 17th, about two months ago, to
24 convince this Court to allow them to call Jamie Kalven

1 as an attorney -- or as a witness in this case.

2 Judge, the first thing, and it's part of the
3 exhibits that I gave you, it's People's Exhibit
4 Number 1, and in particular, I believe it's from the
5 October 17th, 2017, transcript, Page 31, Lines 8 to 12.
6 In that particular argument, Mr. Herbert said, quote,
7 well, he -- and he was referring to Kalven, well, he
8 clearly knew Mr. Van Dyke's explanation for the
9 shooting. We know that because he went and conducted
10 interviews with the assistance of the FBI agents with
11 two of the occurrence witnesses, the two Torreses, end
12 quote.

13 Judge, what I can tell you is that that offer
14 of proof clearly indicates that the FBI, at a minimum,
15 either assisted Kalven, or at worse, actually sat in
16 with Kalven as he interviewed the Torreses.

17 Judge, we would proffer to you that there is
18 nothing in the record to indicate that the FBI did
19 either of those things.

20 The Court, your Honor, you seemed somewhat
21 astonished by that statement that Mr. Herbert made
22 because you then asked Mr. Herbert, quote, you're saying
23 with the assistance of the FBI, what does that mean,
24 they gave them the names of the witnesses, end quote.

1 And then when you further read the transcript,
2 there's some back and forth between Mr. Herbert and
3 yourself, and then finally when we get to Page 32, Lines
4 10 to 21 of that transcript, there's a soliloquy back
5 and forth between yourself and Mr. Herbert in which
6 Mr. Herbert reconfirms that his proffer is that the FBI
7 sat in with the reporter, and not only does he reconfirm
8 that, but Mr. Herbert assigned a percentage to it. He
9 assigned a percentage to it to you to get you to allow
10 him to call Mr. Kalven. And that percentage was, quote,
11 by Mr. Herbert, quote, I'm 99 percent sure of that, end
12 quote. And then Ms. Wendt added from the defense table,
13 the word yes to that. And then Mr. Herbert said, and
14 there were other lawyers there too.

15 So they doubled down now on the fact that the
16 FBI assisted in this interview with Kalven and the
17 Torreses, and they assigned a percentage of truth to it,
18 99 percent.

19 However, Judge, there is nothing in the record,
20 when I say the record, what I mean, Judge, is the
21 discovery, there's nothing in the discovery to indicate
22 that the FBI did that in any way.

23 I've given you People's Exhibit Number 2.

24 THE COURT: Excuse me one moment.

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(Pause.)

THE COURT: Mr. Sams, if you know, how many pages of discovery have been turned over to the defense? So people can get the scope of how complex this case is.

MR. SAMS: Judge, I have approximately 50,000 pages, I think when you take phone records, things like that, and you convert those to pages, you're well into several hundred thousand I would guess.

THE COURT: And plus 8,700 pages of Laquan McDonald's DCFS records too?

MR. SAMS: Correct.

THE COURT: Thank you. Proceed then please.

MR. SAMS: Thank you.

So it was on December 15th of 2014, that Jose Torres, who is the father, Judge, first told the FBI agents that Mr. Kalven had already tried to interview him, and that is on Exhibit Number 2, which comes as part of a FBI, what we call a 302, which is basically just an FBI police report, a supplemental police report.

There is nothing in the discovery though to indicate in any way that the FBI assisted Kalven by providing the Torreses names or in setting up or even attending that interview with Kalven and the Torreses despite of what Mr. Herbert said on October 17th.

1 So what we are doing, Judge, we are asking you
2 as part of this motion to reconsider to have the defense
3 kind of reconfirm its offer of proof on this issue.
4 Maybe I'm missing something in the discovery, Judge, but
5 I can't find that anywhere.

6 THE COURT: I'm sorry for interrupting.
7 Mr. Herbert, did you want to address that at this time?

8 MR. HERBERT: I can address it in my argument, but I
9 mean --

10 THE COURT: Well, why don't you clear things up as
11 we can rather than throw everything into, like I said
12 before, like putting water colors in a bowl and pour
13 water into the bowl and trying to find the colors. So
14 right now while we have this issue, can we clarify it?

15 MR. HERBERT: I'll give you a brief response. Our
16 evidence to date, from what we've received and important
17 to note on this, Judge, we have received, our
18 understanding is we have well over 500,000 pages of
19 discovery. But we've received discovery from different
20 governmental agencies, but also we have received
21 evidence through our investigative efforts with a
22 subpoena, and that's an important point here, because
23 the issue of whether or not -- or the FBI's --

24 THE COURT: Mr. Herbert, you told me you were going

1 to be brief.

2 MR. HERBERT: I am going to be brief.

3 THE COURT: Are you affirming that the FBI gave, as
4 presented by Mr. Sams, that assistance?

5 MR. HERBERT: I would agree with Mr. Sams on one
6 point where --

7 THE COURT: Mr. Herbert, please, come on, get to the
8 point.

9 MR. HERBERT: No, I'm not conceding it. There's an
10 explanation.

11 THE COURT: So are you affirming your other proffer
12 that you made back on the other date then, 99 percent?

13 MR. HERBERT: With a clarification, yes, yes, the
14 FBI was involved.

15 THE COURT: Okay. What's your clarification?

16 MR. HERBERT: That clarification that was made that
17 so far we don't have records to indicate that it's true,
18 I made a representation that the FBI physically sat in
19 the room with Mr. Kalven when he interviewed Mr. Torres
20 on that first date. Our evidence doesn't show that he
21 did, but what we know is that Mr. Kalven conducted
22 investigations --

23 THE COURT: That's the only point I want to know,
24 thank you very much.

1 MR. HERBERT: I'll address more in my argument.

2 THE COURT: Proceed, Mr. Sams.

3 MR. SAMS: Judge, the next troubling section of the
4 defense counsel's October 17th, 2017, proffer was in
5 regards to allegations that Kalven passed along
6 Garrity-protected statements to the defendant. Defense
7 counsel never once said any information specifically as
8 to what was alleged and revealed to Torres. All he
9 said, and this is part of People's Exhibit Number 1,
10 again, Judge, on Page 33, Lines 2 to 11, Mr. Herbert
11 said, quote, witnesses were asked specific questions
12 that related specifically to Jason Van Dyke's defense.
13 And then he went on a couple lines later to say, they
14 were specifically told about Van Dyke's defense in a way
15 that witnesses would provide favorable testimony for the
16 case.

17 However, Judge, there is nothing in any of the
18 discovery to indicate that Kalven passed along anything
19 that was Garrity related to the Torreses. Xavier Torres
20 testified in People's Exhibit Number 2, Judge, that he
21 was contacted by a reporter, Jamie Kalven, from the
22 Invisible Institute is what it says, however, there's
23 nothing else from that report that would lead the
24 defense to conclude, or more pertinent to the Court, to

1 claim an offer of proof to this Court that Kalven
2 exposed any information to the elder Torres.

3 Now, counsel says that they've got things from
4 subpoenas --

5 THE COURT: Well, let's just say, what effect would
6 it have on this case, if any, if Mr. Kalven had
7 Garrity-protected material? He wasn't part of the
8 investigation.

9 MR. SAMS: He was not part of the law enforcement
10 investigation, if he had it, there would be actually
11 nothing that would be wrong in terms of the criminal
12 prosecution as it relates to the Garrity issues that are
13 before the Court today for Kalven to have that.

14 If Kalven had it, hypothetically if Kalven had
15 it and we already have a representation today that he
16 didn't, but if he had it and he passed it along to
17 Torres, that could potentially taint Torres.

18 But as I get into my argument later, Judge,
19 when we were here last time, you asked for a verbal
20 timeline on Torres. Torres did not talk to the police
21 the night of October 19th into October 20th, 2014. Not
22 by his own volition, he was there, he was in a car, I
23 believe with his son, and when he stayed in that car and
24 the police arrived, police sent him on his way. Now, I

1 don't know whether there's anything nefarious about
2 that, I don't know whether the police knew he was a
3 witness or if he was just somebody in a car, but he was
4 sent away.

5 So over the next week, what he saw in the press
6 made him decide that he needed to contact IPRA. So I
7 believe it was on October 28th of 2014, that he
8 contacted and talked with IPRA. So that was
9 approximately eight to nine days after the shooting.

10 It was a month later, at the earliest, sometime
11 in late November of 2014, when Torres -- when Kalven
12 came to talk to Torres. At that point in time, Torres's
13 statement was already locked in.

14 THE COURT: That was already memorialized.

15 MR. SAMS: That was already memorialized to IPRA.
16 It was memorialized on a recording, which both sides
17 have, that recording has a transcript, and there is, I
18 don't know -- I don't think there's any indication from
19 the defense that that is tainted in any way. I don't
20 know how it could have been tainted by Kalven because he
21 hadn't talked to Kalven, it was a whole other month
22 later.

23 So going back to the original Haleas part of
24 this motion, Judge, there is an independent source for

1 Torres's statement, and that's his own observations and
2 what he told to IPRA a week later, a month before he
3 talked to Kalven, regardless of what Jamie Kalven may
4 have told him.

5 THE COURT: So your point is, is that it would be
6 physically impossible, due to the timeline, that
7 Mr. Torres ever seen the Garrity-protected statement
8 when he gave his statement to IPRA?

9 MR. SAMS: As far as I know, Judge, there's nothing
10 in any of the documents in discovery to indicate that
11 Torres, who gave his statement on the 28th, was exposed
12 to any Garrity-protected statement, either the IPRA
13 statement of the defendant or anything that the
14 defendant said to OCIC McNaughton, which are the two
15 Garrity-protected statements, yes.

16 THE COURT: Thank you very much. Proceed now
17 please.

18 MR. SAMS: So, Judge, having nothing in the
19 discovery to indicate that Kalven said anything to
20 Torres in regard to the Garrity-protected statements,
21 once again, we would be asking the Court to ask the
22 defense to recommit to that proffer. And if they can't,
23 then, Judge, we believe that you should reconsider the
24 granting of the defense, the ability to call Jamie

1 Kalven as a witness in this proceeding, Judge.

2 And then the last part to my original -- the
3 first part of my motion to quash, Judge, goes to what we
4 just talked about, the timeline, and that it doesn't
5 matter because there's an independent source.

6 Judge, my second part of my argument --

7 THE COURT: Mr. Sams, when I requested that you
8 produce and create the timeline, that had been helpful
9 even to you; is that correct?

10 MR. SAMS: Yes, thank you, your Honor.

11 The second part of my motion to quash goes to
12 the reporter's privilege and Special Witness Doctrine.
13 Judge, I don't know whether you want me to get into
14 those.

15 THE COURT: The Special Witness Doctrine, have you
16 heard any case outside the Fourth Appellate District?

17 MR. SAMS: No, that was just a --

18 THE COURT: I understand --

19 MR. SAMS: And when you said that, Judge, as it
20 applies to reporters?

21 THE COURT: Right.

22 MR. SAMS: Yes.

23 THE COURT: Let's go on, I'm not going to consider
24 the Special Witness Doctrine.

1 MR. SAMS: Okay. Judge, as to the reporter's
2 privilege, to the extent that the defense wants to get
3 Jamie Kalven up on the stand and ask him who your source
4 was at IPRA, and I'm not sure whether they want to ask
5 whether your -- who your source was at IPRA or CPD or
6 the FBI, because they kind of convolute these different
7 parties together.

8 To the extent they're looking for the source,
9 who that person was, we agree with Mr. Topic and the
10 Amicus that that would be protected by the reporter's
11 privilege, and that there would have to be some type of
12 divestiture motion to get this Court to consider that.

13 As it relates to, as you can see in my motion,
14 Judge, what I consider that first question as to who
15 your source was, Judge, we believe it's also an
16 irrelevant question, to the simple fact that whether
17 Kalven had Garrity-protected materials or not is an
18 important question, of course the important question is
19 did he give those to Torres. But who his source was,
20 Judge, is irrelevant for this particular issue on
21 Garrity.

22 And to that, I gave the Court, I believe it was
23 another Fourth District case, pardon me if I'm wrong,
24 People versus McKee (phonetic), which is pretty much,

1 Judge, directly on point. That the source of the
2 material in terms of who gave this to Kalven is
3 irrelevant.

4 And perhaps, Judge, you want to save that until
5 we get to the point in time that there is a divestiture
6 hearing, but --

7 THE COURT: The only thing I want to correct myself.
8 It wasn't the R. Kelly case that the divestiture applied
9 to, it was the first Brown's Chicken case, Juan Luna.
10 Here, it was a different story. There was a report --
11 investigative report prepared by the better business
12 government association concerning the investigation
13 missteps concerning the gathering of evidence at the
14 Brown's Chicken location, and things, if true, would
15 have led to impeachment of the expert witnesses and
16 their recovery of the evidence. Therefore, the source
17 there would have been a witness against prosecution
18 witnesses.

19 So at that time, and then it was a death
20 penalty case, so those were the things, plus there were
21 80 depositions involved in the Juan Luna case, but go
22 ahead.

23 MR. SAMS: Thank you, Judge.

24 As it relates to what the People believe the

1 questions should be, the very simple questions for Jamie
2 Kalven, if you do not quash his subpoena, those
3 questions should be did you receive Garrity-protected
4 material, and the other question would be then, did you
5 tell that to Torres.

6 Judge, we believe that those are the relevant
7 questions, but limited to those simple questions. To
8 some extent, the second question has been answered today
9 by Mr. Topic. The second question is -- the answer to
10 that is, no, you don't get to that third question. But
11 the first question of who the source is, Judge, is
12 irrelevant.

13 But to the extent that Mr. Topic and Mr. Kalven
14 argue that the questions as to did you get this material
15 and did you give it to Torres, we would disagree with
16 Mr. Topic. We don't believe that Mr. Kalven is
17 protected by the reporter's privilege for those simple
18 questions because we do not believe that those go to the
19 source. And we believe that the reporter's privilege
20 only protects the source, not the information that you
21 get, but the source and the means, but that does not
22 include the information.

23 THE COURT: Again, in a hypothetical, if the
24 Garrity-protected statement was attached to a report

1 signed by the source, then by turning over that material
2 would give the name of the source. So that would -- in
3 that hypothetical, and I'm not making a ruling on that,
4 that would divulge who the source was.

5 MR. SAMS: That would, and then your Honor would
6 have to --

7 THE COURT: But I think we're going far field. Do
8 we have any evidence right now as it stands, that
9 Mr. Kalven ever received Garrity-protected material?

10 MR. SAMS: There is no evidence that I have seen,
11 Judge.

12 THE COURT: Okay, thank you. You may proceed then.

13 MR. SAMS: Judge, that is pretty much my argument.
14 We're asking you to reconsider the granting of this
15 because you know now that the proffer was not perfect by
16 Mr. Herbert, and you know now the timeline as it relates
17 to Torres when he gave his IPRA statement as to when he
18 was first contacted by Kalven, Judge, those all show an
19 independent source, that timeline shows an independent
20 source, and you should grant our original motion to
21 quash the subpoena, Judge. Thank you.

22 THE COURT: Thank you very much. Mr. Healey?

23 MR. HEALEY: Thank you, your Honor. Brendan Healey
24 on behalf of the Reporters Committee for Freedom of the

1 Press. We're joined by --

2 THE COURT: Mr. Healey, could you enlighten us, not
3 everybody knows about your outstanding client, so who
4 some of the representatives are.

5 MR. HEALEY: Sure, your Honor, thank you.

6 So we represent the Reporters Committee for
7 Freedom of the Press, that's an organization devoted to
8 press advocacy, media advocacy, and working to open
9 courtrooms, access to records, representing journalists.

10 We're joined by the American Society of
11 Journalists and Authors, the American Society of News
12 Editors, the Associated Press, Associated Press Media
13 Editors, Association of Alternative News Media,
14 BuzzFeed, Chicago Tribune Company, LLC, Dow Jones
15 Company, Inc., First Look Media, Gannett Company, Inc.,
16 the Illinois Broadcasters Association, the Illinois
17 Press Association, the News Media Alliance, the Online
18 News Association, Radio Television Digital News
19 Association, Society of Professional Journalists, Sun
20 Times Media, LLC, and Univision Communications, Inc.

21 So as a preparatory matter, your Honor, thank
22 you for granting our motion for leave to appear. Can we
23 at this point, we had attached our Amicus brief, can we
24 deem that filed at this juncture?

1 THE COURT: Absolutely, Mr. Healey.

2 MR. HEALEY: Thank you, your Honor. So I'll briefly
3 summarize the brief. We basically make three broad
4 points. We talk about how the reporter's privilege
5 broadly protects confidential sources, but also
6 reporters and doing the work that they do, the strict
7 requirements that need to be applied to overcome the
8 reporter's privilege, and finally the public policy of
9 the act applies, I think with particular urgency in this
10 situation.

11 The reporter's privilege protects reporters in
12 large part because it protects sources, and without the
13 protection of the privilege, sources are less likely to
14 go to reporters in the first place. One case uses the
15 statement of a prospective source saying, "don't tell
16 anybody I told you this, but", and that's the sort of
17 thing that the reporter's privilege is meant to protect.
18 It does extend to confidential sources clearly.

19 We would also argue frankly in line with what
20 Mr. Topic said, that it applies to the news gallery
21 process, as well as non-confidential sources. There's a
22 compelling interest in protecting this reporter/source
23 relationship, because without it, our sources will be
24 reluctant to come to us if they feel that those

1 interactions can be disclosed.

2 THE COURT: Mr. Healey, generally speaking, take
3 Washington D.C., I mean, for God's sake, federal
4 government does not have any reporter privilege because
5 it's not in common law and it's not statutory, but there
6 are thousands of leaks in Washington D.C.

7 So it really -- and I understand that it would
8 put a chill, but it doesn't seem to really put it down
9 to zero that nobody is going to come forward.

10 MR. HEALEY: I understand, your Honor, but as we
11 point out in our brief, 49 states have adopted it by
12 statute or common law, so it has been not just here, but
13 elsewhere.

14 And clearly, you know, the signed statement
15 that Governor Oglesby gave when the act became law,
16 talked about the importance of the reporter's privilege
17 to free press. So we believe there's a compelling
18 interest and it's a very important one for both
19 reporters and the sources.

20 Given that, there are strict requirements that
21 must be overcome, and both Mr. Topic and Mr. Sams have
22 talked about those, I'll talk about them just more
23 generally. The reporter's privilege is viewed generally
24 as going to the reporter for information about the

1 reporter's sources or other information is a last
2 resort. It's not the first step in the process, and the
3 State needs to show a compelling interest.

4 In this --

5 THE COURT: Not the State.

6 MR. HEALEY: Excuse me?

7 THE COURT: Not the State.

8 MR. HEALEY: Excuse me. In this case it would be
9 the defendant, the parties seeking the divestiture must
10 show a compelling interest. Those are just some of the
11 aspects that must be shown in order to overcome the
12 privilege.

13 As you noted already, there's an exhaustion
14 requirement. That's because the public policy of the
15 act I think applies, as I mentioned earlier, with
16 particular importance and urgency in this situation. We
17 talk in our brief about the impact that Mr. Kalven's
18 reporting had, and not just in this courtroom, but
19 throughout the City of Chicago. This is the kind of
20 story that the reporter's privilege is meant to protect,
21 this is the kind of reporting it's meant to protect.

22 That's why the Reporters Committee for the
23 Freedom of the Press and the other Amici thought it was
24 so important to weigh in.

1 We thank you again, your Honor, for granting
2 our motion for leave to appear. And unless your Honor
3 has any additional questions, we would refer you to our
4 brief.

5 THE COURT: Mr. Healey, thank you very much for your
6 presentation.

7 MR. HEALEY: Thank you, your Honor.

8 THE COURT: Mr. Herbert?

9 MR. HERBERT: Thank you, Judge.

10 Judge, first of all, we need to remember why
11 we're here, Judge. And we're not here to pick a fight
12 with the press, we are not here to pick a fight with
13 Mr. Kalven who, no offense --

14 THE COURT: I understand, but you're using a
15 pronoun. When you say we, who is we?

16 MR. HERBERT: The defense.

17 THE COURT: Okay, go ahead.

18 MR. HERBERT: My client who I represent, Judge.

19 THE COURT: Fine.

20 MR. HERBERT: I had no idea who Mr. Kalven was prior
21 to these proceedings. We're not here to pick -- the
22 defense is not here to pick a fight with the First
23 Amendment or to challenge the First Amendment.

24 The reason that we are here on behalf of my

1 client, Jason Van Dyke, is because he is facing the most
2 serious charges in our state, first-degree murder. The
3 reason we're here is to ensure that Mr. Van Dyke is
4 afforded all the rights that he deserves under the
5 constitution.

6 From a standpoint of the source, Judge, quite
7 frankly, we don't necessarily care who the actual source
8 was in this case. We would think that the government,
9 the FBI, the U.S. Attorney's Office, the State's
10 Attorney's Office, would care because, as you will see,
11 clearly it was recognized that there was a violation
12 here. And as we've submitted, this would be a criminal
13 violation based upon official misconduct, 720 ILCS 33.3
14 subparagraph B.

15 We haven't received the results of any
16 investigation into this leak. However, we know that
17 there was an investigation launched. So when we talk
18 about, Judge, in this context of, well, the evidence
19 doesn't necessarily show this, it doesn't necessarily
20 show that, we need to remember that the evidence is not
21 in our control for the most part. We have established
22 various points --

23 THE COURT: Who is conducting this investigation
24 that you said is taking place or has been completed?

1 MR. HERBERT: I'm sorry, Judge, I didn't hear you.

2 THE COURT: You said there was an investigation
3 concerning this leak, what unit or agency was conducting
4 that investigation?

5 MR. HERBERT: That's a good question. We know that
6 IPRA, the Independent Police Review Agency, notified the
7 Chicago Police Department's Bureau of Internal Affairs,
8 and we know that the two of them talked about an
9 investigation, but as far as who conducted it, we don't
10 know. We've -- we subpoenaed IPRA, they indicated that
11 they did not conduct the investigation. We also
12 subpoenaed the internal affairs department, and they
13 told us that they did not conduct the investigation.
14 And I believe we have a subpoena out to the Office of
15 the Inspector General who we believe may have conducted
16 the investigation.

17 THE COURT: Haven't you talked to them? They're
18 listed in the phonebook.

19 MR. HERBERT: They are, Judge, but they won't talk
20 to us unless we send them subpoenas, which we did, and
21 they won't talk to us until the Court requires them to
22 talk to --

23 THE COURT: Do we have a representative from the
24 City of Chicago Inspector General? Come up, sir, maybe

1 we can clarify this real quick. Thank you. Could you
2 state your name and spell your name for the record?

3 MR. NEUMER: Peter Neumer, N-E-U-M-E-R, on behalf of
4 the City of Chicago Inspector General.

5 THE COURT: Mr. Neumer, have you conducted an
6 investigation concerning this leak?

7 MR. NEUMER: Your Honor, our office has not and is
8 not conducting any investigation regarding the leak
9 referenced in the subpoena we've received on November
10 21st.

11 THE COURT: Mr. Neumer, thank you very much, you are
12 dismissed. I appreciate your appearance.

13 MR. NEUMER: Thank you.

14 MR. HERBERT: Judge, based upon that representation,
15 I can only say it's a sad day here because as the United
16 States Supreme Court said in Branzburg versus Hayes, 408
17 U.S. 665, there is a public interest in maintaining the
18 integrity of criminal investigations. As you will see,
19 and as we've shown in the brief, there clearly was a
20 leak, there clearly was a breach.

21 THE COURT: Mr. Herbert, I understand your point and
22 it's a very important one, Mr. Herbert, but there's no
23 investigation that has taken place, all right?

24 MR. HERBERT: I understand.

1 THE COURT: So let's move on from that. I know that
2 appropriately it should have taken place.

3 MR. HERBERT: Absolutely, a lot of things should
4 have been done.

5 THE COURT: But that issue is not before us right
6 now.

7 MR. HERBERT: Right, but the issue is still in front
8 of us, Judge. I understand the investigation to
9 determine who violated this potential criminal statute
10 and who leaked the information, apparently we're never
11 going to find that out because unless Mr. Kalven is
12 forced to testify, which I think is another compelling
13 reason --

14 THE COURT: There's no evidence that Mr. Kalven
15 conducted that investigation about any leak either. So
16 move on.

17 MR. HERBERT: I agree.

18 THE COURT: And that's something else. This has
19 nothing to do -- look at the elements, and I know you
20 have, and I know you're an outstanding attorney, look at
21 the elements of first-degree murder or aggravated
22 battery with a firearm. None of those have to do with
23 what you're alleging right now as an improper
24 investigation of maybe a criminal violation by another

1 person concerning information that you already have,
2 been turned over to you. Go ahead.

3 MR. HERBERT: Right, and I agree 100 percent with
4 your Honor, but I will just add this caveat, and this
5 goes towards our motion here.

6 Again, this is in the Garrity context, this
7 motion, this issue that's being raised, I haven't seen
8 it raised anywhere in a Garrity context. It's normally
9 raised in a civil, a First Amendment issue, but here,
10 Judge, we're talking about Garrity context. And even
11 Mr. Sams indicated, and I don't want to misquote you --

12 THE COURT: Mr. Herbert, get behind that.

13 MR. HERBERT: I was going to grab a folder.

14 THE COURT: You have many people over there that can
15 assist you.

16 MR. HERBERT: Can somebody please grab the folder?

17 THE COURT: I'm going to give you some time to look
18 at it.

19 MR. HERBERT: Mr. Sams indicated that if Kalven were
20 exposed to this information, the Garrity information,
21 and Kalven were to have spoken to other witnesses and
22 revealed that information, that would be a Garrity
23 violation. And that is based on the law that we have
24 here, Judge, where we're talking about proscribed use,

1 it goes to the non-evidentiary realms, such as use of
2 compelled statements to develop leads, shape testimony,
3 and refresh recollection, which is exactly what we have
4 in this case, as well as prosecutorial strategy. And
5 then in the North case it talks about any use, direct or
6 indirect.

7 The burden with the Garrity case, Judge, and
8 I'm briefly going through this, once we've established
9 that a compelled statement, an immunized statement under
10 Garrity was produced, the burden shifts to the
11 government to prove the legitimate independent source
12 for the evidence.

13 THE COURT: Mr. Herbert, we've had Garrity hearings,
14 all right, and I know you are and I certainly am aware
15 of the law, and I know the prosecution is and they have
16 a Garrity team, so you're not saying anything new right
17 here.

18 MR. HERBERT: I'm just saying that is the context in
19 which we're deciding this issue, is the Garrity issue,
20 and it goes towards my --

21 THE COURT: That's what you're arguing.

22 MR. HERBERT: Correct.

23 THE COURT: Go on.

24 MR. HERBERT: Judge, the timeline in this case, and

1 it's kind of hard to read. May I approach, Judge?

2 THE COURT: Absolutely.

3 MR. HERBERT: The timeline is critically important
4 in this case. October 2014, Jason Van Dyke gives
5 statements to OCIC McNaughton. He gives statements to
6 IPRA. November 23rd --

7 THE COURT: And he gave statements to Detective
8 March at the scene.

9 MR. HERBERT: Correct.

10 November 23rd, 2014, Jamie Kalven interviews
11 Torres. December 7th, 2014, the State's Attorneys, FBI,
12 U.S. Attorney, become aware of the fact that Jamie
13 Kalven and two probate lawyers assigned to the Laquan
14 McDonald case were conducting interviews of occurrence
15 witnesses. The probate lawyers tell the State's
16 Attorney's Office and the FBI and the U.S. Attorney's
17 Office that you should interviews these witnesses
18 because they have valuable information for them.

19 They had valuable information for them because
20 the lawyers, along with Kalven, were allowed to shape
21 their testimony. The date, December 7th, 2014.

22 The next significant date, March 19th, 2015,
23 Detective March completes and submits his supplemental
24 report. March 23rd, 2015, the lawyers from probate

1 state they still have not received any police reports
2 from the city. Why is this significant, Judge? As the
3 Court has already ruled, the statements Jason Van Dyke
4 made to IPRA, as well as OCIC McNaughton, are clearly
5 covered by Garrity. The statements made to Detective
6 March, are not covered by Garrity.

7 So what that leaves us is that area in between
8 March 19th, 2015, and October 2014, what statements were
9 out there, Judge, during that time period. The only
10 statements that were out there, as will be shown, are
11 the Garrity-protected statements of Jason Van Dyke as
12 well as other reports of other officers.

13 Here we get into the information about the
14 leak, Judge. This is when Scott Ando, who is the head
15 of IPRA, realized that certain information had been
16 obtained via the CLEAR system. The CLEAR system, as the
17 Court knows, is a system in which various reports and
18 evidence are put into a computer system and under
19 individual boxes. The access to these boxes is -- was
20 supposed to be limited to people that were directly
21 involved in the investigation. What Scott Ando realizes
22 is that people outside the investigation, that had
23 nothing to do with the investigation, had seen and
24 retrieved these documents. The documents are important

1 as well.

2 So we're talking December 2nd, 2014, here,
3 Judge, and that paragraph, which I would say is
4 impossible to read, talks about this -- to Commander
5 Leuin, who is the computer commander from the police
6 department, Scott Ando is telling him, listen, we need
7 to run an audit on log number 1072125, which is the
8 investigation into the Laquan McDonald shooting, and he
9 talks about specifically certain attachments that were
10 reviewed that were very troublesome to him. That's what
11 he refers to. Well, what were those? We're going to
12 see.

13 Judge, here, we have an e-mail, this one talks
14 about an e-mail where we have essentially the story of
15 Jamie Kalven that comes out, Fighting the Code of
16 Silence. A couple of important points relative to this
17 issue that is important.

18 First of all, it's on heading from the
19 Invisible Institute, it's a civil rights clinic, Judge.
20 It's a civil rights clinic that is devoted to police
21 accountability. Kalven works for them.

22 In this one, Judge, it's an interview with
23 Craig Futterman, who is an attorney who works for a
24 legal clinic that conducts business with the Illinois

1 Institute. In this interview which was published in the
2 Daily Law Bulletin, Craig Futterman talks about
3 receiving a leak from information from somebody within
4 the department. We can only assume that it's the same
5 leak that we're talking about with Jamie Kalven.

6 Again, when you read this, he's talking
7 about -- this is a news agency, he describes his group
8 as an advocacy group, not a news agency. The next one,
9 he talks about how students are the ones that made the
10 decision to look into this. Students, he indicates in
11 the highlighted portions, were working as investigators.
12 We, he says worked as investigators, not reporters,
13 which is important for the context here, Judge. Next
14 one, students did everything in this case.

15 Judge, this one indicates the beginning steps
16 of an investigation in which we now know was never
17 concluded. It talks about the documents that were
18 accessed that were -- that should not have been
19 accessed. They were accessed by persons that were not
20 part of the investigation. Very important, Judge. The
21 date on this is December 4th, 2014.

22 This document talks about -- or one of the
23 information that was accessed was the strip request,
24 which was a document prepared by the Independent Police

1 Review Agency, sent to the chief of the police
2 department at the time period, McCarthy, calling for
3 Jason Van Dyke to be stripped of his police powers, not
4 unusual in a police involved shooting case. But what's
5 important with respect to this document is this document
6 contained every single statement.

7 THE COURT: What was the date on that document?

8 MR. HERBERT: December 4th, 2015.

9 THE COURT: All right.

10 MR. HERBERT: That document contained every single
11 statement that Jason Van Dyke, in quotes, made during
12 his IPRA investigation. These statements were accessed
13 by unauthorized people. There was somebody who was
14 unauthorized that leaked information.

15 THE COURT: Now where would this unauthorized person
16 have to have access, he has to be an employee of the
17 city or a sworn officer; is that correct?

18 MR. HERBERT: Correct.

19 THE COURT: But not a reporter?

20 MR. HERBERT: Correct.

21 THE COURT: All right.

22 MR. HERBERT: Yes. So we're connecting dots here,
23 Judge, because we're not getting investigations done by
24 the appropriate parties, and we're not -- we're having

1 people standing behind a privilege, which I understand
2 that's absolutely a right, Judge, but this is what we're
3 finding on our investigation.

4 Next document, this is the FBI, they become
5 aware of the fact that Jamie Kalven goes to interview
6 this Mr. Torres. Important to note in this document,
7 this is Mr. Torres who was very concerned about why this
8 individual came to his house, he's like how did he get
9 my identity, I wasn't in any police reports. Important
10 in this is when Mr. Kalven introduces himself to
11 Mr. Torres, he doesn't say, hi, I am a reporter, hi, I
12 am a journalist. What he says is I am a human rights
13 activist. Which again, Judge, is important, as you
14 know, towards the issues of the reporter's privilege.

15 What was the goal here, was it to be a neutral
16 investigator or was it to act as an advocate. Well,
17 clearly, he was acting as an advocate in this case.

18 FBI and Cook County State's Attorney were aware
19 of this fact. They were aware that this was potentially
20 contaminating this criminal investigation.

21 This is an e-mail between Jamie Kalven and
22 Mr. Torres, where Mr. Kalven and Mr. Torres are
23 reviewing the story that is due to come out, that is due
24 to be publicized, and Mr. Torres is correcting certain

1 events by Mr. Kalven and vice versa, they're working
2 collaboratively here.

3 In this publication, Judge, again, we don't
4 have a smoking gun to say, here, we have video of this
5 reporter giving documents to Mr. Kalven, we don't have
6 that, but we have to use our common sense and utilize
7 inferences.

8 THE COURT: All right. Using common sense, did you
9 ever interview Mr. Torres and say, and did reporter
10 Kalven ever show him a document or did he ever refer to
11 a police document in getting the information for the
12 news report?

13 MR. HERBERT: We have not because he was
14 apprehensive to talk to us when we called him.

15 THE COURT: Apprehensive. Did he say he refused?

16 MR. HERBERT: He refused then, we can say that.

17 THE COURT: Don't adopt my language. This is your
18 presentation, not mine.

19 MR. HERBERT: He was unwilling to talk to us at that
20 moment.

21 THE COURT: What time was that moment?

22 MR. HERBERT: Probably a couple months ago.

23 THE COURT: You're sure on that?

24 MR. HERBERT: Yes, it was the day he came into

1 court, before that.

2 THE COURT: All right.

3 MR. HERBERT: Important in that story, Judge, is
4 that it contains --

5 THE COURT: And just for the record, any witness has
6 the right not to talk to either side. But go ahead.

7 MR. HERBERT: Judge, important in connecting the
8 dots here is that this story that was produced, it
9 certainly wouldn't be considered by anyone as a neutral
10 report of facts. It was clearly slanted, it was
11 editorial, it was that of an activist, which he has
12 every right to report about, but that's important.

13 THE COURT: But that's not isolated, come on, we
14 hear about national news networks being bias one way or
15 the other constantly, but that does not affect their
16 ability or status as a reporter.

17 MR. HERBERT: Agreed, Judge, I agree 100 percent.
18 But what it does do is -- but what is still impacted is
19 the role that this slanted reporter, this bias reporter,
20 if you will, what they play in this criminal
21 investigation, and does that in fact taint the
22 investigation.

23 THE COURT: But what role have they played and
24 how -- you should have demonstrated that today.

1 MR. HERBERT: We'll show you, Judge. You can review
2 the document, the publication.

3 THE COURT: This isn't my presentation, you better
4 articulate it.

5 MR. HERBERT: Okay, Judge, I will. Here, in the
6 article that was published that I believe he received
7 awards on, there are various things mentioned in there
8 that we believe could have only come from
9 Garrity-protected statements because of the timing of
10 this. Yes, Detective March reported everything
11 essentially that Jason Van Dyke, his explanation --

12 THE COURT: You got things in context. Detective
13 March's report was more comprehensive than the Garrity
14 statements made by Mr. Van Dyke; is that correct?

15 MR. HERBERT: Well, they're more comprehensive than
16 the Garrity statements made to OCIC McNaughton, but I
17 would say equally as comprehensive as the Garrity --

18 THE COURT: I'll go with equal then, they're equal,
19 that's fine.

20 MR. HERBERT: Right. But Detective March's report,
21 as I indicated in our timeline, March 19th, 2015, here
22 we have all this information that is clearly known to
23 Mr. Kalven in December 2014. He's talking about
24 specific things that come from Garrity-protected

1 statements.

2 MR. SAMS: Objection, Judge. Can you please point
3 to those and say that they specifically come to
4 Garrity-protected statements as opposed to statements of
5 other officers?

6 THE COURT: Proceed, Mr. Herbert. Go ahead, show
7 us.

8 MR. HERBERT: I'm not -- I'm having trouble
9 following the objection.

10 THE COURT: Reiterate your objection for
11 Mr. Herbert.

12 MR. SAMS: Judge, the objection is that I don't
13 think he's being specific in showing Garrity-protected
14 statements, he's making generalities. And we're at a
15 point in time, Judge, where we really need to be talking
16 about specifics, not about who talked to whom, but what
17 was passed along that was Garrity protected and what
18 proof it is that it's Garrity protected, as opposed to
19 coming from another officer that was at the scene that
20 is not Garrity protected.

21 MR. HERBERT: Well, the information that's contained
22 within the report that's reported in this highlighted
23 portion talks about all the events preceding and leading
24 up to the shooting and the reasons for the shooting.

1 Nothing is attributed to a particular officer. Nothing
2 is attributed to my client, Jason Van Dyke. If it were,
3 then it would be clearly much easier for us to establish
4 a Garrity violation, but it hasn't been done here.

5 Could it come from other police officers, we
6 would say sure, these other officers that provided
7 immunized statements, it could have come from their
8 statements.

9 THE COURT: Well, do you know offhand how many
10 occurrence witnesses and police and civilian were at the
11 scene of the shooting that night?

12 MR. HERBERT: Definitively, no.

13 THE COURT: Well, you have some ballpark idea.

14 MR. HERBERT: Yes, we do.

15 THE COURT: Give it to us, I'm not going to hold you
16 to an exact number.

17 MR. HERBERT: I'll show you.

18 THE COURT: No, you'll tell me, come on, I'm making
19 the inquiry.

20 MR. HERBERT: I'll tell you right now, Judge. Here,
21 I'll read them off, I'm not going to give names.

22 THE COURT: Just give me a numeric, I didn't say
23 names. A ballpark.

24 MR. HERBERT: Seven.

1 THE COURT: Only seven people were out there that
2 night?

3 MR. HERBERT: Civilian.

4 THE COURT: And how many police?

5 MR. HERBERT: Numerous.

6 THE COURT: You've had this case for a long time,
7 you should know that. So a lot more. Then that's your
8 answer, go ahead, move on.

9 MR. HERBERT: Judge, important to note that only
10 five officers provided IPRA statements. In addition --

11 THE COURT: But that doesn't mean that there could
12 be a hundred sources out there, right?

13 MR. HERBERT: Right.

14 THE COURT: And for you not to know how many police
15 officers were out there, you know, go ahead, move on.

16 MR. HERBERT: Judge, the sources that were out
17 there, those sources, their information was documented
18 and it was contained within a supp report, so I'm not
19 sure if the Court is saying that maybe some officer on
20 the scene provided information to Mr. Kalven, I guess
21 it's plausible, Judge. But what we know is we have a
22 leak in the Independent Police Review Agency, we believe
23 that Mr. Kalven acknowledges having within the
24 department.

1 Judge, this is the document that I previously
2 described as the strip request. As you can see when you
3 go through that, Judge, it contains, specifically this
4 portion is all of the Garrity-protected statements by
5 Jason Van Dyke to the Independent Police Review Agency.

6 THE COURT: Which would include Detective March's
7 equal or greater report and facts, right? IPRA
8 interviewed Detective March, right?

9 MR. HERBERT: IPRA interviewed Detective March well
10 after this incident. Detective March --

11 THE COURT: You're talking about the strip report,
12 right? What's the date of the strip request?

13 MR. HERBERT: October 29th, 2014.

14 THE COURT: And they didn't interview Detective
15 March before they submitted that?

16 MR. HERBERT: No.

17 THE COURT: Okay.

18 MR. HERBERT: And Detective March probably hadn't
19 begun his report at this point.

20 THE COURT: Yeah, but he still has an intellect, and
21 he still has a database in his head. I mean, if he
22 doesn't remember anything, how could he prepare a report
23 months later?

24 MR. HERBERT: Understood.

1 THE COURT: And he has GPR's also, correct?

2 MR. HERBERT: Correct.

3 THE COURT: He has the information, whether it's
4 memorialized in a supplemental report or not.

5 MR. HERBERT: Judge, but IPRA asked questions that
6 Detective March quite frankly wouldn't ask. And these
7 quotes that are in here are quotes from the IPRA
8 investigation. That cannot be disputed in this case.

9 All right. Judge, here we have an FBI 302 --
10 I'm sorry, it's not an FBI 302, it's an inspector
11 general office investigation where in here it talks
12 about the Office of the Inspector General conducts
13 interviews with the probate attorneys that were
14 representing the Laquan McDonald estate, and Laquan
15 McDonald's wrongful death case in the probate estate.

16 So in this case, the investigators are speaking
17 with Neslund and Michael Robbins about their
18 investigative steps in this case. And here, the first
19 one is -- we're not disclosing peoples' names, are we,
20 Judge, witnesses?

21 THE COURT: You don't have to.

22 MR. HERBERT: Here is one occurrence witness that
23 was clearly interviewed by the reporters in this case.

24 THE COURT: Well, you can disclose Mr. Kalven's

1 name. Was that the reporter that interviewed that
2 witness?

3 MR. HERBERT: I misspoke. They were clearly
4 interviewed by the lawyers in this case. And then there
5 is a -- it goes on to list the seven occurrence
6 witnesses and how an investigation had been or
7 interviews had been conducted with each of those
8 individuals, including the Torreses, Jose and Xavier
9 Torres.

10 And in this indication or in this portion of
11 the report, this is where we start connecting some dots,
12 Judge. And in this portion, Neslund and Robbins, the
13 probate lawyers, talk about how they interviewed Jose
14 Torres. Jamie Kalven, a journalist, introduced Neslund
15 and Robbins to Jose and Xavier Torres. Neslund and
16 Robbins had to gain Kalven's trust before Kalven agreed
17 to make the introduction. Neslund and Robbins granted
18 Kalven's -- or gained Kalven's trust by exchanging
19 information related to McDonald. An anonymous source
20 told Kalven about the dash cam video and Jose Torres.
21 Kalven used this information to visit Jose Torres's
22 home. Jose Torres interviewed well with Neslund and
23 Robbins, and they believe he would be a great witness,
24 if he was needed to testify.

1 He interviewed well with these lawyers who
2 certainly had an agenda, just as Mr. Kalven did, it was
3 an antipolice, it was a pro-advocacy agenda to discredit
4 the defense of Jason Van Dyke. The testimony of the
5 witnesses were shaped by -- shaped in a specific manner
6 to dispute the defense of Jason Van Dyke.

7 The report goes on to say, Neslund and Robbins
8 were concerned with various members of the CPD for
9 inaccuracies in the police reports related to the
10 McDonald incident. Neslund and Robbins were not allowed
11 to make copies of the police reports, but were allowed
12 to take notes related to the police reports.

13 Judge, I agree that this does not specifically
14 say that Jamie Kalven gave police reports to Neslund and
15 Robbins, but would not allow them to copy it. But I
16 would say, Judge, in the context, it clearly shows that
17 Neslund and Robbins were shown copies of the reports.
18 We know they were shown copies of the reports before
19 they had received anything from the city, which we'll
20 show in the next slide. We know that there was a leak
21 from the department that accessed certain reports that
22 they shouldn't have accessed. We know that that leak --

23 THE COURT: We're going in -- it's like a fog is
24 coming over. The report -- the alleged statement made

1 by Mr. Kalven, I thought that he had a source at IPRA;
2 is that correct? That's what you alleged.

3 MR. HERBERT: I believe he said the department.

4 THE COURT: My understanding was IPRA. Mr. Sams, do
5 you have any information, was it IPRA or was it the
6 department?

7 MR. SAMS: I believe it was IPRA, Judge, is what --

8 THE COURT: Right, that's what was presented when I
9 denied the motion to quash the subpoena on Mr. Kalven
10 last time. So IPRA has nothing to do with the
11 department, so you're mixing oranges and apples, all
12 right.

13 MR. HERBERT: Well --

14 THE COURT: These are your statements, not mine.

15 MR. HERBERT: Judge, I disagree with you with
16 respect to IPRA not being part of the department.

17 THE COURT: It starts out independent police review.
18 So independent, they're not really part of the
19 department then. I don't know the city ordinance, and
20 you should, you work for the --

21 MR. HERBERT: I do know it, Judge, we have it here.

22 THE COURT: So they don't say they're independent?

23 MR. HERBERT: That's in their title, yes.

24 THE COURT: And we're all citizens of the United

1 States too. That doesn't -- come on, move on.

2 MR. HERBERT: All right. Judge, here is another --
3 it's the same report with the inspector general, and I
4 had made comments earlier about how it seemed as
5 though --

6 THE COURT: If you made the comments earlier, make
7 new comments now.

8 MR. HERBERT: The FBI working in conjunction with
9 these non-law enforcement individuals, which is what I
10 talked about. Well, here, this is some of the proof of
11 it.

12 Neslund and Robbins have had some
13 communications with the FBI regarding the McDonald
14 shooting in February 2015 before the March report was
15 prepared. Neslund and Robbins participated in the
16 interview of McDonald's mother, along with
17 representatives from the FBI, the State's Attorney's
18 Office, and Independent Police Review Agency. They
19 recommended to the United States Attorney's Office that
20 they interview specific witnesses. Why, because they
21 had already interviewed those witnesses, and those
22 witnesses had had their testimony shaped by them knowing
23 what Jason Van Dyke's defense was, and getting these
24 witnesses --

1 MR. SAMS: I'm going to object. How does this
2 relate to Kalven?

3 THE COURT: Sustained. Move on.

4 MR. HERBERT: If I can make an offer of proof. We
5 know that Kalven worked in conjunction with the two
6 lawyers. So the two lawyers' actions certainly can be
7 attributed to Jamie Kalven because we also know that
8 Jason Kalven [sic] certainly contributed to the
9 investigative efforts of these lawyers by his production
10 of unlawfully leaked information. Does that change your
11 decision at all?

12 THE COURT: Just move on.

13 MR. HERBERT: Okay. Here, this letter is
14 important --

15 THE COURT: Hold on.

16 (Pause.)

17 THE COURT: Move on.

18 MR. HERBERT: Judge, in wrapping up here, this
19 letter is important for a couple of reasons. The most
20 important part is the date of it, which is March 23rd,
21 2015. It's a letter written by the probate lawyers to
22 the City Corporation Counsel's Office, and they are, in
23 that letter, they're indicating we still have not
24 received any reports from you, city, in this case.

1 But the letter goes on to talk about all the
2 people that they interviewed who would be good witnesses
3 for them, their case. In other words, they shaped their
4 testimony probably to help their case, but certainly to
5 the detriment of Jason Van Dyke.

6 This next -- FBI 302, goes on to further
7 confirm that the probate attorneys and the FBI were
8 exchanging information about the case. The probate
9 attorneys were assisting the FBI. They're telling them
10 which witnesses they've already interviewed and which
11 ones they should interview. Interview the good ones
12 that hurt Jason Van Dyke's defense, don't interview the
13 ones that help his defense.

14 THE COURT: That's in that report?

15 MR. HERBERT: No, Judge, but that could be inferred
16 from it I would submit, Judge. Well, Judge --

17 THE COURT: I'm sorry, you know, if you want to try
18 the FBI, that's fine, but do that in federal court.
19 Like they're not going to conduct a professional
20 investigation and interview all the witnesses that
21 they're aware of, so let's move on, all right. And that
22 can be assumed from that set the facts.

23 MR. HERBERT: I don't think that it's implausible to
24 conclude that probate lawyers that have a --

1 THE COURT: No, no, you're talking about the FBI and
2 then the collusion between the probate lawyers and the
3 FBI, and the FBI is only going to use and interview
4 affirmative witnesses that would be detrimental to Jason
5 Van Dyke, then their case would fall apart all the time,
6 so let's move on.

7 MR. HERBERT: I didn't mean to infer that, Judge.

8 THE COURT: Well, then read the transcript.

9 MR. HERBERT: Again, this letter provides in more
10 detail that these lawyers, they know everything that's
11 contained within the reports, and the date of this is
12 March 6th, 2015. Important, Detective March's supp has
13 not been released. The source for Jason Van Dyke's
14 Garrity-protected statements were in two different
15 sources, McNaughton and IPRA.

16 Clearly, the lawyers knew the defense, the
17 Garrity-protected statements at this time, and clearly,
18 they had not received March's report because it wasn't
19 done, and clearly, they had not received any reports
20 from the city. So how did they know, because they
21 received leaked information from Jamie Kalven who
22 received it from his source at IPRA.

23 This one talks about all the witnesses, the
24 detailed letter of the lawyers, but all the witnesses

1 that they have interviewed and how their testimony,
2 their -- what they will tell the FBI, which they hadn't
3 done yet at this point, how they, their testimony
4 disputes Jason Van Dyke's defense, in detail. Shows
5 witnesses the morgue reports, that's clearly admitted in
6 here, showed the morgue reports to dispute the defense
7 of Jason Van Dyke.

8 Not only are they conducting interviews, Judge,
9 they're interviewing individuals and they're getting
10 signed affidavits. They're locking in the antipolice
11 version of the statement that was essentially fed to
12 them by Mr. Kalven and these lawyers.

13 Judge, in conclusion, I would think that the
14 Court would certainly agree that at the very least, we
15 have created one heck of a smoke storm here, Judge. And
16 what we have proven -- what we have proven that is
17 undisputed, it can't be disputed, is that
18 Garrity-protected statements were given to two sources.

19 Garrity-protected statements were given to one
20 source and that information wasn't produced until
21 March 19th, 2015. From the time that the
22 Garrity-protected statements were given, we know these
23 things, unauthorized people from the department accessed
24 them.

1 THE COURT: Now, when you say department, be
2 specific, because you didn't recall, you said IPRA at
3 the last time.

4 MR. HERBERT: Mr. Kalven apparently indicated it was
5 IPRA, but we have nothing from the department, because
6 the department's initial investigation revealed various
7 names of people not only in IPRA, but also in the
8 Chicago Police Department who they called into question
9 as having authorization to access reports.

10 THE COURT: But what does that mean? You have to
11 listen to what -- the presentation, just because they
12 have access that didn't mean that there were wrongdoers,
13 all right.

14 MR. HERBERT: Correct.

15 THE COURT: I just want to clarify that, but go
16 ahead.

17 MR. HERBERT: What is clear is that the system was
18 somehow broken, and the system should not have allowed
19 access to anyone other than this group of people.

20 THE COURT: Point well taken.

21 MR. HERBERT: We know that system was broken, we
22 know that unauthorized people actually accessed it, it's
23 not that they could have accessed it, we know that they
24 went in and accessed certain documents. We know that

1 the documents that they accessed included Jason Van
2 Dyke's statement to IPRA, verbatim.

3 MR. SAMS: Objection, Judge, that is not borne out
4 by any of the evidence that's been presented.

5 MR. HERBERT: Untrue, Judge. The semi audit shows
6 all the documents that had been in the system at the
7 time that were available to anybody. Included in those
8 documents were Van Dyke's statement to IPRA.

9 THE COURT: Well, that proves -- and it's not
10 disputed, that Mr. Van Dyke's statement was in the
11 database. Go ahead.

12 MR. HERBERT: We know that somebody from IPRA leaked
13 this information to Mr. Kalven. We know that Mr. Kalven
14 met with journalists and apparently provided them
15 information from these reports. We know that these
16 journalists then went and conducted interviews of every
17 single occurrence witness.

18 And the point was made about Mr. Torres. Well,
19 had Mr. Torres already given a statement to IPRA, why is
20 it relevant if they shaped his testimony afterwards.
21 Well, it's relevant, everyone's given testimony in this
22 case, Judge, in numerous instances. Some to IPRA, some
23 to the FBI, some to the State's Attorney's Office, some
24 to all three of them, but all the occurrence witnesses

1 have given other statements. They've all been locked in
2 in front of the federal grand jury, and that's why it's
3 important, Judge.

4 If their statements are tainted at any point
5 during the investigation, and they're tainted to dispute
6 Jason Van Dyke's defense, which they knew of, and they
7 knew how to shape it, this is not unlike some of the
8 cases that ironically the Invisible Institute champions.

9 THE COURT: Let's go on. Pertain to this case.

10 MR. HERBERT: I'm pertaining to this case, Judge.

11 THE COURT: No, you're not, you're wandering a
12 little bit.

13 MR. HERBERT: Jason Van Dyke finds himself in a
14 situation where his membership to a police department
15 essentially in today's day and age in this county has
16 created some type of subclass of citizen.

17 THE COURT: This is on a motion to quash the
18 subpoena. Pertain your argument and presentation to
19 that, all right.

20 MR. HERBERT: Okay, Judge. I'm trying to make it in
21 the constitutional sense, Judge.

22 THE COURT: No.

23 MR. HERBERT: Because it's all linked in.

24 THE COURT: Well, then use the constitution, it has

1 numbers on it.

2 MR. HERBERT: Judge, it reminds me of the case Brown
3 versus Mississippi, 1934, a white farmer is killed,
4 three black sharecroppers --

5 THE COURT: Has that got anything to do with the
6 motion to quash the subpoena?

7 MR. HERBERT: Yes, because it's based on -- the
8 constitutional issue here, Judge, we can't ignore that.
9 Yes, this is brought in the context of a Garrity motion.

10 THE COURT: Mr. Herbert, tie it up in two minutes.

11 MR. HERBERT: Sure. The Brown versus Mississippi, I
12 believe it's 1934, white farmer killed, three black
13 sharecroppers are brought in by police and they are
14 tortured into giving confessions concerning the murder.
15 Thank goodness the United States Supreme Court came in
16 and they quashed the statements, they quashed the
17 admissions.

18 And what formed as a result of that case and
19 those abuses essentially were the Miranda Rights, very
20 important rights that every defendant --

21 THE COURT: Mr. Herbert, when did they codify
22 Miranda Escobedo? What year?

23 MR. HERBERT: 1960's -- 1971.

24 THE COURT: So 40 years afterwards, that's a good

1 nexus, go ahead.

2 MR. HERBERT: Well, the Court makes a -- a legal
3 analysis makes a nexus too, Judge. But anyway, the
4 point is am I comparing Jason Van Dyke to people that
5 have suffered years and years of slavery, no. But from
6 a legal standpoint, Judge, it's exactly the same
7 argument here. This is an individual that had his
8 confession, his statement --

9 THE COURT: Mr. Herbert, that has nothing really to
10 do -- we've exhausted your client's rights on the Fifth
11 Amendment, which has been litigated here. Let's pertain
12 yourself -- you got about a minute left, go ahead.

13 MR. HERBERT: I'm wrapping up.

14 Judge, Garrity -- the Garrity motion, which is
15 what we're arguing here, it is based upon constitutional
16 violations. And the constitutional violations is that
17 an individual --

18 THE COURT: The Fifth Amendment, I'm fully aware of
19 it.

20 MR. HERBERT: Judge, I know you are, I'm giving it
21 in context to my argument. The constitutional argument
22 is that the immunized statement, his confession, should
23 not have been used. It's the same thing legally as
24 those sharecroppers that were tortured, and that's just

1 the point of my argument, Judge.

2 And we we're going to ask the Court to look at
3 this case in the context of what we're looking at. This
4 is not some esoteric argument concerning a defamation
5 case.

6 THE COURT: Nobody is taking it in that context, and
7 I'm glad that you pointed that out, so thank you.

8 MR. HERBERT: It's a first-degree murder case, my
9 client is entitled to every single constitutional right
10 that every other defendant that comes in here, and I
11 think we clearly have shown that he wasn't, not only on
12 this issue but on numerous issues.

13 THE COURT: Thank you very much.

14 MR. HERBERT: Thank you.

15 THE COURT: We're going to have rebuttal arguments,
16 but we're going to take about a 10-minute break.
17 Court's in recess.

18 (Recess taken.)

19 THE COURT: Court is back in session, please remain
20 seated. We have all the press here, okay, good. At
21 this time, Mr. Topic.

22 MR. TOPIC: Thank you, your Honor. I'd like to
23 start by pointing to you Exhibit 5 to defense's response
24 brief. It's one of the documents that Mr. Herbert

1 showed on the screen, and it was a copy of the article
2 that was published by Mr. Kalven. And Mr. Herbert
3 pointed to a paragraph that said a second squad car
4 arrived, the boy again refused to drop the knife, the
5 police tried to use the two vehicles to box him in, and
6 he talks about that. He took the position that that
7 could only have come from Jason Van Dyke's
8 Garrity-protected statements. In fact, what it came
9 from, and I'm happy to tender an exhibit to you, your
10 Honor.

11 THE COURT: Sure. And you've given it to all the
12 other parties?

13 MR. TOPIC: I will do that now.

14 THE COURT: All right, thank you. Proceed.

15 MR. TOPIC: Your Honor, this is in October 21st,
16 2014, press release by the Chicago Police Department
17 that came out basically the day after the shooting
18 occurred. And if you compare the paragraph that
19 Mr. Herbert claims could only have come from Mr. Van
20 Dyke's Garrity-protected statements, to the Chicago
21 Police Department press release from October 21st, you
22 can see that they are essentially the same. And if you
23 go back just one page in the article itself, it's clear
24 that when Mr. Kalven is reporting on those facts, what

1 he says is, quote, here is what the press reported based
2 on what they were told by police sources.

3 So the idea that that paragraph had to have
4 come from a Garrity-protected statement is completely
5 contradicted by the CPD press release which of course
6 said that Mr. McDonald was approaching officers at the
7 time, which Mr. Kalven reported to the contrary.

8 THE COURT: Have we given this an exhibit number?

9 MR. TOPIC: We have not.

10 THE COURT: Would you do that, Mr. Topic?

11 MR. DARMAN: I will offer it as Exhibit A.

12 THE COURT: No, let's do numerics.

13 MR. TOPIC: So may I call it Kalven Exhibit 1?

14 THE COURT: Exactly.

15 MR. TOPIC: Thank you, your Honor.

16 If you'd like, I also have a copy of the
17 Chicago Tribune article that quotes Pat Camden as saying
18 that Mr. McDonald lunged with a knife, et cetera, of
19 course that was a statement that was made by Mr. Van
20 Dyke's representative, Pat Camden of the FOP, I'm happy
21 to give you that exhibit as well.

22 THE COURT: That's in the record already, Mr. Camden
23 has been here, but that will be part -- you can submit
24 it, you don't have to -- as part of the record, that

1 will be Kalven's Exhibit Number 2.

2 MR. TOPIC: Thank you. So this really seemed to be
3 a central part of the argument as to the, I guess you
4 could call it a proffer, that Mr. Kalven received copies
5 of Garrity-protected statements because he knew the
6 description of what happened on the scene, and of course
7 that's contradicted by other sources that made that
8 information available right after the shooting occurred.

9 So I guess along the same lines, the idea that
10 Mr. Van Dyke's defense was some sort of mystery is not
11 borne out by that. His own representative made clear
12 that he was going to argue that his life was threatened
13 and he had to respond because he was being lunged at.

14 Next thing I want to address is the reference
15 to the probate attorneys and the March 6th letter which
16 Mr. Herbert claimed because it listed the names of
17 witnesses, that only could have come from
18 Garrity-protected statements that Mr. Kalven received
19 from a source.

20 So I mean, just as a general point, those
21 materials certainly could have come from anywhere, but
22 the last place they're likely to have come from is
23 Mr. Van Dyke's Garrity-protected statements. Because if
24 you think about it for a second, what they're saying

1 essentially, is that Mr. Van Dyke conducted the canvass
2 of witnesses of the shooting he was just a part of.

3 MR. HERBERT: I'm going to object, it's misstating
4 the evidence. We're not claiming it's the identity of
5 witnesses Garrity-protected statements.

6 MR. TOPIC: If you're no longer going to argue
7 that --

8 THE COURT: For the record, it will stand the way
9 it's been presented, your objection is overruled. Go
10 ahead.

11 MR. TOPIC: I guess there's no contention anymore
12 that the only way that the probate attorneys do help
13 witnesses was because of Garrity-protected statements
14 that they were given by Mr. Kalven, if that's no longer
15 being argued, then we will move on from there.

16 Also back to Exhibit 5, it was represented to
17 the Court that there was an exchange of e-mails from
18 Mr. Torres and Mr. Kalven on which they were jointly
19 crafting.

20 THE COURT: Shaping.

21 MR. TOPIC: Correct, sorry. That Mr. Kalven was
22 correcting Mr. Torres's statement. If you look at the
23 exhibit, all it is is an e-mail from Mr. Kalven to
24 Mr. Torres that say thanks for correcting my account of

1 the incident, check the attached revised brief, did I
2 get it right. And of course, that's what reporters do
3 all the time. If they're quoting sources, if they're
4 attributing things to sources, if they're relying on a
5 source, of course they're going to confirm the accuracy
6 of that. There's nothing in here that at all says
7 Mr. Kalven saying, Mr. Torres, well, don't you mean this
8 or don't you mean that or anything at all that any
9 testimony was being shaped. And again, that's long
10 after his IPRA statement had been given and seems to
11 have no bearing on anything here.

12 I don't think we have any dispute anymore that
13 Mr. Kalven is a reporter. I mean, there were some
14 accusations that he was an activist.

15 THE COURT: Mr. Topic, you make me feel at home,
16 you're not paying attention to what I said. I did find
17 that Mr. Kalven is a reporter.

18 MR. TOPIC: Then I will argue no further on that
19 point. I did want to address the Willis case that you
20 referenced, your Honor. Just for the record, I
21 understand your ruling.

22 THE COURT: Go ahead.

23 MR. TOPIC: At issue in that case was only a judge,
24 so it did not hold it's limited to judges, it left open

1 the possibility it could apply.

2 THE COURT: My point was that it's never been
3 litigated outside the Fourth District as it would apply
4 to reporters.

5 MR. TOPIC: And we don't dispute that, but it also
6 hasn't been foreclosed by the First District is our
7 position.

8 THE COURT: Nor has an infinite number of other
9 issues that have not arised yet too, so we're in
10 agreement.

11 MR. TOPIC: We are. Only to make the point that
12 even though it's a Fourth District case --

13 THE COURT: You don't want to give up an issue and
14 that's good lawyering, so you got it.

15 MR. TOPIC: Thank you, your Honor.

16 The last point I want to make is there was
17 discussion about constitutional issues and
18 Mr. Van Dyke's fair trial rights. I will point out
19 first that that's an issue in any number of cases that
20 still held that reporter's privilege applies or
21 addresses the Special Witness Doctrine. There's nothing
22 unique about this case in that sense. And then my
23 second point is --

24 THE COURT: I know there's nothing unique and I know

1 you don't mean to disparage it, but these are -- in
2 every criminal case, these constitutionals would apply
3 at equal level no matter what the charges are. So we're
4 in agreement with that.

5 MR. TOPIC: Absolutely agree. But the second point
6 I would make is that's really properly an argument if we
7 get to the divestiture phase in where you would have to
8 consider the public interest and all those issues. And
9 I would point out that the Haleas case does talk about
10 there's also a public interest in holding the police
11 accountable, so it's not as simple as simply one side of
12 the public interest. But we're not at the point, as I
13 understand it, if we get to that point, we will
14 certainly address that if we get to divestiture.

15 In sum, there's been nothing presented today
16 that in any way shows that Mr. Kalven was given copies
17 of any Garrity-protected statements, the proffer did not
18 have any basis. I think on that reason alone it should
19 be quashed.

20 I don't know that we need to get to the
21 reporter's privilege issues, if we do, then we will wait
22 for the filing of an application, and we can certainly
23 deal with it at that point.

24 THE COURT: Thank you very much.

1 MR. TOPIC: Thank you.

2 THE COURT: Mr. Sams.

3 MR. SAMS: Thank you, your Honor.

4 Judge, I do want to take this opportunity to
5 correct something that Mr. Herbert quoted me as saying
6 or at least paraphrasing me as saying that if Mr. Kalven
7 was aware of Garrity-protected statements and if he then
8 passed them along to Torres that would be a violation --
9 a Garrity violation. I never said that that would be a
10 Garrity violation. I believe I said that would require
11 some further inquiry into the Court as to whether there
12 was an independent source.

13 And of course we are not abandoning our Haleas
14 argument as to the independent source in that Torres not
15 only saw what happened on October 19th into
16 October 20th, 2014, but related that to IPRA on
17 October 28th of 2014, a month before Jamie Kalven walked
18 into his life.

19 Judge, going to that, I think it's also
20 important to note that in the timeline that Mr. Herbert
21 put up on the screen, one of his first graphics up
22 there, the first thing he talked about was October
23 of 2014, the first thing that's important is the
24 defendant's statements. We would actually say

1 October 2014, the first thing that was important was
2 that Laquan McDonald was shot and killed.

3 However, Judge, that October 2014 date, he then
4 followed on his timeline with November 23rd of 2014,
5 when he said Jamie Kalven interviewed Torres. Of course
6 that timeline, the important thing that he left out was
7 that October 28th date when Torres gave his statement to
8 IPRA.

9 After all of this, Judge --

10 THE COURT: Review those dates again. October 28th
11 was when Mr. Torres gave the statement to IPRA.

12 MR. SAMS: To IPRA.

13 THE COURT: I got that one. You said October what
14 prior to that?

15 MR. SAMS: October 19th was when Laquan McDonald was
16 shot, I believe it was October 20th or 21st that the
17 defendant gave his Garrity-protected statement to IPRA.

18 THE COURT: Okay.

19 MR. SAMS: And it was not until November 23rd, 2014,
20 that Kalven contacted Torres for the first time. So a
21 month later after he witnessed it and after he had given
22 a statement.

23 There is still no evidence, despite what
24 counsel says, that Jamie Kalven knew or told Torres

1 anything about Garrity-protected statements. One of the
2 things that counsel emphasized was this e-mail from
3 Scott Ando, the director of IPRA, in which Scott Ando
4 mentioned four attachments that he was very, very
5 concerned about and worried about and whether those were
6 somehow leaked.

7 Counsel told you we don't know what those are
8 but I'm going to tell you what they are, Judge, and then
9 he proceeded to not tell you what they were. What he
10 did was he then immediately moved into talking about
11 some 302 statements, some FBI reports and other things.
12 Judge, I think -- and I'm not saying that he made the
13 implication that that's what those attachments were, but
14 that is certainly the implication that could have been
15 taken from that, but that is far from the truth, Judge.
16 Those four exhibits --

17 MR. HERBERT: Judge, if I can, I'm going to object,
18 it's misstating the evidence.

19 THE COURT: First of all, your argument is not
20 evidence, but go ahead.

21 MR. HERBERT: Okay. He's misstating what was quoted
22 by me.

23 THE COURT: Sure.

24 MR. HERBERT: And what I clearly showed, and the

1 e-mail clearly showed that the documents that were
2 available included Jason Van Dyke's statements, and
3 specifically one of the documents that was accessed that
4 was troublesome was the stripping statement which
5 contained Jason Van Dyke's Garrity-protected statements.

6 MR. SAMS: That is not true, they did not present
7 that evidence to you that those were one of those
8 attachments. Scott Ando referred to attachments 83, 84,
9 85, and 87. 83, Judge, the attachment 83 of IPRA was a
10 copy of Jose Torres driver's license.

11 Attachment 84, and I'm giving this to you,
12 Judge, as an offer of proof, 84 was an affidavit that
13 Jose Torres signed on October 28th of 2014. Attachment
14 85 was two discs, I believe, which contained a recording
15 of Jose Torres's statement from October 28th of 2014.
16 And attachment 87 is the transcript of that
17 October 28th, 2017, [sic].

18 So the four attachments that Scott Ando was
19 very concerned about all related to Jose Torres. And of
20 course that makes sense because they were beginning this
21 investigation into who had possibly leaked Jose Torres's
22 name. But it had absolutely nothing to do with any
23 Garrity-protected statements being leaked.

24 MR. HERBERT: Judge, I'm going to object. That's

1 clearly contradictory to the exhibit that's in here.
2 Yes, I agree that Scott Ando was concerned, he
3 indicated, about the statements of --

4 THE COURT: What does the e-mail say?

5 MR. HERBERT: The e-mail says that --

6 THE COURT: Read it, read it.

7 MR. HERBERT: He's talking about the audit.

8 THE COURT: Just read it.

9 MR. HERBERT: Based on audit of access to log number
10 1072125 via CLEAR, it came to my attention that several
11 BIA personnel have accessed the file. I would like you
12 to look at the dates and times of the access as compared
13 with the timeline and let me know if they should have
14 accessed the file or if you have any concerns relative
15 to their access at the time they did so. I have
16 attached as well the audit. And below is the
17 attachment, date of incident, 20, October 2014.
18 Interview of witness, Jose Torres by IPRA, 28, October
19 2014. Relevant documents, parenthetical, DL affidavit,
20 transcript of interview, close parenthetical, uploaded
21 29 and 30, October 2014. Strip request, send to
22 superintendent on 29, October 2014, which contained the
23 quotes of Jason Van Dyke.

24 THE COURT: But the strip document did not contain

1 the FBI report, right?

2 MR. HERBERT: It did not. The FBI had not been part
3 of this yet.

4 THE COURT: Okay, fine.

5 MR. SAMS: And of course, let's be clear here,
6 Judge. The body of another e-mail talked about the four
7 attachments that we talked about. Let's also be clear
8 that that's just things that Ando was interested in
9 looking at. There still is no proof that any of that
10 was delivered to Jamie Kalven.

11 THE COURT: Well, there's indication that someone
12 unauthorized entered into the CLEAR system, and that's
13 the only evidence that's been presented.

14 MR. SAMS: That's what the State's argument is, yes.

15 THE COURT: Well, I haven't heard any reports as a
16 result of the audit, any proof of any other reports
17 disseminated or looked at, but they had access to that
18 data.

19 MR. SAMS: That's correct. Judge, another argument
20 I wish to make is regarding Mr. Herbert's argument is
21 that he seemed to be conflating two very important, but
22 different concepts here. One of those on this hand is
23 Mr. Van Dyke's Garrity-protected statements, and the
24 other one is Mr. Van Dyke's defense.

1 When he refers to the fact that these people
2 knew Mr. Van Dyke's defense, he is conflating that with
3 the fact that he knew and there's proof that they had
4 the Garrity-protected statements. Judge, it's been
5 pretty clear from day one to everybody, and I believe
6 counsel has even come in here and admitted, this is not
7 a, as we call it in the legal jargon, some other dude
8 did it case. This is, from day one, a self-defense
9 case.

10 So to conflate those two concepts that people
11 knew Jason Van Dyke's defense and to get to that point
12 in time that we are then saying they knew his
13 Garrity-protected statements, those are two very
14 different things, and we cannot combine those and say
15 that they equal --

16 THE COURT: I think that was pointed out by
17 Mr. Topic on Kalven Exhibit Number 1.

18 MR. SAMS: Judge, finally, counsel talked about how
19 we are here and we are in one heck of a smoke storm.

20 Judge, you heard a lot of things today about
21 Jamie Kalven, you also heard a lot of things about other
22 witnesses other than Jose Torres. Let's not get beyond
23 what we are here today on, that is a Garrity issue, that
24 is Jamie Kalven as it relates to Jose Torres because

1 that's what they put in their proffer when they wanted
2 to call him, Jamie Kalven as a witness, was only as it
3 relates to Jose Torres. It did not have anything to do
4 with any other witnesses.

5 We're also getting beyond, Judge, when we start
6 talking about these civil lawyers, these probate
7 lawyers, we are here on a very, very small issue. And
8 because it's not been shown that there's any proper
9 connection, that there's no Garrity-protected materials
10 given to Mr. Kalven, nor that he passed them along to
11 Torres, Judge, we would ask you to reconsider your
12 initial denial of our motion to quash subpoena as it
13 relates to Mr. Kalven. Thank you very much.

14 THE COURT: Mr. Healey, do you want to say anything?

15 MR. HEALEY: No. Thank you, your Honor.

16 THE COURT: Thank you for your presentation and your
17 input here.

18 Seeing that the opposition to the subpoena has
19 the burden, that's why they got rebuttal, as far as this
20 case, I'm going to take this under advisement and I'll
21 make a ruling, but I'm not going to give the date on the
22 ruling until we handle the other material involved here
23 today concerning the Lynch material.

24 But what I'm going to do, we have other people

1 on our call that have not been addressed, so I'm going
2 to recess until 12:00 o'clock on People of the State of
3 Illinois versus Jason Van Dyke.

4 (Whereupon, the Court attended to
5 other matters on its call, after which
6 the following proceedings were had:)

7 THE CLERK: Jason Van Dyke.

8 THE COURT: Recalling Jason Van Dyke. It's been
9 brought to my attention, the only people who are going
10 to take still photographs are people authorized by the
11 Extended Media Coverage Act, and we have a boss here,
12 Ms. Kelly. You let that slip.

13 MS. BARNICLE: We did.

14 THE COURT: That's all right. It's a learning
15 point, so we won't let that happen.

16 The Garrity team, what do you need?

17 MR. SAMS: Judge, we weren't sure whether we were
18 getting a date or --

19 THE COURT: I just want to go over the Lynch
20 materials because I want to make sure we have
21 consolidated dates. It might not be the 20th of
22 December, it might be before that if we have compliance
23 or no compliance. Why don't you just relax and have a
24 seat.

1 MR. SAMS: Thank you.

2 THE COURT: Thank you. The attorney -- this is the
3 special prosecution team, not the Garrity team from the
4 special prosecutions office. So everybody has addressed
5 and stated their names.

6 Why don't we do this. Dan, why don't you go
7 through the agreed memorandum.

8 MR. WEILER: Sure, Judge. Judge, we have filed an
9 agreed memorandum outlining the November 6th court date.
10 On that date, the Court denied the defendant's motion to
11 dismiss the indictment on speedy trial grounds.

12 The defendant filed a motion in limine to admit
13 Lynch material, and a motion to dismiss alleging
14 prosecutorial misconduct.

15 The State was to submit its response to the
16 above-listed motions on November 20th of 2017. Those
17 have been filed.

18 The defendant's reply was due on November 28th,
19 2017, that was also received.

20 The case was continued to today's date for in
21 court filings of those replies and responses, and also
22 for a hearing on the Garrity team's motion to quash the
23 subpoena to Jamie Kalven. And then it also mentions
24 that there was a court date for December 20th, which

1 will be for hearing on those motions.

2 THE COURT: Specifically, the defense was supposed
3 to interview witnesses. There's two ways that you can
4 get Lynch material in at trial. One is
5 self-authenticating, and that is not police reports,
6 they're not even evidence, as by Supreme Court rule, and
7 the other one is via statement of conviction, which
8 would be self-authenticating. The other is testimony or
9 testimony of witnesses.

10 So have you interviewed these witnesses that
11 you propose to present?

12 MS. WENDT: Judge, yes, we've actually -- well,
13 there's --

14 THE COURT: When you start out yes, that means you
15 have completely, all right. Start thinking before you
16 start answering.

17 MS. WENDT: Well, we have interviewed several.

18 THE COURT: But that isn't all of them.

19 MS. WENDT: No, not all of them.

20 THE COURT: I'm not going to get into these
21 arguments of semantics. You were supposed to interview
22 all these witnesses and submit those proffers today.
23 Are you ready to do that?

24 MS. WENDT: I'm submitting to you what we have.

1 THE COURT: How could you submit anything that you
2 don't have?

3 MS. WENDT: Well, Judge, we have attempted to
4 interview 47 witnesses.

5 THE COURT: When did you start this interview
6 process?

7 MS. WENDT: Right after the last court date because
8 you ordered that.

9 THE COURT: Yeah, I understand. But part of the
10 defense is to prepare a defense, all right. And
11 self-defense, you are allowed to bring in Lynch
12 material. These materials were turned over to you,
13 especially like the DCFS records, et cetera, was
14 December 8th, 2016. And, State, when did you turn over
15 a majority of the -- there's not much, did you turn over
16 any Lynch material?

17 MR. MCMAHON: We have turned over some Lynch
18 material, yes.

19 THE COURT: I just want to find out about the date
20 of it. This investigation should not have began last
21 month, it should have began December 9th, 2016.

22 MR. MCMAHON: Judge, we began tendering documents
23 within 60 days of our appointment, that would have been
24 approximately October of 2016. And we have continued to

1 produce documents in a variety of forms to the defense
2 since October of '16.

3 THE COURT: Now, Tammy, 47 sounds like a big number
4 of witnesses, but not if you amortize it over a 15-month
5 period, so it doesn't seem like that.

6 How many have you interviewed? You have to
7 know this stuff when you come up here.

8 MS. WENDT: Judge, I have it.

9 THE COURT: Tell me.

10 MS. WENDT: I'm looking at my notes. We've spoken
11 to 18 people, left messages for 14, and we're still
12 looking for 12. And that information -- actually
13 information from most of them we weren't getting because
14 they were saying they had attorneys that we needed to
15 speak to.

16 THE COURT: They have a right to that.

17 MS. WENDT: And that's fine. And your office knew
18 about that, so their attorneys now have --

19 THE COURT: I didn't know about that, that would
20 have been nice to know about January 2nd, 2017, all
21 right. I mean, what I'm saying is you're waiting until
22 the last moment to do these things, that's why we get
23 these problems.

24 Who's been holding back on you as far as -- you

1 know, the witnesses don't have to talk to you if they
2 don't want to, you understand that?

3 MS. WENDT: Right, but, you know, we do -- we have
4 found, I mean, the ones that we have gotten information
5 for, we've spoken with.

6 THE COURT: You made a proffer?

7 MS. WENDT: I've made a proffer of evidence and
8 filed it with the Court as to what those say.

9 THE COURT: How many have you filed then, witnesses
10 you've interviewed?

11 MS. WENDT: 18.

12 THE COURT: 18 out of 47?

13 MS. WENDT: Yes.

14 THE COURT: Mr. Herbert, you're in charge, so what's
15 going on here?

16 MR. HERBERT: Well, Judge, the biggest problem, an
17 impediment came from there's two different lawyers that
18 were representing the large percentage of the
19 individuals that we have.

20 THE COURT: Start explaining. The two lawyers what?

21 MS. WENDT: Avik Das, who he represents the
22 probation officers, probation department. And then
23 there was Margaret something and I know she did appear
24 here today.

1 THE COURT: And she just left?

2 MS. WENDT: I don't know where she is, she was here.

3 MR. HERBERT: I see a hand being raised, Judge.

4 MS. WENDT: Avik Das is here.

5 THE COURT: Mr. Das, come on up please. And who is
6 next to you?

7 MR. DAS: Margaret.

8 MS. WENDT: They're both here.

9 THE COURT: Nothing is getting by you today.

10 MS. WENDT: I knew they were both here this morning.

11 THE COURT: We'll have a short recess at this time.
12 Talk to these people.

13 (Recess taken.)

14 THE CLERK: Recalling Jason Van Dyke.

15 THE COURT: Did you explain, Ms. Wendt, what was
16 going on about the difficulties with the attorneys?

17 MS. WENDT: So, Judge, we attempted to contact all
18 employees in the Cook County Juvenile Detention Center
19 and we were informed that we had to speak to their
20 attorneys or their supervisors before we could talk to
21 them. And the two attorneys who are standing here right
22 now are their attorneys.

23 THE COURT: Let's get that on the record. Would you
24 state your names, your positions, and spell your last

1 names for the record?

2 MS. OLESNAVAGE: My name is Margaret Olesnavage,
3 O-L-E-S-N-A-V-A-G-E, I'm assistant general counsel at
4 the Juvenile Temporary Detention Center.

5 MR. DAS: My name is Avik Das, I'm the acting
6 director and chief probation officer for the Cook County
7 Juvenile Probation and Court Services Department.

8 THE COURT: Have you -- what was your efforts to get
9 the names of the individuals under both jurisdictions of
10 two attorneys?

11 MS. WENDT: Judge, I have received 14. Yesterday, I
12 received information for 14 employees under
13 Ms. Margaret. And today Mr. Avik has advised me that
14 six of them, an additional six are his employees. So
15 really there's only -- they've given us, he's
16 indicated --

17 THE COURT: Let's do one at a time, okay.

18 MS. WENDT: Margaret has indicated that we're going
19 to have to contact all these employees and meet with
20 them.

21 THE COURT: Do you have the addresses of the
22 employees?

23 MS. OLESNAVAGE: Addresses, last known address, and
24 phone number were provided to counsel.

1 THE COURT: Have you listed which ones are employes
2 now and which ones are not employes? That's on the list
3 that you turned over. You have to answer for the court
4 reporter.

5 MS. OLESNAVAGE: Yes.

6 THE COURT: I appreciate that. So that's current
7 then.

8 MR. HERBERT: Judge, the ones that are not
9 employees, I don't believe we have contact information
10 for them because --

11 THE COURT: I'm sorry, let's start paying attention.
12 Could you read that back what she said when I inquired
13 about which ones are employees and do they have the
14 names and addresses of those people?

15 (Record read by the reporter.)

16 THE COURT: So you got those.

17 MR. HERBERT: For the employees, but not the
18 ex-employees.

19 MS. OLESNAVAGE: Can I clarify, your Honor?

20 THE COURT: Well, you better.

21 MS. OLESNAVAGE: One is deceased, two are --

22 THE COURT: Did you put that down on it?

23 MS. WENDT: Yes, sorry.

24 THE COURT: You really want that phone number,

1 Mr. Herbert?

2 MS. OLESNAVAGE: And two are no longer employed, and
3 we indicated that on the sheet.

4 THE COURT: Did they retire?

5 MS. OLESNAVAGE: I believe one was terminated with
6 cause, and the other one I believe retired.

7 THE COURT: The one that's retired, pay attention to
8 me please, it's not like you're not confused, the one
9 that's retired, you can go to the Cook County Pension
10 Board and find those addresses from if you don't have
11 them. Do you have that?

12 MS. OLESNAVAGE: I gave that to counsel.

13 THE COURT: You have the address of the one that is
14 retired?

15 MS. OLESNAVAGE: Last known address, correct.

16 THE COURT: And another thing is they have to mail
17 the check, so this is part of your investigative
18 process.

19 Now what about the one that was terminated?

20 MS. OLESNAVAGE: Her last known address was also
21 provided.

22 THE COURT: Now is that a public record? Don't they
23 have a hearing on that? They had to have a hearing to
24 terminate something, right?

1 MS. OLESNAVAGE: Yes, due process within the JTDC.

2 THE COURT: So they had to have the addresses at
3 that time of where she lived and everything, so that's
4 available.

5 So then you fulfilled your obligation; is that
6 correct, Margaret?

7 MS. OLESNAVAGE: Yes, your Honor.

8 MS. WENDT: She did, I'm satisfied.

9 THE COURT: Thank you, Margaret. Mr. Das, come up
10 now.

11 What about Mr. Das?

12 MS. WENDT: Mr. Das has six employees that are on
13 our list that he has stated he will gather together
14 hopefully.

15 THE COURT: Let him state it.

16 MR. DAS: Your Honor, I'm now aware of six.

17 THE COURT: When did you get this request?

18 MR. DAS: Let's say by Monday.

19 THE COURT: Monday of this week?

20 MR. DAS: Yes, two days ago.

21 THE COURT: Okay.

22 MR. DAS: I understand now that those names of
23 juvenile probation were part of an inquiry given much
24 earlier to JTDC, so I was not aware --

1 THE COURT: Let's explain what an inquiry, you mean
2 by the defense?

3 MR. DAS: By the defense.

4 THE COURT: Why don't you say a request by the
5 defense.

6 MR. DAS: Request by the defense.

7 THE COURT: Tammy, what was the date on that?

8 MS. WENDT: Approximately November 30th maybe.

9 THE COURT: Of this year?

10 MS. WENDT: Correct.

11 THE COURT: So you have provided the -- listen, this
12 case is going on a long time and people have not been
13 coming up to speed about what they're supposed to do
14 concerning investigation. So now that I'm getting
15 dragged into it, when are these people going to be
16 available?

17 MR. DAS: Your Honor, I don't know, but I'm going to
18 make every effort to make them available as soon as
19 possible.

20 THE COURT: You show me on the clock as soon as
21 possible or you show me on the calendar as soon as
22 possible. I'm not putting up with this nonsense
23 anymore.

24 MR. DAS: The defense has asked if we can make

1 arrangements within the next two weeks.

2 THE COURT: No, no, because I'm going to have a
3 court date here next week about what your progress is.
4 So I mean, their progress about interviewing people, not
5 about getting names and all this other stuff. Are
6 these -- what shifts are these people working?

7 MR. DAS: I am not aware.

8 THE COURT: Get on the phone. Pass this case.
9 People coming in, they told you about these requests,
10 you should know when they're available, you suggested a
11 solution that could get them all together, but you
12 haven't said when or where or what time. Those are not
13 solutions, that is chaos.

14 Pass this case. There will be a short recess
15 again.

16 (Recess taken.)

17 THE COURT: Court's back in session, please remain
18 seated.

19 THE CLERK: Sheet 7, recalling Jason Van Dyke.

20 THE COURT: Mr. Das.

21 MR. DAS: Yes, your Honor.

22 THE COURT: Have you got in contact with these
23 people so that you can set up an appointment?

24 MR. DAS: I have not gotten in contact with them. I

1 have gotten in contact with our human resources who's
2 pulling together all the last known addresses, what the
3 next shift is, their phone numbers so that I can give
4 that to the defense counsel and we can arrange the
5 dates.

6 THE COURT: Wait a minute. I thought that you're
7 supposed to put them all together. Are they going to be
8 over at juvenile detention and then you're going to
9 provide access to them?

10 MR. DAS: At the probation department, that's the
11 expectation, yes.

12 THE COURT: You're not in probation, right?

13 MR. DAS: Juvenile probation, that's correct.

14 THE COURT: How many people there?

15 MR. DAS: A total of seven.

16 THE COURT: All right. I want these interviews, and
17 this is going to be a court order and I want that
18 drafted, to be conducted tomorrow and Friday as
19 available. These people have to be available, otherwise
20 they better have a doctor's note, a hospital entry
21 admission, or they're on vacation. They're just not
22 going to disappear and be sicced on this. This has to
23 get done, all right.

24 You got these fine people from the media here

1 and like this, this should be a case where there is
2 transparency. And especially, you all are in the
3 judicial system with juveniles so you should be
4 cooperating too.

5 What I'm going to do, the 13th of December, I'm
6 going to enter and continue this, I want more proffers
7 of these witnesses, 12-13-2017. Any problems -- here's
8 what I'm going to do.

9 Certainly they have a right not to talk to
10 anybody, so I can't take that away from them. But if
11 they're devious or something else like this that the
12 defense can prove, I'll order depositions so then
13 they'll have to do that.

14 So this case will be continued to -- on the
15 Brady motion -- excuse me, on the Lynch motions,
16 December 13th, 2017.

17 As far as the motion to quash the subpoena,
18 that will be the same date, 12-13-2017. Mr. Kalven, I
19 know it's an inconvenience, but I'm going to order you
20 to be here.

21 Anything else?

22 MR. MCMAHON: Judge, there was one other matter, the
23 defense issued a subpoena to the Chicago Transit
24 Authority, I received a copy of that. I have not seen

1 anyone from the Chicago Transit Authority this morning.

2 MR. HERBERT: It's for records.

3 THE COURT: Why haven't they complied? When did you
4 issue the subpoena?

5 MS. WENDT: Judge, we issued the subpoena on
6 November 30th, and I know that they were served with it
7 yesterday by the post office in their mailroom, so I
8 have not heard anything, nobody was here.

9 THE COURT: You don't do personal service at all?

10 MS. WENDT: Sometimes.

11 THE COURT: Well, you better start doing it because
12 sometimes isn't working.

13 And that was September 30th [sic], and again,
14 this information is available for you since
15 December 8th, 2016, and you're doing this stuff now and
16 only four days before this court date. Don't let this
17 happen again, otherwise, you're actually delaying
18 things, all right. So I want you to get ahold of those
19 things.

20 Did you call them this morning to find out why
21 they haven't complied?

22 MS. WENDT: No, I was here.

23 THE COURT: They got phones here, you got phones in
24 your pocket.

1 MR. HERBERT: And this is not related to the Lynch
2 motion, Judge.

3 THE COURT: I don't care, but it's related to the
4 case.

5 MR. HERBERT: I understand. I just want to make it
6 clear for you.

7 THE COURT: Anything else?

8 MR. MCMAHON: No, Judge.

9 THE COURT: Thank you all. It's been a long day.
10 Court is in recess at this time.

11 (Which were all the proceedings had
12 at the hearing of the above-entitled
13 cause, this Wednesday, 12/06/2017.)
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1 STATE OF ILLINOIS)
2 COUNTY OF C O O K) SS:

3
4 I, SABRINA M. TOMICKI, Official
5 Shorthand Reporter of the Circuit Court of Cook County,
6 do hereby certify that I reported in shorthand the
7 proceedings had in the above-entitled cause, and that
8 the foregoing Report of Proceedings is a true and
9 correct transcript of the proceedings had before the
10 Honorable VINCENT M. GAUGHAN, Judge of said court.

11
12 *Sabrina Tomicki*

15 _____
16 Official Shorthand Reporter
17 SABRINA M. TOMICKI, CSR
18 Circuit Court of Cook County
19 License No. 084-004755

20
21 Date: January 16th, 2018
22
23
24

EXHIBIT D

BETTER GOVERNMENT ASSOCIATION,

Plaintiff,

v.

BOARD OF EDUCATION,

Defendant.

BOARD OF EDUCATION,
Defendant.

This FOIA dispute is before the Court on plaintiff's Emergency Motion to Vacate the Court's February 4, 2019 Order. That Order concerns a document (the "Report") delivered to plaintiff's counsel, *in Court, as part of these proceedings*, by defendant's counsel. Defendant says the Report was delivered in error. Plaintiff says that once its counsel gets the Report – no matter how, and whether in error or not – it becomes publishable and the Court has no authority to enter a protective order with respect to it.

At the outset, the Court notes that it rejects the extreme positions asserted on both sides. The Board insists that the entire Report is absolutely non-producible under FOIA because the BGA's FOIA request did not ask for it in the right way.¹ Not so. Both sides know, and have known for some time, that the Report is the subject of the BGA's FOIA request. It would be otiose to pretend otherwise. On the other hand, the BGA insists that if its counsel gets hold of the Report – even by mistake, or perhaps by artifice – the Court cannot prevent its disclosure, even if disclosure would violate FOIA. Again, not so. That would prevent the Court from managing its own proceedings – including, here, proceedings initiated by the BGA itself, to seek the Court's aid with respect to the very Report which is the subject of the dispute. The Court cannot be so powerless over its own proceedings.² Nor can the BGA properly disavow the very judicial authority which the BGA itself invoked in the first place.

¹ The Board's position apparently is that the BGA, by asking for the information in a way which linked it to a specific student's name (e.g., "all reports about an incident involving student John Smith"), has made it impossible for the Board to respond *at all* without violating the Illinois School Students Records Act. See 5 ILCS 140/7.5(r). The Board believes this is so even if the Report itself does not specifically identify or refer to the student. That is too extreme. It would block any discussion of a poorly worded FOIA request, even in an effort to modify the request – and even if the public body knows that there are producible records which do not violate the ISSRA. Such an approach would impede, not promote, FOIA's purposes.

² The Court expresses no view regarding a situation in which the news media obtain a document independent of any court proceeding, and seek to publish it. Perhaps that may, as BGA argues, implicate "prior restraint" concerns. But that is not the situation we confront here.

Those extremes aside, let us focus on the matter actually at hand (which is, in fact, much narrower than the “prior restraint” shibboleth to which plaintiff escalates it). Here is the background. The parties have known for some time that a document – the Report – exists which contains information responsive to BGA’s FOIA request. The Board maintains, however, that the Report also contains matter which falls within one or more FOIA exceptions, including 5 ILCS 140/7.5(r) (concerning information not disclosable under ISSRA). At the Court’s urging, the Board had prepared a redacted version, for submission to the Court for *in camera* review. If the Board’s proposed redactions were approved by the Court, the redacted Report could then be produced to BGA, thereby meeting the BGA’s desire for information while honoring the Board’s concern that it not over-disclose.

Accordingly, on January 22, 2019, the Board delivered to the Court (i) a redacted version of the Report; (ii) an index to the redactions, explaining the Board’s asserted basis for each redaction; and (iii) an unredacted version (so that the Court could review the redactions). So far, so good. The Board’s counsel also made available to BGA’s counsel a copy of the redacted version of the Report and the index to the redactions. See Order, Jan. 22, 2019, ¶ 1. At the time, that appeared agreeable to both sides.

Shortly thereafter, however, the Board’s counsel sought to retrieve the redacted Report which had been tendered to BGA’s counsel. BGA’s counsel declined to turn over the Report, arguing – as noted previously – that even if it had been tendered in error, it could not be “clawed back.” The Board moved for a protective order, asserting *inter alia* that there was at least one further redaction which, mistakenly, the Board had not made in the versions of the Report tendered to BGA’s counsel and to the Court.³ The Court granted the protective order. That led to BGA’s present Emergency Motion to Vacate.

For the reasons already explained, the Court believes that it has the inherent authority to enter a protective order under these particular circumstances. Recall that the protective order is not addressed to “the media.” Like almost any protective order, *see, e.g.*, Ill. Sup. Ct. Rule 201(c), it is addressed only to the parties to this suit. Even more specifically, its focus is really limited to counsel for one of those parties, who is in possession of the redacted Report. The protective order simply tells counsel not to further use or disclose the Report, for the time being.

It seems obvious that a court has – and *must* have – at least that much ability to manage proceedings in the course of litigation, and in the courtroom itself. The Court’s authority to enter protective orders regarding discovery, and to regulate the conduct of counsel in the course of litigation, is necessarily broad. *See* Ill. Sup. Ct. Rule 201(c). It is surely a serious overstatement to term any such protective order a “prior restraint.” If that label were accurate, then Rule 201(c) itself – a long-standing and manifestly

³ Counsel explained that the Board had neglected to redact the name of the student who was, in some sense, the protagonist of the events described in the Report. That likely requires multiple redactions, since the name probably appears in multiple places in the Report. Such a redaction would seem to fall within the scope of the statutory exemption found in 5 ILCS 140/7.5(r).

necessary adjunct of civil litigation – would be on shaky ground. It is true, as BGA's counsel points out, that the particular issue presented here does not fall within the ordinary ambit of "discovery." (Here, the Report is the subject of the suit, not an aspect of discovery information.) But that seems a point more technical than substantive. The Court's explicit authority over "case management" generally, including the Court's explicit ability to impose sanctions for violation of case management directives, is also quite broad. *See* Ill. Sup. Ct. Rules 218, 219(c). Even lacking that explicit authority, it seems ineluctable that inherent authority along the same lines would be necessarily implied. Otherwise parties could misuse court procedures to accomplish "gotcha" results, entirely out of conformity with fairness and orderly procedure. It is a settled truth that our judicial system cannot operate effectively in a "gotcha" atmosphere. To the contrary, reasonable collaboration among litigants and counsel is essential to the proper functioning of the system. *See, e.g.,* Ill. Sup. Ct. Rule 201(k).

With specific regard to "clawback" of inadvertently-disclosed material (the precise problem at hand here), the Congressional debates over what is now F.R. Ev. 502(b), (d) make very clear that such a clawback procedure is needed – and well within judicial authority – to prevent what otherwise would be greatly increased expense in handling document and other disclosure in the context of civil litigation. Our own Illinois Supreme Court has recognized the same point for purposes of Illinois civil litigation. *See* Ill. Sup. Ct. Rule 201(p).⁴

Accordingly, the Court will deny BGA's present Emergency Motion to Vacate.⁵ But the Court wishes to emphasize that the protective order which thus remains in place is meant to be both narrow and temporary. To that end, the following provisions contemplate that, other things being equal, this matter should be at or very close to an end no more than two weeks from now.

Accordingly, **IT IS HEREBY ORDERED** as follows:

1. BGA's Emergency Motion to Vacate is DENIED.
2. The Court's protective Order entered February 4, 2019 remains in place. To that end, BGA and its counsel may retain the copy of the redacted Report presently in

⁴ The recent trend away from routinely filing discovery materials as part of the civil litigation record (*see, e.g.,* Ill. Sup. Ct. Rule 201(m); Cook County Cir. Ct. Rule 3.1(c)) may signal an attempt to shield discovery materials from unfettered casual inspection. (Rights of privacy do exist, and do matter.) If it weren't for such don't-file provisions, "clawback" rules such as Ill. Sup. Ct. Rule 201(p) might be effectively unenforceable. But that just highlights the serious practical problems which led to the need for "clawback" provisions to begin with.

⁵ It is not, in truth, an "emergency." The Report has been the subject of this litigation since its inception. No present exigency has been shown to exist that would compel greater haste in completing the FOIA-required redactions to the Report. BGA argues that the "emergency" arises from what is said to be a "prior restraint" antithetical to First Amendment principles. The preceding discussion in this Order explains, however, that this Court does not share that concern under these circumstances.

their possession; they shall not, however, disclose that Report or any part thereof pending further Order of this Court.


3. The Board shall tender to the Court and BGA any further proposed redactions to the Report, including redacting the name(s) of any student(s) therefrom, as promptly as practicable and in no event later than 5:00 p.m. on February 14, 2019.

4. The Motion of Reporters' Committee for Freedom of the Press to File Amicus Letter is GRANTED. The amicus letter is deemed filed.

5. This matter is set for a status hearing, and ruling on proposed redactions, on February 20, 2019 at 9:30 a.m.

DATED: February 7, 2019

ENTER:



Circuit Judge

