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

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff.	)	
	)	
vs.	)	Case No. 17 CR 9700
	)	
DAVID MARCH, JOSEPH WALSH, and THOMAS GAFFNEY,	)	
	)	
	)	
Defendants.	)	

REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS INDICTMENT

NOW COMES the Defendants, DAVID MARCH, JOSEPH WALSH and THOMAS GAFFNEY, by their attorneys, and in support of their Motion to Dismiss Indictment, replies to the Special Prosecutor's Response to said Motion as follows:

INTRODUCTION

The Defendants' Motion to Dismiss Indictment is indeed remarkable, but not for the reasons stated by the Special Prosecutor. Instead, the Defendants' motion is remarkable because it is supported by overwhelming evidence in the record, it mandates a hearing pursuant to 725 ILCS 5/114-1(d), and after said hearing, the extraordinary remedy of dismissal would be warranted by this Honorable Court where it is shown that the indictment was not based on real evidence.

It is disingenuous of the Special Prosecutor to label the Defendants' motion as having an "accuse first, investigate later approach," but then also concede that not all transcripts of the Special Grand Jury proceedings have been provided to the defense. Why hasn't there been full disclosure by the Special Prosecutor? It begs the question, what else hasn't been tendered by the

prosecution? As this Court knows, the defense had been asking for months for the indictment transcript until it was finally tendered in discovery. Why wasn't the indictment transcript returned to the Court on the first court date, as is usually the case? The defense can only rely on what has been tendered in discovery. The allegations by the defense are based on the record provided in discovery, not speculation.

To be clear, the Defendants' motion has nothing to do with grand jury secrecy. The Defendants are not asking for the names and other contact information of the grand jurors. But since the Special Prosecutor cited 725 ILCS 5/112-6 in footnote 4 of the Response, this Honorable Court should pay close attention to 725 ILCS 5/112-6(c)(3) which provides that, "disclosure otherwise prohibited by this Section of matters occurring before the Grand Jury may also be made when the court, preliminary to or in connection with a judicial proceeding, directs such in the interests of justice or when a law so directs." The Defendants respectfully submit that in the interests of justice, full disclosure of all grand jury proceedings in this case should be ordered.

While it is convenient for the prosecution to simply state that the rights of 725 ILCS 5/112-4(b) were "properly and repeatedly" given to the Special Grand Jury, where is the proof? Why wasn't a Grand Jury transcript attached to the Response to prove their position? Why weren't these rights included in the witnesses' transcripts, as is usually the case? Offering to provide transcripts to the Court for an *in camera* review of rights mandated by the Illinois Supreme Court, **none of which are secret**, is troublesome because it suggests that there is something else that the prosecution is keeping from the defense. (Emphasis added.)

In addition, the Special Prosecutor adds an argument about the alleged timeliness of the Defendants' motion in footnote 2 of the Response, but then suggests they are not "pressing that

ground for denial." Then why raise it? Considering the lengthy delay in receiving the indictment transcript from the prosecution, along with the very recent disclosure of co-conspirator statements that the prosecution didn't provide until after the defense inquired about them, along with other discovery issues, the timeliness of the Defendants' motion is more than reasonable. 725 ILCS 5/114-1(b). Indeed, a defendant may move for dismissal of the indictment at any time prior to trial. 725 ILCS 5/114-1(a).

Regardless, the Defendants' motion and the prosecution's response clearly indicate that issues of fact exist that compels this Court to conduct a hearing pursuant to 725 ILCS 5/114-1(d). The Defendants respectfully request that hearing.

ARGUMENT

A. FAILURE TO COMPLY WITH 725 ILCS 5/112-4(b)

The Special Prosecutor claims the rights mandated by 725 ILCS 5/112-4(b) were "properly and repeatedly" given to the Special Grand Jury. As stated above, there is no evidence of that in the record; certainly not the record provided to defense counsel during discovery.

725 ILCS 5/112-4(b) clearly states that, "The Grand Jury has the right to question any person against whom the State's Attorney is seeking a Bill of Indictment, or any other person, and to obtain and examine any documents or transcripts relevant to the matter being prosecuted by the State's Attorney. Prior to the commencement of its duties and, **again, before the consideration of each matter** or charge before the Grand Jury, the State's Attorney **shall inform the Grand Jury of these rights.**" (Emphasis added). There is no evidence that these rights were given to the Grand Jury before each of the eighteen (18) witnesses were presented. The Defendants submit these rights should have been given before each witness testified. "Each matter" refers to each witness or other presentations before the Grand Jury. At a minimum, each

day the Grand Jury met they should have been given these rights. The defense has no record of this.

If these rights were "repeatedly" given as the Special Prosecutor maintains, there should be several transcripts to support this. Yet, no transcript is attached to the prosecution's response.

Further, there is no need for an *in camera* review if there is a record of these declarations to the Grand Jury. There is nothing secret about the rights mandated by 725 ILCS 5/112-4(b). Disclosure of these rights does not violate the secrecy of the Grand Jury. The Special Prosecutor citing 725 ILCS 5/112-6 to support non-disclosure is inapplicable.

The case cited by the Special Prosecutor, *People v. Haag,* 80 Ill. App. 3d 135, 399 N. E. 2d 284 (2nd Dist. 1979) stands for the proposition that the failure to comply with 725 ILCS 5/112-4(b), standing alone, does not require a dismissal of the case. The Special Prosecutor failed to mention that in *Haag,* there was no evidentiary hearing held. *Haag* at 137. In *Haag,* the trial court made its determination solely on the pleadings, transcripts, and representations of counsel. Id. The Defendants in the instant case are asking this Court for a hearing.

Further, the Second District in *Haag,* posited that the State's Attorney in *Haag* should have advised the Grand Jury of their rights pursuant to 725 ILCS 5/112-4(b), but the Illinois Appellate Court ruled that the trial court's dismissal of the indictment was improper based on the limited record before them, and absent a hearing, there was no rule requiring a transcript to prove the advice was given to the Grand Jury. *People v. Haag,* 80 Ill. App. 3d 135, 138-139, 399 N.E. 2d 284 (2nd Dist. 1979). Again, the Defendants are seeking a hearing before this Honorable Court.

B. <u>NO EVIDENCE WAS PRESENTED TO SUPPORT THE CHARGES</u>

The weakness of this indictment is apparent when the Special Prosecutor defends it by

arguing that the sufficiency of the evidence is not important at this stage of the proceedings. *Some* or *any* evidence to support the indictment is enough. (Emphasis added). (Prosecution Response, pages 6, 8). That's their best argument? Instead of offering the Grand Jury real evidence that directly (or indirectly) established a conspiracy on the part of the Defendants, they offered the Grand Jury videos, police reports and the testimony of witnesses most of whom never met the Defendants, and none of whom established an agreement between the Defendants. In addition, there was no evidence offered to the Grand Jury to support the charges of obstructing justice and official misconduct. If the Special Prosecutor had presented real evidence implicating the three Defendants before the Grand Jury they would have argued it in their response. Instead, they argue that over 150 subpoenas were issued. This is not evidence. Further, no witness presented to the Grand Jury offered any testimony to support the "eight pages of detailed information." The indictment is not evidence. The indictment in this case is a politically motivated theory without a shred of evidence to support it.

All the prosecution can rely on is the existence of a few police reports, drafted by the Defendants, that indicate Mr. McDonald committed an aggravated assault against three Chicago Police officers. Generally, police reports are not evidence. Illinois Rule of Evidence 803(8). Federal Rule of Evidence 803(8)(B). As this Court knows, police reports are summaries. Yet, the Special Prosecutor wants this Court to believe these reports are evidence of an agreement, and consequently, the charge of conspiracy. Further, the Special Prosecutor wants this Court to believe these reports are evidence of the necessary acts and intent or knowledge to support the charges of obstructing justice and official misconduct. The Special Prosecutor is wrong and misled the Grand Jury.

Absent from the Special Prosecutor's response is the police report detailing the forcible felonies of burglary committed by McDonald as witnessed by the innocent civilian who called 911. This civilian was then attacked by McDonald at knifepoint. This attempt murder committed by McDonald, constituted another forcible felony and was witnessed by the civilian's wife. The police arrived shortly thereafter and pursued McDonald who never complied with police orders to drop the knife and stop. McDonald's use of his knife against Officer Gaffney, who was trying to prevent McDonald's escape by blocking with his police vehicle, and McDonald's waving of his knife when confronted by Officers Van Dyke and Walsh, despite more police commands to drop the knife and stop, constituted aggravated assault. The Special Prosecutor (or anybody with an anti-police agenda) may disagree with the interpretation that these acts by McDonald constituted aggravated assault, but that interpretation does not rise to the level of criminal conduct, especially the crimes of conspiracy, obstructing justice and official misconduct.

Assuming *arguendo,* the interpretation that McDonald committed an aggravated assault was truly false, there was no evidence presented to the Grand Jury that an agreement existed between the Defendants to report it that way. Absent some evidence of an agreement, there can be no conspiracy.

The innocent civilian and his wife were subpoenaed and interviewed by the Special Prosecutor who then chose not to present them to the Grand Jury. The Special Prosecutor had their federal grand jury transcripts detailing their consistent testimonies about the armed forcible felonies committed by McDonald, but chose not to give those transcripts to the Grand Jury.

The physical evidence of McDonald's armed violence is minimized or ignored by the Special Prosecutor's presentation to the Grand Jury. McDonald's knife is considered a Category

II dangerous weapon in Illinois, which under the law made McDonald armed and dangerous during the commissions of numerous felonies. 720 ILCS 5/33A-1(c)(2). His puncturing the tire of Gaffney's police vehicle and subsequent jab at Gaffney's windshield indicated McDonald would not hesitate to use that knife against the police who were called to the scene by the civilian victim. The medical examiner's report revealed a gunshot wound to McDonald's chest, that travelled from front to back and slightly downward – consistent with McDonald facing Officer Van Dyke when receiving that wound, and inconsistent with receiving that wound when on the ground. None of this physical evidence was presented in a fair and impartial manner, if it was presented at all.

The Special Prosecutor argues that sections of the Chicago Municipal Code and CPD General Orders were given to the Grand Jury, but is silent on the absence of Illinois criminal law given to the Grand Jury. Instead, the prosecution cites *Williams v. Jaglowski,* 269 F.3d 778 (7th Cir. 2001) to support the claim that a violation of a section of the municipal code is state law and a criminal offense. They fail to recognize that this federal civil rights case did not definitely hold this claim. In her opinion, Judge Wood stated, "Although it is not entirely clear that a Chicago police officer's failure to follow police rules could violate a state criminal law, it appears likely that this is the case. At the very least, we find the law is unsettled." *Williams at* 784. In *Williams,* the Court found that section 2-84-290 of the Chicago Municipal Code was a state law for purposes of that case. However, even if it applied to all cases, that section of the municipal code does not apply to this indictment. The section referenced by the prosecution calls out negligence to perform a duty, that if committed, constitutes a minor offense punishable by a fine. This indictment calls out intentional conduct or reckless conduct.

C. PROSECUTORIAL MISCONDUCT

The Special Prosecutor argues the Defendants offered no proof of misconduct in the motion to dismiss. On the contrary, Exhibits A, B and C were attached to the motion which clearly supports the Defendants' position. These transcripts reflect in no uncertain terms the unusual conduct by the prosecutor, to put it mildly. Ironically, the prosecution submitted nothing to support their response. Again, this is another disingenuous argument by the prosecution.

1. Alma Benitez

The prosecution avoids several issues with Ms. Benitez in their response. First, they ignore the obvious question, why was Ms. Benitez allowed to read a statement prepared by her and her civil rights attorney? If this were really a search for the truth, why didn't the Special Prosecutor demand Ms. Benitez give candid, responsive answers to all questions asked of her? The Defendants submit that a hearing should be conducted on this issue of fact, along with all of the issues of fact in this case pursuant to 725 ILCS 5/114-1(d).

Next, and contrary to the prosecution's argument, the Defendants did identify the perjured testimony of Ms. Benitez. The prosecution may try to sell Benitez' under oath false testimony as "prior inaccurate statements" but a lie is a lie, and when it's under oath, it's perjury. If indeed Ms. Benitez did not commit perjury, and hence, the prosecutor did not present perjured testimony before the Grand Jury, then why not give the grand jurors Ms. Benitez' federal grand jury transcript? Wouldn't that provide the grand jurors a perspective about the inaccuracies of her prior testimony? It's also ironic for the prosecution to suggest that members of the Grand Jury had the opportunity to question Ms. Benitez, and yet in the same response they attempt to justify the Special Prosecutor cutting off a grand juror from asking a relevant question. (See Dora Fontaine, *infra*).

Finally, the prosecution fails to address the argument that Ms. Benitez committed a federal crime when she lied to the FBI. Ignoring this in the Grand Jury was bad enough. Ignoring this issue now during this stage of the proceedings demands a hearing on the matter.

2. Dora Fontaine

The prosecutor does not decide what is relevant, the grand jurors do. Make no mistake about it, the Special Prosecutor interrupted a grand juror and prevented him from asking a relevant question that goes directly to the interest, bias or motive of the witness to testify. The record is clear. The grand juror was trying to ask why Ms. Fontaine wasn't fired. The Special Prosecutor over stepped her bounds and cut off that grand juror and the subsequent answer by Fontaine. That cannot happen. The grand jurors can ask whatever they want. They have that right. 725 ILCS 5/112-4(b). They can ask why other officers got fired. While the State can go direct to a grand jury instead of a preliminary hearing, they assume the risk of grand jurors asking a witness whatever comes to mind. Conversely, a judge will entertain objections at a preliminary hearing, but there to, a judge determines what is relevant, not the prosecutor. This misconduct requires a hearing and an explanation.

In addition, the prosecution incorrectly applied *Garrity* protections to Ms. Fontaine. Since the Special Prosecutor chose not to charge Ms. Fontaine but instead chose to use her as a witness, *Garrity* does not prevent Fontaine's statements being used against her. Compelled statements by a police officer cannot be used against that officer if she is investigated and later charged with a crime. *Garrity v. New Jersey,* 385 U.S. 493 (1967). Once the Special Prosecutor made Fontaine a witness and not a suspect, all bets were off. *Garrity* certainly cannot be used as an excuse to cut off a grand juror's question to Fontaine.

3. Vincent Williams

It was generous of the Special Prosecutor to advise us in Footnote 8 that Mr. Williams had investigated violent crimes and murders, but he didn't say that in the Grand Jury. Instead, he testified he was an IRS agent for 31 years. Any experience he claims to have in murders was as a private investigator. Nowhere did he testify that he had experience in violent crimes and more importantly, nowhere did he testify he had any experience in the police reporting of violent crimes.

If the Special Prosecutor wants us to believe that the Grand Jury read all of the police reports as they suggested on pages 6 and 10 of their response, then why did they call Mr. Williams to explain what he perceived as differences between the video and police reports?

Further, there was no evidence established to allow Mr. Williams to testify that not all videos were collected in this case. All videos that captured the incident of October 20, 2014, were collected by the police. The FBI and IPRA found no credible evidence that other video capturing the incident actually existed but was ignored by the Chicago Police. Yet, Mr. Williams was allowed to inject his personal opinion, contrary to the reports the prosecution claims the Grand Jury possessed and read.

WHERFORE, the Defendants respectfully request that this Honorable Court conduct a hearing and dismiss the indictment.

Respectfully submitted,

Attorney for David March

Attorney for Joseph Walsh

Attorney for Thomas Gaffney