No. 122949

IN THE SUPREME COURT OF ILLINOIS

BETTER GOVERNMENT ASSOCIATION,	)	Appeal from the Appellate
	)	Court, First District, No. 1-16-1376
	)	
Plaintiff-Appellant,	)	
	)	
-vs-	)	There on appeal from the Circuit Court of
	)	Cook County, Chancery Division, Illinois
	)	No. 15 CH 4183
CITY OF CHICAGO LAW DEPARTMENT,	)	
CITY OF CHICAGO MAYOR'S OFFICE,	)	
CHICAGO POLICE DEPARTMENT,	)	
OFFICE OF THE SPECIAL PROSECUTOR,	)	
	)	
	)	Hon. Mary L. Mikva, Judge Presiding
Defendants-Appellees.	)	

OPENING BRIEF FOR PLAINTIFF-APPELLANT BETTER GOVERNMENT ASSOCIATION

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

I. NATURE OF THE ACTION

This is a Freedom of Information Act case about a special prosecutor's closed investigation into the 2004 killing of David Koschman by the nephew of then-Mayor Richard M. Daley and any illegal cover-up by authorities. The investigation is detailed in a 162-page report previously released by the special prosecutor with the permission of the criminal court. Although that report already named the grand jury witnesses and includes extensive details about the investigation, the special prosecutor and the City of Chicago have refused to produce any further records based on expansive secrecy theories inconsistent with the prior release of the report and with the transparency principles that have long governed our FOIA.

II. ISSUES PRESENTED

(1) May circuit court judges use protective orders to create non-statutory bases for withholding records under FOIA, and does FOIA require a secondary analysis asking whether it would be "proper" or "improper" to withhold records?

(2) May a public body take refuge from FOIA in a protective order that it helped procure?

(3) May a prosecutor withhold as "matters occurring before the grand jury" all of its own records from a closed investigation whenever it empanels a grand jury, including information that was never presented to the grand jury and does not disclose what took place in the grand jury room?

(4) Is FOIA "a law" that "directs" the disclosure of non-exempt records, triggering the grand jury secrecy exception for "when a law so directs" that records be disclosed?

III. STANDARD OF REVIEW

This Court reviews *de novo* rulings on motions to dismiss under Sections 2-615 and 2-619 and motions for judgment on the pleadings. *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 361 (2009); *Hooker v. Ill. State Bd. of Elections*, 2016 IL 121077, ¶ 21.

IV. JURISDICTION

This Court granted Appellant Better Government Association's petition for leave to appeal. Jurisdiction is proper under Rule 315.

V. STATUTES INVOLVED

The Appellate Court's ruling implicates the following provisions of the Illinois Freedom of Information Act:

> Each public body shall make available to any person for inspection or copying all public records, except as otherwise provided in Sections 7 and 8.5 of this Act.

5 ILCS 140/3(a).

> All records in the custody or possession of a public body are presumed to be open to inspection or copying. Any public body that asserts that a record is exempt from disclosure has the burden of proving by clear and convincing evidence that it is exempt.

5 ILCS 140/1.2.

> [T]he following shall be exempt from inspection and copying: (a) Information specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law.

5 ILCS 140/7(1)(a).

> The circuit court shall have the jurisdiction to enjoin the public body from withholding public records and to order the production of any public records improperly withheld from the person seeking access.

5 ILCS 140/11(d).

The ruling also implicates the following provisions of the Illinois Criminal Code ("grand jury secrecy provisions"):

> (a) Only the State's Attorney, his reporter and any other person authorized by the court or by law may attend the sessions of the Grand Jury[.]
>
> (b) Matters other than the deliberations and vote of any grand juror shall not be disclosed by the State's Attorney, except as otherwise provided for in subsection (c)[.]
>
> (c)(1) Disclosure otherwise prohibited by this Section of matters occurring before the Grand Jury . . . may be made to:
>
> a. a State's Attorney for use in the performance of such State's Attorney's duty; and
>
> b. such government personnel as are deemed necessary by the State's Attorney in the performance of such State's Attorney's duty to enforce State criminal law.
>
> (2) Any person to whom matters are disclosed under paragraph (1) of this subsection (c) shall not use the Grand Jury material for any purpose other than assisting the State's Attorney in the performance of such State's Attorney's duty to enforce State criminal law[.]
>
> (3) Disclosure otherwise prohibited by this Section of matters occurring before the Grand Jury may also be made . . . when a law so directs.
>
> (d) Any grand juror or officer of the court who discloses, other than to his attorney, matters occurring before the Grand Jury other than in accordance with the provisions of this subsection or Section 112-7 shall be punished as a contempt of court, subject to proceedings in accordance to law.

725 ILCS 5/112-6.

VI. STATEMENT OF FACTS

A. Vanecko Kills Koschman and Two Investigations Result In No Charges

The following facts are taken from the special prosecutor's report, which it elected to release publicly with the permission of the criminal court. Due to the report's breadth and depth, BGA provides only the key points, but the full report can be found at C305-471 and is available on the internet.

On April 24, 2004, 21-year-old Chicago suburban resident David Koschman and several of his high-school friends spent the day in the City of Chicago with plans to attend a Chicago Cubs game the next day. C319. That evening, the group visited several bars in Chicago's Division Street area. *Id.* Around 3:15 a.m., they started to head back to a friend's apartment for the night. C319-320.

That same evening, Richard J. Vanecko, nephew of then-Mayor Richard M. Daley, and several of his friends attended a Daley-family engagement dinner and then spent several hours drinking at a neighborhood bar before heading to Division Street to continue. C320.

As the Koschman group headed home and the Vanecko group headed out, the two groups crossed paths and a verbal altercation took place. C321. Vanecko, who was 6'3" and 230 pounds, punched 5'5" and 125-pound Koschman "square in the face." *Id.* Koschman went "flying back," like "dead weight," and struck the back of his head on the pavement. *Id.* Rather than render aid or await the arrival of the police, Vanecko and one of his friends fled the scene in a taxi while the two others, Kevin and Bridget McCarthy, attempted to walk away. *Id.* Koschman was taken unconscious by ambulance to

Northwestern Memorial Hospital. C322. He underwent numerous surgeries, but on May 6, 2004, Koschman died from his injuries. C322-323.

Immediately after the assault, Koschman's friends flagged down a police officer. C323. The McCarthys' attempt to flee was unsuccessful after Koschman's friends pointed them out to the officer. *Id.* Kevin McCarthy lied to the police and said he did not know the men who ran and lied again when interviewed later by detectives. C324; C330-331. Notes of the interview are missing, which a former CPD Superintendent described as "rais[ing] red flags." C331. Detectives interviewed bystander witnesses and submitted reports that were either altered from their original drafts or are missing. C333.

Within "a couple days" of the incident, CPD was aware that Vanecko was involved and was Mayor Daley's nephew. C349-350. So were the Mayor and his Chief of Staff for Public Safety. C350, C429. After some initial interviews on April 25 that yielded a number of leads to be followed up on, no further detective work occurred until three days after Koschman died, a span of fourteen days of non-activity. C334.

When the investigation finally resumed three days after Koschman's death, it was investigated as a homicide. C339. The details of the investigation and a 2011 re-investigation are too numerous to recite, spanning over 100 pages in the special prosecutor's publicly released report. C339-452. Those investigations did not result in any charges, initially because police and prosecutors said they could not conclude that Vanecko threw the fatal punch, and after the re-investigation, because they concluded Vanecko acted in self-defense. C405.

B. The Sun-Times Investigation, the Appointment of a Special Prosecutor, and the Outcome of the OSP's Investigation

In January 2011, the Chicago Sun-Times submitted a FOIA request to CPD for records related to the Koschman investigation. C260. After receiving them, in redacted form, the Sun-Times located and attempted to interview all of the witnesses. *Id.* Several challenged the veracity of the accounts that had been recorded by the detectives. C260-261. Two insisted they had identified Vanecko as the person who killed Koschman at a lineup. C261. One said that it "seemed like [the police] were trying to intimidate us," and another that a police report stating the witness had described Koschman as the "aggressor" was a "flat-out lie." *Id.*

Following the Sun-Times reporting,[1] the Koschman family petitioned for the appointment of a special prosecutor to re-investigate Koschman's death, as well as any wrongdoing by police or prosecutors in the original investigations. C006-027. That petition was granted in a lengthy opinion ordering a "fresh look" at the case, noting, among other problems, a "missing files syndrome," alteration of police reports, serious questions whether law enforcement "conjured up" Vanecko's self-defense claim, and the state's attorney's conflict of interest. C264-266, C278-279, C286. Two weeks later the court appointed Dan Webb to the office of the special prosecutor ("OSP"). C287.

The OSP's task was not only to determine whether Vanecko should be charged, but also to "maintain the public's confidence in the impartiality and integrity of our criminal justice system." C286. Despite that laudatory goal, the OSP's work began in almost total secrecy. At the outset, after empaneling a special grand jury, the OSP filed a motion for a protective order, which itself was filed under seal. C290-291, C294-295.

[1] *See* Chicago Sun-Times Website, *The Killing of David Koschman*, *available at* http://projects.suntimes.com/koschman/ (last visited Feb. 15, 2018).

The proposed protective order purported to prohibit "[a]ny individuals or entities who receive Grand Jury materials," which included subpoenas and other materials, from "further disseminating that material or information contained therein." C294-295. The criminal court granted the OSP's motion and entered the protective order, placing the protective order and the motion seeking it under seal for unexplained reasons. *Id.*

We know from the report that the OSP interviewed 133 witnesses during the course of the investigation. C317. The OSP did not present all of those witnesses or even summaries of their interviews to the grand jury. Rather, the OSP presented only 24 of the witnesses live to the grand jury and provided the grand jury the results of what the OSP determined to be "relevant witness interviews." *Id.* All of the witnesses agreed to sit for voluntary interviews, some subject to proffer agreements. *Id.* The OSP also reviewed a number of documents, some of which were the result of grand jury subpoenas and others that were not. C318; C1540-41.

Every single witness who testified before the grand jury is identified by name in the OSP's publicly available report, along with summaries of the testimony and whether the witness testified under a grant of use immunity. C318 n.25; C305-471. So are the names of witnesses who furnished declarations or statements that were presented to the grand jury. C321 n.46, C323 n.54, C340 n.17, C351 n.257, C352 n.264. Many of the people interviewed are identified by name in the report, as are the grand jury witnesses who testified in the original investigations. C305-471; C449-450 n. 813.

The report explains that Mayor Daley was interviewed, that Michael Daley provided a declaration, that Katherine Daley was interviewed, that an email between Katherine Daley and Bridget McCarthy was presented to the grand jury in which

McCarthy said "it is best for myself and RJ [Vanecko] that it not be discussed and anyone [sic] know what happened." C320 n.37, C351 n.257, C352 n.264, C429 n.708. It discloses that Mayor Daley and a top aide were aware of the Koschman incident shortly after it happened. C350, C429. It discloses that police and prosecutors were aware that Vanecko was Mayor Daley's nephew early on and conducted the investigation in a way they otherwise would not because of that fact. C364 n.338 (detective "reached out to [ASA] O'Brien directly to review the case because the case involved the nephew of Mayor Daley"; the ASA "believe[s] the reference to a Daley relative is why I, as opposed to one of the felony review team, went out on a call."). The report concludes, without providing the specifics of the questioning, however, that "Mayor Daley told the OSP he never had substantive discussions with his staff about the law enforcement investigations into Koschman's homicide nor did he ever direct anyone how to handle the matter. The OSP's interviews of his staff confirmed these statements by Mayor Daley." C430 n.709.

At the conclusion of the investigation, the OSP charged Vanecko with involuntary manslaughter and he ultimately served 60 days in jail, a decade later, for killing David Koschman. C312. None of his friends who lied to the police were charged. With regard to any illegal interference in the earlier investigations, the OSP concluded that any charges based on the 2004 investigation were barred by the statute of limitations, and that there was insufficient evidence to prove beyond a reasonable doubt the element of criminal intent for conduct that occurred during the 2011 investigation. C312, C315-316.

C. Prior FOIA Proceedings and the City's Role In Procuring the "Clarified" Protective Order

In February 2014, the Sun-Times sent a FOIA request to CPD for any grand jury subpoenas it received in the Koschman matter and any documents produced in response. C640. CPD denied the request based on the OSP's protective order described above. C640-641. The Sun-Times sought review by the Public Access Counselor, who requested a copy of the protective order. C641. Because even the protective order itself was sealed, CPD requested that the criminal court unseal it so CPD could provide it to the PAC. *Id.* The criminal court granted the motion and unsealed the order. C649.

The PAC determined that the subpoenas were covered by the protective order, but "it was not clear" that "the documents produced by the City in response to the subpoenas were protected." C653. For reasons that are unclear, rather than find that CPD failed to meet its burden of proving by clear and convincing evidence that the records were exempt, the PAC determined that "the City and CPD must either provide the responsive documents to [the Sun-Times], or alternatively, return to the court to seek clarification of the limits of the protective order upon which they have based their denial of [the Sun-Times'] FOIA requests." C653. As the criminal court described it, the City "declined the PAC's invitation to disclose the subject materials" and chose the second option, C1541-42, but rather than ask the criminal court to ***clarify*** its order, the City asked the court for an affirmative order to ***prevent*** the City from producing the records:

> The PAC's interpretation that the Grand Jury subpoenas are protected but that the documents produced in response to those very same subpoenas is illogical. Production of the documents clearly includes responsive documents the City provided to the Special Prosecutor and, thus, reveal what the subpoenas requested, thereby revealing the substance of the subpoenas issued by the Special Prosecutor. . . .

> Therefore, the City requests that this court conclusively state that the records the City produced pursuant to the grand jury subpoenas are covered by the June 14, 2012, Protective Order and cannot be produced.

C654-55. The criminal court granted the City's motion and "clarified" the order, allowing the City to withhold the records. C726-29.

D. The FOIA Requests and Denials

On January 23, 2015, BGA requested from the OSP:

> Documents sufficient to show the names of everyone interviewed by Dan Webb's special prosecutors in relation to the David Koschman/Richard Vanecko case.
>
> [C]opies of any and all statements by and communications with Daley family members and their attorneys.
>
> [T]he same information for [corporation counsel] Mara Georges.
>
> Copies of any and all itemized invoices and billing records for the special prosecutor's team.

SR16.[2] The OSP denied the requests based on the grand jury provisions. SR18-19.

Also on January 23, 2015, BGA requested from the City:

> [C]opies of any and all subpoenas issued to the Chicago Police Department, the Law Department and the Mayor's Office in regards to the Vanecko/Koschman investigation/special prosecution.
>
> [C]opies of any and all emails and other communications between special prosecutor Dan Webb's office and CPD, the Law Department and the Mayor's Office in regards to the same investigation/special prosecution.
>
> [A]ny and all indexes of records produced by the city for Webb's office, also in regards to the Vanecko/Koschman investigation.

SR20-22. The City denied the requests based on the protective order. SR23-24.

[2] Citations to the record in BGA's FOIA case, which was provided as a supplemental record, are noted as "SR."

E. The Circuit Court Proceedings

BGA filed suit in chancery court, which is assigned to hear FOIA matters in Cook County. SR34-40. The City moved to dismiss under Sections 2-615 and 2-619. SR123. The OSP filed a "motion to dismiss plaintiff's complaint . . . or in the alternative motion to transfer" the case to the criminal court (thus seeking transfer ***only*** if the chancery court was not inclined to find for the OSP on the merits). SR143. At BGA's request, the chancery court first resolved the OSP's motion to transfer independent of how it was inclined to resolve the merits. SR173. The chancery court denied the motion to transfer, but noted that it would not put the OSP "in jeopardy of being the subject of two conflicting court orders." SR372-73.

On the merits of the motions to dismiss, the court granted the OSP's motion and denied the City's. SR748-56. It did not conduct an *in camera* inspection of any of the records and no affidavits were furnished to establish any of the exemption claims. The court found that the grand jury secrecy provisions prohibited disclosure by the OSP as "matters occurring before the grand jury." SR752-53 As to the City, the court found that nothing in the grand jury provisions apply to subpoena recipients, and that court orders are not "state law" under FOIA Section 7(1)(a). SR753-56. The court also noted that allowing judges to create exemptions through individual court orders raises "possibilities for abuse" because "if one were to carry this argument to the extreme, all information regarding the affairs of government would be legally exempt from disclosure as long as the government could find a judge to sign an order prohibiting disclosure." SR755 (quoting *Carbondale Convention Ctr. Inc. v. City of Carbondale*, 245 Ill. App. 3d 474, 479 (1993)). The court stayed enforcement of its order while the parties and the court determined how best to address the criminal court order procedurally, both of which the

parties anticipated appealing. SR 756. Ultimately, the City filed a motion with the criminal court asking for relief from the order based on changed circumstances as a result of the chancery court's order. C1151.

The criminal court denied the City's motion, believing that FOIA "has no place at the table" because grand juries are not public bodies (even though BGA did not request records from the grand jury, 5 ILCS 140/3(a)), that the records are not "public records" under FOIA (even though they relate to public business and were in the possession of the OSP, 5 ILCS 140/2(c)), and that there is a permanent "blanket prohibition" on release of any grand jury matters. C1538, C1552, C1555, C1556. Following the criminal court's decision, BGA moved for judgment on the pleadings against the City before the chancery court. SR1502. The court granted the motion in a final order resolving all issues and stayed enforcement pending appeal. SR1769-70.

F. The Appellate Court's Decision

The Appellate Court decided three consolidated appeals: (1) the City's appeal of the criminal court's decision not to modify its protective order; (2) the City's appeal of the chancery court's decision; and (3) BGA's appeal of the chancery court's decision as to records of the OSP. *In re Appointment of Special Prosecutor*, 2017 IL App (1st) 161376, ¶¶ 28-29.

With regard to the City's appeal of the criminal court's decision, the Appellate Court noted the nearly unreviewable discretion a circuit court judge has in entering protective orders, which requires only that some reasonable person could adopt the circuit court's view. *Id.* at ¶ 32. It then discussed what it believed to be the historic generalized need for grand jury witness secrecy as support for the protective order. *Id.* at ¶ 39. The Appellate Court did not address the fact that the OSP and the criminal court judge had

already released the OSP's 162-page report naming all of the witnesses who appeared before the grand jury and many other details. *See id.*

With regard to the City's appeal of the chancery court's decision, the Appellate Court did not find that any FOIA exemption applied to the City's records. *Id.* at ¶ 46. Rather, the Appellate Court held that a public body does not "improperly" withhold records when a court order purports to prohibit their release if the public body "did not obtain the protective order at issue[.]" *Id.* at ¶¶ 46, 49. The Appellate Court also rejected BGA's concern, which had been articulated in the concurrence in the *Carbondale* decision and discussed by the chancery court, that allowing individual judges to prohibit disclosure under FOIA through protective orders would interfere with the public's right to information "as long as the government could find a judge to sign an order prohibiting disclosure." *Id.* at ¶ 52. In response to that argument, the Appellate Court found that the order at issue in this ***particular*** case, in its view, "was issued upon a court's due consideration of the need for confidentiality in particularized circumstances," but the Appellate Court did not address the broader issue or explain what circumstances, if any, of the sort raised in the *Carbondale* concurrence and by the chancery court would be sufficient to preclude the use of a protective order to make records exempt from disclosure. *Id.* at ¶¶ 32, 52.

With regard to BGA's appeal as to the OSP's records, the Appellate Court affirmed the chancery court in part and reversed in part. With regard to billing records, the Appellate Court rejected the wholesale withholding of the records and instead required an individualized determination on remand of whether particular records would "reveal the strategy and direction of the investigation." *Id.* at ¶ 67. For reasons that it did

not explain, however, the Appellate Court did not require a similarly individualized assessment with regard to records showing the identity of everyone interviewed by the OSP, statements of Daley family members or of Mara Georges, or communications between the OSP and those people or their lawyers. *Id.* at ¶ 64. Instead, the Appellate Court concluded that every such record would necessarily disclose "matters occurring before the grand jury," which it broadly construed to include anything that would disclose any details of the OSP's investigation. *Id.* at ¶¶ 58-62, 64-65.

Finally, the Appellate Court held that the "when a law so directs" exception to grand jury secrecy does not include the disclosure directive in FOIA for non-exempt records, but only "situations of particularized necessity, such as disclosure to a court clerk or to confront a witness in a criminal trial with his prior contrary testimony." *Id.* at ¶ 63. It described these situations as ones in which "release is necessary to protect the rights of an accused or 'avoid a possible injustice'," which tracks the separate statutory secrecy exception for avoiding "a possible injustice" in "connection with a judicial proceeding." 725 ILCS 5/112-6(c)(3); *see Douglas Oil Co. of Calif. v. Petrol Stops Nw.*, 441 U.S. 211, 222 (1979). Thus, the Appellate Court appears to have interpreted the "when a law so directs" exception to be concurrent with the separate exception for "when the court, preliminary to or in connection with a judicial proceeding, directs such in the interests of justice." 725 ILCS 5/112-6(c)(3).

VII. LEGAL STANDARDS

A. Our Freedom of Information Act and the Principles That Have Long Governed Its Interpretation

Both the General Assembly and this Court have long supported the critical role of transparency in a democracy. *See, e.g.*, 5 ILCS 140/1; *Stern v. Wheaton-Warrenville Cmty. Unit Sch. Dist. 200*, 233 Ill. 2d 396, 410-11 (2009). "Pursuant to the fundamental philosophy of the American constitutional form of government, it is declared to be the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees consistent with the terms of this Act." 5 ILCS 140/1. The General Assembly noted that "[s]uch access is necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest." *Id.*

Time and again, this Court has held that FOIA exists to "open governmental records to the light of public scrutiny," which governs the interpretation of the statute in favor of disclosure. *Nelson v. Kendall County*, 2014 IL 116303, ¶ 24; *Stern*, 233 Ill. 2d at 405; *S. Illinoisan v. Ill. Dep't of Public Health*, 218 Ill. 2d 390, 415 (2006); *Ill. Educ. Ass'n v. Ill. State Bd. of Educ.*, 204 Ill. 2d 456, 462-63 (2003); *Lieber v. Bd. of Tr. of S. Ill. Univ.*, 176 Ill. 2d 401, 407 (1997); *Bowie v. Evanston Consol. Cmty. Sch. Dist. No. 65*, 128 Ill. 2d 373, 378 (1989). This requires all FOIA exemptions to be "narrowly construed." *See id.*

This Court has also made clear that a public body seeking to withhold records must furnish "a ***detailed*** justification for its claim of exemption, addressing the requested

documents specifically and in a manner allowing for adequate adversary testing." *Ill. Educ. Ass'n*, 204 Ill. 2d at 468-69 (emphasis in original). Otherwise a court should conduct an *in camera* inspection of the records to determine whether they are exempt as alleged. *Id.*

B. The Legal Standards Applicable to Claims Against the City

1. "Improper Withholding" Is Not a Doctrine Under Illinois Law and Should Not Become One

As this Court has repeatedly held, there is a simple method for resolving a FOIA case. First, "when a public body receives a proper request for information, it must comply with that request unless one of the narrow statutory exemptions set forth in section 7 of the Act applies." *Ill. Educ. Ass'n*, 204 Ill. 2d at 463; *Am. Fed'n of State, County & Mun. Employees (AFSCME), AFL-CIO v. County of Cook*, 136 Ill. 2d 334, 341 (1990); *see also Nelson*, 2014 IL 116303, ¶ 26; *Stern*, 233 Ill. 2d at 406; *S. Illinoisan*, 218 Ill. 2d at 417; *Lieber*, 176 Ill. 2d at 407-08. Second, and the inverse of the first point, a public body may withhold a record whenever it fits within the language of an exemption, without regard to whether there is actually a proper reason to do so in the particular case. *Lieber*, 176 Ill. 2d at 408; *see also Stern*, 233 Ill. 2d at 407. And finally, courts do not create new FOIA exemptions, even when they perceive a good reason for it, but leave that job to the General Assembly and apply only the statutory exemptions. *Fagel v. Ill. Dep't of Transp.*, 2013 IL App (1st) 121841, ¶ 35; *Rockford Police Benevolent & Protective Ass'n, Unit No. 6 v. Morrissey*, 398 Ill. App. 3d 145, 152-53 (2010); *see also, e.g., Ill. Educ. Ass'n*, 204 Ill. 2d at 463 (records must be produced unless a statutory exemption applies). Together these principles have made for a simple analysis that has

been fairly easy for lower courts to administer for decades: apply only the narrowly construed exemptions in the statute and without regard to any secondary arguments.

The Appellate Court's decision discards these long-established, balanced, and easily administered principles. It replaces them with a system in which public bodies may withhold the public's records whenever a court determines it is "not improper" to do so. Here that involves a single judge's protective order (which is problematic enough), but there seems to be little principled basis to stop there in deciding what is "improper." And it cannot be that the ***government*** may withhold a non-exempt record where it is "not improper" but the ***public*** may not access an exempt record when it "is improper" to withhold it. Thus, the Appellate Court's approach requires a second analysis of "propriety" in every FOIA case, under standards that neither the Appellate Court's decision, nor the case law on which it relied, nor the term "improper," nor anything else provide. This Court should affirm its time-tested approach and not allow the government to withhold the public's records whenever a court believes it would not be "improper" to withhold them. *See Better Gov't Ass'n v. Blagojevich*, 386 Ill. App. 3d 808, 814-15 (2008) ("The federal courts that have held otherwise—that is, those courts that have decided that Congress' failure to act was the result of an oversight—have taken it upon themselves to correct this oversight by judicially amending Rule 6(e)(2). We disagree with this course of action and decline to follow it.").

In standing by our time-tested FOIA principles, this would not be the first time this Court declined to follow federal FOIA cases restricting transparency. In *AFSCME*, this Court faced the question of whether a public body could withhold a computer tape where it produced the same information in a different format. 136 Ill. 2d at 341. The

D.C. Circuit had allowed that practice unless the requester proved a need for the requested format. *Id.* at 345. This Court "decline[d] to interpret the Illinois Act as narrowly as the [federal] court interpreted the Federal Freedom of Information Act." *Id.* Noting that the Illinois and federal statutes were not identical and that federal courts had "essentially shifted the burden to the plaintiffs," and adopting an approach that put the public's right to information above government convenience and avoided a secondary "need" analysis, this Court held that an ***Illinois*** public body may not "provide a public record that does not conform to the request and then force the requester to explain why it will not suffice."[3] *Id.* at 345-47.

This Court's approach in *AFSCME* applies with equal force here. In addition to our enduring principles of protecting transparency and avoiding secondary analyses in Illinois FOIA cases, our statute differs materially from the federal FOIA statute. While both statutes include the "improper withholding" phrase, they are set in fundamentally different statutory contexts and the "not improper" approach would create significant

[3] For discussions of the shortcomings of the federal judicial approach to FOIA more generally, see David E. Pozen, Freedom of Information Beyond the Freedom of Information Act, 165 U. Pa. L. Rev. 1097, 1099 (2017) ("Notwithstanding FOIA's explicit requirement of *de novo* judicial review, the courts affirm agency denial decisions at extraordinary rates."); Paul R. Verkuil, An Outcomes Analysis of Scope of Review Standards, 44 Wm. & Mary L. Rev. 679, 719 (2002) (noting 90% rate of affirmance of FOIA denials by federal district courts); Margaret B. Kwoka, Deferring to Secrecy, 54 B.C. L. Rev. 185, 211 (2013) ("the way courts actually review agency decisions to withhold records under FOIA is not the *de novo* review Congress required" but a "set of practices in FOIA cases that collectively contribute to [a] super-deferential review"); Toby Mendel, The Fiftieth Anniversary of the Freedom of Information Act: How It Measures Up Against International Standards and Other Laws, 21 Comm. L. & Pol'y 465, 466 (2016) (ranking U.S. FOIA law in the "fifty-first position globally, alongside Australia, Belize, Honduras and Romania, just about the middle point of all countries with such laws").

problems under the text of the Illinois statute, in addition to conflicting with this Court's consistent approach to Illinois FOIA cases for decades.

Under federal FOIA, the provision that commands the production of agency records is facially absolute, other than for a few specific and immaterial exclusions. 5 U.S.C. § 552(a)(3)(A). Another provision, however, says that FOIA "does not apply to" a list of things that are commonly referred to as exempt. 5 U.S.C. § 552(b). Nothing in the statute says that the bases for withholding records are ***limited*** to those things to which FOIA "does not apply" under Section (b), so nothing in federal FOIA precludes non-statutory bases for withholding under the "not improper" approach.

Illinois FOIA is structured very differently. Unlike federal FOIA, our statute expressly provides the ***exclusive*** bases on which any records can be withheld, which must be understood as the ***only*** reasons a withholding would be "proper": "Each public body shall make available to any person for inspection or copying ***all*** public records, except as otherwise provided in Sections 7 and 8.5 of this Act." 5 ILCS 140/3(a) (emphasis added).[4] This Court has repeatedly relied on that phrase to hold that all records must be produced unless they are exempt, as discussed above. And unlike federal FOIA, the Illinois FOIA is backed, in part, by a state Constitutional right to all "reports and records of the obligation, receipt and use of public funds of the State, units of local government and school districts," which are deemed "public records available for inspection by the public according to law." Ill. Const. art. VII § (1)(c).

[4] The same statutory section also provides for the handling of requests deemed to be unduly burdensome in Section 3(g), which the provision refers to as an "exemption." 5 ILCS 140/3(g).

Further indication that "improper withholding" is not a substantive doctrine in Illinois, but merely means "not exempt," is found in the provision applicable to a public body's denial of the request. "When a request for public records is denied on the grounds that the records are exempt under Section 7 of this Act, the notice of denial shall specify ***the exemption*** claimed to authorize the denial and the specific reasons for the denial, including a detailed factual basis and a citation to supporting legal authority." 5 ILCS 140/9(b) (emphasis added). Relatedly, a public body must maintain a file of its denials "indexed according to the type of exemption asserted." *Id.* And in litigation, the court "shall" order, upon a plaintiff's motion, that the public body furnish an index describing the documents being withheld and a "statement of the exemption or exemptions claimed for each such deletion or withheld document." 5 ILCS 140/11(e). All of these provisions further reinforce what this Court has already held: all public records must be produced unless a specific statutory exemption applies to them.

Problems that would result from the "not improper" approach are evident in our FOIA statute too, and indicate the General Assembly did not intend the phrase to have substantive meaning beyond "not exempt." In addition to judicial review, a requester may seek review by the Public Access Counselor, who has the authority to issue a binding opinion that a losing party may challenge only on administrative review. 5 ILCS 140/9.5. Because the "improper withholding" language is found only in the provision for judicial review, there is no statutory basis to apply it to a proceeding before the PAC. This would create a dichotomy by which a protective order or other "not improper" basis for withholding a record could be used in court but not in an adjudication before the PAC. Nothing indicates that the General Assembly intended this illogical result. This

also further distinguishes Illinois FOIA from federal FOIA, which has no such adjudicatory office. *See* 5 U.S.C. § 552(h)(3) (creating office with only ability to mediate and issue advisory opinions).

The Appellate Court's approach would also frustrate the clear and unambiguous intent of the General Assembly with regard to a specific type of record. The General Assembly amended FOIA to make clear that "all settlement and severance agreements entered into by or on behalf of a public body are public records subject to inspection and copying by the public, provided that information exempt from disclosure under Section 7 of this Act may be redacted." P.A. 96-542 (codified as 5 ILCS 140/2.20). This was added in response to claims by public bodies that confidentiality provisions in their settlement agreements precluded disclosure under FOIA. *See* Public Access Op. 14-004, at 4-6 (May 9, 2014)[5] (discussing legislative history). Under the Appellate Court's "not improper" analysis, however, a public body and complicit counter-party could evade this directive by asking the court, as a condition to the parties settling the case, to enter an order prohibiting the public body from disclosing it.

Indeed, that was precisely what happened in *Carbondale Convention Center, Inc. v. City of Carbondale*. 245 Ill. App. 3d 474 (1993). The government settled a case with a private party, and after receiving a FOIA request for the agreement, successfully moved the circuit court in the underlying case for a dismissal order prohibiting the parties from "disclos[ing] to anyone the terms or conditions constituting the resolution of the dispute between the parties," which the government relied on to deny the request. *Id.* at 475-77.

[5] *Available at* http://foia.ilattorneygeneral.net/pdf/opinions/2014/14-004.pdf (last accessed Feb. 17, 2018).

While *Carbondale* involved a different legal issue, it is nonetheless instructive. At issue legally in *Carbondale* was whether a court order is "state law" under Section 7(1)(a); the government did not argue and the court did not address whether withholding the record was "improper." *Id.* at 477. The majority resolved the appeal without answering that question by considering dispositive the fact that the government (along with its counter-party) had requested the entry of the protective order. *Id*. As explained by the concurring judge, however, in answering the broader question:

> The city's argument leads to a variation of the Catch 22 situation: The city requests a gag order to prohibit a citizen from validly obtaining information. The trial judge protests and says that such an order is improper and illegal under the Act. The city attorney then tells the judge: "All you have to do to make the order legal is to sign the order and your improper and illegal order becomes 'State law' and legal." If one were to carry this argument to the extreme, all information regarding the affairs of government would be legally exempt from disclosure as long as the government could find a judge to sign an order prohibiting disclosure.

245 Ill. App. 3d at 479 (Lewis, J. concurring). Those concerns are equally present whether the issue arises under Section 7(1)(a) or the Appellate Court's "not improper" analysis here. They counsel against either path toward allowing individual judges to make records exempt by court order. *See id.* ("we do not deem the making of law by judicial decree to be a desirable practice" (quotation omitted)); *Allegis Realty Inv'rs v. Novak*, 223 Ill. 2d 318, 335 (2006) ("the legislature's role is to make the law and the judiciary's role is to interpret the law").

Finally, rejecting the "not improper" approach and affirming this Court's longstanding FOIA principles will not cause any practical problems. Much was made below about the possibility of contempt if a public body did not follow an order purportedly requiring it to withhold non-exempt public records. To the contrary, however, "there can be no contempt finding where compliance with an order would

require a party to violate the law." *In re Marriage of Kneitz*, 341 Ill. App. 3d 299, 304 (2003); *see Abbott v. Abbott*, 129 Ill. App. 2d 96, 100 (1970) ("It is improper to adjudge a party in contempt of court where compliance would require him to violate the law."). Notably, this argument was not even at issue in *GTE Sylvania, Inc. v. Consumers Union of the U.S., Inc.*, which the Appellate Court relied on here for the "not improper" doctrine. 445 U.S. 375 (1980).

Further, if this Court finds for BGA, one would expect that decision to be followed by the judges of this state, and so there would be no orders to "violate." But should such an unlikely situation nonetheless arise, "there are procedural devices aplenty designed to avoid the hazard of conflicting obligations." *Consumers Union of the U.S., Inc. v. Consumer Prod. Safety Comm'n*, 590 F.2d 1209 (D.C. Cir. 1978), *rev'd sub nom. GTE Sylvania*, 445 U.S. 375. In fact, it is the Appellate Court's approach that results in practical difficulties, as evidenced by the head-spinning issues and burdens on requesters that arose in *GTE Sylvania*, all of which can be avoided by simply holding that individual judges cannot make records exempt through their court orders. *Id.*; *see also Consumers Union of the U.S., Inc. v. Consumer Prod. Safety Comm'n*, 561 F.2d 349, 357 (D.C. Cir. 1977).

Nor is the judiciary left powerless to manage cases. FOIA contains more than fifty specific exemptions, plus dozens more derivative of other statutes. 5 ILCS 140/7; 5 ILCS 140/7.5. This includes "unwarranted invasion of personal privacy," "interfer[ence] with pending or actually and reasonably contemplated law enforcement proceedings," "a substantial likelihood that a person will be deprived of a fair trial," and "the identity of a confidential source," among others. 5 ILCS 140/7(1)(c), (d).

A federal court of appeals has also noted that courts inclined to grant protective orders that implicate potential freedom of information issues should issue "conditional orders" expressly stating "that the order of confidentiality will become inoperative if the information it orders confidential is later determined to be available under a freedom of information law" or "that the scope of the confidentiality order does not extend so as to prevent disclosure pursuant to any freedom of information law." *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 791 (3d Cir. 1994). This addresses the "strong presumption [that] exists against granting or maintaining an order of confidentiality whose scope would prevent disclosure of that information pursuant to the relevant freedom of information law" in light of "the enduring beliefs underlying freedom of information laws: that an informed public is desirable, that access to information prevents governmental abuse and helps secure freedom, and that, ultimately, government must answer to its citizens." *Id.* at 791-92. While a court's failure to include such language should not result in a court's order taking precedent over the public's statutory right to public records, this mechanism makes clear that any procedural complications can be easily addressed without compromising important public transparency rights.

Conversely, by adopting the Appellate Court's approach, this Court would be permitting every judge in this state to make any records exempt from disclosure in an act that the Appellate Court described as largely unreviewable, and then only through an appeal that will delay the release of information under a statute that requires its proceedings to be "expedited in every way." 5 ILCS 140/11(h). And the very doctrine that would allow for that judicial creation of exemptions through protective orders would also allow courts to create exemptions through the undefined "not improper" analysis

itself. That is not what the General Assembly intended and cannot be reconciled with this Court's long-standing precedent.

This Court should stand by its well-established principles for resolving FOIA disputes and reject the Appellate Court's secondary "proper or not improper" analysis.

2. Protective Orders May Not Be Procured By a Public Body and Used as a Secrecy Sword

This Court should not allow individual circuit court judges to create FOIA exemptions through protective orders, but should leave that job to the General Assembly, as this Court always has. But even if the Court were inclined to grant that power, it should not allow public bodies to benefit from protective orders they were involved in procuring.

This issue arose and was addressed in *Carbondale,* as discussed above. In *Carbondale,* both parties jointly and successfully requested that the trial court in their underlying litigation enter a dismissal order purporting to bar the release of the settlement agreement. 245 Ill. App. 3d at 475-76. During the ensuing FOIA litigation, those parties jointly fought the requester's effort to have the agreement released, arguing that the court order was "state law" under FOIA exemption 7(1)(a). *Id.* at 476-77. The court rejected that argument as "incompatible with the intent of the Act":

> [T]he "State law" defendant asserts as exempting disclosure of the agreement exists, in part, as a result of defendant's efforts to prevent disclosure of the agreement. Since such an action contradicts the purpose and intent of the Act under which the exemptions are intended as shields rather than swords, we hold section 7(1)(a) does not apply as a possible exemption in this case.

Id. at 477. Thus, when a public body is even "in part" responsible for procuring the very protective order on which it relies, it cannot be allowed to use that protective order as a "sword" under Section 7(1)(a). And the result is no different if judges' purported ability

to make records exempt by court order is instead decided under the "not improper" analysis adopted by the Appellate Court: it would be "improper" to allow a public body to use as a sword a protective order it had any hand in procuring.

This conclusion is supported not only by *Carbondale*, but the very purpose of FOIA. The General Assembly has mandated that "it is the public policy of the State of Illinois that access by all persons to public records promotes the transparency and accountability of public bodies at all levels of government. It is a ***fundamental obligation*** of government to operate openly and provide public records as expediently and efficiently as possible in compliance with this Act." 5 ILCS 140/1 (emphasis added). Indeed, "providing records in compliance with the requirements of this Act is a ***primary duty*** of public bodies to the people of this State, and this Act should be construed to this end[.]" *Id.* (emphasis added). Allowing public bodies to rely on orders they had any hand in procuring is antithetical to that "fundamental obligation" and "primary duty."

3. No Gag Order May Be Placed on Grand Jury Subpoena Recipients

Finally, there is the question of whether a court may even impose a gag order on the recipient of a grand jury subpoena in Illinois. As the criminal court noted, the purported basis for its order was "to implement the protection of grand jury secrecy." C1556. There is no such support in the grand jury secrecy provisions or otherwise.

The provisions start by limiting who "may attend the sessions of the Grand Jury" to the state's attorney, "his reporter," and other people authorized by the court or by law. 725 ILCS 5/112-6(a). Next they state that "[m]atters other than the deliberations and vote of any grand juror shall not be disclosed by the State's Attorney," except in particular circumstances like disclosure to other government personnel deemed necessary

for the performance of the state's attorney's duties, who in turn "shall not use the Grand Jury material for any purpose other than assisting the State's Attorney." 725 ILCS 5/112-6(b), (c). Finally, they state that "[a]ny grand juror or officer of the court" who improperly discloses "matters occurring before the Grand Jury" is subject to contempt. 725 ILCS 5/112-6(d). Thus, the grand jury secrecy provisions only impose secrecy on the state's attorney, government personnel assisting the state's attorney, grand jurors, and officers of the court. A recipient of a grand jury subpoena, like the City here, is subject to no such secrecy restrictions under the plain language of the statute.

This plain language should be sufficient, but further support is found in well-reasoned appellate case law requiring, under Illinois FOIA, the disclosure of federal grand jury subpoenas by a state public body who received them. As the criminal court here explained, this Court has "recognized that the federal rule was the model for the Illinois Grand Jury Act,"[6] making this case law instructive. C1549.

In *Better Government Association v. Blagojevich*, our appellate court held that "if a private citizen were served with a federal grand jury subpoena, federal law would not bar him from revealing the contents of the subpoena or his thoughts about it." 386 Ill. App. 3d at 814. The court explained that "[a]lthough most federal grand jury subpoena recipients usually prefer to remain silent about the matter, circumstances may prompt that person to choose to disclose its existence and content." *Id.* "Such circumstances may include the recipient's belief that disclosure of the subpoena's content would (1) be in his best interest to demonstrate his ongoing cooperation with the federal prosecutor

[6] As the Appellate Court noted, this does not actually appear to be the name of this statutory provision, which is why BGA now uses the term "grand jury secrecy provisions."

(particularly if the recipient held a political position) or (2) represent the opening salvo in the recipient's contention that he is the target of a political witch hunt and the subpoena is evidence of government corruption." *Id.* But "[r]egardless of the recipient's motive, under federal law, a private citizen has the discretion to reveal the subpoena, and if he chooses to do so, he will not suffer the wrath of the federal court's contempt powers or be subject to any federal charges." *Id.*

In reaching this conclusion, the appellate court noted that the few federal cases "that have expanded Rule 6(e)(2)'s disclosure prohibitions" were not persuasive:

> There is nothing new or novel about private citizens or public officials receiving federal grand jury subpoenas. Federal grand juries have been issuing subpoenas for over 200 years. Yet, during all this time, Congress has not seen fit to specifically restrict the behavior of subpoena recipients. . . . The federal courts that have held otherwise—that is, those courts that have decided that Congress' failure to act was the result of an oversight—have taken it upon themselves to correct this oversight by judicially amending Rule 6(e)(2). We disagree with this course of action and decline to follow it.

Id. at 814-15. Consistent with this Court's precedent, the appellate court also "reject[ed] the Governor's argument that, as a matter of policy, revealing any aspect of the federal grand jury process is not desirable. This court's role is not policy formulation. Instead, our role is to apply—and abide by—the legislation that the policy-making bodies, Congress and the Illinois General Assembly, have enacted." *Id.* at 815. These principles remain equally true as to state grand jury subpoenas.

Lastly, while the criminal court relied solely on grand jury secrecy, case law on gag orders is also applicable. As this Court has explained, gag orders are subject to a "heavy presumption" against their validity. *In re A Minor*, 127 Ill. 2d 247, 265 (1989). Even in the context of ***pending*** judicial proceedings, a gag order will be upheld only if it

is "(1) necessary to obviate a 'serious and imminent' threat of impending harm, which (2) cannot adequately be addressed by other, less speech-restrictive means." *Id.* at 265-66.

C. The Legal Standards Applicable to Claims Against the OSP

1. The Phrase "Matters Occurring Before the Grand Jury" Must Be Narrowly Construed and Does Not Include Records That Do Not Disclose What Took Place In the Grand Jury Room or Evidence the Prosecutor Elected *Not* to Present to the Grand Jury

The OSP relies not on the criminal court's order, but on the grand jury secrecy provisions, as incorporated by FOIA Section 7(1)(a) for disclosure "specifically prohibited" by state law. The relevant grand jury phrase is "matters occurring before the grand jury." It is beyond dispute that this Court's decisions require all FOIA exemptions to be narrowly construed, and this Court has not only applied that rule when interpreting the provisions of FOIA itself, but also exemptions that derive from the secrecy provisions in another statute, as is the case here.

In *Southern Illinoisan*, this Court interpreted the phrase in the Cancer Registry Act "tends to lead to the identity[] of any person whose condition or treatment is submitted to the Illinois Health and Hazardous Substances Registry." 218 Ill. 2d at 418. This Court noted that the General Assembly "intended to limit public access to information in order to protect the privacy of cancer patients included in the Registry," looked to a dictionary definition of the word "tends" as indicating the need for a flexible standard, and nonetheless concluded that the phrase must be limited to the release of records that would tend to reveal such identities to the general public, as opposed to "experts conducting statistical experiments." *Id.* at 418-24. As this Court explained:

> We also note, as stated above, that under the FOIA, public records are presumed to be open and accessible, with exceptions to disclosure to be read narrowly. Accordingly, in light of these public policies, we conclude

> that information "tends to lead to the identity" of Registry patients only if that information can be used by the general public to make those identifications. . . .
>
> As the FOIA is to be interpreted liberally, and the exemptions to disclosure are to be interpreted narrowly, we conclude that the lower court properly instructed the Department to disclose to plaintiff the information contained in its FOIA request.

Id. at 423-24, 427. Similarly, in *Bowie*, this Court narrowly construed the phrase "school student record" to exclude data where names had been redacted and any identifying information had been masked. 128 Ill. 2d at 379; *see also State Journal-Register v. Univ. of Ill. Springfield*, 2013 IL App (4th) 120881, ¶ 72 (rejecting expansive application of "education records" in Educational Privacy Act in context of FOIA Section 7(1)(a) exemption claim).

In addition, while not involving another statute, this Court in *Illinois Education Association* held that "in light of the public policy favoring open and accessible government documents, the attorney-client exemption set forth in section 7(1)(n) is to be construed and applied narrowly. This is so ***notwithstanding*** the countervailing policy favoring confidentiality between attorneys and clients." 204 Ill. 2d at 470 (emphasis added). And this Court in *Lieber* narrowly construed "student," relying on a dictionary definition and common sense, despite countervailing privacy interests of admitted prospective students who had not yet actually become "students." 176 Ill. 2d at 410-12.

These decisions establish than even when there are countervailing concerns, even when exemptions derive from other statutes, and even when they involve third-party interests, any secrecy provisions must be narrowly construed in light of FOIA's policy of transparency. That is a result that makes much sense because, as this Court has repeatedly noted, FOIA "is necessary to enable the people to fulfill their duties of

discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest." 5 ILCS 140/1. This Court has always given those words real meaning and not discarded them as mere aspirational fluff.

Applying these principles to the phrase "matters occurring before the grand jury" makes clear that the Appellate Court erred in holding that records of a prosecutor that were not presented to the grand jury and that would not disclose what took place in the grand jury room are "specifically prohibited" from disclosure.

BGA begins with the statutory language: "matters occurring before the grand jury." The General Assembly did not make secret "all information about a state's attorney's investigation where a grand jury has been empaneled," but only matters "occurring before" the grand jury. The most grammatically applicable definition of "occur," and the narrowest, is "happen, take place." *Occur*, Dictionary.com, *available at* http://www.dictionary.com/browse/occur (last visited Feb. 18, 2018). For "before," that definition is "in the presence or sight of." *Before*, Dictionary.com, *available at* http://www.dictionary.com/browse/before?s=t (last visited Feb. 18, 2018). These make clear that "matters occurring before the Grand Jury" includes only information disclosing what took place in the presence of the grand jury, such as evidence presented to the grand jury and transcripts of its proceedings.

This limited scope is further supported by grand jury case law. In *Board of Education v. Verisario*, the appellate court described the provision as shielding "only the essence of what takes place in the grand jury room." 143 Ill. App. 3d 1000, 1007 (1986). *Verisario* even explained that "the mere fact that a particular document is reviewed by a

grand jury does not convert it into a matter occurring before the grand jury"; instead, secrecy does not apply to such documents when they are not sought "to learn what ***took place*** before the grand jury." *Id.* at 1007-08 (emphasis added).

This is further supported by *Taliani v. Herrmann*. 2011 IL App (3d) 090138. In *Taliani*, the only record at issue was the quintessential example of "what took place before the grand jury"—a transcript of grand jury proceedings. *Id.* at ¶¶ 12-13. Thus, the Criminal Code, not FOIA, was the proper statute for the plaintiff to obtain the transcript related to his indictment. *Id.* at ¶ 14. While the case did not decide the outer bounds of "matters occurring before the grand jury," its facts only support, if anything, BGA's narrow interpretation of the phrase.

The Appellate Court also relied erroneously on a decision of this Court that predates the enactment of FOIA by more than a decade—*People ex rel. Sears v. Romiti*, 50 Ill. 2d 51 (1971)—to claim that this Court has "also emphasized the need for secrecy in grand jury proceedings." *In re Appointment of Special Prosecutor*, 2017 IL App (1st) 161376, ¶ 57. *Romiti* involved an effort to have "a hearing to receive the testimony of grand jurors concerning charges that relate to the demeanor of a prosecutor while examining witnesses before the grand jury," which plainly implicated what occurred in the grand jury room. 50 Ill. 2d at 55. Thus, in reaching its decision, this Court stated that "the secrets ***of the grand jury room*** shall not be revealed." *Id.* at 56 (emphasis added, *quoting Gitchell v. People*, 146 Ill. 175, 183 (1893)). And no FOIA statute even existed at the time, so the case does not establish that FOIA's pro-disclosure principles, while indisputably applicable to ***other*** situations involving a countervailing interest in secrecy, do not apply to grand jury secrecy.

Still further support is found in the actual roles of the prosecutor and the grand jury. Cases make clear that the essential characteristic of a grand jury is its independence from the prosecution. *See, e.g., United States v. Dionisio*, 410 U.S. 1, 16 (1973) (describing grand jury as "an investigative body acting independently of either prosecuting attorney or judge" (citation and quotation marks omitted)); *People v. DiVincenzo*, 183 Ill. 2d 239, 259 (1998) ("The grand jury exercised its own independent will and was not overborne by the prosecution."), *abrogated on other grounds*, *People v. McDonald*, 2016 IL 118882; C1546 ("In fact the whole theory of [the grand jury's] function is that it belongs to no branch of institutional Government, serving as a kind of buffer or referee between the Government and the People." (quotation and citation omitted)). Thus, the prosecution may acquire evidence independently of the grand jury and has no obligation to present all of it to the grand jury. *People v. Creque*, 72 Ill. 2d 515, 525 (1978) ("The prosecutor is under no duty to present all the incriminating evidence he has, nor to inform the grand jurors of the existence of additional or more direct evidence."); *People v. Beu*, 268 Ill. App. 3d 93, 97-98 (1994) ("However, the prosecutor has no duty to present exculpatory evidence to the grand jury."); *see also* C1540 ("Many of these documents were obtained by Grand Jury Subpoena, while others were gathered through search warrants issued by this Court.").

Finally, by conflating prosecutors with the grand jury, the Appellate Court's interpretation risks gutting the public's right to obtain ***any*** prosecutorial records, even in a closed investigation, whenever a grand jury was empaneled in the prosecutor's own discretion. As this Court recently held in *Nelson*, "because the office of State's Attorney is, and has long been recognized to be, an executive body of the State, we believe that the

legislature intended for such offices to fall within the FOIA's definition of a 'public body.'" 2015 IL 116303, ¶¶ 27, 28, 33 (citation omitted). This Court should not allow any room for state's attorneys to argue now that all of their records related to any of their cases are forever outside the scope of FOIA merely because they decided to empanel a grand jury. That result could be disastrous. *See* Thomas P. Sullivan & Maurice Possley, The Chronic Failure to Discipline Prosecutors for Misconduct: Proposals for Reform, 105 J. Crim. L. & Criminology 881, 889 (2015) ("Illinois has a particularly long and sorry record when it comes to prosecutorial misconduct."); 5 ILCS 140/1 ("Such access is necessary to enable the people to fulfill their duties of . . . monitoring government to ensure that it is being conducted in the public interest.").

To be clear, BGA does not, and need not, contend that there was anything wrong with the OSP's investigation or charging decisions. But FOIA's very purpose is "to permit the public to decide for ***itself*** whether government action is proper." *Cooper v. Dep't of the Lottery*, 266 Ill. App. 3d 1007, 1012 (1994) (quoting *Washington Post Co. v. U.S. Dep't of Health & Human Serv.*, 690 F.2d 252, 264 (D.C. Cir 1982) (emphasis in original)). That purpose will only be served by narrowly construing the phrase "matters occurring before the grand jury" to ensure that it permits scrutiny into the independent actions of a prosecutor, subject to any of the particularized exemptions in the FOIA statute.

2. FOIA Is "A Law" That "So Directs" Disclosure of Non-Exempt Records

Even for matters that actually did occur before the grand jury, the plain text of the grand jury secrecy provision states that the prohibition on release of such information is not absolute. Rather, among other bases for disclosure, it permits disclosure "when a law so directs." 725 ILCS 5/112-6(c)(3). According to the Appellate Court, this only "addresses situations of particularized necessity, such as disclosure to a court clerk or to confront a witness in a criminal trial with his prior contrary testimony." *In re Appointment of Special Prosecutor*, 2017 IL App (1st) 161376, ¶ 63. Yet none of those limitations actually appear in the phrase "when a law so directs" or otherwise. *See* 725 ILCS 5/112-6. Therefore, the Appellate Court's interpretation "depart[s] from the language of the statute by reading into it exceptions, limitations, or conditions that conflict with the intent of the legislature," which intent "can be determined from the plain language of the statute" as the "best evidence of legislative intent." *See, e.g., People v. McClure*, 218 Ill. 2d 375, 382 (2006); *see also, e.g., Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130, ¶ 25 ("Words should be given their plain and obvious meaning unless the legislative act changes that meaning."). Contrary to the Appellate Court's approach, the only questions are whether FOIA is "a law" and whether it "directs" the disclosure of non-exempt records.

As to the first question, there is no dispute that FOIA is a law.

As to the second question, the FOIA statute and case law make clear that "[e]ach public body ***shall*** make available to any person for inspection or copying all public records, except as otherwise provided in Sections 7 and 8.5 of this Act." 5 ILCS 140/3(a) (emphasis added). Thus, FOIA "directs" that all public records be disclosed unless they

are exempt. As a result, where records in the possession of a prosecutor are not covered by a statutory FOIA exemption, the secrecy exception for when "a law so directs" applies and release is not specifically prohibited under the grand jury provisions.

The Appellate Court, at the urging of the OSP, believed that this interpretation would render the grand jury secrecy provisions "a dead letter." *In re Appointment of Special Prosecutor,* 2017 IL App (1st) 161376, ¶ 63. But in doing so, the Appellate Court ignored BGA's explanation of how the two statutes fit together harmoniously, which BGA provides again here.

While public bodies are ***permitted*** to withhold records if a FOIA exemption applies, they are not ***required*** to do so. Rather, public bodies are ordinarily free to release exempt documents to the public. 5 ILCS 140/7(1) ("public body ***may elect*** to redact the information that is exempt" (emphasis added)); *Lieber,* 176 Ill. 2d at 413 (voluntary release of exempt material can result in waiver of exemption); *GTE Sylvania,* 445 U.S. at 378 n.2 ("The theory . . . that the exemptions to [FOIA] were mandatory bars to disclosure . . . [has been] squarely rejected[.]"); Illinois Attorney General, Illinois FOIA Frequently Asked Questions By Public Bodies, at 5 (providing list, inapplicable to this case, of "the only information that the Freedom of Information Act requires a public body to redact")[7]. This means that a state's attorney (or a law enforcement agent assisting the state's attorney) is ordinarily free under FOIA to release to the public the names of confidential informants, information that would interfere with a pending investigation, information that would deprive a defendant of a fair trial, or other exempt material.

[7] *Available at* http://foia.ilattorneygeneral.net/pdf/FAQ_FOIA_Government.pdf (last accessed Feb. 19, 2018).

When those records are grand jury materials, however, the grand jury secrecy provisions remove that discretion by ***requiring*** that a state's attorney or assisting law enforcement personnel keep that exempt information confidential. As a result, when a record is covered by a specific FOIA exemption (interference with a pending investigation, etc.), FOIA does not "direct" that the record be released and the "when a law so directs" clause does not apply. In that case, the prohibition on release of matters occurring before the grand jury would still apply, and the exemptions that protect the very kinds of things that animate any legitimate need for grand jury secrecy would become mandatory instead of discretionary.

If instead the records are not covered by any of the litany of specific exemptions, Section 3(a) of FOIA "directs" that they be disclosed and the grand jury secrecy provisions do not "specifically prohibit" their release. As a result, the Section 7(1)(a) exemption would not apply because the grand jury secrecy provisions do not specifically prohibit release, but ***allow*** release because of the "when a law so directs" clause. 5 ILCS 140/7(1)(a).

As this demonstrates, the two statutes can be interpreted harmoniously by applying the ordinary meaning of the terms "a law" and "so directs," without judicially importing language like "addresses situations of particularized necessity" into the grand jury statute.[8] Indeed, the Appellate Court's narrow interpretation of "when a law so directs" would render ***that*** provision a dead letter because the only instances of

[8] The Appellate Court did not define "particularized necessity" or provide examples of which laws it had in mind, but the FOIA statute makes clear that there ***is*** a "particularized necessity" for the release of public records. 5 ILCS 140/1 ("Such access is necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest.").

"particularized necessity" that the Appellate Court described would seem to be already covered by the ***other*** secrecy exception for "when the court, preliminary to or in connection with a judicial proceeding, directs such in the interests of justice." 725 ILCS 5/112-6(a), (c)(3). And while BGA strongly believes that its position furthers good government and represents optimal policy, even if the Appellate Court disagreed, "[w]here the words employed in a legislative enactment are free from ambiguity or doubt, they must be given effect by the courts even though the consequences may [be perceived to] be harsh, unjust, absurd or unwise. Such consequences can be avoided only by a change of the law, not by judicial construction." *Cty. of Knox ex rel. Masterson v. Highlands, LLC,* 188 Ill. 2d 546, 557 (1999).

VIII. ARGUMENT

Before turning to the merits of the arguments at issue, a note on how everything fits together:

The City and the OSP each rely on different exemption claims. The City relies on the criminal court's protective order; it does not rely on the grand jury secrecy provisions. Conversely, the OSP relies solely on the grand jury secrecy provisions and does not rely on the criminal court's order.

The City's claim should be rejected because: (1) courts cannot authorize the withholding of records whenever they determine it is "not improper" to do so and cannot use protective orders to make records exempt that otherwise must be produced; (2) even if this Court decided to allow that practice, the City was instrumental in procuring the protective order on which it relies; and (3) the secrecy order is legally flawed. Any one of these bases is sufficient to reverse the Appellate Court as to the City.

The OSP's claim should be rejected because: (1) the phrase "matters occurring before the grand jury" is limited to disclosure that reveals what took place "in the grand jury room"; and (2) FOIA is another law that "so directs" disclosure of non-exempt records, which supersedes the secrecy requirement of the grand jury secrecy provision. Either of these bases is sufficient to reverse the Appellate Court as to the OSP.

Finally, all of the claims should be rejected for the additional reason that release of the records ***would*** be "improper," should this Court give that phrase substantive application. There is a significant public interest in disclosure of these records and no justification for withholding them in light of the prior voluntary release of the 162-page report. This provides another independently sufficient basis to reverse the Appellate Court as to both the City and the OSP.

A. Claims Against the City

1. The Secrecy Order Does Not Trump the Public's Statutory Right to the Requested Records

As discussed above in Section VII-B-1, improper withholding is not a substantive doctrine under Illinois FOIA and individual judges cannot use secrecy orders to require public bodies to withhold records that the public has a statutory right to obtain.

Even if the Court finds that "not improper" has substantive meaning, however, it applies only to one form of relief that BGA has sought. The full clause states: "The circuit court shall have the jurisdiction to enjoin the public body from withholding public records ***and*** to order the production of any public records improperly withheld from the person seeking access." 5 ILCS 11(d) (emphasis added). Under the last antecedent doctrine, "improperly withheld from the person seeking access" modifies "to order the production of any public records," and not the separate provision "to enjoin the public

body from withholding public records." Therefore, the Appellate Court's approach, if accepted, could only apply to ordering the production of records, as opposed to enjoining their withholding. BGA sought both forms of relief in its complaint here, so even if the Court elects to apply the "improper withholding" standard, BGA should be permitted to seek an order enjoining the withholding of the requested records regardless of the "not improper" analysis. SR14. Alternatively, this odd result—the scope of review depending on whether the court is asked to order production instead of enjoin withholding or both—serves to demonstrate further that the General Assembly did not mean anything substantive by the phrase "improperly withheld" beyond "not exempt."

2. The City Was Instrumental In Procuring the Order Purporting to Prohibit the City From Releasing the Records and Therefore Cannot Rely On It

Even if this Court holds that individual judges can use protective orders to make records exempt and to order public bodies to violate statutory law, it should not allow public bodies to rely on protective orders that they had any role in procuring, as explained in Section VII-B-2. Applying that rule to the facts of this case establishes that the City cannot rely on the protective order.

To begin, it is important to understand the order actually at issue. The original protective order stated that "[a]ny individuals or entities who receive Grand Jury materials from the Office of the Special Prosecutor in connection with this investigation are precluded from further disseminating that material or information contained therein." C294. That order neither specifically references subpoena recipients (indeed, it refers to receiving materials from the OSP, not the grand jury) nor specifically purports to prohibit disclosure otherwise required under FOIA. As the City knew first-hand, under prevailing First District case law, a protective order that did not "specifically prohibit the

dissemination of documents pursuant to a FOIA request" could not act as an exemption under Section 7(1)(a). *Watkins v. McCarthy*, 2012 IL App (1st) 100632, ¶ 43.

During the PAC review of the Sun-Times' FOIA request, the City determined that it was "unable to sustain its burden before the PAC without violating the very terms of the seal and protective order." C641. Rather than simply live with that consequence and be directed by the PAC to produce the documents, or better yet, ask the criminal court to vacate the order as purporting to require the City to violate the law, so that the City could fulfill its "primary obligation" of complying with FOIA, 5 ILCS 140/1, the City chose sides and took the affirmative step of asking the criminal court to unseal the order so the City could rely on it to justify withholding the records. *Id.*

The City's lack of neutrality did not end there. After the PAC indicated that it was inclined to rule against the City, at least in part, based on the PAC's interpretation of the order, the PAC gave the City the ***option*** of either producing certain of the records or "return[ing] to the court to seek clarification of the limits of the protective order." C653. In the criminal court's own words, the City "declined the PAC's invitation to disclose the subject materials," C1541-42, and instead filed a motion not merely seeking clarification one way or the other, but affirmatively asking the criminal court to enter an order prohibiting the City from releasing the records, C654-655. Again in the words of the criminal court, the City "reiterate[d] its resistance to making the disclosure" sought by the Sun-Times, and characterized the motion as part of the City's "efforts to withhold" the records. C726; C1545. In the motion, the City strongly advocated for a "clarifying" order against disclosure, "disagree[d] with the PAC's assertion," called the PAC decision

"illogical" and "neglect[ing] a basic rule of statutory construction," and requested "that this court conclusively state" that the records could not be produced. C654-55.

At no time did the City object to the order or argue that it had a statutory obligation to produce the records under FOIA. It was only after BGA succeeded in chancery court—over the City's objections—that the City finally asked for any relief from the order.

It is true that the City did not ask for the entry of the original protective order, but it is also true that (1) the existence of that order was not enough for the City to prevail before the PAC absent further action by the City, and (2) the City moved for a more definitive order barring the release of records after the PAC found the original order insufficient. Further still, the original order was likely inadequate under *Watkins* given the lack of specific reference to production under FOIA, which was likely cured by the second order specifically responding to a FOIA request and entered on the City's motion.

The City has clearly used the secrecy order as a sword and not merely a shield, and was at least "in part" responsible for procuring the order on which it was ultimately able to rely. *Carbondale*, 245 Ill. App. 3d at 477. Therefore, the City cannot rely on that order to block its disclosure obligations under FOIA. *Id.*

3. The Order Itself is Fatally Flawed

Even if "improper withholding" is determined to be a substantive doctrine, and even if this Court concludes either that the City was in no way responsible for procuring the "clarified" order or that its responsibility is not relevant, the order itself is still fatally flawed. There simply is no legal basis in the grand jury secrecy provisions or otherwise to impose secrecy on the recipient of a grand jury subpoena, as discussed in Section VII-B-3.

Nor is there any evidence in the record overcoming the "heavy presumption" against gag orders. Rather, in refusing to vacate the order in response to the City's belated request, the criminal court judge relied solely on "the possible effects upon the functioning of future grand juries." C1548. That is inadequate under this Court's precedent, which requires a "serious and imminent threat of impending harm." *In re A Minor*, 127 Ill. 2d at 265. But it also ignores that the criminal court already authorized the release of the OSP's 162-page report full of myriad details, including the names of everyone who appeared before the grand jury. Not only does that release legally conflict with the criminal court's decision not to vacate its gag order—thus allowing the OSP and the criminal court to pick and choose what details would be made public—but it renders the "possible effects," of which the criminal court was so concerned, largely non-existent: those effects would have already happened based on the release of the report, if at all.

Because the specific order at issue lacks a legal justification, it cannot block the public's statutory right to the requested records.

B. Claims Against the OSP

1. There is No Support for OSP's Claims That the Requested Records Reveal "Matters Occurring Before the Grand Jury"

As discussed in Section VII-C-1, "matters occurring before the grand jury" is limited to records showing what transpired "in the grand jury room." There is no evidentiary record showing that the specific records at issue disclose those details, as opposed to the independent actions of the OSP. In fact, the record is clear that documents were obtained other than through grand jury subpoenas and witnesses were interviewed who were never presented to the grand jury. C1540 ("Many of these documents were obtained by Grand Jury Subpoena, while others were gathered through search warrants

issued by this Court."); C317 (only 24 of 133 witnesses appeared before the grand jury and only "relevant" witness interviews were shared with the grand jury).

Nor would it appear likely, as a matter of common sense, that every communication (or really any) between the OSP and attorneys for Daley family witnesses, SR16, for example, would have been shared with the grand jury or discussed in the grand jury room. And even under the Appellate Court's unduly broad interpretation of "matters occurring before the grand jury," it seems unlikely these sorts of records would rise to the level of revealing the "strategy or direction" of anything. *In re Appointment of Special Prosecutor*, 2017 IL App (1st) 161376, ¶ 65. There certainly was no ***evidentiary*** basis for the Appellate Court to conclude "that disclosure of these materials would reveal the identity of witnesses, as well as their testimony and the 'strategy or direction of the investigation'," because the records were never furnished for *in camera* inspection, described in affidavits, or even listed on an index under FOIA Section 11(e) or discussed specifically.[9] *Id.*; *Ill. Educ. Ass'n*, 204 Ill. 2d at 468-69; 5 ILCS 140/11(e).

2. "A Law So Directs" That the Records Be Produced

As discussed in Section VII-C-2, the grand jury secrecy provisions do not apply secrecy to records when another law so directs. Because FOIA directs that all non-exempt records be produced, and the OSP has not proven or even cited any other exemptions over any particular records, the Appellate Court should be reversed.

[9] BGA moved for an index, which the statute says the court "shall" order upon the plaintiff's motion, but the chancery court declined to grant one. C375; C409.

C. It Would Be "Improper" To Withhold Any of the Records Given the Public Interest in Disclosure and Prior Disclosure of the Report

Finally, if this Court elects to adopt the Appellate Court's "not improper" analysis, it must still answer the question of whether it was "proper" or "improper" for the City and the OSP to have withheld the requested records. In *GTE Sylvania*, the Court did not articulate any standard for answering what is "proper" or "improper," so BGA will follow suit and provide an open-ended argument about what is "improper" about withholding these records—the type of argument that this secondary level of analysis will necessitate in all FOIA cases if this Court adopts the Appellate Court's approach.

First, there is a significant public interest in disclosure of these records specifically, and criminal justice records generally. We all know that this state has seen too much corruption and too many wrongful convictions. We all know that powerful people like R.J. Vanecko often get special treatment at the expense of the powerless. In this case, someone with connections nearly escaped justice for killing someone who had none. In other cases, poor and powerless people have been framed by police or tortured into confessions with the complicity of our prosecutors. It is transparency that gives us some hope to uncover those injustices and reform what is broken. To interfere with that would be "improper," to say the least. *See also* C286 (OSP's task was not only to determine whether Vanecko should be charged, but also "maintain the public's confidence in the impartiality and integrity of our criminal justice system").

Second, the OSP and the criminal court already released the OSP's report of the investigation, which sets forth what the OSP has elected to disclose. To release the report only to hide behind a protective order and the grand jury secrecy provisions when asked to disclose what else happened in the investigation, using arguments that apply with equal

force to the report, is, to put it mildly, hypocritical. *Cf. State of North Dakota ex rel. Olson v. Andrus,* 581 F.2d 177, 182 (8th Cir. 1978) (selective disclosure "is offensive to the purposes underlying the FOIA and intolerable as a matter of policy"). It fuels the cynicism and distrust of government that has reached a fever pitch in Illinois and across the country. It tells the taxpaying public that its most powerful government institutions can violate or follow supposed legal prohibitions on identical activities inconsistently and however it suits them. While the OSP may claim otherwise, the truth is that BGA has no particular gripe with the OSP's charging decisions based on the report. But this continued secrecy causes one to wonder whether, intentionally or not, the OSP showed the Daley family, police, and prosecutors a deference the rest of us will never enjoy, then released a carefully crafted report justifying its investigation so we can all move along to something else.

Maybe those things are not true. Maybe there is no need for cynicism. Maybe the OSP deserves nothing but our gratitude. BGA sincerely hopes so. But we all know that, for better or for worse, in the absence of information, people suspect the worst and wonder, "What are they hiding?" Is that really what is in the best interests of this State—or "proper"—at this point in our history, with all of the challenges we face? Or should we truly live up to what our transparency laws ask of us—to fulfill our "duties of discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest"?

BGA submits that with all this in mind, it was "improper" for the City and the OSP to withhold these records.

IX. CONCLUSION

For these reasons, the Appellate Court should be reversed. Because the City appealed from the Circuit Court's order granting judgment on the pleadings to BGA, the case should be remanded solely to resolve the ancillary issue of attorney fees and costs. With regard to the OSP, the appeal was taken from the Circuit Court's order granting the OSP's motion to dismiss, and so the case should be remanded for further proceedings consistent with this decision.

RESPECTFULLY SUBMITTED,

/s/ Matthew V. Topic

_____

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CERTIFICATION OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 47 pages.

/s/ Matthew V. Topic

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IN THE SUPREME COURT OF ILLNOIS

BETTER GOVERNMENT ASSOCIATION, Plaintiff-Appellant, v. OFFICE OF THE SPECIAL PROSECUTOR, et al.; Defendant-Appellee.	)	Appeal from the Appellate Court, First District, No. 16-1376, 16-1892, 16-2071 There on appeal from the Circuit Court of Cook County, Chancery Division, Illinois No. 2015 CH 04183 Hon. Mary Mikva

SEPARATE APPENDIX

TO OPENING BRIEF FOR
PLAINTIFF-APPELLANT
BETTER GOVERNMENT ASSOCIATION

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Appellate Court

***In re Appointment of Special Prosecutor*, 2017 IL App (1st) 161376**

Appellate Court Caption	*In re* APPOINTMENT OF SPECIAL PROSECUTOR (The City of Chicago, Movant-Appellant, v. The Office of the Special Prosecutor and Dan K. Webb, Respondents-Appellees).–BETTER GOVERNMENT ASSOCIATION, Plaintiff-Appellant and Appellee, v. THE CITY OF CHICAGO LAW DEPARTMENT, THE CITY OF CHICAGO MAYOR'S OFFICE, THE CHICAGO POLICE DEPARTMENT, and THE OFFICE OF THE SPECIAL PROSECUTOR, Defendants-Appellants and Appellees.
District & No.	First District, Sixth Division Docket Nos. 1-16-1376, 1-16-1892, 1-16-2071 cons.
Filed	October 20, 2017
Decision Under Review	Appeal from the Circuit Court of Cook County, Nos. 2011-Misc-46, 15-CH-4183; the Hon. Michael P. Toomin and the Hon. Mary Lane Mikva, Judges, presiding.
Judgment	No. 1-16-1376, Affirmed. No. 1-16-1892, Affirmed in part, reversed in part, and remanded. No. 1-16-2071, Reversed; motion granted.
Counsel on Appeal	Loevy & Loevy, of Chicago (Matthew Topic and Joshua H. Burday, of counsel), for appellant Better Government Association.

Stephen R. Patton, Corporation Counsel, of Chicago (Benna Ruth Solomon, Myrian Zreczny Kasper, and Irina Y. Dmitrieva, Assistant Corporation Counsel, of counsel), for other appellants.

Winston & Strawn , LLP, of Chicago (Daniel D. Rubinstein, Sean G. Wieber, and Patrick R. O'Meara, of counsel), for appellee.

Panel

JUSTICE DELORT delivered the judgment of the court, with opinion. Presiding Justice Hoffman and Justice Cunningham concurred in the judgment and opinion.

OPINION

¶ 1 The consolidated cases in this appeal present questions regarding the competing interests of public disclosure and confidentiality in records generated because of a grand jury investigation. Historically, the cases had their genesis in 2004, when Richard J. Vanecko assaulted David Koschman in the Rush Street neighborhood of Chicago. Although the chronology of the two cases overlaps, we will set out the facts of each case separately.

¶ 2 BACKGROUND

¶ 3 *In re Appointment of a Special Prosecutor* (No. 1-16-1376)

¶ 4 Although Koschman died from his injuries, the incident did not result in the filing of charges against Vanecko or anyone else. Dissatisfied with this outcome, members of the Koschman family filed a petition for appointment of a special prosecutor in the criminal division of the circuit court of Cook County (Case No. 2011 Misc. 46). The petition alleged that a special prosecutor should be appointed because Vanecko was related to Chicago Mayor Richard M. Daley of Chicago and that "officials in the Police Department and the State's Attorney's Office may have been led by favoritism or other improper motives to obstruct the investigation so that [Vanecko] did not face criminal charges." The petition was assigned to Judge Michael P. Toomin.[1]

¶ 5 On April 6, 2012, Judge Toomin granted the petition and appointed Dan K. Webb as a special State's Attorney, directing him to determine (1) whether criminal charges should be brought against anyone in connection with Koschman's death and (2) whether Chicago police or Cook County State's Attorney employees "acted intentionally to suppress and conceal evidence, furnish false evidence, and generally impede" the Koschman investigation. Webb empaneled a special grand jury that investigated the incident, obtained information from over 140 witnesses, and reviewed over 22,000 documents totalling more than 300,000 pages.

[1]Because we must address three different appeals from two different judges who interacted with each other during the pendency of their respective cases, the need for clarity requires that we depart from convention and name the judges in this opinion.

¶ 6 On June 14, 2012, while the grand jury was still empaneled, the Office of the Special Prosecutor (OSP) filed a motion requesting that Judge Toomin issue a protective order. The OSP explained that it requested the protective order "to prevent entities like the City from complying with [Freedom of Information Act] requests for the secret grand jury materials that would inevitably end up in its hands." Noting that the interests of justice required secrecy in the grand jury proceeding, Judge Toomin granted OSP's motion and entered an order placing under seal "all Grand Jury materials, including but not limited to subpoenas, target letters, and other correspondence related to the service of a Grand Jury subpoena, sent by the [OSP] to any individual or entity in connection with this investigation." In addition, the order prohibited anyone who received "Grand Jury materials" from the OSP "from further disseminating that material or information contained therein." The order defined "Grand Jury materials" to include "subpoenas, target letters, and other correspondence related to the service of a Grand Jury subpoena." The protective order itself was sealed from public disclosure.

¶ 7 The special grand jury indicted Vanecko for involuntary manslaughter. After Webb informed the court that he would not prosecute any other individuals in connection with the Koschman death or the subsequent investigation, the special grand jury was discharged. On January 31, 2014, Vanecko entered into a guilty plea and was sentenced.

¶ 8 On February 3, 2014, Judge Toomin granted Webb permission to unseal and release a 162-page report detailing the special grand jury's investigation. This report was made available to the public and is included in the record before us.

¶ 9 At this stage, even though the special grand jury had been discharged, various parties began appearing before Judge Toomin to request that he unseal documents generated in the course of the special grand jury investigation. First, on March 21, 2014, the City of Chicago (City) filed a motion requesting that Judge Toomin unseal the June 12, 2012, protective order, because its scope was relevant to resolving a request that the *Chicago Sun-Times* had made to the City pursuant to the Freedom of Information Act (FOIA) (5 ILCS 140/1 *et seq.* (West 2012)). On March 27, 2014, Judge Toomin granted the motion and unsealed the protective order.

¶ 10 Thereafter, a dispute arose between the City and the Illinois Attorney General's Public Access Bureau regarding how the City should respond to the *Chicago Sun-Times'* FOIA request. In particular, the City and Attorney General were uncertain what records were covered by Judge Toomin's protective order. To resolve this uncertainty, the City appeared before Judge Toomin and filed a motion to clarify the June 12, 2012, protective order.

¶ 11 On June 25, 2014, Judge Toomin entered a second protective order prohibiting the City from complying with any FOIA request that identified or characterized documents as having been "disseminated to the [OSP] in furtherance of" the Koschman investigation. In addition, the second protective order stated that the June 12, 2012, protective order (1) remained in effect and (2) "limit[ed] only the identification of any documents or other records as being grand jury materials." The order further stated that if "some or all the documents related to the death of David Koschman and subsequent investigations were sought by FOIA request or subpoena in a matter not connected with the work of the Special Prosecutor, such documents could be produced by the City or the [police department], subject to any other applicable restrictions or prohibitions."

¶ 12 On February 25, 2016, the City again appeared before Judge Toomin and filed a motion to modify the June 12, 2012, and June 25, 2014, protective orders. The motion explained that in a

separate case regarding a FOIA request by the Better Government Association (BGA), Judge Mikva had made a preliminary ruling that the City was required to release certain documents whose disclosure was prohibited by Judge Toomin's protective order. See *infra* ¶¶ 14-27.

¶ 13 On April 13, 2016, Judge Toomin denied the City's motion to modify. In a detailed memorandum opinion, Judge Toomin explained that the City documents sought by the BGA were grand jury materials under the scope of his protective order and there was a continuing interest in keeping them secret. In particular, Judge Toomin noted the importance of safeguarding the deliberations of grand jurors and witnesses who provided information to the investigation. He further explained that, even though the need for secrecy in a specific grand jury may diminish after proceeding has resulted in an indictment and conviction, there nonetheless existed a general interest in preserving the legitimacy and functionality of the grand jury as an institution that justified, and necessitated, keeping the protective order in effect.

¶ 14 On May 12, 2016, the City filed a timely notice of appeal from the April 13, 2016, order (appeal No. 1-16-1376).

¶ 15 *Better Government Ass'n v. City of Chicago* (Nos. 1-16-1892 and 1-16-2071)

¶ 16 On January 23, 2015, Bob Herguth of the BGA sent a FOIA request to the City seeking (1) "any and all subpoenas issued to the Chicago Police Department, the Law Department and the Mayor's Office in regards to the Vanecko/Koschman investigation/special prosecution" and (2) "all emails and other communications between special prosecutor Dan Webb's office and [the police department], the Law Department and the Mayor's Office in regards to the same investigation/special prosecution."

¶ 17 The City denied the requests based on Judge Toomin's June 14, 2012, and June 25, 2014, protective orders. The City cited section 7(1)(a) of FOIA, which exempts documents from disclosure if disclosure is prohibited by "State law." 5 ILCS 140/7(1)(a) (West 2014).

¶ 18 From the OSP, the BGA sought (1) documents sufficient to show the name of everyone interviewed by the OSP; (2) statements by and communications with Daley family members, their attorney, and Mara Georges, the City's Corporation Counsel; and (3) itemized invoices and billing records. The OSP denied the BGA's request pursuant to FOIA's "State law" exception, but instead of relying on Judge Toomin's order, it cited section 112-6 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/112-6 (West 2014)).[2]

¶ 19 On March 12, 2015, the BGA filed a complaint for injunctive and declaratory relief against the City, various City departments, the OSP, and Webb (case No. 15 CH 4183). Count I related to the OSP's denial of the BGA's FOIA request. Counts II, III, and IV related to the City's denial of the BGA's FOIA request.

¶ 20 The BGA's case was assigned to Judge Mikva. Judge Mikva declined to transfer the case to Judge Toomin, so the two cases proceeded separately before their respective judges.

¶ 21 The City moved to dismiss BGA's complaint pursuant to section 2-619(a)(9) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 2014)), arguing that section 7(1)(a) of FOIA, which provides that a public agency is not required to disclose "[i]nformation

[2]In their briefs, the parties incorrectly refer to this statute as part of the "Grand Jury Act" or the "Grand Jury Secrecy Act." No law by that title exists in Illinois.

specifically prohibited from disclosure by federal or State law," exempted the requested materials from disclosure. See 5 ILCS 140.7(1)(a) (West 2014). As it did in its original denial, the City argued that Judge Toomin's protective order was a "State law" for the purpose of section 7(1)(a) of FOIA. The OSP and Webb, for their part, also moved to dismiss the BGA's complaint pursuant to section 2-619(a)(9) of the Code of Civil Procedure, on the basis that the records were exempt from disclosure under section 112-6 of the Code.

¶ 22 On December 17, 2015, Judge Mikva denied the City's motion to dismiss, finding that for purposes of section 7(1)(a) of FOIA, Judge Toomin's protective order was not a "State law." Judge Mikva specifically disagreed with Judge Toomin's construction of section 112-6 of the Code, holding that it did "not extend to protecting persons who provide information to the Grand Jury, unless such person is a State's Attorney or government personnel as provided in" section 112-6(c)(1) of the Code. Therefore, Judge Mikva reasoned, the City could not rely on FOIA's "State law" exemption to justify withholding the records. However, Judge Mikva did grant the OSP's and Webb's motion to dismiss, finding that records sought from them were exempt from disclosure under FOIA under section 112-6 of the Code. Citing *Board of Education, Community Unit School District No. 200 v. Verisario*, 143 Ill. App. 3d 1000, 1008 (1986), Judge Mikva reasoned that FOIA was not the kind of "specific law that would 'direct' the disclosure of otherwise confidential grand jury materials" and that the secrecy provisions of section 112-6 of the Code extended to records and information possessed by a prosecutor, even if the information was never presented to the grand jury, because they could tend to " 'reveal the direction and purpose of the grand jury investigation.' " (quoting *Verisario*, 143 Ill. App. 3d at 1008).

¶ 23 Judge Mikva recognized that this disposition put the City in the untenable position of having to decide which of two conflicting court orders it should obey. She suggested that the BGA request Judge Toomin to modify his protective order in light of her evaluation of the City's obligations under FOIA. Her order had the effect of terminating the OSP and Webb's party status in the case, but it was not immediately appealable because the BGA's claims against the City remained, and the court did not enter any finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016), making the order appealable.

¶ 24 The BGA chose not to seek any relief from Judge Toomin, so the City filed its own motion asking him to modify the protective orders in light of Judge Mikva's ruling. After considering the City's request, Judge Toomin issued his April 13, 2016, opinion declining to modify the protective orders (see *supra* ¶ 11).

¶ 25 The City filed a motion to reconsider the denial of its motion to dismiss. Judge Mikva denied the motion, reiterating her position that the term "State law" in section 7(1)(a) of FOIA did not include court orders.

¶ 26 Thereafter, the City filed an answer and affirmative defenses to the BGA's complaint. The City then moved for judgment on the pleadings pursuant to section 2-615(e) of the Code of Civil Procedure (735 ILCS 5/2-615(e) (West 2014)), arguing that Judge Toomin's order was a "State law" preventing it from complying with the BGA's FOIA request. In turn, the BGA filed its own motion for judgment on the pleadings, which adopted the arguments it made in opposition to the City's motion to dismiss.

¶ 27 On July 12, 2016, Judge Mikva (1) granted the BGA's motion for judgment on the pleadings and (2) denied the City's motion for judgment on the pleadings. Judge Mikva ordered the City to release to the BGA "the subpoenas and emails requested in the Freedom of

Information Act requests directed to the City Defendants that are attached the Complaint in this action," subject to other FOIA exemptions. Noting the conflict between her order and Judge Toomin's order, Judge Mikva stayed the City's disclosure obligations pending appeal. She also entered a finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016) that the July 12, 2016, orders on the motions for judgment on the pleadings and the December 17, 2015, order dismissing the OSP and Webb were final and appealable.

¶ 28 On July 13, 2016, the City filed a notice of appeal from the July 12 order (appeal No. 1-16-1892). On August 1, the BGA filed a notice of appeal from the December 17, 2015, order which had dismissed its claims against the OSP and Webb (appeal No. 1-16-2071).

¶ 29 On August 12, 2016, this court consolidated appeal Nos. 1-16-1376, 1-16-1892, and 1-16-2071.

¶ 30 ANALYSIS

¶ 31 We begin with the City's appeal from Judge Toomin's order denying the City's motion to modify the protective order. A protective order "circumscribing the publication of information is reviewable as an interlocutory injunctive order, pursuant to Rule 307(a)(1)." *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 221 (2000) (citing *In re A Minor*, 127 Ill. 2d 247, 263 (1989)). We therefore have jurisdiction over the appeal from the order denying reconsideration of the protective order.

¶ 32 Illinois Supreme Court Rule 201(c)(1) (eff. July 1, 2014) states:

> "The court may at any time on its own initiative, or on motion of any party or witness, make a protective order as justice requires, denying, limiting, conditioning, or regulating discovery to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or oppression."

Trial courts enjoy a great deal of latitude in determining whether a protective order is necessary. *Skolnick*, 191 Ill. 2d at 223. We review an order refusing to modify a protective order for abuse of discretion, which means "[w]e will alter the terms of a protective order only if no reasonable person could adopt the view taken by the circuit court." *Id.* at 224.

¶ 33 Judge Toomin explained why he denied the City's motion to modify the protective order. Citing *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958), Judge Toomin specifically found that even though the grand jury had been discharged, and Vanecko had been indicted and sentenced, secrecy was still justified by (1) the institutional legitimacy of the grand jury, (2) the need to "assure freedom of deliberation of future grand juries and the participation of future witnesses," and (3) the need to ensure witnesses that the confidentiality of their testimony would not be " 'lifted tomorrow.' " *Id.* at 682.

¶ 34 The City argues that once Judge Toomin learned of Judge Mikva's order, and Koschman had been prosecuted and sentenced, he should have modified his protective orders so as to accommodate her determination that the records were disclosable under FOIA. In the alternative, the City argues that Judge Mikva erred in finding that the protective orders did not constitute a "State law" preventing release of the documents under FOIA. At bottom, the City asks this court to free it from the burden of having to choose which of two conflicting orders it must obey.

¶ 35 The OSP submits that, by requesting the protective order in the first instance, it specifically "sought to prevent entities like the City from complying with FOIA requests for the secret

grand jury materials that would inevitably end up in its hands." It contends that Judge Toomin did not abuse his discretion in imposing a protective order regarding the grand jury's sensitive investigation and proceedings.

¶ 36 "[T]he veil of secrecy surrounding a grand jury proceeding is a fundamental element of a grand jury investigation." *People v. Fassler*, 153 Ill. 2d 49, 62 (1992). The grand jury is an integral part of the court and not the tool of the prosecutor. *People v. Sears*, 49 Ill. 2d 14, 36 (1971). The court has inherent power to supervise the grand jury so as to prevent the perversion of its process. *Id.* at 35 (citing *In re National Window Glass Workers*, 287 F. 219, 224 (N.D. Ohio 1922)).

¶ 37 The justification for grand jury secrecy is well established:

> "[T]he proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings. [Citation.] In particular, we have noted several distinct interests served by safeguarding the confidentiality of grand jury proceedings. First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule." *Douglas Oil Co. of California v. Petrol Stops Northwest*, 441 U.S. 211, 218-19 (1979).

¶ 38 In recognition of these interests, section 112-6 of the Code expressly mandates secrecy regarding "matters occurring before the Grand Jury." 725 ILCS 5/112-6(c)(1) (West 2014); see also Ill. S. Ct. R. 201(c)(1) (eff. July 1, 2014) (providing that courts may enter protective orders).

¶ 39 In the City's view, Judge Toomin's concern that disclosure might undermine future investigations was unjustified. We cannot agree. Candid, complete, and trustworthy testimony is vital to the grand jury's role. As a matter of common sense, a witness who knows that testimony and material he provides to the grand jury is secret, and *will be kept secret*, will be more frank and truthful than a witness who fears his identity might be disclosed at some later time. As such, we cannot find that Judge Toomin abused his discretion when he found that the need for particularized secrecy still existed with respect to certain aspects of the grand jury's investigation. Accordingly, we affirm Judge Toomin's April 13, 2016, order refusing to modify his earlier protective order.

¶ 40 We next turn to the appeals from Judge Mikva's orders, beginning with the City's appeal of Judge Mikva's order granting the BGA judgment on the pleadings. "Judgment on the pleadings is proper only where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Hooker v. Illinois State Board of Elections*, 2016 IL 121077, ¶ 21. When ruling on a motion for judgment on the pleadings, "a court may consider only those facts appearing on the face of the pleadings, matters subject to judicial notice, and any judicial admissions in the record." *Id.* Moreover, the court must take as true all well-pled facts and reasonable inferences which can be drawn from those facts. *Id.* We review an order granting judgment on the pleadings *de novo*. *Id.*

¶ 41 Section 1 of the FOIA states:

> "Pursuant to the fundamental philosophy of the American constitutional form of government, it is declared to be the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees consistent with the terms of this Act. Such access is necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest." 5 ILCS 140/1 (West 2014).

¶ 42 The breadth of its policy statement notwithstanding, FOIA provides that certain materials are exempt from disclosure. The exception at issue here is contained in section 7(1)(a), which provides: "[T]he following shall be exempt from inspection and copying: (a) Information specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." 5 ILCS 140/7(1)(a) (West 2014).

¶ 43 The BGA correctly notes that no Illinois case has held that a court order constitutes a "State law" so as to insulate documents from release under FOIA. The City contends that a court order constitutes a "State law." But the City also relies on *GTE Sylvania Inc. v. Consumers Union of the United States, Inc.*, 445 U.S. 375 (1980), in which the United States Supreme Court considered whether a federal agency could withhold records subject to disclosure under federal FOIA (5 U.S.C § 552 *et seq.* (1976)) that were sealed pursuant to an injunction imposed by a federal district court. The Court noted that the remedial provisions of the federal FOIA are only activated when an agency "improperly" withholds documents. *GTE Sylvania Inc.*, 445 U.S. at 384-87. Since the agency was subject to an injunction, the broad purposes of federal FOIA promoting public disclosure were "inapplicable," with the result that it had no authority to release the documents. The Court explained:

> "The conclusion that the information in this case is not being 'improperly' withheld is further supported by the established doctrine that persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order. [Citations.] *** Under these circumstances, the [agency] was required to obey the injunctions out of 'respect for judicial process.'
>
> There is nothing in the legislative history to suggest that in adopting the Freedom of Information Act ***, Congress intended to require an agency to commit contempt of court in order to release documents. Indeed, Congress viewed the federal courts as the necessary protectors of the public's right to know. To construe the lawful obedience of an injunction issued by a federal district court with jurisdiction to enter such a decree as 'improperly' withholding documents under the Freedom of Information Act would do violence to the common understanding of the term 'improperly' and would extend the Act well beyond the intent of Congress." *Id.* at 386-87.

¶ 44 Because the Illinois FOIA was modeled on the federal Freedom of Information Act, Illinois courts look to case law regarding the federal FOIA when interpreting the Illinois FOIA. See *Hamer v. Lentz*, 132 Ill. 2d 49, 58 (1989).

¶ 45 We recognize that the Illinois FOIA, in its current form, is more generous with respect to public access than the federal Freedom of Information Act. Even so, *GE Sylvania* is no less persuasive. Like the federal law at issue in *GE Sylvania*, the Illinois FOIA only allows a court

to order a public agency to produce documents when the agency has "improperly" withheld them. Compare 5 U.S.C. § 552(a)(4)(B) (2012) (federal court "has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records *improperly withheld* from the complainant" (emphasis added)), with 5 ILCS 140/11 (West 2016) ("The circuit court shall have the jurisdiction to enjoin the public body from withholding public records and to order the production of any public records *improperly withheld* from the person seeking access." (Emphasis added.)).

¶ 46 The *GTE Sylvania* Court expressed a straightforward rule that "respect for the judicial process" required that an injunction could theoretically allow a public agency to withhold materials otherwise disclosable under FOIA. We see no reason, nor any textual distinction in the Illinois FOIA, why the rule articulated in *GTE Sylvania* should not apply with equal force here. In so holding, we need not address whether a court order is a "State law" under section 7(1)(a) of FOIA. We merely hold, as did the United States Supreme Court in *GTE Sylvania*, that "respect for judicial process" requires that a lawful court order must take precedence over the disclosure requirements of FOIA and that a public body refusing to disclose documents because a court order commands it to do so does not always withhold those documents "improperly."

¶ 47 The BGA's arguments to the contrary are not persuasive. The BGA cites two cases in which Illinois appellate courts have ordered disclosure of documents pursuant to FOIA even though disclosure was prohibited by a court order. Both are inapposite. In *Carbondale Convention Center, Inc. v. City of Carbondale*, 245 Ill. App. 3d 474, 477 (1993), a governmental body sought to keep a settlement agreement confidential, arguing that the court that dismissed the underlying action entered an order prohibiting disclosure of the agreement, "and that such an order constitutes State law." *Id.* The court explained that even "[a]ssuming *** and without so holding that such an order is a 'State law,' " that the agency's position was incompatible with the intent of FOIA. *Id.* The court pointed out that because the agency itself *requested* the court to impose the gag order, the "State law" prohibiting disclosure existed, in part, through the actions of the agency itself. *Id.* The *Carbondale* court concluded that such an action contradicted "the purpose and intent of [FOIA] under which the exemptions are intended as shields rather than swords," the agency could not rely on the "State law" exemption in section 7(1)(a) of FOIA. *Id.*

¶ 48 And in *Watkins v. McCarthy*, 2012 IL App (1st) 100632, the court held that a federal court's protective order regarding materials exchanged in discovery in a civil rights lawsuit against the City did not prevent the City from releasing the materials under a proper FOIA request. The *Watkins* court did so for two reasons. First, the protective order in the federal case did not—unlike Judge Toomin's order—specifically prohibit dissemination of discovery materials to a non-party who made a FOIA request. *Id.* ¶ 43. Second, by the time the *Watkins* case was resolved, the federal case had been settled and dismissed, so the protective order was no longer in force. *Id.* As in *Carbondale*, the court assumed that the court order in question was a "State law" within the meaning of FOIA's section 7(1)(a) exception. *Id.*

¶ 49 *Carbondale* and *Watkins* thus stand for the general proposition that an agency cannot—through its own participation, action, collusion, or acquiescence—help obtain a court order and then claim that the order prevents it from releasing otherwise disclosable records. The City did not obtain the protective order at issue here, so these cases do not inform our analysis.

¶ 50 *Kibort v. Westrom*, 371 Ill. App. 3d 247 (2007), is instructive. There, a board of election commissioners received a FOIA request for ballot materials which were, as required by law, kept under seal following an election. The court held that the board properly denied the FOIA request. Even though the Election Code lacked specific language prohibiting public access to the records, it did establish a comprehensive regulatory scheme through which ballot materials were to be secured and sealed and further detailed the narrow circumstances under which a candidate or member of the public could examine these sealed materials following an election. *Id.* at 256-57. Addressing the apparent conflict between FOIA and the Election Code, the *Kibort* court held that "records are exempt from disclosure under [FOIA] in instances where the plain language contained in a state or federal statute reveals that public access to the records was not intended." *Id.* at 256. See also *Better Government Ass'n v. Zaruba*, 2014 IL App (2d) 140071, ¶ 29.

¶ 51 Unlike the courts that issued the protective orders at issue in *Carbondale* and *Watkins*, Judge Toomin issued the protective order at the request of the OSP without the involvement of the public agency holding the records—the City. The City was not a party to the grand jury proceedings, but the protective order nonetheless prohibited it from releasing certain records in its possession. Once it was placed in the dilemma of having to obey conflicting orders, the City itself did appear in the grand jury case and asked Judge Toomin to modify the protective order. He declined to do so and provided cogent reasons for that decision. Judge Toomin was obviously aware of Judge Mikva's FOIA release order because his April 13, 2016, order specifically stated that the City was still prohibited from releasing the documents in response to the BGA's FOIA request.

¶ 52 The BGA echoes the concern of the concurring justice in *Carbondale*, that "all information regarding the affairs of government would be legally exempt from disclosure as long as the government could find a judge to sign an order prohibiting disclosure." *Carbondale*, 245 Ill. App. 3d at 479 (Lewis, J., specially concurring). But the protective order here was issued upon a court's due consideration of the need for confidentiality in particularized circumstances. The order was issued by a judge supervising a grand jury and was not issued at the behest of the City. We do not share the BGA's fear that public entities will abuse the rule of this case because it somehow establishes a precedent under which courts can "legislate" new FOIA exceptions.

¶ 53 In sum, we resolve the question presented by the City's appeal by applying the rule established in *GTE Sylvania*. We need not, and do not, address the issue of whether a court order is "a State law" within the meaning of section 7(1)(a) of FOIA. We reverse the order granting the BGA's motion for judgment on the pleadings. Pursuant to our authority under Illinois Supreme Court Rule 366(a) (eff. Feb. 1, 1994), we grant the City's motion for judgment on the pleadings. See *Massachusetts Bay Insurance Co. v. Unique Presort Services, Inc.*, 287 Ill. App. 3d 741, 748 (1997).

¶ 54 We next address the BGA's appeal from Judge Mikva's order, dismissing its FOIA claim for disclosure of records which it requested from the OSP and Webb. As we noted, Judge Mikva found that every item listed in the BGA's request to the OSP and Webb constituted "matters occurring before the Grand Jury" protected from disclosure by section 112-6 of the Code. Accordingly, she dismissed the BGA's FOIA claim against the OSP and Webb pursuant to section 2-619(a)(9) of the Code of Civil Procedure.

¶ 55 When ruling on a motion to dismiss under section 2-619, a court must accept all well-pleaded facts in the complaint as true and draw all reasonable inferences from those facts in favor of the nonmoving party. *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶ 24. As a result, a motion to dismiss pursuant to section 2-619 should not be granted unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery. *Snyder v. Heidelberger*, 2011 IL 111052, ¶ 8. We review *de novo* the circuit court's decision on motions to dismiss brought under section 2-619. *Coghlan*, 2013 IL App (1st) 120891, ¶ 24. Finally, we review the judgment, not the reasoning, of the circuit court, and we may affirm on any ground in the record, regardless of whether the court relied on those grounds or whether the court's reasoning was correct. *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 97 (1995).

¶ 56 The office of a State's Attorney is an executive body of the State, and is a "[p]ublic body" as defined in section 2(a) of FOIA. See 5 ILCS 140/2(a) (West 2016). "As public bodies, State's Attorney's offices must make their public records available for inspection and copying as required by [FOIA]." *Nelson v. Kendall County*, 2014 IL 116303, ¶ 27. The same analysis applies to records of the OSP. See, *e.g.*, 55 ILCS 5/3-9008(b) (West 2016) (a special State's Attorney "shall possess all the powers and discharge all the duties of a regularly elected State's attorney under the laws of the State").

¶ 57 Our supreme court has relied on FOIA's strong policy statement in support of rulings requiring release of governmental records to public review. See, *e.g.*, *Stern v. Wheaton-Warrenville Community Unit School District 200*, 233 Ill. 2d 396, 404 (2009). The same court has, however, also emphasized the need for secrecy in grand jury proceedings. See, *e.g.*, *People ex rel. Sears v. Romiti*, 50 Ill. 2d 51, 58 (1971).

¶ 58 The BGA suggests that, in light of its FOIA request, the secrecy provisions in the grand jury law must be construed narrowly. It also contends that because Judge Mikva resolved the BGA's appeal of the OSP's denial on a motion to dismiss, she never had the opportunity to conduct an *in camera* review of the documents to determine whether, in fact, they were records of "matters occurring before the Grand Jury."

¶ 59 The BGA contends that the materials it sought were not "matters occurring before the Grand Jury" under section 112-6 of the Code. It claims that its request was broad enough to encompass some "records that were never presented to the grand jury and do not disclose what was presented to the grand jury." It also claims that section 112-6(3)(c) of the Code, which allows disclosure of grand jury materials "when a law so directs," allows disclosure of grand jury materials, because FOIA is "a law" which "so directs."

¶ 60 In pursuing this argument, BGA relies heavily on *Better Government Ass'n v. Blagojevich*, 386 Ill. App. 3d 808 (2008). There, the court determined that FOIA required the Governor to release copies of grand jury subpoenas his office had received. The court rejected the Governor's reliance on a federal grand jury secrecy law that specifically applied to grand jurors, interpreters, reporters, and similar persons who would normally attend the grand jury room. *Id.* at 811-12. The federal grand jury law did not prohibit *recipients* of grand jury subpoenas, such as the Governor, from disclosing their contents. And unlike here, no protective order was at issue in *Blagojevich*.

¶ 61 More on point is *Verisario*. In that case, the court found that "section 112-6(b) was designed to protect from disclosure only the essence of what takes place in the grand jury room." *Verisario*, 143 Ill. App. 3d at 1007. After examining the body of federal case law which had developed on the issue, the *Verisario* court determined that "[t]he mere fact that a

particular document is reviewed by a grand jury does not convert it into a matter occurring before the grand jury within the meaning of section 112-6(b)," and that the section "was not intended to foreclose from all future revelation to proper authorities the same information or documents which were presented to the grand jury." *Id.* Therefore, "if a document is sought for its own sake *** rather than to learn what took place before the grand jury, and if the disclosure will not seriously compromise the secrecy of the grand jury investigation, disclosure is not prohibited." *Id.* at 1006-08 (citing *In re Special March 1981 Grand Jury*, 753 F.2d 575, 578 (7th Cir. 1985)).

¶ 62 *Taliani v. Herrmann*, 2011 IL App (3d) 090138, is also instructive. There, the court considered whether a prisoner could use FOIA to obtain copies of the transcript of the grand jury proceedings which led to his indictment and prosecution. The court noted that section 7(1)(a) of FOIA protects records from disclosure if their release is prohibited by a state law. *Id.* ¶ 12. It then found that section 112-6 of the Code, which prohibited disclosure of grand jury transcripts without a court order, was such a law. *Id.* ¶ 13. Since section 112-6(a) of the Code provides that grand jury proceedings are secret and only open to the "State's Attorney, his reporter and any other person authorized by the court or by law," the court found that the prisoner was only entitled to a copy of the grand jury transcripts pursuant to section 112-6(c)(3) of the Code, which stated: "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." 725 ILCS 5/112-6(c)(3) (West 2008). The court found that the mechanisms listed in section 112-6(c)(3) of the Code did not include FOIA requests. Therefore, the prisoner could not obtain the transcripts pursuant to his FOIA request. *Taliani*, 2011 IL App (3d) 090138, ¶¶ 12-13. While the *Taliani* court's analysis is brief, and the BGA argues it does not apply, we are nonetheless persuaded that it, and *Verisario*, state sound and workable rules.

¶ 63 The BGA argues that the conflict between "when a law so directs" in section 112-6 of the Code and "prohibited from disclosure by *** State law" in FOIA must be resolved in favor of FOIA. When grand jury materials are actually released, it is often because release is necessary to protect the rights of an accused or "avoid a possible injustice." *Douglas Oil Co.*, 441 U.S. at 222. We believe that the clause "when a law so directs" in section 112-6(c)(3) addresses situations of particularized necessity, such as disclosure to a court clerk or to confront a witness in a criminal trial with his prior contrary testimony. Despite exhaustive briefing, no party has cited a case where section 112-6 of the Code was held *not* to trigger a section 7(1)(a) exemption. We agree with the OSP that adopting the BGA's expansive interpretation of "when a law so directs" would render the secrecy provisions in section 112-6 of the Code "a dead letter," because FOIA would effectively nullify them.

¶ 64 With these principles in mind, we examine the three specific requests that BGA made to the OSP and Webb. The BGA's first request was for documents showing names of every person interviewed by Webb in connection with his investigation. Judge Mikva correctly determined that these materials were "matters occurring before the grand jury" and thus within the scope of section 112-6. Disclosure of the list would clearly reveal the "identity of witnesses," secrecy of which is clearly critical to the integrity of the grand jury process. See *Verisario*, 143 Ill. App. 3d at 1007.

¶ 65 Second, the BGA requested copies of all statements by and communications with "Daley family members," their attorneys, and Mara Georges, the City's corporation counsel. We find

that disclosure of these materials would reveal the identity of witnesses, as well as their testimony and the "strategy or direction of the investigation." See *id.* Accordingly, Judge Mikva did not err in dismissing the portions of counts II, III, and IV relating to the first two of the BGA's FOIA requests from the OSP.

¶ 66 The third BGA request was for the OSP's itemized invoices and billing records. Judge Toomin appointed Webb pursuant to section 3-9008 of the Counties Code. 55 ILCS 5/3-9008 (West 2016). That section requires that a special State's Attorney's bills are to be paid by the county, up to a certain limit. See 55 ILCS 5/3-9008(b) (West 2016). It also requires that before the county pays the bills, "the county shall be provided with a detailed copy of the invoice describing the fees, and the invoice shall include all activities performed in relation to the case and the amount of time spent on each activity." 55 ILCS 5/3-9008(c) (West 2016).

¶ 67 Attorney fee invoices paid from public funds are generally disclosable under FOIA, subject to redaction for work-product and privilege. See 2012 Ill. Att'y Gen. Pub. Access Op. No. 12-005. Judge Mikva stated that disclosure of the invoice detail would "reveal the strategy and direction of the investigation." While some entries in the billing records might reveal "the strategy or direction of the investigation," surely all do not. We, therefore, reverse the dismissal of the portion of count III of BGA's complaint that sought disclosure of the OSP's attorney fee invoices, and remand for an *in camera* review of those records pursuant to section 11(f) of FOIA (5 ILCS 140/11(f) (West 2016)).

¶ 68 On remand, the circuit court shall determine what, if any, portions of the requested records may be disclosed notwithstanding section 112-6 of the Code's prohibition on disclosure of information regarding "matters occurring before the grand jury." Section 112-6 of the Code was modeled on Rule 6 of the Federal Rule of Criminal Procedure. *Romiti*, 50 Ill. 2d at 58. In its current form, the federal rule prohibits disclosure of "a matter occurring before the grand jury" (Fed. R. Crim. P. 6(e)(2)(B)), but its earlier form followed the Illinois rule verbatim, prohibiting disclosure of "matters occurring before the grand jury" (Fed. R. Crim. P. 6(e)(2)(B) (prior to amendment by USA Patriot Act of 2001, Pub. L. No. 107-56, § 203, 115 Stat. 272, 278-79 (2001))).

¶ 69 The phrase "matters occurring before the grand jury" has been defined not only by *Verisario*, but through a well-established body of federal case law, which should guide the court on remand. The United States Court of Appeals for the District of Columbia Circuit has held that the term " 'matters occurring before the grand jury' " in the federal rule encompasses (1) "the identities of witnesses or jurors," (2) "the substance of testimony," (3) "the strategy or direction of the investigation," and (4) "the deliberations or questions of jurors, and the like." *Securities & Exchange Comm'n v. Dresser Industries, Inc.*, 628 F.2d 1368, 1382 (D.C. Cir. 1980). See also *Senate of the Commonwealth of Puerto Rico v. United States Department of Justice*, 823 F.2d 574, 582 (D.C. Cir. 1987). Likewise, the Fifth Circuit has explained that the rule prohibits disclosure of "anything which 'may tend to reveal what transpired before the grand jury.' " *In re Grand Jury Investigation*, 610 F.2d 202, 216 (5th Cir. 1980) (quoting *United States v. Armco Steel Corp.*, 458 F. Supp. 784, 790 (W.D. Mo. 1978)). The circuit court should also be mindful that "the interests in grand jury secrecy, although reduced, are not eliminated merely because the grand jury has ended its activities." *Douglas Oil Co.*, 441 U.S. at 222.

¶ 70 Accordingly, in appeal No. 1-16-1892, we affirm in part as to Judge Mikva's order dismissing the BGA's FOIA complaint regarding its first and second requests; reverse in part,

as to its third request; and remand for further proceedings consistent with this opinion.

¶ 71 CONCLUSION

¶ 72 For these reasons, we (1) affirm Judge Toomin's order in appeal No. 1-16-1376, (2) affirm in part and reverse in part Judge Mikva's order in appeal No. 1-16-1892 and remand that appeal for further proceedings consistent with this opinion, and (3) reverse Judge Mikva's order in appeal No. 1-16-2071 and grant the City's motion for judgment on the pleadings in that appeal.

¶ 73 No. 1-16-1376, Affirmed.

¶ 74 No. 1-16-1892, Affirmed in part, reversed in part, and remanded.

¶ 75 No. 1-16-2071, Reversed; motion granted.

The Death of David Koschman

Report of the Special Prosecutor Dan K. Webb

Winston & Strawn LLP
September 18, 2013

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I. MANDATE OF THE SPECIAL PROSECUTOR

On April 23, 2012, Judge Michael P. Toomin appointed Dan K. Webb, Chairman of Winston & Strawn LLP, and former United States Attorney for the Northern District of Illinois, as the Special Prosecutor in the Matter of the Death of David Koschman.

In doing so, Judge Toomin ordered that the Special Prosecutor investigate two distinct issues related to the Koschman matter:

Issue One

> [W]hether criminal charges should be brought against any person in connection with the homicide of David Koschman in the spring of 2004[.][1]

Issue Two

> [W]hether, from 2004 to the present, employees of the Chicago Police Department and the Cook County State's Attorney's Office acted intentionally to suppress and conceal evidence, furnish false evidence, and generally impede the investigation into Mr. Koschman's death.[2]

Judge Toomin further ordered that "at the conclusion of his investigation, the Special Prosecutor shall submit a final report to this Court and for the benefit of the Cook County Board of Commissioners detailing the progress and ultimate results of the investigation and any criminal prosecutions commenced."[3]

Therefore, the Special Prosecutor, having concluded his investigation, submits this report to the Court which, in the pages that follow, describes in detail the ultimate results of the investigation undertaken pursuant to the judicial mandate set forth above.

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1 *See* Special Grand Jury Exhibit 5 (Order by J. Toomin (Apr. 23, 2012)).

2 *See* Special Grand Jury Exhibit 5 (Order by J. Toomin (Apr. 23, 2012)).

3 *See* Special Grand Jury Exhibit 5 (Order by J. Toomin (Apr. 23, 2012)).

II. SUMMARY OF FINAL CONCLUSIONS OF THE SPECIAL PROSECUTOR'S INVESTIGATION

A. Issue One: Whether Criminal Charges Should be Brought Against Any Person in Connection with Koschman's Homicide

On December 3, 2012, the Special Prosecutor, after having thoroughly investigated whether criminal charges should be brought against any person in connection with the homicide of David Koschman in the spring of 2004, sought, and the special grand jury returned, an indictment against Richard J. ("RJ") Vanecko charging him with involuntary manslaughter in connection with Koschman's death. According to the trial court, the Vanecko trial is expected to commence in early 2014. With the indictment of Vanecko, the Special Prosecutor has satisfied the Court's mandate to determine whether criminal charges should be brought in connection with Koschman's death.

B. Issue Two: Whether, From 2004 to the Present, Employees of the Chicago Police Department and the Cook County State's Attorney's Office Acted Intentionally to Suppress and Conceal Evidence, Furnish False Evidence, and Generally Impede the Investigation Into Koschman's Death

1. Applicable State Law Crimes

The Special Prosecutor, while conducting his assessment as to whether employees of the Chicago Police Department ("CPD") and the Cook County State's Attorney's Office ("SAO") acted intentionally to suppress and conceal evidence, furnish false evidence, and generally impede the investigation into Koschman's death, first had to determine what Illinois criminal state law violations could potentially stem from such conduct, assuming the evidence could ultimately substantiate such a charge.[4] With that in mind, the Special Prosecutor primarily evaluated the following four Illinois criminal violations: (1) official misconduct; (2) obstructing justice; (3) conspiracy; and (4) tampering with public records – each of which has a three-year statute of limitations.[5] Under Illinois law, no prosecution can be commenced against any

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[4] The Special Prosecutor emphasizes that his evaluation was limited to Illinois state law violations only, as he lacks jurisdiction in connection with potential federal criminal law violations.

[5] Official misconduct (720 ILCS 5/33-3) (West 2013); obstructing justice (720 ILCS 5/31-4) (West 2013); conspiracy (720 ILCS 5/8-2) (West 2013); and tampering with public records (720 ILCS 5/32-8) (West 2013). The Special Prosecutor further evaluated the potential for "organizational" criminal liability against state and municipal law enforcement agencies, such as CPD and SAO, in connection with failing to properly investigate a criminal matter, but found no applicable state law statutes.

individual under these statutes if the final act in commission of the crime occurred more than three years ago.[6]

2. Burden of Proof

Constitutional due process rights require that a person may not be convicted of a crime unless the prosecution meets its burden of proving all the elements of the charged offense beyond a reasonable doubt, including the applicable criminal intent (also known as "scienter").[7] In Illinois, the prosecution's burden is explained to jurors as follows:

> The defendant is presumed to be innocent of the charge against him. This presumption remains with him throughout every stage of the trial and during your deliberations on the verdict and is not overcome unless from all the evidence in this case you are convinced beyond a reasonable doubt that he is guilty.
>
> The State has the burden of proving the guilt of the defendant beyond a reasonable doubt, and this burden remains on the State throughout the case. The defendant is not required to prove his innocence.[8]

The burden of proving all elements of a crime beyond a reasonable doubt is widely recognized as a "heavy" burden of proof.[9] Additionally, under applicable ethical standards, a

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[6] The applicable statute of limitations, 720 ILCS 5/3-5 (West 2013), requires that prosecution for the offenses listed above "must be commenced within 3 years after the commission of the offense if it is a felony, or within one year and 6 months after its commission if it is a misdemeanor."

However, under Illinois law, and as more fully described in Section V., in certain factual situations there can be exceptions to the statute of limitations, although, based upon the Special Prosecutor's investigation and legal analysis, none were deemed applicable in this instance.

[7] U.S. CONST. amend. XIV; *Christoffel v. United States*, 338 U.S. 84, 89 (1949) ("An essential part of a procedure which can be said fairly to inflict a punishment is that all the elements of the crime shall be proved beyond a reasonable doubt"); *In re Winship*, 397 U.S. 358 (1970); *Davis v. United States*, 160 U.S. 469 (1895); *People v. Hernandez*, 2012 WL 997363 (Ill. App. Ct. 1st Dist. 2012); *Speiser v. Randall*, 357 U.S. 513, 525–26 (1958); *see also In re Winship*, 397 U.S. 358, 369–72 (1970); *Morissette v. United States*, 342 U.S. 246 (1952); *People v. Anderson*, 473 N.E.2d 1345, 1351 (Ill. App. Ct. 2d Dist. 1985) ("State must prove scienter").

[8] Illinois Pattern Jury Instruction 2.03.

[9] *See, e.g., People v. Antoine*, 676 N.E.2d 1374, 1378 (Ill. App. 4th Dist. 1997); *People v. Kozlowski*, 639 N.E.2d 1369, 1373 (Ill. App. Ct. 1st Dist. 1994); *People v. Sanchez*, 546 N.E.2d 268, 271 (Ill. App. Ct. 4th Dist. 1989).

prosecutor acting in good faith should not pursue a prosecution for charges that the prosecutor cannot reasonably expect to prove beyond a reasonable doubt by legally sufficient evidence at trial.[10]

3. Background on the Law of Criminal Intent (Scienter)

Under Illinois law, in order to convict a defendant of a criminal offense, the prosecution must prove two things beyond a reasonable doubt: first, that a crime occurred, and second, that it was committed by the person charged.[11] According to the Illinois Criminal Code, proof that a crime occurred requires proof of a voluntary act by the defendant[12] that is prohibited by law, and proof of criminal intent (scienter), which is a particular state of mind.[13] In other words, under Illinois law, and as more fully described in Section V., a person can be found guilty of an offense only if, with respect to each element described by the statute defining the offense, he or she acted with the requisite criminal intent (recklessly, knowingly, or intentionally), depending upon the terms of the criminal statute.[14] In proving the accused's criminal intent (scienter), the beyond a

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[10] *See, e.g.,* American Bar Association, "Standards for Criminal Justice: Prosecution and Defense Function" § 3-3.9(a) (3d ed., 1993) ("A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction"); National District Attorneys Association, "National Prosecution Standards" § 4-2.2 (3d ed., 2009) ("A prosecutor should file charges that he or she believes adequately encompass the accused's criminal activity and which he or she reasonably believes can be substantiated by admissible evidence at trial.")

[11] *People v. Hurry*, 967 N.E.2d 817, 820 (Ill. App. Ct. 3d Dist. 2012), *as modified on denial of reh'g,* (Apr. 20, 2012); *People v. Bell*, 598 N.E.2d 256, 262 (Ill. App. Ct. 2d Dist. 1992); *People v. Curry*, 694 N.E.2d 630, 636 (Ill. App. Ct. 1st Dist. 1998); *People v. Groves*, 691 N.E.2d 86, 93-94 (Ill. App. Ct. 1st Dist. 1998), *appeal denied*, 699 N.E.2d 1034 (1998); *People v. Assenato,* 586 N.E.2d 445, 448 (Ill. App. Ct. 1st Dist. 1991), *habeas corpus denied*, 1998 WL 704327 (N.D. Ill. 1998); *People v. Lenius*, 688 N.E.2d 705, 718 (Ill. App. Ct. 1st Dist. 1997), *appeal denied*, 698 N.E.2d 546 (1998) *and cert. denied*, 119 S. Ct. 185 (U.S. 1998); *People v. Lloyd*, 660 N.E.2d 43, 48 (Ill. App. Ct. 1st Dist. 1995); *People v. Lesure*, 648 N.E.2d 1123, 1125 (Ill. App. Ct. 1st Dist. 1995).

[12] 720 ILCS 5/4-1 (West 2013).

[13] 720 ILCS 5/4-3 (West 2013).

[14] *See People v. Valley Steel Products Co.*, 375 N.E.2d 1297, 1305 (Ill. 1978); *People v. McMullen*, 414 N.E.2d 214, 218 (Ill. App. Ct. 4th Dist. 1980); *People v. Arron*, 305 N.E.2d 1, 3 (Ill. App. Ct. 1st Dist. 1973). The only exception, which is not relevant to the Special Prosecutor's investigation, is that "absolute liability offenses" do not require a culpable mental state as an element. *People v. Studley*, 631 N.E.2d 839, 841 (Ill. App. Ct. 4th Dist. 1994).

reasonable doubt standard is an especially high hurdle because it can rarely be proven by direct evidence; but, instead, is typically proved only by surrounding circumstances, i.e., circumstantial evidence.[15]

C. The Events of 2004: Evaluating Whether Employees of CPD and SAO Violated Illinois Criminal Law

1. Prosecution is Barred by the Applicable Statute of Limitations

As more fully described in Section V., any state law violations by employees of CPD and SAO relating to acts that occurred during their participation in the Koschman matter in 2004 are barred by the three-year statute of limitations.

D. The Events of 2011-2012: Evaluating Whether Employees of CPD and SAO Violated Illinois Criminal Law

1. The Events of 2011-2012: Prosecution Is Not Barred by the Applicable Statute of Limitations

Unlike the events which occurred in 2004, any state law violations by employees of CPD and SAO relating to acts that occurred during their participation in the Koschman matter in 2011 and 2012 are not barred by the applicable three-year statute of limitations as of the date of this report.

2. The Events of 2011-2012: Insufficient Evidence to Prove Beyond a Reasonable Doubt the Element of Criminal Intent (Scienter)

However, as more fully described in Section V., based upon all the evidence gathered by the Special Prosecutor and his office (the Office of the Special Prosecutor ("OSP")) (e.g., witness interviews, sworn witness testimony before the special grand jury, documents subpoenaed and reviewed), and after having evaluated the elements of the potentially applicable state criminal laws with regard to the acts of certain individuals, the Special Prosecutor does not believe he could prove beyond a reasonable doubt by legally sufficient evidence at trial that any employee of CPD or SAO acted with the requisite criminal intent (scienter) to violate Illinois law during their participation in the Koschman matter in 2011 and 2012. Therefore, in compliance

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[15] *See People v. Castillo*, 974 N.E.2d 318, 326-27 (Ill. App. Ct. 1st Dist. 2012), *appeal denied*, 979 N.E.2d 881 (Sept. 26, 2012).

with his ethical obligations discussed above, the Special Prosecutor must exercise his prosecutorial discretion and not seek any additional charges in this matter.

E. Evidence Supporting the Decision to Appoint a Special Prosecutor

The sections of the report that follow summarize in great detail what the evidence actually established during the course of the Special Prosecutor's investigation. The Special Prosecutor notes that the evidence outlined below strongly supports Judge Toomin's April 6, 2012, order and decision to appoint a special prosecutor in this matter.[16] Indeed, it is the Special Prosecutor's conclusion that the evidence outlined in the pages that follow does "bring transparency to the mixed signals emanating from this troubling case," as was Judge Toomin's stated objective in ordering the appointment of a special prosecutor in the Matter of the Death of David Koschman.[17]

III. OVERVIEW OF THE SPECIAL PROSECUTOR'S INVESTIGATION

In May 2012, the OSP engaged as its investigative partner the City of Chicago Inspector General's Office ("IGO").[18] The IGO had initiated its own investigation into the Koschman matter on February 28, 2011.[19] During the OSP's investigation, IGO assisted with interviewing witnesses, preparing special grand jury materials, analyzing records, and developing investigative leads.

On June 18, 2012, pursuant to Judge Toomin's Order, the Special Prosecutor empaneled a special grand jury to sit during the duration of the investigation. The special grand jury operated independently of the routine grand jury process controlled by SAO at the Leighton

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16 *See generally* Apr. 6, 2012, Order by J. Toomin.

17 *See* Apr. 6, 2012, Order by J. Toomin, at 33.

18 IGO is led by Inspector General Joseph M. Ferguson, a former federal prosecutor with the United States Attorney's Office for the Northern District of Illinois.

19 The work product stemming from IGO's investigation prior to the appointment of the Special Prosecutor was shared with the OSP. This included work product related to the IGO's more than 30 interviews of witnesses in 2011 and early 2012, prior to the Special Prosecutor's appointment.

Criminal Court Building at 26th Street and S. California Avenue in Chicago.[20] In order to protect the independence and secrecy of the special grand jury's work, the OSP obtained court approval for the special grand jury to convene at Winston & Strawn LLP's law offices at 35 W. Wacker Drive, Chicago, Illinois.

In August 2012, the OSP also engaged the services of a well-known investigative firm, Kroll Associates, Inc. ("Kroll").[21] Kroll's investigators assisted the OSP's investigation, including assistance in forensic and data retrieval expertise and interviewing current City of Chicago employees where the IGO's presence complicated cooperation.[22]

During the course of the Special Prosecutor's investigation, 146 witnesses provided information through witness interviews and/or special grand jury testimony. The OSP interviewed 133 witnesses[23] (110 of whom agreed to sit for a voluntary interview, while 23 required the interviews be conducted pursuant to a proffer agreement).[24] The special grand jury was presented with the results of relevant witness interviews, and 24 witnesses personally appeared before the special grand jury and testified (14 witnesses provided live special grand jury testimony without asserting their Fifth Amendment rights, while 10 testified under court-ordered "use immunity" after they refused to testify and invoked their Fifth Amendment

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[20] Both the office of the Clerk of the Circuit Court of Cook County and the Cook County Sheriff's Office provided the OSP valuable assistance in the coordination and administration of the special grand jury.

[21] Kroll's Chicago office is led by Jeffrey H. Cramer, a former federal prosecutor with the United States Attorney's Office for the Northern District of Illinois.

[22] In *Garrity v. New Jersey*, 385 U.S. 493, 87 S. Ct. 616 (1967), the United States Supreme Court held that police officers who were forced to speak or be terminated under their employment agreements were compelled to incriminate themselves in violation of the Fourteenth and Fifth Amendments. As such, the state was prohibited from using their compelled statements in their subsequent criminal prosecutions. In light of potential objections concerning *Garrity*, Kroll investigators assisted with conducting interviews of active City of Chicago employees rather than IGO investigators, due to IGO's authority to seek the termination of city employees.

[23] Before the Special Prosecutor was appointed, IGO interviewed 31 witnesses related to the Koschman matter, 27 of whom were re-interviewed by the OSP.

[24] The OSP interviewed certain witnesses pursuant to a uniform proffer agreement. As part of the proffer agreement, witnesses agreed to be interviewed and provide statements in exchange for the promise that the OSP could not use any of their actual statements against that person in any subsequent prosecution; although any leads developed from those statements could be used against that person in any subsequent prosecution.

privilege against self-incrimination).[25]

The special grand jury issued 160 subpoenas for documentary evidence and testimony, and collected more than 22,000 documents (totaling over 300,000 pages). The records sought and collected included, among other items, telephone records, e-mails, police reports, policy manuals and procedures, attendance records, medical records, access logs, data recovered from backup tapes of shared drives, video surveillance, billing records, and receipts. In addition to the records collected by special grand jury subpoena, the OSP's investigation also procured court orders to obtain documents when necessary.

Lastly, due to the passage of eight years between the date of the incident and the appointment of a Special Prosecutor, many potentially important records from 2004 proved unavailable. For example, while phone records existed for certain individuals dating back to April 2004, other phone records, such as the personal cell phone records for the lead detective in the 2004 CPD investigation, no longer exist. Similarly, e-mail records for CPD and SAO employees from 2004 no longer exist and could not be recovered, as determined by OSP's full exploration, with the assistance of Kroll's computer forensics, of CPD and SAO's e-mail systems. These efforts uncovered that the e-mail records from 2004 no longer exist because of

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[25] A proffer agreement is less comprehensive than court-ordered "use immunity" or "transactional immunity." The Illinois Code of Criminal Procedure authorizes a court, upon motion of the State, to order that "a witness be granted [use] immunity from prosecution in a criminal case as to any information directly or indirectly derived from the production of evidence from the witness if the witness has refused or is likely to refuse to produce the evidence on the basis of his or her privilege against self-incrimination." 725 ILCS 5/106–2.5(b) (West 1994). However, a grant of "use immunity" does not act as an absolute bar from prosecution but, rather, prohibits the State from using any evidence obtained under the grant of immunity, or leads derived from that evidence, against the immunized witness in a later criminal proceeding. *People ex rel. Cruz v. Fitzgerald*, 363 N.E.2d 835, 837, 66 Ill. 2d 546, 549 (1977); *People v. Adams*, 721 N.E.2d 1182, 1189, 308 Ill. App. 3d 995, 1004-05 (4th Dist. 1999). On the other hand, "transactional immunity" affords broader protection from future prosecution than "use immunity" and acts to completely bar the State from prosecuting an immunized witness for any offenses to which the immunity relates. 725 ILCS 5/106–1 (West 1976) and 725 ILCS 106–2 (West 1964); *see also People v. Ousley*, 919 N.E.2d 875, 885-886, 235 Ill. 2d 299, 313-314 (2009). As noted, the OSP did obtain "use immunity" orders from the Court for those witnesses who asserted their Fifth Amendment rights and refused to testify. The OSP, however, did not seek any orders for "transactional immunity." Grants of use immunity were necessary for the OSP to fulfill its court-ordered mandate.

The following witnesses were granted "use immunity": Bridget McCarthy, Kevin McCarthy, Craig Denham, Det. James Gilger, Det. Nick Spanos, Det. Edward Louis, Det. Patrick Flynn, SAO Dir. of State Program Michael Joyce, Lt. Richard Rybicki, and Det. Ronald Yawger. A request by a witness for "use immunity" should not be interpreted to mean that the person has actual criminal liability.

record retention policies and could not be recovered.

IV. DETAILED DISCUSSION OF THE EVIDENCE

A. Overview of the 2004 Incident on Division Street

On Saturday, April 24, 2004, David Koschman, then 21 years of age, and three of his friends — Scott Allen, James Copeland, and David Francis — drove together from their homes in Mount Prospect, Illinois, to Chicago's Humboldt Park neighborhood to visit their friend, Shaun Hageline, at his apartment.[26] Koschman and his friends, who had all gone to high school together,[27] had made plans to go out that night in the City and then attend the Chicago Cubs game the next day.[28] While at Hageline's apartment that evening, the group watched an NBA playoff basketball game,[29] drank beer,[30] and some also recounted smoking marijuana.[31] Later that evening, the Koschman group headed to Division Street[32] — a popular destination on Chicago's near-north side known for its high concentration of bars and clubs. The Koschman group visited several bars in the Division Street area that night,[33] and then, around approximately

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26 Hageline, Shaun, Special Grand Jury Tr. at 6:14-7:2 (Aug. 8, 2012); Allen, Scott, Special Grand Jury Tr. at 7:19-23, 8:7-24 (Aug. 8, 2012).

27 Hageline, Shaun, Special Grand Jury Tr. at 6:19-24 (Aug. 8, 2012); Allen, Scott, Special Grand Jury Tr. at 7:24-8:6, 8:14-16 (Aug. 8, 2012).

28 Hageline, Shaun, Special Grand Jury Tr. at 6:19-7:2 (Aug. 8, 2012); Allen, Scott, Special Grand Jury Tr. at 8:17-20 (Aug. 8, 2012) (Koschman, Francis, Copeland, and Allen planned to attend the Cubs game).

29 Copeland, James, IGO Interview Rep. at 1 (May 21, 2012).

30 Hageline, Shaun, Special Grand Jury Tr. at 7:3-6 (Aug. 8, 2012); Allen, Scott, Special Grand Jury Tr. at 8:21-24 (Aug. 8, 2012); Francis, David, Special Grand Jury Tr. at 12:20-23 (Aug. 8, 2012); Copeland, James, Special Grand Jury Tr. at 7:15-16 (July 11, 2012).

31 Hageline, Shaun, Special Grand Jury Tr. at 7:3-7:6 (Aug. 8, 2012); Allen, Scott, Special Grand Jury Tr. at 8:21-24 (Aug. 8, 2012); Francis, David, Special Grand Jury Tr. at 12:20-23 (Aug. 8, 2012).

32 Hageline, Shaun, Special Grand Jury Tr. at 7:7-9 (Aug. 8, 2012); Copeland, James, Special Grand Jury Tr. at 7:17-19 (July 11, 2012).

33 Allen, Scott, Special Grand Jury Tr. at 9:1-6 (Aug. 8, 2012); Hageline, Shaun, Special Grand Jury Tr. at 7:9-13 (Aug. 8, 2012); Copeland, James, Special Grand Jury Tr. at 7:21-22 (July 11, 2012).

3:15 a.m.,[34] the group left the area and began walking westward[35] down Division Street to make their way back to Hageline's apartment.[36]

That same night, Richard J. Vanecko, Craig Denham, Kevin McCarthy, Bridget McCarthy, and others attended an engagement dinner for Vanecko's cousin, Katherine Daley, at the Adobo Grill in the Old Town neighborhood of Chicago.[37] Vanecko is the nephew of Richard M. Daley, who in 2004, was the Mayor of the City of Chicago. Following dinner, a group of people from the engagement party — including Vanecko, the McCarthys, and Denham — went to a bar in the River North area of Chicago called the Pepper Canister.[38] After a few hours there,[39] the McCarthys, Vanecko, and Denham — planning to go to Butch McGuire's, a bar — took a cab to Division Street, where they exited just west of Dearborn Street and started walking eastward.[40]

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[34] Allen, Scott, Special Grand Jury Tr. at 9:7-13 (Aug. 8, 2012); Hageline, Shaun, Special Grand Jury Tr. at 7:16-21 (Aug. 8, 2012).

[35] Allen, Scott, Special Grand Jury Tr. at 9:7-13 (Aug. 8, 2012); Hageline, Shaun, Special Grand Jury Tr. at 7:16-21 (Aug. 8, 2012).

[36] Hageline, Shaun, IGO Interview Tr. at 10:1-6 (July 16, 2011).

[37] McCarthy, Bridget, Special Grand Jury Tr. at 14:21-15:15 (Aug. 15, 2012); Denham, Craig, Special Grand Jury Tr. at 14:17-15:24 (Aug. 15, 2012); Special Grand Jury Exhibit 57 at 1 (Michael Daley Special Grand Jury Declaration (Aug. 16, 2012)).

[38] McCarthy, Bridget, Special Grand Jury Tr. at 15:11-19 (Aug. 15, 2012); Denham, Craig, Special Grand Jury Tr. at 16:8-11 (Aug. 15, 2012).

[39] Both groups had been drinking much of the night. Before the special grand jury, Bridget McCarthy testified that she, her husband, Vanecko, and Denham had been drinking for approximately eight hours. *See* McCarthy, Bridget, Special Grand Jury Tr. at 29:2-3, 29:17-30:4 (Aug. 15, 2012); *see also* McCarthy, Kevin, Special Grand Jury Tr. at 39:9-22 (Aug. 15, 2012) (stating he had been with his wife, Vanecko, and Denham for eight hours and "had had some drinks"); Denham, Craig, Special Grand Jury Tr. at 35:11-12 (Aug. 15, 2012) (acknowledging he was "drunk"). Similarly, in addition to drinking beers at Hageline's apartment, Copeland testified before the special grand jury that Koschman's group of friends left Hageline's apartment to head to Division Street around 10 p.m. that night, where the group continued drinking and was intoxicated. Copeland, James, Special Grand Jury Tr. at 7:15-8:1 (July 11, 2012); *see also* Francis, David, Special Grand Jury Tr. at 32:3-7 (Aug. 8, 2012) (acknowledging he was "intoxicated"); Hageline, Shaun, Special Grand Jury Tr. at 21:21-22:11 (Aug. 8, 2012) (acknowledging he was "intoxicated"); Allen, Scott, Special Grand Jury Tr. at 9:10-13 (Aug. 8, 2012) ("We were all drunk, but we weren't slurring our words. We were not slurring our words or stumbling.").

[40] *See* McCarthy, Bridget, Special Grand Jury Tr. at 15:20-16:9 (Aug. 15, 2012).

While walking, the Koschman group and the Vanecko group crossed paths on the south sidewalk of Division Street,[41] during which Koschman bumped into Denham.[42] A verbal altercation ensued, and then Vanecko hit[43] Koschman with "a flush head-on punch that hit Koschman square in the face."[44] Another witness at the scene described: "[Koschman] came flying back and fell straight back like a dead weight."[45] Koschman's head then struck the pavement.[46] At the time of the incident, Vanecko was 29 years old, 6'3" and 230 pounds, while Koschman was 21 years old, 5'5" and 125 pounds.[47]

Immediately after Vanecko hit Koschman, Vanecko and Denham ran from the scene and took a taxi back to the Pepper Canister.[48] Kevin McCarthy was briefly detained by police and

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41 McCarthy, Bridget, Special Grand Jury Tr. at 16:10-18 (Aug. 15, 2012); Hageline, Shaun, IGO Interview Rep. at 1-2 (May 19, 2012).

42 *See* Allen, Scott, Special Grand Jury Tr. at 9:23-24; 39:21-40:3 (Aug. 8, 2012); *see* Denham, Craig, Special Grand Jury Tr. at 17:8-11 (Aug. 15, 2012).

43 *See* Allen, Scott, Special Grand Jury Tr. at 21:13-22:4 (Aug. 8, 2012); *see* Copeland, James, IGO Interview Tr. at 30:20-22 (June 23, 2011); *see also* Copeland, James, Special Grand Jury Tr. at 7:21-24 (Aug. 8, 2012).

44 Copeland, James, Special Grand Jury Tr. at 9:16-18 (Jul. 11, 2012).

45 Kohler, Phillip, Special Grand Jury Tr. at 9:7-11 (July 11, 2012).

46 Dr. Stephen F. Futterer, a neuroradiologist at Northwestern Memorial Hospital who reviewed Koschman's initial CT brain scans on April 26, 2004, determined that Koschman suffered: (1) a fracture in the right back of the head (or the right occipital bone); (2) a separate fracture in the left back of the head (or left occipital bone); (3) a fracture on the left, inner side of the skull (extending across the left petrous apex, which is part of the temporal bone); (4) elevated intracranial pressure (based upon a paucity of sulci and crowding of the basilar cisterns); and (5) bruises of the brain tissue (or hemorrhagic contusions in the bilateral inferior/anterior frontal lobes, left greater than right). *See* Special Grand Jury Exhibit 24 at 3 (Statement of Dr. Stephen F. Futterer (Aug. 8, 2012)).

Dr. Gordon Sze, Professor of Radiology and Chief of Neuroradiology at Yale University School of Medicine, who serves as a consulting medical expert to the OSP, stated in his expert report, among other things: "It should be noted that the occipital bone constitutes one of the thicker portions of the skull. It should also be noted that the petrous apex lies more than half way across the skull and is in the interior of the skull. Therefore, the amount of force necessary to cause a fracture of the occipital bone, with propagation to the petrous apex, is very significant." Gordon Sze, MD, Expert Report at 3 (Apr. 3, 2013).

47 *See* Special Grand Jury Exhibit 10 (CPD001115-CPD001118) (Case Supplementary Report 3193543 (approved Nov. 10, 2004)).

48 *See* Denham, Craig, Special Grand Jury Tr. at 21:9-15 (Aug. 15, 2012).

released at the scene of the crime.[49] When Kevin McCarthy was questioned at the scene, he lied to police, claiming he did not know the identities of the other men who had run (Vanecko and Denham).[50] When released, Kevin McCarthy and his wife, Bridget McCarthy, entered a taxi on Division Street, conferred with Vanecko by cell phone, and traveled to the Pepper Canister to meet Vanecko and Denham.[51] While the Pepper Canister had been officially closed, someone at the bar allowed the four to enter and meet.[52]

Koschman was taken unconscious by ambulance from Division Street to Northwestern Memorial Hospital.[53] Despite numerous surgeries over the next eleven days, on May 6, 2004,

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49 *See* McCarthy, Kevin, Special Grand Jury Tr. at 21:12-16, 22:8-15 (Aug. 15, 2012).

50 *See* Special Grand Jury Exhibit 6 at CPD001050 (CPD001049-CPD001050) (General Offense Case Report (approved Apr. 25, 2004)) ("McCarthy states he doesn't know who other offenders are.") Kevin McCarthy testified before the special grand jury that he did not recall being asked by Ofc. Tremore whether he knew the other individuals at the scene. *See* McCarthy, Kevin, Special Grand Jury Tr. at 52:6-11 (Aug. 15, 2012). But, Kevin McCarthy did admit during his testimony before the special grand jury that he lied to detectives later that same morning when he told them his wife and he exited the taxi alone and came upon two groups of people arguing. *See* McCarthy, Kevin, Special Grand Jury Tr. at 53:5-6 (Aug. 15, 2012).

51 *See* McCarthy, Kevin, Special Grand Jury Tr. at 22:14-19, 86:14-17, 87:6-9 (Aug. 15, 2012); McCarthy, Bridget, Special Grand Jury Tr. at 19:2-8 (Aug. 15, 2012); Sprint Account Statement for Richard Vanecko at SPR000547 (May 22, 2004) (SPR000545-SPR000548).

52 Before the special grand jury, Bridget McCarthy was the only member of the Vanecko group who would agree that the Pepper Canister was closed when the group was there after the incident (the altercation on Division Street occurred at approximately 3:15 a.m.), while Denham and Kevin McCarthy could not recall. *See* McCarthy, Bridget, Special Grand Jury Tr. at 54:7-15 (Aug. 15, 2012); Denham, Craig, Special Grand Jury Tr. at 40:3-9 (Aug. 15, 2012); McCarthy, Kevin, Special Grand Jury Tr. at 75:17-19 (Aug. 15, 2012). No one in the Vanecko group could explain how the group was let into the bar when it was closed. *See* McCarthy, Bridget, Special Grand Jury Tr. at 54:7-24 (Aug. 15, 2012); Denham, Craig, Special Grand Jury Tr. at 40:3-8 (Aug. 15, 2012). The OSP interviewed Ivan McCullagh, who was the manager of the Pepper Canister in 2004, and he explained that in 2004, the Pepper Canister closed at 3:00 a.m. on Saturdays and did not have a late-night liquor license. *See* McCullagh, Ivan, IGO Interview Rep. at 1 (Aug. 22, 2012). The OSP also interviewed Steve Bringas and Dominic O'Mahony, two bartenders at the Pepper Canister in 2004. *See* Special Grand Jury Exhibit 63 (Bringas, Steve, IGO Interview (Sept. 13, 2012)) and O'Mahony, Dominic, IGO Interview Rep. (Nov. 21, 2012). No one (McCullagh, Bringas, or O'Mahony) recalled ever letting the McCarthys, Denham, and Vanecko into the Pepper Canister after the bar had closed.

53 *See* Special Grand Jury Exhibit 23 (Statement of Dr. Matthew R. Levine (May 8, 2004)); Special Grand Jury Exhibit 24 at 2-4 (Statement of Dr. Steven F. Futterer (Aug. 8, 2012)); Patient Progress Notes (May 2, 2004) (IG_002067).

Koschman died from injuries resulting from Vanecko's physical assault.[54]

B. The 2004 CPD Investigation of the Incident

1. Early Morning Hours of April 25, 2004

On April 25, 2004, at approximately 3:15 a.m.,[55] after Koschman was hit[56] by Vanecko, on Division Street, Vanecko and Denham ran away[57] and the McCarthys also walked away from the immediate scene.[58] Koschman's friends flagged down 18th District Patrol Ofc. Edwin Tremore, directed him to where the altercation had occurred, and pointed out the McCarthys, who were still in the vicinity.[59] Before attending to Koschman, Tremore placed Kevin McCarthy in handcuffs and seated him in the back of his squad car.[60] Tremore then continued on foot

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54 *See* Special Grand Jury Exhibit 25 (Statement of Dr. Tae Lyong An (Aug. 13, 2012)). Koschman's Blue Cross Blue Shield insurance policy covered his medical expenses, totaling approximately $250,000 incurred during his hospitalization. Northwestern Memorial Hospital patient billing records (NMH004303-NMH004307).

55 *See* Special Grand Jury Exhibit 6 at CPD001049 (CPD001049-CPD001050) (General Offense Case Report (approved Apr. 25, 2004)).

56 *See* Allen, Scott, Special Grand Jury Tr. at 11:7-9, 11:13-14 (Aug. 8, 2012) ("Right at this time, I saw Koschman get punched in the face."); (the punch "was definitely a sucker punch"); *see* Copeland, James, Special Grand Jury Tr. at 9:7-9 (Aug. 8, 2012) ("[The punch] was flush. It was closed fists. It wasn't like a smack.") and Copeland, James, Special Grand Jury Tr. at 9:16-18 (Jul. 11, 2012) ("The punch was a flush head-on punch that hit Koschman square in the face."); Hageline, Shaun, Special Grand Jury Tr. at 10:22-11:2 (Aug. 8, 2012) ("I don't remember Koschman trying to break his fall, which leads me to believe that he was knocked out before he hit the ground."); Kohler, Phillip, Special Grand Jury Tr. at 9:8-12 (Jul. 11, 2012) ("Almost immediately after Koschman moved between the two groups, he came flying back and fell straight back like a dead weight. It was like an explosion."). Furthermore, according to their testimony before the special grand jury in 2012, neither Kevin McCarthy, Bridget McCarthy, nor Craig Denham saw the physical contact between Vanecko and Koschman because they had each turned their backs and were walking away at the time Koschman was struck. *See* McCarthy, Kevin, Special Grand Jury Tr. at 18:9-14, 20:8-22, 49:14-18 (Aug. 15, 2012); McCarthy, Bridget, Special Grand Jury Tr. at 17:23-18:14, 39:5-14 (Aug. 15, 2012); Denham, Craig, Special Grand Jury Tr. at 20:4-10, 47:7-14, 48:7-10 (Aug. 15, 2012); *see also* General Progress Report at CPD001542 (CPD001541-CPD001543) (May 13, 2004).

57 *See* Denham, Craig, Special Grand Jury Tr. at 20:4-24 (Aug. 15, 2012).

58 *See* McCarthy, Bridget, Special Grand Jury Tr. at 17:23-18:2 (Aug. 15, 2012).

59 *See* Tremore, Edwin, Kroll Interview Rep. at 2-3 (Sept. 18, 2012).

60 *See* Tremore, Edwin, Kroll Interview Rep. at 3 (Sept. 18, 2012).

down Division Street, where he found Koschman lying in the street unconscious.[61] Tremore immediately called for an ambulance.[62]

In response to Tremore's request, the Office of Emergency Management and Communications ("OEMC") dispatched the Chicago Fire Department's ("CFD") Engine 4 and Ambulance 11.[63] By approximately 3:21 a.m.,[64] the dispatched CFD personnel began attending to Koschman. Koschman, having been attended to primarily by CFD Paramedic-in-Charge Patrick Jessee, was then transferred from the street into Ambulance 11 via a scene-stretcher, and at approximately 3:30 a.m., the ambulance departed to take Koschman to Northwestern Memorial Hospital, which was about a mile away.[65] Koschman arrived at Northwestern Memorial Hospital at approximately 3:35 a.m. and was immediately taken from Ambulance 11 into the emergency room via a hospital stretcher.[66]

Meanwhile, back on Division Street, Tremore questioned Kevin McCarthy.[67] During the questioning, Kevin McCarthy lied to Tremore by claiming he did not know the identities of the other men who had run from the scene (Vanecko and Denham).[68] After interviewing Kevin McCarthy, Tremore ultimately released him on-site, after Koschman's friends told Tremore that

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61 *See* Tremore, Edwin, Kroll Interview Rep. at 3 (Sept. 18, 2012).

62 *See* Tremore, Edwin, Kroll Interview Rep. at 3 (Sept. 18, 2012).

63 *See* CFD Pre-Hospital Care Report at CLD000001 (Apr. 25, 2004) (CLD000001-CLD000003); *see* CFD Pre-Hospital Care Report at CFD000012 (Apr. 25, 2004) (CFD000011-CFD000014).

64 *See* CFD Pre-Hospital Care Report at CFD000012 (Apr. 25, 2004) (CFD000011-CFD000014); *see* CFD Pre-Hospital Care Report at CLD000001 (Apr. 25, 2004) (CLD000001-CLD000003).

65 *See* CFD Pre-Hospital Care Report at CFD000012-CFD000013 (Apr. 25, 2004) (CFD000011-CFD000014).

66 *See* CFD Pre-Hospital Care Report at CFD000012-CFD000013 (Apr. 25, 2004) (CFD000011-CFD000014).

67 *See* Special Grand Jury Exhibit 6 (CPD001049-CPD001050) (General Offense Case Report (approved Apr. 25, 2004)).

68 Tremore's General Offense Case Report identifies four "offenders" (which includes Kevin McCarthy); three of them were listed as "unknown." *See* Special Grand Jury Exhibit 6 at CPD001049 (CPD001049-CPD001050) (General Offense Case Report (approved Apr. 25, 2004)). It is now known the three "unknown offenders" were Vanecko, Denham, and Bridget McCarthy.

it was not Kevin McCarthy who assaulted Koschman.[69] Bridget McCarthy remained nearby[70] while her husband was in temporary custody and left by taxi with her husband when he was released. The OSP has found no indication that Bridget McCarthy spoke with anyone from CPD that night.[71]

Tremore also took statements from Michael Connolly, a bystander witness, and Koschman's friend, Shaun Hageline.[72] According to Tremore's General Offense Case Report, Hageline told him that Koschman was punched in the face.[73] According to the same report, Connolly told Tremore that Koschman was pushed in the chest;[74] however Connolly explained to the special grand jury in August 2012 that he did not actually see the physical contact between Vanecko and Koschman, because his view was obstructed,[75] although he did see Koschman fall like a "dead weight" after the physical contact occurred.[76]

According to Tremore, because the unidentified men who fled the scene had simply been described by the witnesses as "white males," he did not put out a bulletin for other officers to be on the lookout for them, due to the amount of white males that were in the area at that time of the

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69 *See* McCarthy, Kevin, Special Grand Jury Tr. at 22:8-15 (Aug. 15, 2012).

70 *See* McCarthy, Bridget, Special Grand Jury Tr. at 45:8-16 (Aug. 15, 2012).

71 *See, e.g.,* McCarthy, Bridget, Special Grand Jury Tr. at 100:15-101:7 (Aug. 15, 2012).

72 *See* Special Grand Jury Exhibit 6 (CPD001049-CPD001050) (General Offense Case Report (approved Apr. 25, 2004)).

73 *See* Special Grand Jury Exhibit 6 at CPD001050 (CPD001049-CPD001050) (General Offense Case Report (approved Apr. 25, 2004)) ("Witness #2 [Hageline] stated the same except he says victim was punched in the face not pushed.") In his 2012 special grand jury testimony, Hageline stated, "I did not actually see the punch thrown, but I heard a noise that could have been the sound of a punch or the sound of Koschman's head hitting the pavement." *See* Hageline, Shaun, Special Grand Jury Tr. at 10:10-15 (Aug. 8, 2012). Other than Vanecko and Koschman, the only other people at the scene of the incident who saw the physical contact between Vanecko and Koschman were Allen and Copeland, and both have consistently stated since 2004 that Vanecko punched Koschman in the face.

74 *See* Special Grand Jury Exhibit 6 at CPD001049 (CPD001049-CPD001050) (General Offense Case Report (approved Apr. 25, 2004)) ("Witness #1 (Connelly) [sic] stated . . . one of the unknown offenders pushed victim in the chest....")

75 *See* Connolly, Michael, Special Grand Jury Tr. at 9:9-13 (July 11, 2012).

76 *See* Connolly, Michael, Special Grand Jury Tr. at 9:14-16 (July 11, 2012); *see also* Kohler, Phillip, Special Grand Jury Tr. at 9:8-12 (July 7, 2012).

morning (closing time for many of the bars).[77] Additionally, Tremore did not enter any of the businesses near the altercation in an attempt to identify any additional witnesses, citing that the incident took place just west of Dearborn Street, at a section of the block with no bars.[78] After departing the scene, Tremore drove to Northwestern Memorial Hospital to check on the condition of Koschman.[79] There he spoke with the emergency room attending physician, Dr. Matthew Levine, who related that Koschman was being treated for a head injury and was in serious condition.[80]

In order for Tremore to complete the required CPD paperwork (the General Offense Case Report), he needed OEMC to assign a "records division number," also known as a RD #. Tremore was provided RD # HK323454 for his report.[81] Based on the facts known at that time, Tremore categorized the offense as a simple battery, a designation that his Sergeant, Patrick Moyer, approved.[82] Tremore simultaneously notified detectives in the Violent Crimes section of Area 3 about the incident.[83] Around 5:15 a.m., approximately two hours after Koschman had been struck, Tremore officially completed his work on the matter.[84] He was never contacted by any detectives during their subsequent 2004 and 2011 investigations into the Koschman case.[85]

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77 *See* Tremore, Edwin, Kroll Interview Rep. at 4 (Sept. 18, 2012).

78 *See* Tremore, Edwin, Kroll Interview Rep. at 5 (Sept. 18, 2012).

79 *See* Tremore, Edwin, Kroll Interview Rep. at 5 (Sept. 18, 2012).

80 *See* Tremore, Edwin, Kroll Interview Rep. at 5 (Sept. 18, 2012); *see* Special Grand Jury Exhibit 6 at CPD001050 (CPD001049-CPD001050) (General Offense Case Report (approved Apr. 25, 2004)).

81 *See* Tremore, Edwin, Kroll Interview Rep. at 5 (Sept. 18, 2012); *see* Special Grand Jury Exhibit 6 at CPD001050 (CPD001049-CPD001050) (General Offense Case Report (approved Apr. 25, 2004)).

82 *See* Special Grand Jury Exhibit 6 at CPD001049 (CPD001049-CPD001050) (General Offense Case Report (approved Apr. 25, 2004)).

83 *See* Special Grand Jury Exhibit 6 at CPD001049 (CPD001049-CPD001050) (General Offense Case Report (approved Apr. 25, 2004)).

84 *See* Tremore, Edwin, Kroll Interview Rep. at 3 (Sept. 18, 2012); It is unknown how many CPD officers were actually at the scene of the altercation that morning and may have interacted with witnesses or bystanders. Only Tremore has been identified.

85 *See* Tremore, Edwin, Kroll Interview Rep. at 6 (Sept. 18, 2012).

2. The Area 3 Investigation

a. Assigning the Koschman Matter

Upon notification of Area 3 detectives, responsibility for investigating the matter moved from CPD's Patrol Division to the Detective Division. Typically, detectives receive new assignments from their sergeant (and sometimes through a sergeant within the Area's Case Management Office) after their "watch" roll call.[86] In any given 24-hour period, CPD personnel typically work one of three possible "watches" (or shifts). Although the specific start and end times vary, generally speaking, the "first watch" is from approximately midnight until 9 a.m.; the "second watch" is from approximately 8 a.m. until 5 p.m.; and the "third watch" is from approximately 4 p.m. until 1 a.m. Sergeants are generally responsible for overseeing the assignments given to detectives during their watch,[87] although detectives are given wide latitude as to how best to handle the details of a particular investigation they are assigned.[88]

Area 3 Violent Crimes Sgt. Robert O'Leary primarily worked the second watch in 2004, and was working on the morning of April 25, 2004.[89] According to Robert O'Leary, he assigned Det. Rita O'Leary (no relation) and Det. Robert Clemens, both of whom primarily worked second watch in 2004, to follow up on the Koschman case when they arrived to begin their watch the morning of April 25.[90] Robert O'Leary cannot recall why he assigned Rita O'Leary and

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86 *See* Special Grand Jury Exhibit 123 at 2-3 (O'Leary, Robert, Kroll Interview Rep. (Oct. 8, 2012)).

87 *See* Special Grand Jury Exhibit 123 at 2-3 (O'Leary, Robert, Kroll Interview Rep. (Oct. 8, 2012)).

88 *See* Special Grand Jury Exhibit 122 at 3 (O'Leary, Rita, Kroll Interview Rep. (Oct. 5, 2012)); *see* Clemens, Robert, Kroll Interview Rep. (Proffer) at 7 (Oct. 25, 2012).

89 *See* Special Grand Jury Exhibit 123 at 2, 5 (O'Leary, Robert, Kroll Interview Rep. (Oct. 8, 2012)).

90 *See* Special Grand Jury Exhibit 123 at 5 (O'Leary, Robert, Kroll Interview Rep. (Oct. 8, 2012)). Det. Andrew Sobolewski is listed on police reports from 2004 as the "Primary Detective Assigned" to the matter, even though he never worked on the case. *See, e.g.*, Special Grand Jury Exhibit 10 at CPD001115 (CPD001115-CPD001128) (Case Supplementary Report 3193543 (approved Nov. 10, 2004)); *see* Special Grand Jury Exhibit 15 at CPD001218 (CPD001199-CPD001234) (Case Supplementary Reports 8585610 and 858620 (approved Feb. 28, 2011)). Sobolewski passed away on July 22, 2012, and did not testify before the special grand jury; however, the IGO interviewed him about the Koschman matter in August 2011. Det. Edward Day, who worked in Area 3's Case Management Office, believes he assigned Sobolewski to the Koschman matter in the Criminal History Records Information System (CHRIS), CPD's system for electronically storing police reports, a couple of days after the April 25 incident. *See*

Clemens to the Koschman matter, but he noted that it could "have been as simple as they were the first two detectives in that day."[91] Both Rita O'Leary and Clemens had pre-planned furloughs, with both working their final days before vacation or furlough on April 27,[92] with Rita O'Leary set to return May 20,[93] and Clemens on May 19.[94]

Neither Rita O'Leary nor Clemens are absolutely certain which sergeant assigned the case to them.[95] Rita O'Leary asserts she was never truly "assigned" the Koschman case, but rather was only asked to conduct a very narrow initial portion of the work (a few witness interviews and to follow up on Koschman's medical condition).[96]

Similarly, Clemens believes he was either "assigned to assist" Rita O'Leary's investigation[97] — as opposed to being formally assigned the investigation himself — or that he may have simply "volunteered" to help Rita O'Leary interview Kevin McCarthy without ever being assigned anything by a sergeant.[98] Nevertheless, Clemens is confident that Rita O'Leary

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Day, Edward, IGO Interview Rep. at 4-5 (Nov. 29, 2012). Once a name is entered in CHRIS as a matter's "Primary Detective Assigned," that name carries forward regardless of a detective's actual involvement. *See* Sobolewski, Andrew, IGO Interview Tr. at 8:7-9:3, 23:6-12 (Aug. 5, 2011). Sobolewski stated that although he was listed as "Primary Detective Assigned," he was not responsible for investigating the matter. *See* Sobolewski, Andrew, IGO Interview Tr. at 23:6-12 (Aug. 5, 2011). Sobolewski did not recall ever working on the Koschman matter, including aiding or being asked to aid Rita O'Leary on the case. *See* Sobolewski, Andrew, IGO Interview Tr. at 2:24-8:6, 36:9-11 (Aug. 5, 2011).

91 *See* Special Grand Jury Exhibit 123 at 5 (O'Leary, Robert, Kroll Interview Rep. (Oct. 8, 2012)).

92 *See* CPD Attendance & Assignment Record, Det. Div. Area 3 at IG_004044-IG_004045 (Apr. 27, 2004) (IG_004041-IG_004051); CPD Attendance & Assignment Record, Det. Div. Area 3 at IG_004054-IG_004056 (Apr. 28, 2004) (IG_004052-IG_004061).

93 *See* CPD Attendance & Assignment Record, Det. Div. Area 3 at IG_004279 (IG_004276-IG_004285) (May 20, 2004).

94 *See* CPD Attendance & Assignment Record, Det. Div. Area 3 at IG_004268 (IG_004266-IG_004275) (May 19, 2004).

95 *See* Special Grand Jury Exhibit 122 at 3 (O'Leary, Rita, Kroll Interview Rep. (Oct. 5, 2012)); Clemens, Robert, Kroll Interview Rep. (Proffer) at 5 (Oct. 25, 2012).

96 *See* Special Grand Jury Exhibit 122 at 3, 9 (O'Leary, Rita, Kroll Interview Rep. (Oct. 5, 2012)).

97 *See* Clemens, Robert, Special Grand Jury Tr. at 17:1-14 (Apr. 24, 2013).

98 *See* Clemens, Robert, Special Grand Jury Tr. at 69:10-70:19 (Apr. 24, 2013).

was officially assigned the investigation[99] — likely by Robert O'Leary[100] — even though he believes that the scope of what Rita O'Leary (and potentially he himself) was asked to do was not the "investigation in total."[101]

b. Investigative Steps Taken by Det. O'Leary and Det. Clemens on April 25, 2004

The first investigative work done on the Koschman matter by Area 3 detectives occurred at approximately 9:30 a.m. on the morning of April 25, 2004, when Rita O'Leary called Northwestern Memorial Hospital to check on Koschman's condition.[102] Rita O'Leary spoke with a nurse over the phone and learned that Koschman was unconscious, unable to be interviewed, and was in critical but stable condition.[103]

At approximately 11:00 a.m.,[104] Rita O'Leary was joined by Clemens,[105] and they drove[106] to Kevin McCarthy's residence to interview him (Kevin McCarthy had been identified in Tremore's report from earlier that morning).[107] Once inside Kevin McCarthy's residence, Rita O'Leary took the lead in questioning him,[108] while Clemens listened and asked follow-up

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99 *See* Clemens, Robert, Special Grand Jury Tr. at 69:10-19, 75:4-6 (Apr. 24, 2013); *see* Clemens, Robert, Kroll Interview Rep. (Proffer) at 3 (Oct. 25, 2012).

100 *See* Clemens, Robert, Kroll Interview Rep. (Proffer) at 5 (Oct. 25, 2012).

101 *See* Clemens, Robert, Special Grand Jury Tr. at 75:18-76:4 (Apr. 24, 2013).

102 *See* Special Grand Jury Exhibit 7 at CPD001058 (CPD001054-CPD001060) (Case Supplementary Report 3215651 (approved Nov. 10, 2004)).

103 *See* Special Grand Jury Exhibit 7 at CPD001058 (CPD001054-CPD001060) (Case Supplementary Report 3215651 (approved Nov. 10, 2004)).

104 *See* Clemens, Robert, Special Grand Jury Tr. at 86:13-19 (Apr. 24, 2013); *see* Special Grand Jury Exhibit 122 at 6 (O'Leary, Rita, Kroll Interview Rep. (Oct. 5, 2012)).

105 *See* Clemens, Robert, Special Grand Jury Tr. at 69:10-24 (Apr. 24, 2013).

106 *See* Clemens, Robert, Kroll Interview Rep. (Proffer) at 9 (Oct. 25, 2012).

107 *See* Special Grand Jury Exhibit 6 (CPD001049-CPD001050) (General Offense Case Report (approved Apr. 25, 2004)).

108 *See* Clemens, Robert, Kroll Interview Rep. (Proffer) at 9 (Oct. 25, 2012).

questions.[109] Rita O'Leary described Kevin McCarthy as appearing to be hungover and groggy.[110] Clemens thought Kevin McCarthy smelled of alcohol and was still intoxicated from the night before.[111]

During the questioning, Kevin McCarthy once again denied knowing anyone involved in the altercation, which was false.[112] While questioning Kevin McCarthy in his home, detectives asked him if they could speak to his wife, Bridget McCarthy.[113] Kevin insisted Bridget was not available at that time.[114] The detectives asked Kevin McCarthy where Bridget and he went after he was released by Tremore. Kevin McCarthy told the detectives that they went home,[115] which was also false. In fact, after Kevin McCarthy was released by Tremore, the McCarthys got into a cab on Division Street.[116] Then, Bridget McCarthy called Vanecko on her cellphone from the

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109 *See* Clemens, Robert, Kroll Interview Rep. (Proffer) at 4 (Oct. 25, 2012).

110 *See* Special Grand Jury Exhibit 122 at 6 (O'Leary, Rita, Kroll Interview Rep. (Oct. 5, 2012)).

111 *See* Clemens, Robert, Special Grand Jury Tr. at 89:6-14 (Apr. 24, 2013). Both groups had been drinking for a number of hours that night and were intoxicated to some degree. *See* McCarthy, Bridget, Special Grand Jury Tr. at 29:2-3 (Aug. 15, 2012) ("I had definitely been drinking and was drunk"); McCarthy, Kevin, Special Grand Jury Tr. at 39:9-22 (Aug. 15, 2012) (stating he had been with his wife, Vanecko, and Denham for eight hours and "had had some drinks"); Denham, Craig, Special Grand Jury Tr. at 35:11-12 (Aug. 15, 2012) (acknowledging he was "drunk"); Francis, David, Special Grand Jury Tr. at 32:3-7 (Aug. 8, 2012) (acknowledging he was "intoxicated"); Hageline, Shaun, Special Grand Jury Tr. at 21:21-22:11 (Aug. 8, 2012) (acknowledging he was "intoxicated"); Allen, Scott, Special Grand Jury Tr. at 9:10-13 (Aug. 8, 2012) ("We were all drunk, but we weren't slurring our words. We were not slurring our words or stumbling"); Copeland, James, Special Grand Jury Tr. at 7:21-8:1 (July 11, 2012) (acknowledging he was "intoxicated"). According to toxicology reports, Koschman's blood alcohol level was 0.193. *See* Toxicology Report (Apr. 25, 2004) (IG_000610-IG_000611).

112 *See* Special Grand Jury Exhibit 122 at 6 (O'Leary, Rita, Kroll Interview Rep. (Oct. 5, 2012)).

113 *See* Clemens, Robert, Kroll Interview Rep. (Proffer) at 4 (Oct. 25, 2012); *see* Special Grand Jury Exhibit 122 at 6 (O'Leary, Rita, Kroll Interview Rep. (Oct. 5, 2012)).

114 *See* Special Grand Jury Exhibit 122 at 6 (O'Leary, Rita, Kroll Interview Rep. (Oct. 5, 2012)).

115 *See* Special Grand Jury Exhibit 7 at CPD001059 (CPD001054-CPD001060) (Case Supplementary Report 3215651 (approved Nov. 10, 2004)).

116 *See* McCarthy, Bridget, Special Grand Jury Tr. at 19:2-8 (Aug. 15, 2012).

cab.[117] Vanecko advised Bridget McCarthy that he and Denham were at the Pepper Canister, and the McCarthys went there to meet them.[118] Denham and Kevin McCarthy testified before the special grand jury that they could not recall anything that happened at that meeting.[119] Bridget McCarthy testified before the special grand jury that she only recalled telling the group at the Pepper Canister that Kevin had been handcuffed.[120]

Both Rita O'Leary and Clemens thought Kevin McCarthy was lying to them throughout the interview.[121] Rita O'Leary stated that both she and Clemens "probably" took notes during their interview of Kevin McCarthy,[122] while Clemens, on the other hand, testified that he did not take any notes.[123]

Detectives typically record their interview notes on General Progress Report ("GPR") forms.[124] GPRs are thereafter used to prepare detectives' Case Supplementary Reports, or "case supps," as they are often referred to. Both the GPRs and the case supps are, according to CPD protocol,[125] supposed to be preserved in case files[126] and tendered to defense counsel under

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117 *See* Special Grand Jury Exhibit 32 at SP000024 (SPR000023-SPR000027) (cell phone bill for cell phone number associated with Bridget McCarthy reflecting calls on April 25, 2004); *see also* McCarthy, Bridget, Special Grand Jury Tr. at 50:11-54:6 (Aug. 15, 2012).

118 *See* McCarthy, Bridget, Special Grand Jury Tr. at 19:3-8, 54:1-6 (Aug. 15, 2012).

119 *See* McCarthy, Kevin, Special Grand Jury Tr. at 23:2-8 (Aug. 15, 2012); Denham, Craig, Special Grand Jury Tr. at 21:15-17 (Aug. 15, 2012).

120 *See* McCarthy, Bridget, Special Grand Jury Tr. at 57:2-23 (Aug. 15, 2012).

121 *See* Special Grand Jury Exhibit 122 at 6 (O'Leary, Rita, Kroll Interview Rep. (Oct. 5, 2012)); *see* Clemens, Robert, Special Grand Jury Tr. at 89:6-18 (Apr. 24, 2013).

122 *See* Special Grand Jury Exhibit 122 at 6 (O'Leary, Rita, Kroll Interview Rep. (Oct. 5, 2012)).

123 *See* Clemens, Robert, Special Grand Jury. Tr. at 78:18-79:1, 87:24-88:4 (Apr. 24, 2013). But note, at one point during Clemens' proffer interview with the OSP, he stated he could not recall whether he took notes during the interview of Kevin McCarthy. *See* Clemens, Robert, Kroll Interview Rep. (Proffer) at 4 (Oct. 25, 2012).

124 Villardita, Anthony, IGO Interview Rep. at 3 (Feb 13, 2013); *see* Chasen, Michael, IGO Interview Tr. at 51:4-20 (Aug. 23, 2011); Giralamo, Anthony, IGO Interview Rep. at 2 (Dec. 21, 2012).

125 *See* CPD's Detective Division Standard Operating Procedures, Ch. 8, Sec. 8.3, Conducting a Field Investigation, Sub. Sec. (L)(4) at IG_005310-IG_005311 (1988) (IG_005234-IG_005450) (stating

prevailing discovery rules.

Rita O'Leary believes the GPRs she took throughout the day on April 25, 2004, formed the basis of the Case Supplementary Reports (one draft and one final report) she created for the Koschman case.[127] However, Rita O'Leary's GPRs of her interview of Kevin McCarthy, as well as her GPRs from her other interviews taken that day, are missing.[128] In former CPD Superintendent Jody Weis's opinion, missing GPRs raise red flags about an investigation.[129]

At approximately 3:00 p.m. on April 25, 2004,[130] Rita O'Leary called Connolly, one of the two bystander witnesses (but the only one of whom Tremore had taken a statement from at the scene earlier that morning), and conducted a brief interview.[131] Connolly told Rita O'Leary that he and his friend, Phillip Kohler (who was the other bystander witness), witnessed the altercation on Division Street that morning.[132]

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that "[i]n every case received for field investigation the assigned detective will . . . submit to the watch supervisor … all general progress reports and investigative notes prepared during the investigation.")

126 In normal practice, detectives are required to attach corresponding GPRs to their draft reports submitted to sergeants for review. *See* Special Grand Jury Exhibit 123 at 10 (O'Leary, Robert, Kroll Interview Rep. (Oct. 8, 2012)); *see* Special Grand Jury Exhibit 122 at 5 (O'Leary, Rita, Kroll Interview Rep. (Oct. 5, 2012)) (stating that she typically submitted GPRs with her reports); *see* Louis, Edward, Special Grand Jury Tr. at 34:24-36:7 (Feb. 20, 2013) (stating that as a matter of practice the GPRs go with the Case Supplementary Reports). Specifically, Robert O'Leary stated that Area 3 detectives were required to put their GPRs in a bin for a sergeant to review and sign, and then those GPRs were to be placed in the case file. *See* Special Grand Jury Exhibit 123 at 10 (O'Leary, Robert, Kroll Interview Rep. (Oct. 8, 2012)).

127 *See* Special Grand Jury Exhibit 122 at 6 (O'Leary, Rita, Kroll Interview Rep. (Oct. 5, 2012)).

128 While Robert O'Leary stated there have been instances when GPRs are not turned in with reports, he believes Rita O'Leary's April 25, 2004 GPRs should have been turned in and ultimately placed in the Koschman case file. *See* Special Grand Jury Exhibit 123 at 10 (O'Leary, Robert, Kroll Interview Rep. (Oct. 8, 2012)). Additionally, even though it would have been Rita O'Leary's typical practice to turn in her GPRs, she cannot recall whether she specifically did in this instance. *See* Special Grand Jury Exhibit 122 at 5 (O'Leary, Rita, Kroll Interview Rep. (Oct. 5, 2012)).

129 *See* Weis, Jody, IGO Interview Rep. at 2 (May 28, 2013).

130 *See* Michael Connolly Phone Records at IG_002403 (IG_002399-IG_002413).

131 *See* Special Grand Jury Exhibit 7 at CPD001059-CPD001060 (CPD001054-CPD001060) (Case Supplementary Report 3215651 (approved Nov. 10, 2004)).

132 *See* Special Grand Jury Exhibit 7 at CPD001059-CPD001060 (CPD001054-CPD0001060) (Case Supplementary Report 3215651 (approved Nov. 10, 2004)).

The final Case Supplementary Report recording this interview was altered from what was recorded in the draft. Rita O'Leary's April 25, 2004, draft Case Supplementary Report contained a short write-up on her phone interview of Connolly. A portion of the draft report reads as follows:

> CONNOLLY does see the victim get into the center of the altercation, he does not know if the victim was a [sic] aggressor or peacemaker, then he saw the victim get 'pushed or shoved' from the group and fall to the ground.[133]

The same paragraph in Rita O'Leary's May 20, 2004 final Case Supplementary Report reads as follows:

> CONNOLLY saw the victim get into the center of the altercation, and then he saw the victim get 'pushed or shoved' from the group and fall to the ground.

The final case supp removes the phrase "he [Connolly] does not know if the victim was a [sic] aggressor or peacemaker."[134] Rita O'Leary's April 25, 2004 handwritten GPR of this telephone interview of Connolly is missing.[135]

At approximately 3:20 p.m., Rita O'Leary called Northwestern Memorial Hospital again

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[133] *See* Special Grand Jury Exhibit 14 at CPD001619 (CPD001616-CPD001619) (Draft CPD Case Progress Report 323454 (drafted Apr. 25, 2004)).

[134] *See* Special Grand Jury Exhibit 7 at CPD001059 (CPD001054-CPD001060) (Case Supplementary Report 3215651 (approved Nov. 10, 2004)). Rita O'Leary testified that she did not know whether she removed the phrase on her own or upon someone else's instruction, but either way she believed the phrase was "redundant." *See* Special Grand Jury Exhibit 122 at 7-8 (O'Leary, Rita, Kroll Interview Rep. (Oct. 5, 2012)). Connolly testified before the special grand jury that this statement was not an accurate reflection of what he told CPD in 2004 and that he "would not have said the term 'peacemaker' at all." Connolly, Michael, Special Grand Jury Tr. at 7:10-14 (Aug. 8, 2012). He further testified that he has "always said that the victim was the verbal aggressor in the incident. And definitely no peacemaking action on his part at all." Connolly, Michael, Special Grand Jury Tr. at 7:10-14 (Aug. 8, 2012). Connolly explained to the special grand jury that he did not actually see the physical contact between Vanecko and Koschman, because his view was obstructed, although he did see Koschman fall like a "dead weight" after being struck. *See* Connolly, Michael, Special Grand Jury Tr. at 9:9-16 (July 11, 2012).

[135] The Court noted this discrepancy between the draft narrative and the final case supplementary report in its April 6, 2012 Order granting the petition to appoint a special prosecutor. *See* Order by J. Toomin at 12, Apr. 6, 2012.

to check on Koschman's medical condition.[136] Rita O'Leary spoke with the same nurse she had spoken with earlier in the day, and the report was the same — Koschman remained in critical but stable condition.[137] At that time, the nurse handed the telephone to Nanci Koschman, David's mother, who, according to the case supp, explained her son's injuries in more detail and related that David would be sedated for at least the next five days.[138]

With that, Rita O'Leary and Clemens's investigative work ended. However, based on their April 25, 2004 work alone, they were provided with the names of at least six additional individuals (Bridget McCarthy, Scott Allen, James Copeland, David Francis, Phillip Kohler, and Vrej Sazian) who could provide further information. All six were listed as "TO BE INTERVIEWED" in Rita O'Leary's draft case supp.[139] Rita O'Leary and Clemens never contacted these witnesses. In fact, none of these witnesses were contacted by any CPD personnel until May 9, 2004 — three days after Koschman had died. To be clear, no Area 3 detective work occurred on the Koschman matter from the end of Rita O'Leary and Clemens's April 25 shift until May 9, 2004 (13 days).

c. Certain Issues Stemming from Area 3's Initial Work

i. Assignment of Detectives on Furlough

Both detectives assigned on April 25, 2004, to investigate the Koschman matter were scheduled to take an extended period of time off (through the use of vacation days and official furlough) beginning April 28 — meaning that on the day they were assigned the case, at a maximum, they were available to work three shifts before stopping. Detectives knew, from information gathered from Tremore's conversation with the emergency room doctor, and from

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136 *See* Special Grand Jury Exhibit 7 at CPD001059 (CPD001054-CPD001060) (Case Supplementary Report 3215651 (approved Nov. 10, 2004)).

137 *See* Special Grand Jury Exhibit 7 at CPD001059 (CPD001054-CPD001060) (Case Supplementary Report 3215651 (approved Nov. 10, 2004)).

138 *See* Special Grand Jury Exhibit 7 at CPD001059 (CPD001054-CPD001060) (Case Supplementary Report 3215651 (approved Nov. 10, 2004)). Nanci Koschman also told Rita O'Leary that earlier that day she had received a phone call from Sazian, a friend of David's, who was the first person to inform her that David had been injured in an altercation while out with his friends Scott Allen, James Copeland, and David Francis.

139 *See* Special Grand Jury Exhibit 14 at CPD001617-CPD001618 (CPD001616-CPD001619) (Draft Case Supplementary Report (drafted Apr. 25, 2004)).

Rita O'Leary's calls to the hospital, that Koschman would be unable to provide an immediate statement because he had suffered a severe head injury, was in critical condition, and would be sedated for at least five additional days.

According to CPD witnesses, given Koschman's condition, Rita O'Leary and Clemens (or certainly at least other Area 3 detectives) should have continued to investigate the matter through April 27, and upon leaving for their extended periods of time off, the case should have been immediately reassigned to other Area 3 detectives.[140] Neither occurred.

Rita O'Leary explained she did not work on the matter on April 26 or 27 because her assignment was narrow in scope and was limited to conducting a few witness interviews and following up on Koschman's medical condition.[141] According to Rita O'Leary, the work she did on April 25 was the totality of the work she was assigned to handle, and she "got the ball rolling" by identifying additional witnesses to be interviewed.[142] However, she did not attempt to contact those additional witnesses herself before leaving for furlough. Clemens explained he did not work on the matter on April 26 or 27 because he was simply "assigned to assist"[143] the investigation or may have simply "volunteered"[144] for the matter. According to Clemens, responsibility for the investigation should have rotated to third watch detectives.[145]

According to Clemens, it was "common knowledge" that Rita O'Leary and he were scheduled for furlough in late April,[146] a sentiment that Rita O'Leary echoed.[147] In fact, Rita

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140 *See* Rybicki, Richard, Special Grand Jury Tr. at 65:19-67:1 (Mar. 27, 2013); *see* McLaughlin, Gillian, IGO Interview Rep. at 5 (Jan. 25, 2013); *see also* Chasen, Michael, IGO Interview Tr. at 100:19-101:6 (Aug. 23, 2011).

141 *See* Special Grand Jury Exhibit 122 at 3 (O'Leary, Rita, Kroll Interview Rep. (Oct. 5, 2012)).

142 *See* Special Grand Jury Exhibit 122 at 3-4 (O'Leary, Rita, Kroll Interview Rep. (Oct. 5, 2012)).

143 *See* Clemens, Robert, Special Grand Jury Tr. at 17:9-14 (Apr. 24, 2013).

144 *See* Clemens, Robert, Special Grand Jury Tr. at 69:10-70:19 (Apr. 24, 2013).

145 *See* Clemens, Robert, Kroll Interview Rep. (Proffer) at 6 (Oct. 25, 2012). Commander James Gibson also believes this procedure should have occurred. *See* Gibson, James, Kroll Interview Rep. at 4 (Dec. 13, 2012). In the spring of 2004, Gibson was an Area 3 sergeant who typically worked the "third shift." *See* Sobolewski, Andrew, IGO Interview Tr. at 19:10-20:8 (Aug. 5, 2011) (explaining that cases often get passed from shift to shift).

146 *See* Clemens, Robert, Special Grand Jury Tr. at 71:23-72:5 (Apr. 24, 2013).

O'Leary explained that she reminded her sergeant when she was given the case that she was going on furlough.[148] Also, Clemens explained that furlough schedules are widely known, with the Area Commander and Case Management Office both having knowledge of the applicable dates for all detectives.[149] Both Clemens and Rita O'Leary have explained that they bid on the April/May 2004 furlough dates in 2003.[150]

The initial days of an investigation are critical, since a case can become a "cold case" relatively quickly and it is atypical for both detectives working a matter to be gone at the same time.[151] Former Area 3 Sgt. James Gibson explained that the fact that both detectives would soon be on furlough "would not preclude them from beginning the investigation," but ideally, the same detectives work an investigation day after day.[152] Another Area 3 sergeant, Gillian McLaughlin (who in 2004 typically worked second watch), noted that the Koschman case should not have been assigned to Rita O'Leary and Clemens if they were leaving on furlough; that is, unless the unit was short-handed.[153] Philip Cline, then CPD Superintendent, stated it was not

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147 *See* Special Grand Jury Exhibit 122 at 3 (O'Leary, Rita, Kroll Interview Rep. (Oct. 5, 2012)).

148 *See* Special Grand Jury Exhibit 122 at 3 (O'Leary, Rita, Kroll Interview Rep. (Oct. 5, 2012)).

149 *See* Clemens, Robert, Special Grand Jury Tr. at 72:6-23 (Apr. 24, 2013).

150 *See* Clemens, Robert, Special Grand Jury Tr. at 72:6-13 (Apr. 24, 2013); *see* Special Grand Jury Exhibit 122 at 3 (O'Leary, Rita, Kroll Interview Rep. (Oct. 5, 2012)). In response to a special grand jury subpoena, CPD produced a Records Disposal Certificate indicating that the applicable furlough request forms had been destroyed, pursuant to CPD policy, in approximately March 2004. *See* CPD Records Disposal Certificate for Area 3 Detective Division at CPD003148 (CPD003144-CPD003148). During its investigation, the OSP has found no evidence that undermines Clemens' and Rita O'Leary's assertion that their April 2004 furloughs were scheduled well in advance, pursuant to the normal CPD furlough selection procedures. In fact, the applicable CPD directive on furlough selections supports their statements. *See* CPD Department Notice No. 03-53 regarding Annual Watch, Furlough Selections, and Vacation Schedules 2004 (Issued Oct. 16, 2003) (CPD001937-CPD001940).

151 As stated by Sgt. Thomas Mills, who worked as a sergeant in the Violent Crimes office in Detective Division Area 5 in 2011, "lots of information comes in within 48 hours" and "[a] case can become a cold case relatively quickly." *See* Special Grand Jury Exhibit 108 at 3 (Mills, Thomas, Kroll Interview Rep. (Aug. 20, 2012)).

152 *See* Gibson, James, Kroll Interview Rep. at 4 (Dec. 13, 2012).

153 *See* McLaughlin, Gillian, IGO Interview Rep. at 5 (Jan. 25, 2013); *see* Clemens, Robert, Kroll Interview Rep. (Proffer) at 5 (Oct. 25, 2012) (stating that sometimes a sergeant just has to "pick who's available"); *see* Special Grand Jury Exhibit 122 at 3 (O'Leary, Rita, Kroll Interview Rep. (Oct. 5, 2012))

ideal for detectives leaving for vacation to be assigned aggravated battery cases.[154] Similarly, then Detective Division Chief James Molloy said that "common sense says you shouldn't" assign a new investigation to detectives about to begin furlough.[155]

The OSP was told that it was "odd" the case was not reassigned.[156] Det. Anthony Villardita simply noted: "someone dropped the ball."[157] According to police, the failure to reassign the case and the resulting halt in the investigation is "surpris[ing],"[158] "uncommon,"[159] has "no explanation,"[160] does not "look good,"[161] and is "embarrass[ing]" for CPD.[162]

When asked whose responsibility it is to make sure cases do not "fall through the cracks," McLaughlin did not attempt to skirt the obligation, answering: it is the sergeants' responsibility.[163] Area 3 Lt. Richard Rybicki, who supervised the Violent Crimes sergeants and detectives, testified that, ultimately, it was his responsibility "to make sure that a case [didn't] fall through the cracks like this."[164]

ii. Canvass for Additional Witnesses and Evidence

Immediately after the April 25, 2004 incident, detectives were aware that Koschman

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(stating that she likely was given the assignment because no other detectives were available); *see* Gibson, James, Kroll Interview Rep. at 4 (Dec. 13, 2012) (stating that detective assignments are largely determined based upon who is available on any given day).

154 *See* Cline, Phillip, IGO Interview Rep. at 6 (Dec. 28, 2012).

155 *See* Molloy, James, Kroll Interview Rep. at 4 (Dec. 7, 2012).

156 *See* McLaughlin, Gillian, IGO Interview Rep. at 5 (Jan. 25, 2013) (McLaughlin also stated that things like this happen at CPD when things "fall through the cracks").

157 *See* Villardita, Anthony, IGO Interview Rep. (Proffer) at 7 (Feb. 13, 2013).

158 *See* Gibson, James, Kroll Interview Rep. at 5 (Dec. 13, 2012).

159 *See* Clemens, Robert, Kroll Interview Rep. (Proffer) at 6 (Oct. 25, 2012).

160 *See* Special Grand Jury Exhibit 123 at 7 (O'Leary, Robert, Kroll Interview Rep. (Oct. 8, 2012)).

161 *See* Kobel, Richard, IGO Interview Rep. at 5 (Jan. 17, 2013).

162 *See* Clemens, Robert, Kroll Interview Rep. (Proffer) at 6 (Oct. 25, 2012).

163 *See* McLaughlin, Gillian, IGO Interview Rep. at 5 (Jan. 25, 2013).

164 *See* Rybicki, Richard, Special Grand Jury Tr. at 60:16-21 (Mar. 27, 2013).

suffered serious head injuries,[165] was in critical condition,[166] and would be sedated for at least the next five days.[167] Nevertheless, according to CPD personnel, the inability to interview a victim should not delay the progress of an investigation.[168] In addition, according to CPD's Detective Division Standard Operating Procedures:

> [C]ertain investigative procedures must be accomplished in each follow-up investigation. In every case received for field investigation the assigned detective will: … (B) seek witnesses by a canvass of the area in the immediate vicinity of the location of occurrence [and] (C) view the crime scene and locate, secure and evaluate any evidence found.[169]

Area 3 detectives did not canvass for additional witnesses or evidence (including video surveillance).[170] Numerous current and former detectives and police officers, including

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[165] *See* Tremore, Edwin, Kroll Interview Rep. at 5 (Sept. 18, 2012); *See* Special Grand Jury Exhibit 6 at CPD001050 (CPD001049-CPD001050) (General Offense Case Report (approved Apr. 25, 2004)).

[166] *See* Special Grand Jury Exhibit 7 at CPD001058 (CPD001054-CPD001060) (Case Supplementary Report 3215651 (approved Nov. 10, 2004)).

[167] *See* Special Grand Jury Exhibit 7 at CPD001059 (CPD001054-CPD001060) (Case Supplementary Report 3215651 (approved Nov. 10, 2004)).

[168] *See, e.g.,* Gilger, James, Special Grand Jury Tr. at 121:3-8 (Jan. 23, 2013) (agreeing that "the fact you cannot interview the victim is not supposed to stop you from continuing your investigation").

[169] *See* CPD's Detective Division Standard Operating Procedures, Ch. 8, Sec. 8.3 Conducting a Field Investigation, Sub. Sec. (B) and (C) at IG_005309-IG_005310 (1988) (IG_005234-IG_005450).

[170] Detectives never canvassed for video surveillance, either in 2004 or as part of the 2011 re-investigation. In 2012, in an effort to obtain any surveillance videos that may have recorded the incident, the special grand jury issued subpoenas to those businesses, or entities that owned the businesses, located on Division Street on April 25, 2004, including: Bar Chicago, Butch McGuire's Tavern, Empire Restaurant, FedEx Store, Fifth Third Bank, Jewel Food Store, The Lodge, Original Mother's, Starbucks, T-Mobile store, UPS Store, and Walgreens.

Only Original Mother's had retained any surveillance videos from April 25, 2004 — taken from a video camera mounted inside the bar monitoring the entrance/exit — and provided a copy of the video to the OSP. The video contained footage of Koschman and his friends entering and exiting the Original Mother's bar on that same date (approximately three hours before the incident), but did not capture anything else of any relevance. The following businesses responded that they had no external surveillance video recording devices in 2004: Butch McGuire's, Empire Restaurant, The Lodge, and Original Mother's.

Superintendent Cline, explained that detectives should have canvassed the scene for witnesses and video surveillance shortly after the incident occurred.[171] When Rita O'Leary was asked why she did not conduct a canvass of the area or seek video surveillance, she did not have an answer, other than to say she was assigned only to conduct some interviews.[172] Clemens believes the third watch (the shift that started directly after Rita O'Leary's and his shift ended), should have taken over the investigation on April 25, and immediately canvassed the scene for witnesses and video.[173] As previously noted, the investigation did not transition to third watch detectives on April 25, 2004.

d. Koschman's Death and Assignment of Detective Yawger

Koschman died on May 6, 2004, from injuries sustained as a result of the April 25 attack. After Koschman died, hospital staff notified CPD and the Cook County Medical Examiner's Office.[174] In response, 18th District Patrol Ofc. Tracie Sheehan was dispatched to the hospital to document Koschman's transfer to the Medical Examiner's Office.[175] That same day, Sheehan

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The following businesses may have had external surveillance video recording devices in 2004, but some did not know for certain, and regardless, any video from those devices no longer exists: FedEx, Fifth Third Bank, Jewel Food Store, Starbucks Coffee Company, T-Mobile store, UPS Store and Walgreens.

171 *See* Cline, Phillip, IGO Interview Rep. at 2-3, 6 (Dec. 28, 2012); *see* Kobel, Richard, IGO Interview Rep. at 3-4 (Jan. 17, 2013) (stating that he would have done those things as a detective); McLaughlin, Gillian, IGO Interview Rep. at 5 (Jan. 25, 2013); Jacobs, Jesse, IGO Interview Rep. at 4 (Oct. 16, 2012); Special Grand Jury Exhibit 108 at 3 (Mills, Thomas, Kroll Interview Rep. (Aug. 20, 2012)); Louis, Edward, Special Grand Jury Tr. at 52:1-53:4 (Feb. 20, 2013) (stating that there was no reason not to take investigative steps such as gathering physical evidence, interviewing doormen, checking for videotapes, and trying to locate witnesses, while Koschman was unconscious in the hospital); Special Grand Jury Exhibit 123 at 11 (O'Leary, Robert, Kroll Interview Rep. (Oct. 8, 2012)); Gibson, James, Kroll Interview Rep. at 5 (Dec. 13, 2012); Molloy, James, Kroll Interview Rep. at 5, 8 (Dec. 7, 2012); Chasen, Michael, IGO Interview Rep. at 4 (Nov. 27, 2012); Rybicki, Richard, Special Grand Jury Tr. at 64:11-16 (Mar. 27, 2013).

172 *See* Special Grand Jury Exhibit 122 at 8 (O'Leary, Rita, Kroll Interview Rep. (Oct. 5, 2012)).

173 S*ee* Clemens, Robert, Kroll Interview Rep. (Proffer) at 6 (Oct. 25, 2012).

174 *See* CPD Hospitalization Case Report (May 7, 2004) (CPD001061); Special Grand Jury Exhibit 26 (CCME000015) (Office of the Medical Examiner Case Report (May 8, 2004)).

175 *See* Sheehan, Tracie, Kroll Interview Rep. at 2 (Oct. 17, 2012); *see* CPD Hospitalization Case Report (May 7, 2004) (CPD001061). All cases handled by CPD are given a unique identifier, called an RD # (Records Division), which is used to organize and track that case. On April 25, the Koschman

notified McLaughlin of Koschman's death.[176] On May 7, Koschman's body was transferred to the Medical Examiner's Office,[177] and an autopsy was conducted on May 8.[178] The Deputy Medical Examiner, Tae Lyong An, M.D., concluded the postmortem examination report by providing the following opinion regarding Koschman's cause of death: "This 21 year old white male, DAVID KOSCHMAN, died from craniocerebral injuries due to a blunt trauma. The manner of death is classified as homicide."[179] On May 10, Area 3 detectives reclassified the case from a simple battery to a homicide based upon the Medical Examiner's report.[180]

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matter was assigned RD # HK323454. *See* Special Grand Jury Exhibit 6 (CPD001049-CPD001050) (General Offense Case Report (approved Apr. 25, 2004)). That RD # should have carried forward for all of CPD's work on the Koschman case. However, on May 6, 2004, the Koschman investigation was given a second RD #. The second RD # was created when Sheehan was dispatched to the hospital on May 6, to handle the arrangements for Koschman's body to be transferred to the Medical Examiner's Office. *See* Sheehan, Tracie, Kroll Interview Rep. at 2-3 (Oct. 17, 2012). The second RD # provided by the dispatcher to Sheehan was HK348411. As Det. Patrick Flynn, who was the liaison between Area 3 and the Medical Examiner's Office, explained, it is not uncommon for a dispatcher to supply another RD # under the same victim's name when an officer is sent to the hospital to coordinate the delivery of a body to the morgue. *See* CPD Hospitalization Case Report (May 7, 2004) (CPD001061); Flynn, Patrick, Special Grand Jury Tr. at 66:2-17 (Mar. 13, 2013); *see also* Skelly, Thomas, Kroll Interview Rep. at 2 (Nov. 5, 2012) (stating the issuance of multiple RD #s happens frequently); *see also* Webb, Kenneth, IGO Interview Rep. at 3 (Feb. 11, 2013) (stating it happens once or twice a week). Flynn discovered the dual RD #s on July 19, 2004, and submitted a Case Supplementary Report which not only "unfounded" the second RD # but also included a notation that all investigative reports should be entered under the original RD #. *See* Special Grand Jury Exhibit 114 (IG_007578-IG_007579) (Case Supplementary Report 3364006 (approved July 20, 2004)). According to Flynn, unfounding a case under these circumstances simply means the underlying matter has already been given a RD #, and that the second RD # should not be used any longer. *See* Flynn, Patrick, Special Grand Jury Tr. at 63:6-66:17 (Mar. 13, 2013). Therefore, for a period of time, certain CPD paperwork on the Koschman matter was filed under the original RD #, while a small number of records were filed under the second RD #.

176 *See* CPD Hospitalization Case Report (May 7, 2004) (CPD001061).

177 *See* Office of the Medical Examiner, First Call Sheet (May 7, 2004) (CCME000016).

178 *See* Office of the Medical Examiner, Report of Postmortem Examination at CCME000008 (May 8, 2004) (CCME000008-CCME0000013).

179 *See* Office of the Medical Examiner, Report of Postmortem Examination at CCME000013 (May 8, 2004) (CCME000008-CCME0000013). *See also* Special Grand Jury Exhibit 54 at 5 (Statement of Dr. Joshua M. Rosenow (Aug. 8, 2012)) (the Northwestern Memorial Hospital physician who admitted Koschman) (stating "I would classify Koschman's cause of death as complications stemming from a traumatic brain injury.")

180 *See* Special Grand Jury Exhibit 9 at CPD001067-CPD001068 (CPD001066-CPD001068) (Case Supplementary Report 3192832 (approved May 10, 2004)).

Det. Ronald Yawger was officially assigned on May 9, 2004, to continue the Koschman investigation, which had remained dormant since April 25, 2004.[181] However, the OSP uncovered some evidence indicating Yawger was involved in the investigation prior to May 9, 2004. Specifically, on April 25, 2011, at 11:43 a.m., approximately eight hours after the incident, Yawger (who is identified by his PC Login ID number "PC0N556"), accessed criminal arrest records for Kevin McCarthy.[182] The timing of the inquiry indicates the search may have been run in conjunction with Rita O'Leary's and Clemens' interview of Kevin McCarthy on April 25, 2004.[183] Yawger testified before the special grand jury in July 2013, and after being shown the access evidence, he acknowledged having accessed Kevin McCarthy's criminal arrest records on April 25, 2004; however, he stated he "knew nothing about this case [the Koschman case] until . . . it was assigned to [him]" on May 9, 2004.[184] Furthermore, Yawger testified that he did not know who asked him to access Kevin McCarthy's criminal arrest records on April 25, 2004.[185]

When Yawger testified before the special grand jury in July 2013, he also stated that he may have been assigned the matter on May 9, 2004, by Robert O'Leary.[186] According to Yawger, Robert O'Leary was his immediate supervisor on the Koschman investigation,[187] although Robert O'Leary did not recall assigning the case.[188] According to Yawger's special grand jury testimony, he personally did the majority of the detective work on the 2004

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181 *See* General Progress Report (May 9, 2004) (CPD001065).

182 McCarthy, Kevin CLEAR Rep. (Apr. 25, 2004) (CPD001679); *see also* CLEAR Rep. Personnel Who Accessed Case Rep. HK323454 (Sept. 19, 2011) (CPD004075) (identifying PC0N556 as Yawger's User ID).

183 *See* McCarthy, Kevin CLEAR Rep. (Apr. 25, 2004) (CPD001679).

184 *See* Yawger, Ronald, Special Grand Jury Tr. at 39:16-40:6, 44:10-18, 45:10-12 (July 15, 2013).

185 *See* Yawger, Ronald, Special Grand Jury Tr. at 46:9-12, 46:16-21 (July 15, 2013).

186 *See* Yawger, Ronald, Special Grand Jury Tr. at 111:23-112:2 (July 15, 2013).

187 *See* Yawger, Ronald, IGO Interview Tr. at 92:7-15 (July 1, 2011).

188 O'Leary, Robert, Kroll Interview Rep. at 5 (Oct. 8, 2012).

Koschman case.[189]

Yawger also previously told IGO investigators that he did not know why he was assigned the case,[190] and that he was "[j]ust assigned."[191] But, according to other detectives working in Area 3 in 2004, Yawger was likely chosen because of his reputation.[192] Area 3 Commander Michael Chasen stated he was not involved in the decision to add Yawger to the Koschman investigation, but speculated that Yawger was probably chosen because he was a good detective with an excellent reputation for handling homicide and death investigations.[193] Likewise, even though McLaughlin was not sure why Yawger was assigned to the matter, she reiterated that if the Koschman case had in fact fallen through the cracks, Yawger was the kind of detective who could get the case "back to where it needed to be" because he had a reputation of being a thorough detective.[194] She believes that if the proverbial "ball was dropped" by CPD during the initial days, then the case would have been reassigned to its "best guy" – someone like Yawger.[195]

e. Detective Yawger's Investigation

On May 9, 2004, Yawger called Koschman's three friends who were with Koschman on Division Street the night of the altercation —Allen, Copeland, and Francis — each of whom said they could be interviewed in person on May 12.[196] Yawger also left voicemails for Bridget

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189 *See* Yawger, Ronald, Special Grand Jury Tr. at 34:22-24 (July 15, 2013).

190 *See* Yawger, Ronald, IGO Interview Tr. at 75:23-76:2 (July 1, 2011).

191 *See* Yawger, Ronald, Special Grand Jury Tr. at 111:17-19 (July 15, 2013).

192 Yawger retired from CPD on August 15, 2007, and currently works as an investigator for the Illinois Attorney General's Office. *See* Yawger, Ronald, IGO Interview Tr. at 98:12-18 (July 1, 2011).

193 *See* Chasen, Michael, IGO Interview Rep. at 4 (Nov. 27, 2012).

194 *See* McLaughlin, Gillian, IGO Interview Rep. at 6 (Jan. 25, 2013).

195 *See* McLaughlin, Gillian, IGO Interview Rep. at 6 (Jan. 25, 2013). Yawger stated during his testimony before the special grand jury in July 2013, that even after the Koschman case became a homicide, he never canvassed the scene for additional witnesses, such as Division Street bar bouncers, who may have viewed the April 25, 2004 altercation. *See* Yawger, Ronald, Special Grand Jury Tr. at 35:15-20 (July 15, 2013).

196 *See* General Progress Report (May 9, 2004) (CPD001065); *see* Giralamo, Anthony, IGO Interview Rep. at 4 (Dec. 21, 2012) (stating Yawger drafted this report and noting that he (Det. Giralamo)

McCarthy, Sazian, and Kohler, asking them to contact detectives.[197] Finally, he left a note for third watch detectives asking them to locate and interview Bridget McCarthy, Sazian, and Kohler.[198]

On May 10, Det. Giralamo interviewed Kohler at the Third Municipal District Courthouse in Rolling Meadows.[199] Giralamo's GPR states that Kohler was walking east on Division Street when he saw two groups of people arguing and pushing, with Koschman standing "curbside" and towards "the back of the group."[200] It further states that Kohler saw

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did not participate in any of the phone calls mentioned in Yawger's GPR). The OSP made extensive efforts to acquire Yawger's cell phone records from 2004, and of particular interest were his records from April 25, 2004 (the date of the incident) through May 20, 2004 (the date of the lineups). While the issuance of multiple subpoenas yielded phone records from September 2004 through December 2004, the OSP could not obtain the aforementioned and potentially critical April 2004 through May 2004 records, even after working diligently with the applicable carrier's subpoena compliance center. Ultimately, the OSP received confirmation in writing indicating that the remaining requested 2004 phone records no longer existed. *See* correspondence from AT&T (April 15, 2013) (ATT005988-ATT005996).

197 *See* General Progress Report (May 9, 2004) (CPD001065).

198 *See* General Progress Report (May 9, 2004) (CPD001065).

199 Kohler was at the courthouse for jury duty. *See* Kohler, Phillip, IGO Interview Rep. at 3 (May 16, 2012). In 2012, Kohler told the OSP it was during this interview that he was first shown two or three grainy black-and-white street camera photographs of a white male wearing a hat. *See* Kohler, Phillip, IGO Interview Rep. at 3 (May 16, 2012). Kohler also recalled that when he was at Area 3 on May 20, 2004, to view lineups, detectives again showed him what might have been the same photographs he was shown previously. *See* Kohler, Phillip, IGO Interview Rep. at 3-4 (May 16, 2012). Kohler noted he did not recognize the person in the photographs. Giralamo did not recall showing Kohler any photographs during the May 10, 2004 interview. *See* Giralamo, Anthony, IGO Interview Rep. at 5 (Dec. 21, 2012). However, Giralamo did state that generally speaking, if Yawger or one of his sergeants directed him to show a witness some photographs, he would have. *See* Giralamo, Anthony, IGO Interview Rep. at 5 (Dec. 21, 2012). According to Yawger's special grand jury testimony, he does not think Kohler was ever shown photographs. *See* Yawger, Ronald, Special Grand Jury Tr. at 116:1-24 (July 15, 2013). But, Yawger also testified that he was not present for Kohler's May 10, 2004 interview. *See* Yawger, Ronald, Special Grand Jury Tr. at 114:18-115:7 (July 15, 2013). Besides Kohler, no other witnesses or CPD personnel have mentioned the black-and-white street camera photographs. The special grand jury sought these photographs from CPD via subpoena and no responsive materials were produced. *See* Special Grand Jury Subpoena Duces Tecum to CPD at 2, June 27, 2012.

200 *See* General Progress Report (approved May 13, 2004) (CPD001588). On July 11, 2012, as part of his testimony, Kohler read a statement which, in part, stated that he was walking with Connolly east on Division Street when they encountered the two groups and, "As we got closer, we stopped to take a look. The group that I know — that I now know included David Koschman, had their backs to us and were facing east. The other group was facing west. Koschman was standing about three feet in front of us and behind the other members of his group. I remember Koschman being a small kid." Kohler, Phillip, Special Grand Jury Tr. at 7:22-8:10 (July 11, 2012).

Koschman "rush[ing] forward into [the] center of [the] group (aggressive)."[201] Giralamo's GPR notes that Koschman was observed almost immediately being pushed out of the center of the group, where he fell backwards and hit his head.[202] During his testimony before the special grand jury in July 2012, Kohler stated that he "lost sight of Koschman after he moved in between the two groups," but that "[a]lmost immediately after Koschman moved between the two groups, he came flying back and fell straight back like a dead weight. It was like an explosion."[203] Kohler further stated: "Koschman hit his head pretty hard on the curb, and I believe his head actually bounced off the curb."[204] According to Giralamo's GPR, Kohler also told detectives that he had never seen anyone in Vanecko's group before that night and was unable to identify any of the participants in the altercation.[205]

On May 12, Yawger interviewed Francis,[206] Copeland,[207] and Allen.[208] Giralamo may have also participated in these interviews.[209] That same day, Sazian[210] was also interviewed by

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201 *See* General Progress Report (approved May 13, 2004) (CPD001588). Kohler clarified before the special grand jury that Koschman was being "verbally aggressive," but did not recall any physical contact. Kohler, Phillip, Special Grand Jury Tr. at 8:18-9:4 (July 11, 2012) (Koschman "jumped through a small space between his friends and into the middle of the two groups. I don't recall Koschman clenching his fists or actually touching anyone in the other group, but he was being verbally aggressive toward the people who said something to him. To the best of my memory, Koschman's friends were not restraining him.")

202 *See* General Progress Report (approved May 13, 2004) (CPD001588).

203 *See* Kohler, Phillip, Special Grand Jury Tr. at 9:5-12 (July 11, 2012).

204 *See* Kohler, Phillip, Special Grand Jury Tr. 9:11-16 (July 11, 2012).

205 *See* General Progress Report (approved May 13, 2004) (CPD001588). Kohler would later tell detectives and *Sun-Times* reporters in 2011 that he in fact attended high school with Vanecko at Loyola Academy. Kohler, Phillip, Special Grand Jury Tr. 10:23-11:15 (July 11, 2012).

206 *See* General Progress Report (approved May 13, 2004) (CPD001586-CPD001587).

207 *See* General Progress Report (approved May 13, 2004) (CPD001584-CPD001585).

208 *See* General Progress Report (approved May 13, 2004) (CPD001581-CPD001583).

209 *See* Giralamo, Anthony, IGO Interview Rep. at 5 (Dec. 21, 2012).

210 *See* Special Grand Jury Exhibit 106 (CPD001577) (General Progress Report (May 12, 2004)).

Yawger or Giralamo over the phone.[211] While GPRs have been located for the interviews of Francis, Copeland, and Allen, the existence and location of a GPR for the Sazian interview is unknown, even though Yawger testified he would have created a GPR (if he interviewed him).[212] During Yawger's interviews, Francis, Allen, and Copeland provided statements bearing on the identity of the offender, as well as whether Koschman was punched or pushed. According to Yawger's GPR of his interview with Francis, Francis did not know whether Koschman was "hit or pushed."[213] According to Yawger's GPR of the interview with Copeland, Copeland stated that, "the larger of the three guys punched [Koschman] in the face."[214] Additionally, according to Yawger's GPR of his interview with Allen, Allen stated that "the larger of the 3 guys punched [Koschman] in the face."[215]

Yawger's GPR of the Allen interview also contained several sentences that were scratched out by Yawger.[216] In 2011, the IGO, in an attempt to decipher what had been crossed out, sent the original GPR to the FBI for analysis by the FBI's Questioned Documents Unit.[217] Even with the use of sophisticated technology, the FBI was unable to read the entire obliterated portion.[218] However, based on the FBI's analysis, and the context of Allen's statement, a portion of Yawger's GPR which was crossed out states, "After a few minutes, arguing became 'more

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211 *See* Yawger, Ronald, Special Grand Jury Tr. at 33:14-34:1 (July 15, 2013).

212 *See* Yawger, Ronald, Special Grand Jury Tr. at 34:8-14, 28:6-10 (July 15, 2013).

213 *See* General Progress Report at CPD001587 (approved May 13, 2004) (CPD001586-CPD001587).

214 *See* General Progress Report at CPD001584 (approved May 13, 2004) (CPD001584-CPD001585).

215 *See* General Progress Report at CPD001582 (approved May 13, 2004) (CPD001581-CPD001583).

216 *See* General Progress Report at CPD001581 (approved May 13, 2004) (CPD001581-CPD001583). *See* Yawger, Ronald, Special Grand Jury Tr. at 60:19-21 (July 15, 2013).

217 *See* FBI Laboratory Report of Examination (Dec. 19, 2011) (IG_005735-IG_005736).

218 *See* FBI Laboratory Report of Examination (Dec. 19, 2011) (IG_005735-IG_005736).

heated, the larger of the three guys, now becomes very aggressive, starts saying alright come on lets go.'"[219]

Later that day, Yawger spoke over the phone with Bridget and Kevin McCarthy's attorney, Bill Dwyer.[220] Dwyer informed Yawger that his clients knew the other two people involved in the incident (something Kevin McCarthy had twice previously denied).[221] Dwyer told Yawger he would bring his clients in for an interview on May 13.[222] As noted below, Bridget was interviewed on May 13 as planned, while Kevin was not interviewed until May 19. Before leaving for the day, Yawger left another note for third watch detectives asking them to interview Hageline in person.[223]

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219 *See* General Progress Report at CPD001581 (approved May 13, 2004) (CPD001581-CPD001583); *see* FBI Laboratory Report of Examination at IG_005736 (Dec. 19, 2011) (IG_005735-IG_005736). According to Yawger's grand jury testimony, GPRs are "extremely important" because they record what a witness says to the interviewing officer. *See* Yawger, Ronald, Special Grand Jury Tr. at 63:22-64:1, 31:11-14 (July 15, 2013).

220 *See* Special Grand Jury Exhibit 106 (CPD001577) (General Progress Report (May 12, 2004)).

221 *See* Special Grand Jury Exhibit 106 (CPD001577) (General Progress Report (May 12, 2004)). As would ultimately be disclosed, the other two people involved were Vanecko and Denham.

222 *See* Special Grand Jury Exhibit 106 (CPD001577) (General Progress Report (May 12, 2004)).

223 *See* Special Grand Jury Exhibit 106 (CPD001577) (General Progress Report (May 12, 2004)). Yawger's note also instructed third watch detectives to "PLEASE CALL ME AT HOME OR ON MY CELL PHONE BEFORE YOU GO TO INTERVIEW HIM" and left his cell phone number. Louis testified that he did not call Yawger as instructed, while his partner, Villardita, could not recall if he called Yawger, although he believes he would have followed the instructions. Louis, Edward, Special Grand Jury Tr. at 38:22-39:6, 72:6-15 (Feb. 20, 2013); Villardita, Anthony, IGO Interview Rep. (Proffer) at 4-5 (Feb. 13, 2013). Both said it was not unusual to leave requests such as the one left by Yawger. *See* Louis, Edward, Special Grand Jury Tr. at 40:1-6 (Feb. 20, 2013); Villardita, Anthony, IGO Interview Rep. (Proffer) at 5 (Feb. 13, 2013); *see also* Giralamo, Anthony, IGO Interview Rep. at 5 (Dec. 21, 2012) (stating it was typical for Yawger to leave notes). While Villardita could not recall precisely, he presumed Yawger wanted to be called before the witness was interviewed so that Yawger could provide background or ensure that a specific topic was covered during the interview. *See* Villardita, Anthony, IGO Interview Rep. (Proffer) at 5 (Feb. 13, 2013). During his July 2013 special grand jury testimony, Yawger confirmed Villardita's presumption as to the purpose of his note, *see* Yawger, Ronald, Special Grand Jury Tr. at 121:23-123:19 (July 15, 2013), although Yawger could not recall whether Detectives Louis or Villardita actually called him in response to his note, *see* Yawger, Ronald, Special Grand Jury Tr. at 121:17-19 (July 15, 2013).

On May 13, Detectives Villardita and Louis interviewed Hageline, though the existence and location of any GPR is unknown.[224] Louis testified that there would have been a GPR generated in connection with the Hageline interview, and that it was his practice and procedure to submit GPRs with his case supps.[225] Villardita similarly stated that he recalls GPRs for the Hageline interview, and that the notes should have accompanied the case supp into the Koschman homicide file.[226] Following Hageline's interview, Louis submitted his case supp report that evening (which was approved by Gibson on May 17, 2004).[227]

According to Louis's case supp, Hageline described the individuals in Vanecko's group.[228] Hageline described: subject #1 as a 6'-6'2" white male weighing 190-230 pounds, wearing a black hat and gray shirt; subject #2 as a 5'9"-6' white male weighing 185 pounds, with black hair and glasses; subject #3 as a 5'8" white male with no further description; and subject #4 as a white female with blond hair.[229] According to Louis's case supp, Hageline described how Koschman and subjects #1-2 were "calling names" back and forth.[230] When Hageline turned his head to find a taxi, he heard a noise "like a snap sound" and saw Koschman on the ground.[231] Hageline reported that when he attended to Koschman, Koschman's lip was

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224 *See* Special Grand Jury Exhibit 11 (CPD001698-CPD001701) (Case Supplementary Report 3201023 (approved May 17, 2004)).

225 *See* Louis, Edward, Special Grand Jury Tr. at 35:2-36:10 (Feb. 20, 2013).

226 *See* Villardita, Anthony, IGO Interview Rep. (Proffer) at 4-5 (Feb. 13, 2013).

227 *See* Special Grand Jury Exhibit 11 at CPD001698 (CPD001698-CPD001701) (Case Supplementary Report 3201023 (approved May 17, 2004)).

228 *See* Special Grand Jury Exhibit 11 at CPD001700 (CPD001698-CPD001701) (Case Supplementary Report 3201023 (approved May 17, 2004)).

229 *See* Special Grand Jury Exhibit 11 at CPD001700-CPD001701 (CPD001698-CPD001701) (Case Supplementary Report 3201023 (approved May 17, 2004)).

230 *See* Special Grand Jury Exhibit 11 at CPD001701 (CPD001698-CPD001701) (Case Supplementary Report 3201023 (approved May 17, 2004)).

231 *See* Special Grand Jury Exhibit 11 at CPD001701 (CPD001698-CPD001701) (Case Supplementary Report 3201023 (approved May 17, 2004)). On August 8, 2012, as part of his testimony, Hageline read in a statement which, in part, stated, "[a]s the argument continued to go on, I walked a couple of steps away from the group to grab a cab. My back was to the groups at that time. Out of the corner of my eye, I saw a movement, and then Koschman stumbled back and fell into Division Street. I

swollen.[232] According to Louis's case supp, Hageline reported he did not see who actually struck Koschman, "but believed it was subject #1."[233]

Meanwhile, that same day, Yawger interviewed Bridget McCarthy.[234] Bridget McCarthy informed Yawger that the two previously unidentified men who were with Kevin and her on Division Street the morning of the altercation were Vanecko and someone she knew only as "Craig."[235] Bridget McCarthy described walking with Denham when someone in a group of "kids" walking the other direction "flicked" Denham's glasses off — starting an argument between this "kid" and Denham.[236] According to Yawger's GPR, Vanecko and Kevin McCarthy then arrived after paying for the taxi, grabbed Denham, and said "let's go."[237] Bridget McCarthy further described to Yawger that Koschman's friends were trying to "drag" Koschman away.[238] According to Yawger's GPR, the McCarthys, Denham, and Vanecko all turned their backs and started to walk away.[239] Bridget then stated that she was talking to the others while walking

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did not actually see the punch thrown, but I heard a noise that could have been the sound of a punch or the sound of Koschman's head hitting the pavement. Koschman fell back — Koschman fell on his back, and he was facing up. Koschman's nose and mouth were bleeding, and there was blood bubbles in his spit. I don't remember Koschman trying to break his fall, which leads me to believe that he was knocked out before he hit the ground." Hageline, Shaun, Special Grand Jury Tr. at 10:1-11:2 (Aug. 8, 2012).

232 *See* Special Grand Jury Exhibit 11 at CPD001701 (CPD001698-CPD001701) (Case Supplementary Report 3201023 (approved May 17, 2004)).

233 *See* Special Grand Jury Exhibit 11 at CPD001701 (CPD001698-CPD001701) (Case Supplementary Report 3201023 (approved May 17, 2004)). On August 8, 2012, as part of his testimony, Hageline read in a statement which, in part, stated, "I remember saying to one of the guys in the group, What the fuck did you do that for? This guy was built like a linebacker and it seemed like he could have beaten us all up. I think this was the guy who struck Koschman. He was the most threatening guy and was the biggest of all of them." Hageline, Shaun, Special Grand Jury Tr. at 11:3-13 (Aug. 8, 2012).

234 *See* General Progress Report (May 13, 2004) (CPD001541-CPD001543).

235 *See* General Progress Report at CPD001541 (May 13, 2004) (CPD001541-CPD001543). We know now that Bridget was referring to Denham. During Yawger's July 2013 special grand jury testimony, he stated he "was the very first person [at CPD] to become aware of [Vanecko's involvement]" in the April 25, 2004 incident. *See* Yawger, Ronald, Special Grand Jury Tr. at 48:6-11 (July 15, 2013).

236 *See* General Progress Report at CPD001541 (May 13, 2004) (CPD001541-CPD001543).

237 *See* General Progress Report at CPD001542 (May 13, 2004) (CPD001541-CPD001543).

238 *See* General Progress Report at CPD001542 (May 13, 2004) (CPD001541-CPD001543).

239 *See* General Progress Report at CPD001542 (May 13, 2004) (CPD001541-CPD001543).

away until she realized her husband, Denham, and Vanecko were not following her — at which point she turned around and saw Koschman on the ground.[240] Bridget McCarthy stated she did not see whether Koschman was "hit or pushed."[241] Yawger's GPR reflects that Bridget McCarthy stated she then saw Denham and Vanecko run from the scene.[242] According to Yawger's GPR, Bridget McCarthy then stated that police eventually released Kevin McCarthy and placed them in a taxi, whereupon the couple "went home," which was false.[243] As previously noted, Bridget McCarthy testified before the special grand jury in 2012 that her husband and she in fact met up with Vanecko and Denham at the Pepper Canister, after the bar had already closed.[244]

Dwyer, the McCarthys' lawyer, informed Yawger that Vanecko was Mayor Daley's nephew.[245] According to Yawger, he was the first person at CPD to learn of Vanecko's involvement in the Koschman matter[246] – something he first was told by Bridget McCarthy during her May 13, 2004 interview.[247] Yawger, upon learning that a relative of Mayor Daley was involved in the altercation, immediately notified Robert O'Leary and Chasen.[248]

However, Rybicki testified that CPD knew of the Mayor's nephew's (Vanecko) involvement only a "couple of days" after April 25, 2004, when the case arrived at Area 3. According to Rybicki, he was not present when the case first arrived at Area 3 but became aware of it hours later, or possibly the next day.[249] Rybicki first learned of Vanecko's involvement in

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240 *See* General Progress Report at CPD001542 (May 13, 2004) (CPD001541-CPD001543).

241 *See* General Progress Report at CPD001542 (May 13, 2004) (CPD001541-CPD001543).

242 *See* General Progress Report at CPD001542 (May 13, 2004) (CPD001541-CPD001543).

243 *See* General Progress Report at CPD001543 (May 13, 2004) (CPD001541-CPD001543).

244 *See* McCarthy, Bridget, Special Grand Jury Tr. at 19:2-16 (Aug. 15, 2012).

245 *See* Yawger, Ronald, IGO Interview Tr. at 78:1-16 (July 1, 2011).

246 *See* Yawger, Ronald, Special Grand Jury Tr. at 48:6-11 (July 15, 2013).

247 *See* Yawger, Ronald, IGO Interview Tr. at 78:1-16 (July 1, 2011).

248 Yawger, Ronald, IGO Interview Rep. at 2 (July 1, 2011).

249 *See* Rybicki, Richard, Special Grand Jury Tr. at 33:18-24 (Mar. 27, 2013).

the incident "pretty shortly thereafter," or within a "a couple of days" of learning about the case.[250] According to Rybicki, he first learned of Vanecko's involvement when the investigation was still in its early stages and Rita O'Leary and Clemens were working the case.[251] Although Rybicki could not recall the specific details of any conversations with Chasen about the case, he recalled having one conversation with Chasen where it came up that "holy crap, maybe the mayor's nephew is involved."[252] Likewise, Mayor Daley's Deputy Chief of Staff for Public Safety, Matthew Crowl, was uncertain of the exact date, but believed he became aware of the Koschman matter shortly after the incident, when someone at CPD informed him that a nephew of Mayor Daley had been involved in a bar fight on the North Side, possibly in the Rush/Division Street area.[253]

Rybicki further testified that the assignment of the case to Yawger may have been influenced in part by Vanecko's involvement.[254] Rybicki testified that it was important to assign the case to someone competent "because of the fact of who was involved."[255] Rybicki also testified that Yawger "was a highly-experienced homicide detective, and [he thought] it was more a matter of, let's be real careful here."[256]

Following Bridget's interview, Dwyer told Yawger that Vanecko would be represented

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250 *See* Rybicki, Richard, Special Grand Jury Tr. at 34:16-35:18 (Mar. 27, 2013).

251 *See* Rybicki, Richard, Special Grand Jury Tr. at 33:18-35:18, 67:6-10 (Mar. 27, 2013).

252 *See* Rybicki, Richard, Special Grand Jury Tr. at 37:16-38:22 (Mar. 27, 2013). According to Area 3 attendance records, Rybicki was on furlough (or was otherwise not working) starting May 12, 2004 and ending May 27, 2004. *See* Area 3 Detective Division Attendance & Assignment Sheets (Apr. 24, 2004-May 28, 2004) (IG_004011-IG_004354). Thus, when Bridget McCarthy informed Yawger of Vanecko's involvement, Rybicki had already begun his time away. The OSP has not been able to identify who it was that informed CPD of Vanecko's involvement prior to Rybicki's departure on May 12, 2004.

253 Crowl, Matthew, IGO Interview Rep. at 2 (Apr. 25, 2013).

254 *See* Rybicki, Richard, Special Grand Jury Tr. at 68:7-69:22 (Mar. 27, 2013).

255 *See* Rybicki, Richard, Special Grand Jury Tr. at 69:6-22 (Mar. 27, 2013).

256 *See* Rybicki, Richard, Special Grand Jury Tr. at 68:7-14 (Mar. 27, 2013).

by attorney Terence Gillespie.[257] Yawger then called Gillespie and it was agreed that Gillespie would meet with Yawger on May 17 to schedule a time to bring in Vanecko for an interview (an interview which never occurred).[258] On May 17, Gillespie met with Yawger at Area 3 headquarters.[259] Yawger informed Gillespie of the circumstances surrounding the incident, and it was agreed that Vanecko would stand in a lineup on May 20.[260] Thus, Yawger determined he would place Vanecko in a physical lineup (and communicated this to Vanecko's attorney) prior to speaking with Vanecko or the two other males with Bridget McCarthy at the scene of the incident.[261]

On May 19, Dwyer arrived at Area 3 headquarters with his clients Kevin McCarthy and Denham.[262] Yawger interviewed Kevin McCarthy and Denham, and both admitted Vanecko was

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257 *See* Special Grand Jury Exhibit 10 at CPD001124 (CPD001115-CPD001128) (Case Supplementary Report 3193543 (approved Nov. 10, 2004)). It appears from Yawger's notes that he was advised that both Terrence Gillespie and attorney Marc Martin represented Vanecko. *See* Special Grand Jury Exhibit 170 (IG_001525) (Handwritten Notes). This representation resulted from a referral made to Vanecko by Michael Daley, a Chicago attorney who is Vanecko's uncle and the brother of former Mayor Richard M. Daley. *See* Special Grand Jury Exhibit 57 at 2 (Michael Daley Special Grand Jury Declaration (Aug. 16, 2012)).

258 *See* Special Grand Jury Exhibit 10 at CPD001124 (CPD001115-CPD001128) (Case Supplementary Report 3193543 (approved Nov. 10, 2004)).

259 *See* Special Grand Jury Exhibit 10 at CPD001124 (CPD001115-CPD001128) (Case Supplementary Report 3193543 (approved Nov. 10, 2004)).

260 *See* Special Grand Jury Exhibit 10 at CPD001124 (CPD001115-CPD001128) (Case Supplementary Report 3193543 (approved Nov. 10, 2004)). According to GPRs authored by Yawger, on May 18, Yawger called Kohler, Allen, Copeland, Francis, and Connolly, and they all agreed to come to Area 3 headquarters on May 20 to view lineups and be interviewed by Assistant Cook County State's Attorneys. *See* General Progress Report (May 18, 2004) (CPD001091). Yawger also left voicemail messages for Hageline. *See* General Progress Report (May 18, 2004) (CPD001091). Lastly, Yawger left a note asking third watch detectives to contact Hageline to try and get him to view the lineups at the same time as his friends. *See* General Progress Report (May 18, 2004) (CPD001091).

261 As of May 17, 2004, Yawger had not spoken with either Vanecko or Denham. While detectives had previously spoken with Kevin McCarthy on April 25, 2004, the version of events he relayed to detectives on that date was contradicted by his wife's statements to Yawger on May 13, 2004.

262 *See* Special Grand Jury Exhibit 10 at CPD001124 (CPD001115-CPD001128) (Case Supplementary Report 3193543 (approved Nov. 10, 2004)).

the fourth member of their group during the altercation on Division Street on April 25.[263] According to Yawger's GPRs, both Kevin McCarthy and Denham indicated they attended an engagement party the night of the incident and that after that party, they took a taxi, along with Bridget McCarthy and Vanecko, to Division Street.[264] Denham told police that once on Division Street, he and Bridget McCarthy exited the cab while Kevin McCarthy and Vanecko stayed behind to pay the fare.[265] According to Yawger's GPR, a "bunch of guys" bumped into Denham and knocked his glasses off.[266] Yawger's notes indicate that Denham then began arguing with the other group — which involved "pushing and shoving," as well as "a lot of swearing and name calling."[267] By this time, Kevin McCarthy and Vanecko had caught up to Denham and Bridget McCarthy.[268]

According to the GPR of Kevin McCarthy's interview, he and Vanecko stepped in

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263 *See* Special Grand Jury Exhibit 10 at CPD001124, CPD001126 (CPD001115-CPD001128) (Case Supplementary Report 3193543 (approved Nov. 10, 2004)).

264 *See* General Progress Report at CPD001100 (May 19, 2004) (CPD001100-CPD001103); General Progress Report at CPD001097 (May 19, 2004) (CPD001097-CPD001099). According to her case supp, Bridget McCarthy also informed Yawger that the four of them "were at an engagement party for mutual friends." *See* Special Grand Jury Exhibit 10 at CPD001123 (CPD001115-CPD001128) (Case Supplementary Report 3193543 (approved Nov. 10, 2004)). There is no indication that Yawger ever inquired who else was at the engagement party or whose engagement party they attended. In 2012, the OSP learned through witness interviews that the engagement party on April 24, 2004 was for Katherine Daley, Vanecko's cousin and the daughter of attorney Michael Daley. *See* Daley, Katherine, IGO Interview Rep. (Proffer) at 1-2 (July 27, 2012); Special Grand Jury Exhibit 56 at 2 (Jill Denham Special Grand Jury Declaration (Aug. 28, 2012)).

On May 25, 2004, Bridget McCarthy sent Katherine Daley, her close friend, an e-mail referencing the Koschman incident. In the e-mail, Bridget McCarthy explains that she cannot discuss the night of the incident because "it is best for myself and RJ [Vanecko] that it not be discussed and anyone know what happened." Bridget McCarthy-Katherine Daley e-mail at ACE031977 (May 10-25, 2004) (ACE031977-ACE031989). Bridget McCarthy adds, "The evening should be kept between the four of us present . . . ." Bridget McCarthy-Katherine Daley e-mail at ACE031977 (May 10-25, 2004) (ACE031977-ACE031989).

265 *See* General Progress Report at CPD001097 (May 19, 2004) (CPD001097-CPD001099).

266 *See* General Progress Report at CPD001097 (May 19, 2004) (CPD001097-CPD001099).

267 *See* General Progress Report at CPD001097 (May 19, 2004) (CPD001097-CPD001099).

268 *See* General Progress Report at CPD001098 (May 19, 2004) (CPD001097-CPD001099).

between the two groups and tried to separate them by pushing Craig along.[269] According to Kevin McCarthy, as he and Vanecko attempted to remove Denham from the scene, Koschman broke free from his friends, pushed his way past Vanecko and Kevin McCarthy, and attempted to "get at" Denham.[270] The GPR further states that Kevin McCarthy stepped in the way, while Koschman's friends grabbed Koschman and restrained him again.[271] According to Yawger's GPR, Kevin McCarthy told Yawger that Koschman attempted to attack Denham "physically and verbally" but was restrained by his friends.[272]

Kevin McCarthy also told Yawger that, at that point, all four turned their backs and began walking eastbound on Division Street away from "the group of kids."[273] The incident "was over" as far as Kevin McCarthy was concerned.[274] Yawger's GPR of his interview with Denham similarly relayed that Denham "thought everything was over" at that point.[275] Denham further described that as he was walking away, Vanecko was behind him (while the McCarthys were ahead), he felt a "hard jolt from behind," and next thing he knew, he and Vanecko were running down the street.[276]

According to Yawger's GPRs for both interviews, both Denham and Kevin McCarthy

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269 *See* General Progress Report at CPD001101 (May 19, 2004) (CPD001100-CPD001103).

270 *See* General Progress Report at CPD001101 (May 19, 2004) (CPD001100-CPD001103).

271 *See* General Progress Report at CPD001101 (May 19, 2004) (CPD001100-CPD001103).

272 *See* General Progress Report at CPD001102 (May 19, 2004) (CPD001100-CPD001103).

273 *See* General Progress Report at CPD001102 (May 19, 2004) (CPD001100-CPD001103).

274 *See* General Progress Report at CPD001102 (May 19, 2004) (CPD001100-CPD001103).

275 *See* General Progress Report at CPD001098 (May 19, 2004) (CPD001097-CPD001099).

276 *See* General Progress Report at CPD001098 (May 19, 2004) (CPD001097-CPD001099). On August 15, 2012, as part of his testimony, Denham read in a statement which, in part, stated, "[a]t some point I turned and began walking away. After walking away, I felt a jolt or some force in my back, and I started running. I do not know what jolted me in the back. I did not know if the jolt was a push encouraging me to run or if it was an aggressive act, but I recall reflectively [sic] reacting to the jolt and beginning to run. I know at some point R. J. Vanecko was running with me." Denham, Craig, Special Grand Jury Tr. at 20:4-20 (Aug. 15, 2012).

turned their backs to walk away and did not see who struck Koschman.[277] Denham told Yawger he did not see Koschman on the ground, did not see anyone get hit or pushed, and did not know why he was running — speculating it could have been because he did not want to be "jumped" or it may have been fear of getting into trouble for public intoxication.[278] At the conclusion of the interviews, Yawger made arrangements with Kevin McCarthy and Denham's attorney Dwyer to have both his clients stand in lineups the following day, May 20.[279] While Kevin McCarthy had lied to police on two separate occasions about the identities of the other members of his group, police did not seek charges against him for obstructing justice.[280]

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277 *See* General Progress Report at CPD001098 (May 19, 2004) (CPD001097-CPD001099); General Progress Report at CPD001102-CPD001103 (May 19, 2004) (CPD001100-CPD001103).

278 *See* General Progress Report at CPD001098 (May 19, 2004) (CPD001097-CPD001099).

279 *See* Yawger, Ronald, Special Grand Jury Tr. 35:5-6 (July 15, 2013).

280 According to detectives, obstruction of justice or similar charges were not considered against Kevin McCarthy because, in essence, there is no statute prohibiting lying to the police. For example, Molloy noted that even though Kevin McCarthy lied to police during its investigation, CPD did not seek charges because "there's no law in Chicago against lying to the police." *See* Molloy, James, Kroll Interview Rep. at 7 (Dec. 7, 2012). Chasen explained further that CPD detectives are lied to by witnesses on a daily basis, something that he too believes is not against the law. *See* Chasen, Michael, IGO Interview Rep. at 10 (Nov. 27, 2012). While it is true there is no state law that directly criminalizes lying to a police officer under all circumstances, there is a state obstruction of justice statute which could cover such behavior if the requisite elements are met. *See* 720 ILCS 5/31-4 (West 2013) ("(a) A person obstructs justice when, with intent to prevent the apprehension or obstruct the prosecution or defense of any person, he or she knowingly commits any of the following acts: (1) Destroys, alters, conceals or disguises physical evidence, plants false evidence, furnishes false information; or (2) Induces a witness having knowledge material to the subject at issue to leave the State or conceal himself or herself; or (3) Possessing knowledge material to the subject at issue, he or she leaves the State or conceals himself. ..."). The statute of limitations for this offense is three years. 720 ILCS 5/3-5(b) (West 2011).

Former Superintendent Cline noted that lying to police is so common that Kevin McCarthy's actions did not rise to asking for charges. *See* Cline, Phillip, IGO Interview Rep. at 6 (Dec. 28, 2012). And according to Robert O'Leary, even though police are lied to very often, charges for obstruction of justice are never filed. *See* Special Grand Jury Exhibit 123 at 11 (O'Leary, Robert, Kroll Interview Rep. (Oct. 8, 2012)). Lastly, while Rita O'Leary firmly believes that "Kevin's lies hurt [CPD's] investigation," she cannot remember a single instance of a witness being charged with obstruction of justice. *See* Special Grand Jury Exhibit 122 at 6 (O'Leary, Rita, Kroll Interview (Oct. 5, 2012)). 2004 Deputy Chief of Detectives Richard Kobel stated obstruction charges can happen, while not typical, if the lies told in any instance are particularly harmful to a case. *See* Kobel, Richard, IGO Interview Rep. at 5-6 (Jan. 17, 2013).

f. Certain Issues Stemming from Area 3's Continuing Work

Although according to Yawger's GPRs, Kevin McCarthy stated he later left the scene in a taxi and Denham stated he accompanied Vanecko to another bar after the incident, there is no indication in any of the GPRs or case supps that Yawger asked either Denham or Kevin McCarthy where they went after the incident and whether they spoke with Vanecko about the matter. In fact, during his July 2013 testimony before the special grand jury, Yawger stated he never asked them those questions, though he did acknowledge he "should have asked them that."[281] In 2012, the McCarthys testified before the special grand jury that they met Denham and Vanecko at the Pepper Canister immediately after the incident.[282] Denham also testified that although he could not recall going to the Pepper Canister after the incident, he was told by Vanecko's attorney, Terence Gillespie, that both he and Vanecko in fact took a taxi there afterwards.[283] As stated previously, the Pepper Canister was closed by the time the altercation happened.[284] Kevin McCarthy and Denham testified that they did not speak about the incident, while Bridget McCarthy testified they may have spoken about the fact that her husband was detained, but nothing else.[285]

Area 3 detectives also did not seek phone records; therefore, could not discover that Vanecko and Bridget McCarthy called each other several times between 3:30 a.m. and 4 a.m.

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281 *See* Yawger, Ronald, Special Grand Jury Tr. at 57:4-11 (July 15, 2013).

282 *See* McCarthy, Kevin, Special Grand Jury Tr. at 22:8-19 (Aug. 15, 2012); McCarthy, Bridget, Special Grand Jury Tr. at 19:2-8 (Aug. 15, 2012).

283 *See* Denham, Craig, Special Grand Jury Tr. at 21:9-17 (Aug. 15, 2012).

284 *See* McCarthy, Bridget, Special Grand Jury Tr. at 53:24-54:24 (Aug. 15, 2012); Farley, Pam, Special Grand Jury Tr. at 22:16-23:6 (Jan. 23, 2013). The special grand jury issued subpoenas to the Pepper Canister seeking records identifying employees working the night of the incident, receipts and credit card records, and the bar's liquor license for 2004, but was unable to obtain any employment or payment records from 2004. Pam Farley, co-owner of the Pepper Canister in 2004, testified before the special grand jury that employment and payment records could not be located due to their age and because the records had been stored in a basement that had flooded. *See* Farley, Pam, Special Grand Jury Tr. at 15:22-20:11 (Jan. 23, 2013). The OSP also interviewed Ivan McCullagh, who received ownership of the Pepper Canister from Farley in 2012, and who was the manager of the bar in 2004 — as well as Steve Bringas and Dominic O'Mahony, two bartenders at the Pepper Canister in 2004. No one recalled letting the McCarthys, Denham, and Vanecko into the Pepper Canister after the bar had closed.

285 *See* McCarthy, Kevin, Special Grand Jury Tr. at 23:2-8 (Aug. 15, 2012); McCarthy, Bridget, Special Grand Jury Tr. at 57:2-5 (Aug. 15, 2012); *see also* Denham, Craig, Special Grand Jury Tr. at 21:15-17, 40:3-18 (Aug. 15, 2012) (Denham testified that he has no memory of any conversations there).

leading up to their meeting at the Pepper Canister.[286]

3. May 20, 2004 (the Lineups)

Beginning May 17, 2004, Yawger started making arrangements, through their counsel, to have Vanecko, Kevin McCarthy, and Denham stand in lineups at Area 3 headquarters on May 20.[287] Some CPD officers interviewed by the OSP described a "buzz" at Area 3 headquarters on the day of the lineups because it had become known that the Mayor's nephew (Vanecko) was going to be a lineup participant.[288] Yawger and Det. Patrick Flynn conducted the lineups, with Yawger standing outside the lineup room with witnesses and Flynn standing inside the lineup room with those individuals being viewed.[289]

a. Timing and Need for Lineups

In this case, however, Assistant State's Attorney ("ASA") Darren O'Brien, head of SAO's Felony Review unit in 2004, testified before the special grand jury in 2013 that he is not sure whether he requested the lineups held on May 20, 2004.[290] According to his 2013 testimony before the special grand jury, Yawger arranged the lineups.[291]

Before the lineups were even conducted, detectives already believed Vanecko was the

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286 *See* Special Grand Jury Exhibit 32 at SPR000024 (SPR000023-SPR000027) (Sprint phone charges for phone number associated with Bridget McCarthy reflecting calls between Bridget McCarthy and Vanecko's cellular phones).

287 *See* Yawger, Ronald, Special Grand Jury Tr. at 35:5-6 (July 15, 2013) (stating that he arranged the May 20, 2004 lineups) (May 1, 2004).

288 *See, e.g.,* Special Grand Jury Exhibit 122 at 9 (O'Leary, Rita, Kroll Interview Rep. (Oct. 5, 2012)).

289 *See* Special Grand Jury Exhibit 12 at CPD001107 (CPD001105-CPD1108) (Case Supplementary Report 3222163 (approved Nov. 8, 2004)). Det. John Griffin took the photos of the first lineup. *See* Special Grand Jury Exhibit 12 at CPD001107 (CPD001105-CPD001108) (Case Supplementary Report 3222163 (approved Nov. 8, 2004)). Evidence Technician Willard Streff took the photos of the second lineup. *See* Special Grand Jury Exhibit 13 at CPD001113 (CPD001111-CPD001114) (Case Supplementary Report 3222388 (approved Nov. 10, 2004)).

290 *See* O'Brien, Darren, Special Grand Jury Tr. at 33:16-34:1 (May 8, 2013). Although in O'Brien's opinion, "In this case lineups were absolutely necessary to establish the identity of any prospective offender …." *See* O'Brien, Darren, Special Grand Jury Tr. at 34:23-35:1 (May 8, 2013).

291 Yawger, Ronald, Special Grand Jury Tr. at 35:5-6 (July 15, 2013).

person who had struck Koschman. For instance, Yawger has stated that he knew Vanecko was the person who struck Koschman based on the witnesses' statements and through the process of elimination.[292] For example, Koschman's friends (Allen and Copeland — the only two eyewitnesses to the actual physical contact between Vanecko and Koschman) had provided definitive statements that, in sum and substance, the largest of the males in the other group had punched Koschman. Furthermore, Kevin McCarthy and Denham told Yawger they did not hit Koschman, and it was known the female (Bridget McCarthy) also did not strike Koschman.[293] Based on appearance, Yawger could tell Vanecko was the "biggest guy" in the group.[294] In other words, according to Yawger, Vanecko was "the guy" (meaning the offender).[295] Additionally, Flynn testified that Area 3 detectives did not consider Kevin McCarthy or Denham to be suspects at the time they stood in the lineups.[296] Despite the detectives' beliefs, based on the evidence, that Vanecko was the offender, the lineups were still held.

With regard to timing, the lineups were held nearly a month after the altercation, and were conducted without first attempting to speak with Vanecko. Superintendent Cline stated that lineups should be held as soon as possible after an incident.[297] Indeed, it is especially important to hold lineups as soon after an incident as possible where, as here, the incident occurred late at night between strangers[298] and lasted but a few minutes.[299]

In 2012, Chasen explained to the OSP that conducting a lineup was the right thing to do.

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292 *See* Yawger, Ronald, IGO Interview Tr. at 94:16-96:4 (July 1, 2011); *see also* Yawger, Ronald, Special Grand Jury Tr. at 50:5-17 (July 15, 2013).

293 *See* Yawger, Ronald, IGO Interview Tr. at 94:16-96:4 (July 1, 2011).

294 *See* Yawger, Ronald, IGO Interview Tr. at 94:16-96:4 (July 1, 2011).

295 *See* Yawger, Ronald, IGO Interview Tr. at 94:16-96:4 (July 1, 2011).

296 *See* Flynn, Patrick, Special Grand Jury Tr. at 45:3-46:14 (Mar. 13, 2013).

297 *See* Cline, Philip, IGO Interview Rep. at 3 (Dec. 28, 2012); Yawger, Ronald, Special Grand Jury Tr. at 50:24-51:5 (July 15, 2013).

298 *See* O'Brien, Darren, Special Grand Jury Tr. at 34:6-8 (May 8, 2013) (stating "when parties are complete strangers, conducting a lineup sooner is better than later.").

299 *See* Flynn, Patrick Special Grand Jury Tr. at 29:18-30:15 (Mar. 13, 2013); O'Brien, Darren, Special Grand Jury Tr. at 34:2-8 (May 8, 2013); Yawger, Ronald, Special Grand Jury Tr. at 51:13-15 (July 15, 2013).

He noted that detectives could not only presume Vanecko was the offender, but rather an identification had to be made by a witness.[300] Similarly, Flynn believes that even if CPD can identify a witness through process of elimination, a lineup is still necessary so witnesses can identify the person they saw commit the offense[301] — a sentiment echoed in 2013 by 2004 Deputy Superintendent Steven Peterson.[302] Likewise, Superintendent Cline noted that even if a suspect can be identified through process of elimination, holding a lineup helps ensure that CPD has the correct offender.[303] Indeed, despite the length of time between the April 25, 2004 incident and the May 20, 2004 lineups, according to Yawger, there still was no doubt in his mind that the witnesses would pick Vanecko out of the lineup.[304] Furthermore, Giralamo noted that SAO requests lineups for all homicide cases when feasible.[305] Chasen also noted that lineups are conducted in the "majority" of homicide cases.[306]

b. The Lineups

The first lineup consisted of six lineup participants: Vanecko along with five CPD officers who acted as "fillers."[307] Once Area 3 has a description of the suspect who will stand in the lineup, detectives try to find "fillers" matching the suspect's description somewhere in the vicinity, including individuals in lockup or volunteers in and around the building.[308] In this case, according to detectives, finding "fillers" on the day of the lineup who matched Vanecko's description proved somewhat difficult. For example, Yawger recalls delays in finding "big,"

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300 *See* Chasen, Michael, IGO Interview Rep. at 6 (Nov. 27, 2012).

301 *See* Flynn, Patrick, Special Grand Jury Tr. at 74:3-17, 78:15-20 (Mar. 13, 2013).

302 *See* Peterson, Steve, IGO Interview Tr. at 99:8-100:18 (Jan. 10, 2012).

303 *See* Cline, Philip, IGO Interview Rep. at 3 (Dec. 28, 2012).

304 *See* Yawger, Ronald, IGO Interview Tr. at 4:10-17, 26:17-24 (July 1, 2011).

305 *See* Giralamo, Anthony, IGO Interview Rep. at 7 (Dec. 21, 2012).

306 *See* Chasen, Michael, IGO Interview Rep. at 6 (Nov. 27, 2012).

307 *See* Special Grand Jury Exhibit 12 at CPD001107 (CPD001105-CPD001108) (Case Supplementary Report 3222163 (approved Nov. 8, 2004)).

308 *See* Flynn, Patrick, Special Grand Jury Tr. at 17:1-14 (Mar. 13, 2013).

white male "fillers."[309] In fact, Flynn asked Area 3 lockup to identify anyone matching Vanecko's description, and he personally checked the courtroom areas and other floors of headquarters to see if he could find "fillers."[310] Flynn ultimately selected "fillers" from available police officers.[311]

All six of the participants in the first lineup were white males of similar height, weight, and age.[312] Vanecko chose to stand in position number two.[313] Vanecko's lawyer, Terence

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309 *See* Yawger, Ronald, IGO Interview Tr. at 1:16-18 (July 1, 2011).

310 *See* Flynn, Patrick, Special Grand Jury Tr. at 23:14-23 (Mar. 13, 2013).

311 *See* Flynn, Patrick, Special Grand Jury Tr. at 23:24-24:11, 43:3-9 (Mar. 13, 2013). *See also* General Order 88-18 at CPD095827 (effective Sept. 24, 1988) (CPD095827-CPD095828) (stating "Police officers should not be used [as 'fillers'] unless other alternatives have been exhausted.").

312 *See* Special Grand Jury Exhibit 12 at CPD001108 (CPD001105-CPD001108) (Case Supplementary Report 3222163 (approved Nov. 8, 2004)).

On May 13, 2004, Hageline told detectives the largest male in the other group (Vanecko) was wearing a black hat the night of the altercation on Division Street. Special Grand Jury Exhibit 11 at CPD001700-CPD001701 (CPD001698-CPD001701) (Case Supplementary Report 3201023 (approved May 17, 2004)). Hageline also told detectives that one of the other males in the group (Denham) was wearing glasses – something Bridget McCarthy, Kevin McCarthy, and Denham himself have also stated. *See* Special Grand Jury Exhibit 11 at CPD001700-CPD001701 (CPD001698-CPD001701) (Case Supplementary Report 3201023 (approved May 17, 2004)); *see* Special Grand Jury Exhibit 10 at CPD001123, CPD001126 (CPD001115-CPD001128) (Case Supplementary Report 3193543 (approved Nov. 10, 2004)); *see* McCarthy, Kevin, Special Grand Jury Tr. at 16:9-14, 41:16-19 (Aug. 15, 2012). Even so, the Vanecko lineup participants did not wear hats, nor did the Denham/Kevin McCarthy lineup participants wear glasses. According to Flynn, typically speaking, if a witness identified something distinctive about a potential suspect, such as a hat, he would try to mimic that characteristic in the lineup. *See* Flynn, Patrick, Special Grand Jury Tr. at 26:24-27:17 (Mar. 13, 2013). Griffin stated that depending on the circumstances of the case, if a witness identifies a potential suspect as having worn a hat or glasses, he would have the lineup participants put such items on and take them off while witnesses viewed the lineup. *See* Griffin, John, IGO Interview Rep. at 3, 5-6 (Dec. 12, 2012). The decision as to whether the lineup participants would temporarily wear either was Yawger's to make. *See* Flynn, Patrick, Special Grand Jury Tr. at 38:5-9 (Mar. 13, 2013). Yawger stated that, despite Hageline's statement that the offender was wearing a hat, he did not think it was an important factual issue in the case, and he did not think a hat would make any difference, as he was sure Vanecko would be identified by the witnesses. *See* Yawger, Ronald, IGO Interview Tr. at 42:17-43:9 (July 1, 2011).

313 *See* Special Grand Jury Exhibit 12 at CPD001108 (CPD001105-CPD001108) (Case Supplementary Report 3222163 (approved Nov. 8, 2004)).

Gillespie, was also present.[314] Detectives were unable to interview Vanecko prior to his participation in the lineup, which is not uncommon, especially for suspects represented by counsel.[315]

The first lineup was viewed separately by six witnesses: Connolly, Kohler, Hageline, Allen, Copeland, and Francis.[316] Connolly, Kohler, Copeland and Francis were unable to positively identify anyone.[317] Hageline identified the officer in the fourth position as the offender (but added he was not positive).[318] And Allen identified the officer in the first position as the offender (but added he was not positive).[319] It has been suggested by the press that Vanecko, in preparation for the lineup, attempted to change his appearance from how he looked the night of the incident (including potentially shaving his head). However, the OSP did not uncover evidence that substantiated this notion.

The second lineup on May 20, 2004, also consisted of six lineup participants: Kevin McCarthy, Denham, and four "fillers" (one of whom was a CPD officer and another an ASA).[320] All six lineup participants were white males of similar height, weight, and appearance.[321] Kevin

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314 *See* Special Grand Jury Exhibit 12 at CPD001107 (CPD001105-CPD001108) (Case Supplementary Report 3222163 (approved Nov. 8, 2004)).

315 *See* Molloy, James, Kroll Interview Rep. at 6 (Dec. 7, 2012); *see* Chasen, Michael, IGO Interview Rep. at 6 (Nov. 27, 2012).

316 *See* Special Grand Jury Exhibit 12 at CPD001107 (CPD001105-CPD001108) (Case Supplementary Report 3222163 (approved Nov. 8, 2004)).

317 *See* Special Grand Jury Exhibit 12 at CPD001108 (CPD001105-CPD001108) (Case Supplementary Report 3222163 (approved Nov. 8, 2004)).

318 *See* Special Grand Jury Exhibit 12 at CPD001108 (CPD001105-CPD001108) (Case Supplementary Report 3222163 (approved Nov. 8, 2004)).

319 *See* Special Grand Jury Exhibit 12 at CPD001108 (CPD001105-CPD001108) (Case Supplementary Report 3222163 (approved Nov. 8, 2004)).

320 *See* Special Grand Jury Exhibit 13 at CPD001113-CPD001114 (CPD001111-CPD001114) (Case Supplementary Report 3222388 (approved Nov. 10, 2004)).

321 *See* Special Grand Jury Exhibit 13 at CPD001114 (CPD001111-CPD001114) (Case Supplementary Report 3222388 (approved Nov. 10, 2004)).

McCarthy chose to stand in position number one, while Denham selected position five.[322] Their lawyer, Dwyer, was also present.[323]

The lineup was viewed separately by the same six witnesses: Connolly, Kohler, Hageline, Allen, Copeland, and Francis. Connolly, Kohler, and Copeland were unable to positively identify anyone.[324] Hageline identified Denham as the person who was not only initially placed in handcuffs by the police the night of the incident,[325] but also as one of the guys who tried breaking up the altercation.[326] Allen identified Kevin McCarthy as not only the guy who was with the girl (Bridget McCarthy) and placed in handcuffs, but also as someone who tried breaking up the altercation.[327] Lastly, Francis identified Kevin McCarthy as the person who was with the female (Bridget McCarthy) and who was stopped by the police after the incident, but Francis did not remember what role Kevin McCarthy played during the altercation.[328]

In summary, according to CPD reports on the lineup, on May 20, 2004, neither Koschman's friends nor the bystanders were able to positively identify Vanecko in a lineup as the person who struck Koschman.

4. May 20, 2004 (Felony Review Visit)

According to O'Brien, the role of SAO's Felony Review unit is to "review the

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322 *See* Special Grand Jury Exhibit 13 at CPD001114 (CPD001111-CPD001114) (Case Supplementary Report 3222388 (approved Nov. 10, 2004)).

323 *See* Special Grand Jury Exhibit 13 at CPD001113 (CPD001111-CPD001114) (Case Supplementary Report 3222388 (approved Nov. 10, 2004)).

324 *See* Special Grand Jury Exhibit 13 at CPD001113-CPD001114 (Case Supplementary Report 3222388 (approved Nov. 10, 2004)).

325 Kevin McCarthy was the person in the Vanecko group who was placed in handcuffs the night of the altercation, not Denham. Tremore, Edwin, Kroll Interview Rep. at 3 (Sept. 18, 2012).

326 *See* Special Grand Jury Exhibit 13 at CPD001114 (CPD001111-CPD001114) (Case Supplementary Report 3222388 (approved Nov. 10, 2004)).

327 *See* Special Grand Jury Exhibit 13 at CPD001114 (CPD001111-CPD001114) (Case Supplementary Report 3222388 (approved Nov. 10, 2004)).

328 *See* Special Grand Jury Exhibit 13 at CPD001114 (CPD001111-CPD001114) (Case Supplementary Report 3222388 (approved Nov. 10, 2004)).

sufficiency of the evidence gathered by the police."[329] For homicides, such as the Koschman case, when contacted by CPD, the assigned Felony Review ASA reports to the CPD detective, meets with the investigating detective, speaks with all available parties, including the suspect if possible, reads available reports, and examines all available evidence to decide what charges to approve, if any.[330] When called by detectives to review a case, a Felony Review ASA can approve charges, reject charges, or classify the case as a continuing investigation ("CI").[331]

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329 *See* O'Brien, Darren, Special Grand Jury Tr. at 16:22-24 (May 8, 2013).

330 SAO approval is typically required in order for police to charge any person with a felony. *See* Boliker, Shauna, IGO Interview Rep. at 1-2 (Mar. 25, 2013); *see* O'Brien, Darren, Special Grand Jury Tr. at 17:8-12 (May 8, 2013); *see* Milan, Bob, Special Grand Jury Tr. at 6:17-19 (Apr. 24, 2013). In 2004, SAO's Felony Review unit consisted of one Felony Review supervisor, three Felony Review deputy supervisors, and four Felony Review teams of approximately 10 ASAs each. *See* Milan, Bob, Special Grand Jury Tr. at 5:22-6:7 (Apr. 24, 2013); *see* O'Brien, Darren, Special Grand Jury Tr. at 15:19-22 (May 8, 2013). Each of the four teams worked three consecutive days in a row in 12-hour shifts, so that the Felony Review unit operated 24 hours a day, 365 days a year. *See* Milan, Bob, Special Grand Jury Tr. at 6:6-15 (Apr. 24, 2013).

CPD officers are to call Felony Review dispatchers, who are on duty 24 hours a day and were charged with paging the on-duty Felony Review ASAs when a CPD officer called requesting Felony Review assistance. *See* O'Brien, Darren, Special Grand Jury Tr. at 16:1-12 (May 8, 2013); *see* Milan, Bob, Special Grand Jury Tr. at 8:17-18 (Apr. 24, 2013); *see* Kirk, Daniel, IGO Interview Rep. at 2 (Mar. 26, 2013). The dispatchers provided the assigned ASA with a contact, such as the detective, to facilitate the review of the case. *See* Kirk, Daniel, IGO Interview Rep. at 2 (Mar. 26, 2013).

According to O'Brien, detectives would occasionally contact him directly with regard to a request for Felony Review. *See* O'Brien, Darren, Special Grand Jury Tr. at 16:1-12 (May 8, 2013). The Felony Review unit dispatchers maintained a log of both the time that CPD called Felony Review and the time that the assigned ASA finished his or her review of the case. *See* O'Brien, Darren, Special Grand Jury Tr. at 16:15-22 (May 8, 2013). The time that the ASA left the Felony Review office to meet with the calling CPD officer was not recorded in the log. *See* O'Brien, Darren, Special Grand Jury Tr. at 16:20-22 (May 8, 2013). This log could also record whether the ASA was reviewing the case solely as an "advice." *See* O'Brien, Darren, IGO Interview Rep. (Proffer) at 4 (Feb. 5, 2013). According to current SAO Chief Deputy Walt Hehner, Felony Review ASAs contacted the Felony Review dispatcher after reviewing a case to inform them of whether charges were approved or rejected. *See* Special Grand Jury Exhibit 151 at 3 (Hehner, Walt, IGO Interview Rep. (Mar. 11, 2013)).

331 *See* Kirk, Daniel, IGO Interview Rep. at 2 (Mar. 26, 2013). When Felony Review CI's a case, that means CPD needs to obtain additional evidence before a charging decision can be made. *See* O'Brien, Darren, Special Grand Jury Tr. at 19:1-12 (May 8, 2013); *see* Murray, Bernard, IGO Interview Rep. at 3 (Feb. 22, 2013); *see* Devine, Richard, IGO Interview Rep. at 2 (Apr. 9, 2013). According to Murray, it is common, especially in homicide cases, for a case to be CI'd. *See* Murray, Bernard, IGO Interview Rep. at 3 (Feb. 22, 2013). In those instances, the ASA would actually create a "to-do list" of steps that CPD should follow to obtain approval of charges. *See* Milan, Bob, Special Grand Jury Tr. at 10:21-11:5, 16:19-17:2 (Apr. 24, 2013).

However, a Felony Review ASA can also be requested by CPD to review a particular case for the sole purpose of providing guidance to detectives about that case, which is commonly referred to as an "advice."[332] Generally speaking, CPD would request an "advice" from Felony Review when detectives were not ready to seek charges, but instead, wanted to know SAO's opinion on whether and what charges may be appropriate for a particular case.[333]

a. SAO Felony Review Unit Contacted

On May 20, 2004, the day of the lineups, O'Brien visited Area 3 to interview witnesses and consult detectives regarding potential charges in the Koschman case.[334] During his 2013 special grand jury testimony, O'Brien could not pinpoint an exact date that he was first contacted

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332 *See* O'Brien, Darren, Special Grand Jury Tr. at 19:13-17 (May 8, 2013). According to Hehner, approximately 20 percent of CPD calls to Felony Review are for "advices." *See* Special Grand Jury Exhibit 151 at 11 (Hehner, Walt, IGO Interview Rep. (Mar. 11, 2013)). However, according to Kirk, calls for "advices" seldom occur. *See* Kirk, Daniel, IGO Interview Rep. at 2 (Mar. 26, 2013).

333 O'Brien, Darren, Special Grand Jury Tr. at 19:13-17 (May 8, 2013); Kirk, Daniel, IGO Interview Rep. at 2 (Mar. 26, 2013); Murray, Bernard, IGO Interview Rep. at 3 (Feb. 22, 2013); Milan, Bob, Special Grand Jury Tr. at 10:16-20 (Apr. 24, 2013).

334 *See* Special Grand Jury Exhibit 10 at CPD001127 (CPD001115-CPD001128) (Case Supplementary Report 3193543 (approved Nov. 10, 2004)). A difference of opinion exists as to whether it is unusual for the head of Felony Review to conduct a review himself. *See* Special Grand Jury Exhibit 122 at 9 (O'Leary, Rita, Kroll Interview Rep. (Oct. 5, 2012)) (O'Brien's review of a case was not "an everyday occurrence"). According to Rybicki, he had never seen the Felony Review Chief come to a detective area to review a case, calling the occurrence unusual. *See* Rybicki, Richard, Special Grand Jury Tr. at 75:21-76:2 (Mar. 27, 2013). Rybicki acknowledged that, in this respect, the Koschman matter was treated differently than other cases because of the persons involved and because the case was "newsworthy." *See* Rybicki, Richard, Special Grand Jury Tr. at 100:12-18 (Mar. 27, 2013); *see also* Rybicki, Richard, Special Grand Jury Tr. at 46:20-47:1 (Mar. 27, 2013) (He said whoever told him about calling in the State's Attorney said that they did so because "they wanted to be thorough. They wanted, you know, independent review of what their investigation had led to so far. And that they were crossing all the T's and dotting the I's.") According to current SAO Chief of Staff Kirk, it is not completely unheard of for the head of Felony Review to review a case, but that it was not typical and did not occur on a daily basis. *See* Kirk, Daniel, IGO Interview Rep. at 3 (Mar. 26, 2013). *But see* Devine, Richard, IGO Interview Rep. at 2 (Aug. 8, 2013) (stating he was not shocked or surprised to learn that O'Brien went to Area 3 to review the Koschman matter because in his (State's Attorney Devine's) opinion it was not unusual for the head of Felony Review to personally review a case); Milan, Bob, IGO Interview Rep. at 2 (Aug. 8, 2013) (stating that in his opinion it was not unusual for the head of Felony Review to personally review a case, and that when he (Milan) was the head of Felony Review, he personally reviewed cases approximately 12 to 24 times a year). O'Brien testified before the special grand jury that he took the Koschman matter himself "because [he] wanted to have firsthand information about the case by interviewing the witnesses [himself] to make sure [SAO] didn't miss anything, and so that [he] could answer any questions of [his] bosses." O'Brien, Darren, Special Grand Jury Tr. at 32:1-6 (May 8, 2013).

by Yawger regarding the Koschman case, but he testified that he was likely contacted by phone the day before the lineups (May 19, 2004), as well as the day of the lineups (May 20, 2004).[335] According to both O'Brien and Yawger, this was the first contact CPD made with SAO regarding the Koschman case.[336] O'Brien testified that he learned that Mayor Daley's relative was involved during these phone calls.[337] Yawger told the special grand jury in July 2013 that he would not have called the head of Felony Review (O'Brien) if Vanecko had not been Mayor Daley's nephew.[338]

Yawger also told the special grand jury that he initially called O'Brien for an "advice" on the Koschman case, but then [Yawger] shifted gears and instead wanted O'Brien to charge Vanecko.[339] Yawger explained to the IGO in 2011 that he wanted O'Brien to charge Vanecko

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335 *See* O'Brien, Darren, Special Grand Jury Tr. at 30:10-24 (May 8, 2013).

336 *See* O'Brien, Darren, Special Grand Jury Tr. at 31:8-13 (May 8, 2013); *see also* Yawger, Ronald, IGO Interview Tr. at 11:15-24 (July 1, 2011) (SAO was unaware of case prior to his call to O'Brien, and O'Brien seemed as if he was hearing information for first time.); *see also* Yawger, Ronald, IGO Interview Tr. at 9:18-10:9 (July 1, 2011) (Yawger stated that he called the main line for the Felony Review unit); O'Brien, Darren, Special Grand Jury Tr. at 30:20-24 (May 8, 2013) ("I'm not sure if I was paged by the caller directly or received a call through the Felony Review dispatcher. I've given my pager number to many police personnel throughout my career.")

337 *See* O'Brien, Darren, Special Grand Jury Tr. at 31:1-13 (May 8, 2013). *See also* O'Brien, Darren, Special Grand Jury Tr. at 14:9-12 (May 8, 2013) (stating "Vanecko's Daley family relationship had no impact in forming my opinion that charges were not appropriate in this case.")

338 *See* Yawger, Ronald, Special Grand Jury Tr. at 126:7-15, 128:12-15 (July 15, 2013). According to Yawger, and others, he reached out to O'Brien directly to review the case because the case involved the nephew of Mayor Daley. *See* Yawger, Ronald, IGO Interview Tr. at 7:17-22 (July 1, 2011); *see also* Epach, Thomas, Special Grand Jury Tr. at 13:12-15 (May 8, 2013) (testifying that Yawger told him he called O'Brien directly); *see also* O'Brien, Darren, Special Grand Jury Tr. at 31:10-13 (May 8, 2013) ("I believe the reference to a Daley relative is why I, as opposed to one of the felony review team, went out on a call."); *see* Rybicki, Richard, Special Grand Jury Tr. at 76:5-7 (Mar. 27, 2013). Chasen claims that he "demanded" that O'Brien, rather than another ASA, review the case because he wanted an immediate answer, and as the head of Felony Review, O'Brien could provide an answer immediately. *See* Chasen, Michael, IGO Interview Rep. at 5 (Nov. 27, 2012); *see also* Kobel, Richard, IGO Interview Rep. at 2 (Jan. 17, 2013). Chasen could not recall any other time he requested the head of Felony Review to personally review a case, and acknowledged that the Koschman case may have been the first time he made such a demand. *See* Chasen, Michael, IGO Interview Rep. at 5 (Nov. 27, 2012). According to Giralamo, O'Brien sometimes reviewed high profile or "heater" cases, and he only recalled seeing O'Brien at Area 3 four or five times. *See* Giralamo, Anthony, IGO Interview Rep. at 6 (Dec. 21, 2012).

339 *See* Yawger, Ronald, Special Grand Jury Tr. at 127:6-13 (July 15, 2013); Yawger, Ronald, IGO Interview Tr. at 7:22-23 (July 1, 2011).

and that a "Judge [could] throw [the case] out" if there was not sufficient evidence to support such a charge.[340] Before the special grand jury in 2013, Yawger explained his thought process by stating:

> I just wanted — it's not a good thing to say, but I just wanted to kick the can down the road. I mean, why would we [CPD] make this decision? I wanted out of this case. I wanted to get it over with. I figured just charge the guy and go to preliminary hearing, and it would have been thrown out . . . And then we're done with it, it's on somebody else's hands, which is not the right thing to do.[341]

However, according to O'Brien's 2013 special grand jury testimony, Yawger's call was merely for an "advice," and he was never asked by anyone to approve charges in the Koschman case.[342]

Tom Epach (a former Cook County ASA) was the Executive Assistant to Superintendent Cline in 2004 and acted as a liaison between CPD and SAO; on occasion advocating on behalf of detectives when CPD thought a case should be charged.[343] In May 2013, Epach testified before the special grand jury and stated that sometime after the May 20, 2004 lineups, he received a call from Yawger requesting that he (Epach) reach out to SAO to attempt to obtain approval for

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340 Yawger, Ronald, IGO Interview Tr. at 8:4-7 (July 1, 2011).

341 *See* Yawger, Ronald, Special Grand Jury Tr. at 127:13-24 (July 15, 2013).

342 *See* O'Brien, Darren, Special Grand Jury Tr. at 19:17-18, 23:21-24:6, 53:5-17 (May 8, 2013). O'Brien testified that "If Yawger had requested charges against anyone in this case, I would have rejected them … I thought CPD did not have enough evidence to pursue charges." *See* O'Brien, Darren, Special Grand Jury Tr. at 53:12-16 (May 8, 2013). As evidence that charges were not requested, O'Brien pointed to the fact that he never wrote up the case as a rejection, that CPD reports show that charges were never requested, and that Superintendent Cline made a statement to the press that CPD felt charges were not appropriate. *See* O'Brien, Darren, Special Grand Jury Tr. at 152:5-20 (May 8, 2013); Special Grand Jury Exhibit 10 at CPD001117 (CPD001115-CPD001128) (Case Supplementary Report 3193543 (approved Nov. 10, 2004)); Fran Spielman, *No Charges in Fatal Fight Involving Daley's Nephew* (May 26, 2004) (NEWS000009-10) (Superintendent Cline reported as stating on Tuesday, May 25, 2004 that there was "insufficient evidence" to bring charges in connection with Koschman's death). Regardless of whether O'Brien was called to Area 3 for approval of charges or for an "advice," SAO had the authority to charge the case. *See* Milan, Bob, Special Grand Jury Tr. at 59:5-8 (Apr. 24, 2013).

343 *See* Epach, Thomas, Special Grand Jury Tr. at 7:23-8:8 (May 8, 2013); Kobel, Richard, IGO Interview Rep. at 5 (Jan. 17, 2013); Molloy, James, Kroll Interview Rep. at 6 (Dec. 7, 2012); Chasen, Michael, IGO Interview Rep. at 7 (Nov. 27, 2012).

charges against Vanecko.[344] According to Epach, when Yawger contacted him, Yawger stated he had already requested involuntary manslaughter charges against Vanecko on May 20, 2004.[345] Epach testified that Yawger told him that O'Brien refused Yawger's request when he (Yawger) requested charges, and that O'Brien told Yawger that SAO did not charge involuntary manslaughter cases if SAO thought the case would ultimately be dismissed.[346] Epach testified that he called O'Brien to convince him to bring charges against Vanecko; however, according to Epach, O'Brien could not be persuaded to do so.[347] According to Epach, he "told O'Brien [over the phone] that I [Epach] thought self-defense could be viewed as unreasonable in this case."[348] O'Brien told the special grand jury that he does not recall any such request from Epach,[349] while Yawger told the special grand jury that, to the best of his recollection, he did ask Epach to help him get the case charged.[350]

b. O'Brien's Interviews of Witnesses

On May 20, 2004, at Area 3, after the lineups were complete, O'Brien interviewed Koschman's friends (Copeland, Allen, Francis, and Hageline) and Vanecko's friends (the McCarthys and Denham), but he did not interview Connolly or Kohler (the bystander witnesses).[351] It is unclear who was interviewed first, as Yawger has stated that the Koschman group was interviewed first,[352] but O'Brien testified that he interviewed Vanecko's friends

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344 *See* Epach, Thomas, Special Grand Jury Tr. at 10:6-12, 11:15-18 (May 8, 2013).

345 *See* Epach, Thomas, Special Grand Jury Tr. at 11:3-7, 11:11-14, 26:19-27:4 (May 8, 2013).

346 *See* Epach, Thomas, Special Grand Jury Tr. at 26:19-27:7, 77:21-78:4 (May 8, 2013).

347 *See* Epach, Thomas, Special Grand Jury Tr. at 15:9-16:14 (May 8, 2013).

348 *See* Epach, Thomas, Special Grand Jury Tr. at 16:5-7 (May 8, 2013).

349 *See* O'Brien, Darren, Special Grand Jury Tr. at 54:21-24, 55:3-5, 134:7-10 (May 8, 2013).

350 *See* Yawger, Ronald, Special Grand Jury Tr. at 130:23-131:2; 132:11-18 (July 15, 2013).

351 During one of three interviews with the OSP, O'Brien stated that he recalled the lineups were in progress when he arrived at Area 3 on May 20, 2004. O'Brien, Darren, IGO Interview Rep. (Proffer) at 9 (Feb. 20, 2013).

352 *See* Yawger, Ronald, IGO Interview Tr. at 13:10-17 (July 1, 2011).

first.[353] The witnesses were interviewed individually,[354] except for the McCarthys, who were interviewed at the same time accompanied by their attorney, Bill Dwyer.[355]

Before the special grand jury in July 2013, Yawger stated that he took notes, which he described as "doodling" to simply "highlight[] some of the stuff" the witnesses were saying during O'Brien's interviews of Koschman's friends, but that he did not take notes during the interviews of the McCarthys or Denham.[356] Yawger's GPR for the Koschman friends' interviews totaled less than a single page for all four interviews,[357] and no GPRs exist from the interviews of the McCarthys or Denham, even though O'Brien testified before the special grand jury in 2013 that he thinks Yawger took notes during all the May 20, 2004 witness interviews.[358]

According to Yawger, O'Brien "really went after" the McCarthys in his interview and threatened to stop the interview and bring them before the grand jury because O'Brien did not believe the McCarthys' statements that "they did not see" what happened when Koschman was struck.[359] O'Brien similarly testified before the special grand jury in 2013 that he believed it was a reasonable inference that the McCarthys and Denham were lying during their interviews to protect Vanecko.[360] At one point, according to Yawger, the McCarthys' attorney (Dwyer) even

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353 *See* O'Brien, Darren, Special Grand Jury Tr. at 36:18-21 (May 8, 2013).

354 *See* Yawger, Ronald, IGO Interview Tr. at 15:2-7 (July 1, 2011).

355 *See* Yawger, Ronald, IGO Interview Tr. at 17:23-18:6 (July 1, 2011).

356 *See* Yawger, Ronald, Special Grand Jury Tr. at 65:7-66:1, 67:14-68:2 (July 15, 2013). In 2013, O'Brien testified before the special grand jury and said he relied on the detective participating in the interviews to record a summary of each witness statement, *see* O'Brien, Darren, Special Grand Jury Tr. at 17:15-18:16 (May 8, 2013), whereas Yawger told the special grand jury that "Darren O'Brien would never ask any policeman to take his notes, I guarantee you that," *see* Yawger, Ronald, Special Grand Jury Tr. at 66:15-21 (July 15, 2013).

357 According to Yawger's GPR, Allen told O'Brien that Koschman was punched in the cheek, while Copeland told O'Brien that Koschman was punched in the mouth. *See* Special Grand Jury Exhibit 17 (CPD001051) (General Progress Report (May 20, 2004)).

358 *See* O'Brien, Darren, Special Grand Jury Tr. at 36:13-15 (May 8, 2013). O'Brien also testified that he personally did not take notes during any of the interviews in the Koschman matter. *See* O'Brien, Darren, Special Grand Jury Tr. at 35:18-19 (May 8, 2013).

359 *See* Yawger, Ronald, IGO Interview Tr. at 18:19-19:20 (July 1, 2011); *see* Yawger, Ronald, Special Grand Jury Tr. at 53:19-56:1 (July 15, 2013).

360 O'Brien, Darren, Special Grand Jury Tr. at 37:20-38:1, 104:6-24 (May 8, 2013).

threatened to complain to the attorney disciplinary authorities about O'Brien.[361] Likewise, according to then First Assistant State's Attorney Robert Milan's 2013 special grand jury testimony, the McCarthys' attorney also called him after the May 20, 2004 interviews to complain about O'Brien's questioning, stating that O'Brien was "harsh on them" and called them "liars."[362]

As noted above, O'Brien did not interview Connolly or Kohler. O'Brien testified that instead of interviewing these bystander witnesses, he "relied upon CPD reports and conversations with Detective Yawger as to what they said."[363] O'Brien testified it was not necessary to interview Kohler and Connolly because their versions of the incident were generally consistent with that of Koschman's friends, except as to whether Vanecko punched or pushed Koschman.[364]

c. The Charging Decision

i. O'Brien's Standard for Approving Charges

Under Illinois law, a finding of probable cause (defined as sufficient evidence to justify the reasonable belief that the defendant has committed or is committing a crime) is needed to

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361 Yawger, Ronald, IGO Interview Tr. at 19:16-20 (July 1, 2011); *see also* O'Brien, Darren, Special Grand Jury Tr. at 38:2-7 (May 8, 2013) (stating that he "recall[s] their attorney interrupted the interview several times and was angry with me for the manner in which I aggressively interviewed his clients. He threatened to remove his clients from the interview room.")

362 Milan, Bob, Special Grand Jury Tr. at 51:14-20 (Apr. 24, 2013). Milan also testified before the special grand jury that Dwyer stated he wanted to file an Attorney Registration and Disciplinary Commission complaint against O'Brien based on his conduct at the interviews. Milan, Bob, Special Grand Jury Tr. at 51:14-20 (Apr. 24, 2013).

363 O'Brien, Darren, Special Grand Jury Tr. at 46:13-17 (May 8, 2013).

364 O'Brien, Darren, Special Grand Jury Tr. at 46:22-47:3 (May 8, 2013). O'Brien testified that "I do not know the line of vision that the two independent witnesses had at the time of the incident, but my impression was both described the incident as if they had a clear view." O'Brien, Darren, Special Grand Jury Tr. at 46:17-21 (May 8, 2013). Both Kohler and Connolly testified before the special grand jury in 2012 that they only saw the aftermath of the physical contact between Vanecko and Koschman and not the contact itself. *See* Connolly, Michael, Special Grand Jury Tr. at 9:9-13 (July 11, 2012); Kohler, Phillip, Special Grand Jury Tr. at 13:15-21 (Aug. 8, 2012).

return an indictment.[365] However, prosecutors have what is commonly referred to as "prosecutorial discretion," which under Illinois law, provides that a prosecutor is allowed to independently determine whether to charge an individual with a criminal offense and which charge(s) to bring.[366]

In his 2013 special grand jury testimony, O'Brien described his personal standard for approving charges:

> To approve charges in my mind, I would need to know with no doubt that a crime was committed, that the CPD identified the right person as the offender, and that there was some admissible evidence against that person and no negative evidence. There were some cases that was [sic] rejected because the negative evidence was so bad the case could not be salvaged by any new evidence. Negative evidence is evidence that show the offender was innocent of the offense or that contradicted evidence of guilt.[367]

According to former SAO Criminal Prosecutions Chief Bernie Murray, O'Brien "demanded more from police" for all cases coming into SAO where charges were sought.[368] According to O'Brien, his overarching charging policy is that he does "not risk charging a person

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365 *See, e.g., People v. Creque*, 382 N.E.2d 793, 796, 72 Ill. 2d 515, 523 (1978); *People v. Jones*, 830 N.E.2d 541, 551-552, 215 Ill. 2d 261, 273-75 (2005).

366 *See, e.g., Schiller v. Mitchell*, 828 N.E.2d 323, 335 (Ill. App. Ct. 2d Dist. 2005).

367 O'Brien, Darren, Special Grand Jury Tr. at 24:16-25:3 (May 8, 2013).

368 Murray, Bernard, IGO Interview Rep. at 5 (Feb. 22, 2013). According to Bernie Murray, if a case did not meet probable cause standards or the standard of having a strong probability of success at trial, then the Felony Review ASA would formally reject charges. *See* Murray, Bernard, IGO Interview Rep. at 3 (Feb. 22, 2013). However, according to Milan, an ASA could reject a case "for whatever reason" if the evidence was insufficient "to sustain the burden beyond a reasonable doubt." *See* Milan, Bob, Special Grand Jury Tr. at 11:6-10 (Apr. 24, 2013). For all felonies except for homicides, CPD may override SAO's rejection of charges. *See* Kobel, Richard, IGO Interview Rep. at 5 (Jan. 17, 2013). If a Felony Review ASA rejects charges and a CPD watch commander disagrees, the latter may call the on-duty CPD assistant deputy superintendent ("ADS") for a consultation. Detective Division Standard Operating Procedures Sec. 8.8 "Obtaining Approval for Felony Charges" at IG_002503 (1988) (IG_002422-IG_002630); Chasen, Michael, IGO Interview Rep. at 9-10 (Nov. 27, 2012). If the ADS believes charges are appropriate, he, in turn, can inform the ASA that the felony charges are approved. Detective Division Standard Operating Procedures Sec. 8.8, "Obtaining Approval for Felony Charges" at IG002503 (1988) (IG_002422-IG_002630); Chasen, Michael, IGO Interview Rep. at 9-10 (Nov. 27, 2012). When this happens, the case will typically go to a preliminary hearing, where SAO often has it dismissed. Chasen, Michael, IGO Interview Rep. at 10 (Nov. 27, 2012).

unless [he is] certain – or as certain as [he] could be of [the offender's] guilt."[369]

ii. Issues Allegedly Preventing Charges

According to O'Brien's 2013 special grand jury testimony, after he finished interviewing witnesses on the day of the lineups (May 20, 2004), he spoke with Yawger about the case and whether charges would be appropriate.[370] O'Brien testified that after reviewing the available evidence, it was his belief that the case was "nowhere near chargeable," and he told Yawger such.[371] O'Brien's assessment that the case could not be charged (as noted above, O'Brien asserts he was never formally asked by CPD to charge the case) was based primarily on his issues concerning the: (1) lack of witness identification of the offender, and (2) viability of the offender's putative affirmative defense of self-defense.[372]

(A) Supposed Lack of Witness Identification of the Offender

As discussed above, before the May 20, 2004, lineups were conducted, CPD believed Vanecko was the person who had struck Koschman. Furthermore, O'Brien testified before the special grand jury that the identification of an offender can be made by process of elimination.[373] Although the McCarthys and Denham told O'Brien that they did not strike Koschman,[374] O'Brien asserted in his special grand jury testimony that he "could not conclude" whether the person who struck Koschman was Kevin McCarthy, Denham, or Vanecko because he could not rely on Kevin McCarthy's and Denham's statements that they did not strike Koschman.[375] Additionally, even though O'Brien knew that Koschman's friends informed police the night of

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369 O'Brien, Darren, Special Grand Jury Tr. at 24:13-15 (May 8, 2013).

370 O'Brien, Darren, Special Grand Jury Tr. at 48:3-19 (May 8, 2013).

371 O'Brien, Darren, Special Grand Jury Tr. at 49:13-18 (May 8, 2013).

372 O'Brien, Darren, Special Grand Jury Tr. at 48:16-19 (May 8, 2013).

373 O'Brien, Darren, Special Grand Jury Tr. at 52:6-10 (May 8, 2013). According to Bernie Murray, there is no need for a positive ID at a lineup before charging a circumstantial case. Murray, Bernard, IGO Interview Rep. at 4 (Feb. 22, 2013).

374 O'Brien, Darren, Special Grand Jury Tr. at 38:16-19 (May 8, 2013).

375 O'Brien, Darren, Special Grand Jury Tr. at 52:11-22 (May 8, 2013). No witnesses indicated Bridget McCarthy (the only woman in the group) struck Koschman.

the incident that Kevin McCarthy was not the offender, O'Brien testified that "those same friends impliedly said it was also not Vanecko when they failed to pick him out of a lineup."[376] When O'Brien was reminded by the OSP that witnesses had stated that the person who struck Koschman was the "tallest" or "largest" in the group, and even though Vanecko was both the largest (at approximately 230 pounds) and the tallest (at approximately 6'3"),[377] person in his group, O'Brien speculated that because the incident occurred in April, the Vanecko group was likely wearing jackets the night of the incident, "which could possibly distort someone's impression of size."[378]

(B) O'Brien's Evaluation of Self-Defense

Under Illinois law, self-defense is an affirmative defense that must be raised by the defendant, not the prosecution.[379] In Illinois, the law of self-defense is as follows:

> A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force. However, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another,

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376 O'Brien, Darren, Special Grand Jury Tr. at 52:23-53:4 (May 8, 2013).

377 Of note, Denham was 5'10" and 170 pounds, and Kevin McCarthy was 6'2" and 190 pounds. *See* Special Grand Jury Exhibit 40 (Denham Driver License Search Results) and Special Grand Jury Exhibit 39 (Kevin McCarthy Driver License Search Results).

378 O'Brien, Darren, Special Grand Jury Tr. at 50:22-51:3 (May 8, 2013). No witnesses have told police or testified before the special grand jury that the Vanecko group was wearing jackets, nor that jackets distorted their ability to perceive the height or weight of the persons involved in the altercation.

379 *See People v. Zapata*, 808 N.E.2d 1064, 1069-70 (Ill. App. Ct. 1st Dist. 2004); *People v. Moore*, 797 N.E.2d 217, 225 (Ill. App. Ct. 2d Dist. 2003). However, according to Kirk, Felony Review ASAs are trained to anticipate possible defenses, such as self-defense. Kirk, Daniel, IGO Interview Rep. at 5 (Mar. 26, 2013). The accused has the burden of producing evidence to raise the question of self-defense unless that issue arises from the state's proof. *People v. Haynes*, 260 N.E.2d 377, 379 (Ill. App. Ct. 1st Dist. 1970). Once a defendant raises the issue of self-defense, the state has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense, in addition to proving the elements of the charged offense. *People v. Zapata*, 808 N.E.2d 1064, 1069 (Ill. App. Ct. 1st Dist. 2004). If the state negates any one of the elements of self-defense, the defendant's claim of self-defense must fail. *People v. Young*, 807 N.E.2d 1125, 1134 (Ill. App. Ct. 1st Dist. 2004).

or the commission of a forcible felony.[380]

According to O'Brien's 2013 special grand jury testimony, he believes the law requires him "To . . . look at all the evidence, not just what a prospective offender might say. If any witness or possible offender provides evidence that a person was acting in self-defense and I conclude that that is true, I then consider whether the response to that threat was reasonable. If it is, then no crime has been committed and I obviously cannot charge anyone with an offense."[381]

O'Brien also testified that "whoever pushed or punched Koschman did so because they were acting in response to Koschman's aggression."[382] In fact, according to O'Brien, regardless of whether Koschman was punched or pushed, either use of force would have been reasonable, in his opinion.[383] However, O'Brien admitted under oath that none of the witnesses told him that Koschman threw punches or made physical contact with Vanecko immediately before Koschman was struck.[384] In fact, O'Brien also testified that he did not remember the McCarthys or Denham ever telling CPD or him that during the altercation they or Vanecko felt threatened in a physical way or that as they walked away, "there was any danger to them" (i.e., they did not think that great bodily harm to themselves or others was imminent).[385] According to O'Brien, when a person "[f]lees from the scene [as Vanecko did], such evidence may be an indicator of consciousness of guilt, but it could also mean the person did not want to be involved in law

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380 720 ILCS 5/7-1 (West 2004).

381 O'Brien, Darren, Special Grand Jury Tr. at 26:7-17 (May 8, 2013). According to Hehner, SAO does approve charges for cases even if it is believed that a defendant is likely to raise self-defense at trial. Special Grand Jury Exhibit 151 at 11 (Hehner, Walt, IGO Interview Rep. (Mar. 11, 2013)). According to 2011 Area 5 CPD Commander Salemme, self-defense is one of the "favorite reasons" given by SAO for rejecting charges in a case. Special Grand Jury Exhibit 109 at 8 (Salemme, Joseph, Kroll Interview Rep. (Jan. 15, 2013)).

382 O'Brien, Darren, Special Grand Jury Tr. at 26:18-27:4 (May 8, 2013) (concluding that Koschman's friends would not lie about Koschman being the aggressor); *see also* O'Brien, Darren, Special Grand Jury Tr. at 27:10-21 (May 8, 2013).

383 O'Brien, Darren, Special Grand Jury Tr. at 28:5-13 (May 8, 2013).

384 O'Brien, Darren, Special Grand Jury Tr. at 40:6-9 (May 8, 2013).

385 O'Brien, Darren, Special Grand Jury Tr. at 130:9-17 (May 8, 2013).

enforcement activity."[386] However, according to O'Brien, fleeing the scene could also "indicate the person fleeing may be fearful of being attacked again."[387]

Additionally, even though O'Brien and CPD did not speak to Vanecko, according to O'Brien, he was nevertheless able to divine Vanecko's actual state of mind based on not only what the witnesses told him, but also upon his "common sense as to what the average person's state of mind would have been" under the circumstances.[388] O'Brien explained to the special grand jury that the Koschman and Vanecko groups had "been yelling back and forth,"[389] and thus, when Koschman continued the argument:

> What options did the Vanecko group have? Run? They never would have been able to turn and run before Koschman was on them. Stand there and let Koschman strike them first? Not only would that be absurd, the law does not require such action. I believe it [striking Koschman] was more likely a reaction by someone in the Vanecko group throwing up his hands to prevent Koschman from getting to them rather than a punch. Vanecko's group had been drinking, too, and I doubt any among them would have had the time to actually make a decision to throw a punch; however, I don't know exactly what type of contact occurred.[390]

O'Brien summed up his stance on the issue of self-defense in this matter by stating:

> I concluded that if it was Vanecko who punched or pushed Koschman, it was reasonable to believe that Vanecko felt either he or another in his group were being physically threatened by Koschman and acted accordingly. I believe Koschman was physically threatening, and concluded Koschman's aggression led to him being pushed or punched.[391]

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386 O'Brien, Darren, Special Grand Jury Tr. at 29:13-17 (May 8, 2013).

387 O'Brien, Darren, Special Grand Jury Tr. at 29:18-19 (May 8, 2013).

388 O'Brien, Darren, Special Grand Jury Tr. at 40:21-41:9 (May 8, 2013).

389 O'Brien, Darren, Special Grand Jury Tr. at 45:18-19 (May 8, 2013).

390 O'Brien, Darren, Special Grand Jury Tr. at 45:22-46:12 (May 8, 2013).

391 O'Brien, Darren, Special Grand Jury Tr. at 40:11-20 (May 8, 2013). *See also* O'Brien, Darren, Special Grand Jury Tr. at 48:16-49:-6 (May 8, 2013) (stating the Koschman case "was not a close call" when describing the reasons he felt charges in this matter were precluded). As part of his testimony

Additionally, O'Brien testified that he was unaware of the fact that the Vanecko group rendezvoused at the Pepper Canister after the incident on April 25, 2004 (an event that was uncovered by the OSP and revealed to him during an interview with the OSP).[392] In hindsight, according to O'Brien, after learning of the Pepper Canister meeting, he wishes he had asked the McCarthys and Denham why they met up and what they discussed.[393] That is because, according to O'Brien, "[w]hen the parties to a violent act rendezvous after the act, the purpose of the meeting could be an important consideration if the purpose was to develop a consistent fictitious story about the incident."[394]

O'Brien testified that when he left Area 3 after the May 20, 2004 lineups, he probably reported the results of his visit up SAO's chain of command, likely to Bernie Murray and Milan, but O'Brien stressed he "did not ask them what [he] should do [with the case]."[395] O'Brien explained further that while he does not specifically remember speaking about the Koschman case with his superiors, he is "sure they all agreed that this case was not chargeable."[396] Milan recalled hearing the results of O'Brien's Felony Review visit, and testified that while he cannot remember how many times he spoke with State's Attorney Richard Devine about the Koschman case in 2004, he "would bet the ranch" that he discussed the matter, including O'Brien's

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before the special grand jury, O'Brien read a statement which, in part, stated, "I also considered any disparity in size between Koschman and any of the larger males in Vanecko's group as well as the fact that Vanecko left the scene after the incident. Both are considerations in any self-defense evaluation, though they are not necessarily dispositive." *See* O'Brien, Darren, Special Grand Jury Tr. at 47:8-15 (May 8, 2013). Regarding his consideration of the size disparity between Vanecko and Koschman, O'Brien testified that, "what would the alternative be for Vanecko or somebody to sit there and say he's going to hit me. He's smaller than me. I probably should let them strike first. I don't think the law requires that." *See* O'Brien, Darren, Special Grand Jury Tr. at 169:21-170:2 (May 8, 2013).

392 O'Brien, Darren, Special Grand Jury Tr. at 56:6-9 (May 8, 2013).

393 O'Brien, Darren, Special Grand Jury Tr. at 56:11-15 (May 8, 2013).

394 O'Brien, Darren, Special Grand Jury Tr. at 29:20-30:1 (May 8, 2013).

395 O'Brien, Darren, Special Grand Jury Tr. at 54:6-11 (May 8, 2013). During Milan's special grand jury testimony, he described O'Brien as "one of the finest men" and "one of the finest lawyers" he knows. *See* Milan, Bob, Special Grand Jury Tr. at 51:22-24 (Apr. 24, 2013).

396 O'Brien, Darren, Special Grand Jury Tr. at 151:3-14 (May 8, 2013).

findings, with State's Attorney Devine once or maybe twice during that period.[397]

Furthermore, current State's Attorney Anita Alvarez told the OSP she never discussed the Koschman case with O'Brien or State's Attorney Devine in 2004, despite her being in the supervisory chain of command, and State's Attorney Alvarez speculated that she was likely bypassed because she was not part of SAO's "good old boy network."[398] According to State's Attorney Alvarez, if she had been in charge of SAO in 2004, she not only would have wanted to have been made aware of the Koschman matter, but she would have wanted to have discussed it with O'Brien and CPD personnel, as well as had an opportunity to personally review the files – something she believes should have probably occurred at SAO in 2004.[399]

According to the current First Assistant State's Attorney Shauna Boliker, she was surprised SAO did not conduct a more extensive review of the Koschman case in 2004.[400] Boliker would have expected SAO "higher ups" to have been heavily involved with reviewing the case, due to the fact that SAO knew its actions were going to be scrutinized because of the Mayor's nephew's (Vanecko's) involvement in the matter.[401]

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397 Milan, Bob, Special Grand Jury Tr. at 40:2-13, 60:17-23 (Apr. 24, 2013). However, Milan also testified that his knowledge of the Koschman case was derived from what O'Brien told him, and that he (Milan) did not have independent knowledge of the facts, and did not interview witnesses or review CPD reports. *See* Milan, Bob, Special Grand Jury Tr. at 40:22-41:5, 43:5-10, 54:7-10, 118:3-5 (Apr. 24, 2013). Once the *Sun-Times* began covering the Koschman story in 2011, Milan testified that he recalls discussing the case with State's Attorney Devine (and O'Brien) approximately "a half a dozen" times since 2011. Milan, Bob, Special Grand Jury Tr. at 38:7-19, 84:7-85:7 (Apr. 24, 2013). State's Attorney Devine's best recollection was that he was informed of SAO's involvement in the Koschman case by Milan, after O'Brien had become involved in the matter. *Compare* Devine, Richard, IGO Interview Rep. at 2 (Dec. 20, 2011) (informed by Milan or Bernie Murray) *with* Devine, Richard, IGO Interview Rep. at 3 (Apr. 9, 2013) (does not think that Bernie Murray notified him of the Koschman matter). Milan also likely told him of O'Brien's findings. Devine, Richard, IGO Interview Rep. at 3 (Apr. 9, 2013). State's Attorney Devine could not recall reviewing any written materials relating to the matter. *See* Devine, Richard, IGO Interview Rep. at 2 (Dec. 20, 2011); Devine, Richard, IGO Interview Rep. at 3 (Aug. 8, 2013). State's Attorney Devine never issued instructions to Felony Review in connection with the matter; nor did he recall any formal meetings with top supervisors relating to the Koschman case. *See* Devine, Richard, IGO Interview Rep. at 2 (Dec. 20, 2011).

398 Alvarez, Anita, IGO Interview Rep. at 1 (Apr. 29, 2013).

399 Alvarez, Anita, IGO Interview Rep. at 9 (Apr. 29, 2013).

400 Boliker, Shauna, IGO Interview Rep. at 7 (Mar. 25, 2013).

401 Boliker, Shauna, IGO Interview Rep. at 7 (Mar. 25, 2013).

d. Felony Review Folder

As part of the Felony Review process, the reviewing ASA is required to create what is referred to as a Felony Review folder.[402] ASAs use the folders to record certain key case information learned from their review of the evidence, as well as from their interviews of witnesses or the offender himself.[403] In 2004, besides retaining the hard copy Felony Review folder, Felony Review cases were also logged into the SAO's "Prosecutor's Management Information System" (PROMIS).[404]

In this case, neither O'Brien's Felony Review folder (or folders) from his May 20, 2004 interviews, nor the matter's related electronic records, exist.[405] Specifically, O'Brien testified

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402 Furthermore, according to Kirk, Felony Review ASAs were required to turn in a Felony Review folder for every case they reviewed. *See* Kirk, Daniel, IGO Interview Rep. at 2 (Mar. 26, 2013). Indeed, according to Hehner, Felony Review folders for "advice" cases were to be kept in the event CPD called SAO for charges at a later date. Special Grand Jury Exhibit 151 at 3 (Hehner, Walt IGO Interview Rep. (Mar. 11, 2013)); *see also* Boliker, Shauna, IGO Interview Rep. at 6-7 (Mar. 25, 2013); Alvarez, Anita, IGO Interview Rep. at 5 (Apr. 29, 2013). The ASA used the folder to record details of the case: the nature of the ASA's review, including whether the review was a rejection of charges, approval of charges, a continuing investigation, or an "advice." *See* Special Grand Jury Exhibit 151 at 2-4 (Hehner, Walt, IGO Interview Rep. (Mar. 11, 2013)); O'Brien, Darren, Special Grand Jury Tr. at 20:15-21:9 (May 8, 2013); Kirk, Daniel, IGO Interview Rep. at 2 (Mar. 26, 2013); Milan, Bob, Special Grand Jury Tr. at 12:20-14:4 (Apr. 24, 2013). The purpose of the Felony Review folder is to provide ASAs with a guide for the preliminary hearings as the case continues toward trial. Kirk, Daniel, IGO Interview Rep. at 2 (Mar. 26, 2013).

403 The Felony Review folder is approximately the size of a legal pad with carbon copy sheets that were colored white and yellow. *See* O'Brien, Darren, Special Grand Jury Tr. at 20:15-23 (May 8, 2013); Milan, Bob, Special Grand Jury Tr. at 14:9-21 (Apr. 24, 2013); O'Brien, Darren, IGO Interview Rep. (Proffer) at 3 (Feb. 5, 2013); Special Grand Jury Exhibit 151 at 2 (Hehner, Walt, IGO Interview Rep. (Mar. 11, 2013)). The ASA would write on the white sheet and the writing would imprint on the yellow sheet behind it as well as the outer folder. Milan, Bob, Special Grand Jury Tr. at 14:9-21 (Apr. 24, 2013). Therefore, the information recorded in the Felony Review folder would appear on three physical papers: (1) the white sheet, where the information was originally written; (2) the yellow sheet, where the information was imprinted from the white sheet; and (3) the outer folder, where the information was imprinted from the white sheet. *See* Milan, Bob, Special Grand Jury Tr. at 14:9-21 (Apr. 24, 2013).

404 Special Grand Jury Exhibit 151 at 3-4 (Hehner, Walt, IGO Interview Rep. (Mar. 11, 2013).

405 O'Brien, Darren, Special Grand Jury Tr. at 57:24-59:4 (May 8, 2013). Several witnesses have stated that it is extremely uncommon for Felony Review folders to get lost. *See, e.g.*, Gilger, James, Special Grand Jury Tr. at 110:16-111:12 (Jan. 16, 2013) (It is "very uncommon" for a Felony Review file to be lost, and in the hundreds of felony cases he had investigated, no other Felony Review file had ever been lost); Spanos, Nicholas, Special Grand Jury Tr. at 61:13-19 (Feb. 6, 2013) (Spanos agreed that it was

before the special grand jury in 2013 that he is sure he brought a Felony Review folder or folders[406] with him to Area 3 on May 20, 2004.[407] O'Brien further testified that after he completed the May 20, 2004 witness interviews, he likely brought the Felony Review folder back to his office to await further contact from CPD regarding any new developments in the case.[408] According to O'Brien's special grand jury testimony, he likely kept the Koschman folder in his office desk drawer for some time, but "[w]hen nothing more happened in the case, [he] threw the folder away."[409]

Even if O'Brien destroyed the hard copy Felony Review folder, PROMIS should have retained an electronic record of the matter (even if O'Brien was only called for an "advice").[410] In fact, Milan confirmed that "advices" "should have been input[ted]" into the PROMIS

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unusual for a Felony Review file to be missing and confirmed that he has never had any other case in which the Felony Review file was missing).

406 O'Brien, Darren, Special Grand Jury Tr. at 33:3-8 (May 8, 2013) (stating that due to the number of witnesses he interviewed for the Koschman matter on May 20, 2004, it was possible he used four or five Felony Review folders because each folder only had room for biographical information for two witnesses).

407 O'Brien, Darren, Special Grand Jury Tr. at 32:14-21 (May 8, 2013). However, O'Brien previously informed certain SAO staff that he did not recall creating a Felony Review folder for the Koschman matter. For example, according to Boliker, O'Brien informed her (and other SAO staff) that he did not recall whether he created a Felony Review folder when he went to Area 3 on May 20, 2004. *See* Boliker, Shauna, IGO Interview Rep. at 6 (Mar. 25, 2013); *see also* Kirk, Daniel, IGO Interview Rep. at 4 (Mar. 26, 2013). State's Attorney Alvarez told the OSP that SAO still does not know for certain whether the Felony Review file for the Koschman matter ever existed. Alvarez, Anita, IGO Interview Rep. at 5 (Apr. 29, 2013).

408 O'Brien, Darren, Special Grand Jury Tr. at 32:22-33:2 (May 8, 2013).

409 O'Brien, Darren, Special Grand Jury Tr. at 58:23-59:4 (May 8, 2013). O'Brien could not provide a concrete time period in which he threw away the Koschman Felony Review folder. He has said he "probably" kept the Koschman Felony Review folder for "a couple of years" before throwing it away. O'Brien, Darren, Special Grand Jury Tr. at 86:5-11 (May 8, 2013). However, he has also said that he may have thrown away the Felony Review folder when he cleaned out his desk at the time he left the position as head of Felony Review in 2008. O'Brien, Darren, Special Grand Jury Tr. at 14:21-22, 90:16-19 (May 8, 2013).

410 Special Grand Jury Exhibit 151 at 3 (Hehner, Walt, IGO Interview Rep. (Mar. 11, 2013)); Boliker, Shauna, IGO Interview Rep. at 2 (Mar. 25, 2013); Milan, Bob, Special Grand Jury Tr. at 21:20-22:4 (Apr. 24, 2013); Kirk, Daniel, IGO Interview Rep. at 2 (Mar. 26, 2013).

database.[411] Indeed, during his special grand jury testimony, O'Brien confirmed that while he was Chief of the Felony Review unit, he made substantial efforts to ensure that the data entry employees entered advice calls in SAO's computer system.[412] However, no electronic Felony Review records for the Koschman case have ever been discovered.

Additionally, in or around February 2011, and in response to a *Chicago Sun-Times* ("*Sun-Times*") Freedom of Information Act ("FOIA")[413] request received by SAO in January 2011, O'Brien was instructed by either John Brassil (SAO's Chief of the Felony Review unit) or Fabio Valentini (SAO's Chief of the Criminal Prosecutions Bureau) to search for his May 20, 2004 Koschman Felony Review folder(s).[414] Several other SAO employees were instructed to undertake similar efforts.[415] Furthermore, on March 22, 2013, at the OSP's direction, and in an effort to locate an electronic version of the Koschman Felony Review folder, an investigator from Kroll met with representatives from SAO to search O'Brien's shared drive from SAO back-up tapes. The searches performed by Kroll did not yield any files related to the Koschman felony review.[416] Despite these efforts, and as noted above, the Koschman Felony Review folder (both hard copy and electronic versions) has never been located, and thus was unavailable for the

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411 Milan, Bob, Special Grand Jury Tr. at 25:23-26:8 (Apr. 24, 2013). Hehner also confirmed that advices should have been recorded on SAO's computer system. Special Grand Jury Exhibit 151 at 4 (Hehner, Walt, IGO Interview Rep. (Mar. 11, 2013)).

412 O'Brien, Darren, Special Grand Jury Tr. at 22:19-23:2 (May 8, 2013).

413 The purpose of the Illinois Freedom of Information Act is to serve the "public policy of the State of Illinois that access by all persons to public records promotes the transparency and accountability of public bodies at all levels of government." 5 ILCS 140/1 (West 2011).

414 O'Brien, Darren, Special Grand Jury Tr. at 58:15-22 (May 8, 2013); Special Grand Jury Exhibit 151 at 7 (Hehner, Walt, IGO Interview Rep. (Mar. 11, 2013)); Alvarez, Anita, IGO Interview Rep. at 5 (Apr. 29, 2013); Kirk, Daniel, IGO Interview Rep. at 4 (Mar. 26, 2013).

415 Boliker, Shauna, IGO Interview Rep. at 6 (Mar. 25, 2013); Special Grand Jury Exhibit 151 at 5 (Hehner, Walt, IGO Interview Rep. (Mar. 11, 2013)).

416 The OSP also attempted to retrieve e-mails from SAO personnel from 2004. Due to the passage of time and a migration to a different e-mail system in 2010, those e-mails no longer exist. *See* Cook County Bureau of Technology, Chief Information Officer Lydia Murray correspondence (Jan. 4, 2013) (CCSAO_033293). While e-mails were backed up to tape and stored off-site for a period of one year; SAO's backup tapes prior to 2008 were routinely overwritten. *See* Lydia Murray correspondence (Jan. 4, 2013) (CCSAO_033293). Additionally, although Cook County Bureau of Technology officials located a number of e-mail backup tapes, none pre-dated 2008. *See* Murray, Lydia, IGO Interview Rep. at 1-2 (Feb. 27, 2013).

OSP to review and consider during its investigation.[417]

5. Press Inquiries

Following the 2004 decision by CPD and SAO not to charge Vanecko, the media began to report Vanecko's connection to the incident. On May 22, both the *Chicago Tribune* and the *Sun-Times* published articles reporting that the Mayor's nephew had been questioned in connection with the death of David Koschman.[418] John Gorman, Press Secretary for SAO in 2004, is quoted in the *Chicago Tribune* article as stating, "We were consulted about this by the police and agreed that no charges would be placed against any individual in this case at this time. There were four guys, and Vanecko was one of them."[419] According to Gorman, he likely got this information directly from someone in the Felony Review unit — possibly O'Brien.[420]

On May 22, 2004, Hal Dardick of the *Chicago Tribune* submitted a FOIA request seeking "all police reports relating to the April 24 [sic] incident that led to the death of David Koschman. . . ."[421] CPD denied the request on several grounds, including that disclosure would have "interfere[d] with pending or actually and reasonably contemplated law enforcement proceedings. . . ."[422] One consequence of an open investigation is that it provides a grounds for

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417 Special Grand Jury Exhibit 151 at 4 (Hehner, Walt, IGO Interview Rep. (Mar. 11, 2013)); Alvarez, Anita, IGO Interview Rep. at 5 (Apr. 29, 2013). Furthermore, and in response to the OSP's request, SAO searched again in 2013, but the result was the same – no relevant Koschman files or paperwork were found. *See* Valentini letter (Apr. 11, 2013) (CCSAO_033623-CCSAO_033624).

418 *See* Jeff Coen and Carlos Sadovi, *Daley Nephew at Fatal Fight Scene*, (May 22, 2004) (CCSAO_008311-CCSAO_008312); Frank Main and Fran Spielman, *Mayor's Nephew Quizzed in Fatal Fight*, (May 22, 2004) (CCSAO_008316-CCSAO_008317).

419 *See* Jeff Coen and Carlos Sadovi, *Daley Nephew at Fatal Fight Scene*, at CCSAO_008311, (May 22, 2004) (CCSAO_008311-CCSAO_008312).

420 *See* Gorman, John, IGO Interview Rep. at 3 (Jan. 25, 2013).

421 *See* CPD FOIA Requests 2004-Present at CCSAO_002646 (CCSAO_002644-CCSAO_002666); Sandoval, Matthew, Kroll Interview Rep. (Proffer) at 5 (Jan. 11, 2013). The request was stamped "received" by CPD on May 25, 2004.

422 *See* CPD FOIA Requests 2004-Present at CCSAO_002646 (CCSAO_002644-CCSAO_002666); 5 ILCS 140/7(c)(i) (West 2004). CPD FOIA Unit Officer Matthew Sandoval stated that he pulled reports for Dardick, but those reports may have never been picked up. *See* Sandoval, Matthew, Kroll Interview Rep. (Proffer) at 5 (Jan. 11, 2013).

denial of a FOIA request.[423]

On May 26, 2004, *Sun-Times* reporter Fran Spielman published an article, "*No Charges in Fatal Fight Involving Daley's Nephew. Did Clout Play Role? 'Of Course Not,' Police Chief Says.*"[424] The article quotes then Superintendent Cline as making several remarks about the Koschman investigation, which remained open at the time. The article quotes Superintendent Cline as saying, "The state's attorney's office and the Police Department both agree at this time, there's no basis for criminal charges based on the witness statements and all of the evidence we have," and that a charge of involuntary manslaughter "doesn't fit, based on everything we've looked at so far. . . . If new evidence came up, we could change. But, based on all of the evidence we have now — all the witnesses brought in and lineups conducted — there's no basis for criminal charges."[425] Following the report of Superintendent Cline's statement, it appears the

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423 *See* 5 ILCS 140/7(c)(i) and (viii) (West 2004).

424 *See* Spielman, *No Charges in Fatal Fight Involving Daley's Nephew. Did Clout Play Role? 'Of Course Not,' Police Chief Says* (May 26, 2004) (NEWS000009-NEWS000010).

425 *See* Spielman, *No Charges in Fatal Fight Involving Daley's Nephew. Did Clout Play Role? 'Of Course Not,' Police Chief Says* at NEWS000009 (May 26, 2004) (NEWS000009-NEWS000010). On February 28, 2011, the *Sun-Times* published an article entitled, "*Questions in Death Involving Daley Nephew*," which quoted former Superintendent Cline as stating, "At the best, it was mutual combatants... If the other person is the aggressor, then Vanecko has the right to defend himself." (NEWS000021). When interviewed by the OSP, former Superintendent Cline again used the phrase "mutual combatants" to describe the incident on April 25, 2004. Cline, Phillip, IGO Interview Rep. at 7 (Jan. 2, 2013); O'Brien, Darren, Special Grand Jury Tr. at 28:14-16 (May 8, 2013). In Illinois, the concept of "mutual combat" can sometimes arise when a defendant charged with first-degree murder seeks a jury instruction on the lesser included offense of second-degree murder. *See People v. Young*, 618 N.E.2d 1026, 1037, 248 Ill. App. 3d 491, 505 (Ill. App. Ct. 1st Dist. 1993). The Illinois Supreme Court defines "mutual combat" as "a fight or struggle which both parties enter willingly or where two persons, upon a sudden quarrel and in hot blood, mutually fight upon equal terms and where death results from the combat." *People v. Austin*, 549 N.E.2d 331, 334, 133 Ill.2d 118, 125 (1989). When determining whether evidence of mutual combat exists, "the provocation must be proportionate to the manner in which the accused retaliated," *id.* at 335, and mere words generally are not sufficient to show provocation. *People v. Brown*, 584 N.E.2d 355, 367, 222 Ill. App. 3d 703, 720 (Ill. App. Ct. 1st Dist. 1991).

Allen testified before the special grand jury in 2012, that "there was never a point when Koschman was squaring off to fight anyone." *See* Allen, Scott, Special Grand Jury Tr. at 11:3-5 (Aug. 8, 2012); *see also* Francis, David, Special Grand Jury Tr. at 14:4-8 (Aug. 8, 2012) ("Koschman never raised his fists or appeared to be squaring off to fight anyone. I never thought anyone would start throwing fists.") Allen also testified that Koschman was unprepared to defend himself and Koschman was "[a]bsolutely defenseless." *See* Allen, Scott, Special Grand Jury Tr. at 38:23-39:4 (Aug. 8, 2012). Connolly additionally testified before the special grand jury that, "I wouldn't characterize [Koschman] as

media did not publish another article regarding the Koschman case until 2011.

6. Det. Yawger Meets with Nanci Koschman and Her Lawyer

On or around July 12, 2004, Nanci Koschman (David Koschman's mother), accompanied by her attorney, Loretto Kennedy, met with Yawger at Area 3 headquarters.[426] According to what Kennedy told the OSP in 2013, Ms. Koschman arranged the meeting in order to learn more about what occurred the night her son was struck (Apr. 25, 2004).[427] During the meeting Yawger told Ms. Koschman that witnesses had told CPD that her son, David, was the aggressor in the incident.[428] Kennedy recalled this news making Ms. Koschman very upset.[429]

In his 2011 interview with the IGO, Yawger recalled this 2004 meeting with Ms. Koschman (and her attorney).[430] According to Yawger, during the meeting he explained to Ms. Koschman and her attorney that CPD knew who the offender was, but that CPD could not "get him charged."[431] Furthermore, Yawger recalled that he could not provide Ms. Koschman or her lawyer the name of the offender (Vanečko), because the offender had not been charged or

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being physically aggressive. Would not characterize him as physically aggressive. He didn't have his fists raised and didn't appear to be squaring off to fight anyone. Koschman was not attempting to strike anyone." *See* Connolly, Michael, Special Grand Jury Tr. at 8:12-22 (July 11, 2012). Kohler similarly testified, "I don't recall Koschman clenching fists or actually touching anyone in the other group." *See* Kohler, Phillip, Special Grand Jury Tr. at 8:20-9:2 (July 11, 2012). Additionally, as noted above, O'Brien testified before the special grand jury that none of the witnesses told him that Koschman "threw punches or made physical contact with Vanecko immediately before Koschman was struck." O'Brien, Darren, Special Grand Jury Tr. at 40:6-9 (May 8, 2013).

426 Kennedy, Loretto, IGO Interview Rep. at 1 (Jan. 2, 2013); Kennedy, Loretto, IGO Interview Rep. at 1 (Jan. 18, 2013). Kennedy told the OSP that Nanci Koschman's brother-in-law, Richard Pazderski, also attended the meeting with Yawger. Kennedy, Loretto, IGO Interview Rep. at 1 (Jan. 2, 2013). *See also* Yawger, Ronald, Special Grand Jury Tr. at 77:2-11 (July 15, 2013).

427 Kennedy, Lorreto, IGO Interview Rep. at 1 (Jan. 2, 2013). Kennedy told the OSP the meeting lasted no more than 30 minutes. Kennedy, Loretto, IGO Interview Rep. at 1 (Jan. 2, 2013).

428 Kennedy, Loretto, IGO Interview Rep. at 2-3 (Jan. 2, 2013).

429 Kennedy, Loretto, IGO Interview Rep. at 2 (Jan. 2, 2013).

430 Yawger, Ronald, IGO Interview Tr. at 35:13-14 (July 1, 2011).

431 Yawger, Ronald, IGO Interview Tr. at 35:22-24 (July 1, 2011).

identified by witnesses.[432] However, Yawger told the IGO in 2011 that he did inform Ms. Koschman and her attorney that the offender was a "pretty prominent figure" and "not a regular guy walking down the street."[433]

7. Det. Yawger Submits His Reports

Despite concluding his investigation on May 20, 2004, Yawger did not submit his case supp reports documenting the lineups until November 8, 2004, and his case supp report documenting the investigation's conclusions until November 10, 2004.[434] Detectives and police personnel nearly universally commented that a six-month delay in submission of reports is "a long time" and "unusual."[435] During his interview with the OSP in 2012, former Superintendent Cline stated it was odd the report was not written until six months later in November 2004.[436] During his interview with IGO investigators in 2011, Yawger could not explain the delay in submitting his reports, stating, "No, I have no idea. Because those reports had been, were done that night [May 20, 2004], they had to be done, they had to be done and in."[437] In addition, Rita O'Leary's case supp report documenting her interviews of Connolly and Kevin McCarthy on April 25, 2004, was submitted on May 20, 2004, but not approved until November 10, 2004.[438] Detectives similarly opined that such a delay between submission of a report and approval was

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[432] Yawger, Ronald, IGO Interview Tr. at 37:13-23 (July 1, 2011); *see also* Kennedy, Loretto, IGO Interview Rep. at 2 (Jan. 2, 2013); Kennedy, Loretto, IGO Interview Rep. at 1 (Jan. 18, 2013).

[433] Yawger, Ronald, IGO Interview Tr. at 37:15-18 (July 1, 2011); Kennedy, Loretto, IGO Interview Rep. at 2-3 (Jan. 2, 2013).

[434] *See* Special Grand Jury Exhibit 13 (CPD001111-CPD001114) (Case Supplementary Report 3222388 (approved Nov. 10, 2004)); Special Grand Jury Exhibit 12 (CPD001105-CPD001108) (Case Supplementary Report 3222163 (approved Nov. 8, 2004)); Special Grand Jury Exhibit 10 (CPD001115-CPD001128) (Case Supplementary Report 3193543 (approved Nov. 10, 2004)).

[435] *See* Flynn, Patrick, Special Grand Jury Tr. at 41:1-10 (Mar. 13, 2013); Chasen, Michael, IGO Interview Rep. at 8 (Nov. 27, 2012) ("Chasen stated that he was not sure why the reports took so long to be completed (referencing Exhibit 6), and he stated that it was unusual.")

[436] *See* Cline, Philip, IGO Interview Rep. at 4 (Dec. 28, 2012).

[437] *See* Yawger, Ronald, IGO Interview Tr. at 91:11-13 (July 1, 2011).

[438] Special Grand Jury Exhibit 7 at CPD001054 (CPD001054-CPD001060) (Case Supplementary Report 3215651 (approved Nov. 10, 2004)).

also unusual.[439]

On November 10, 2004, Yawger submitted his concluding case supp report, using the PC login of his partner Giralamo.[440] The report concludes:

> Based upon the evidence examined in this incident, the interviews of all parties involved, and the line ups conducted, the following was concluded; the investigation of this incident did not reveal any unjustifiable behavior on behalf of the subject who either pushed or punched David Koschman as David Koschman was clearly the aggressor in this incident. Also, the actual identity of the subject who either pushed or punched David Koschman could not positively be determined.
>
> Upon the completion of these interviews, and after conferring with ASA Darren O'Brien, it was decided that no charges would, or could be sought due to the fact that the victim in this incident, David Koschman, was clearly the aggressor as corroborated by all of the witnesses interviewed, in that David Koschman continued to attack the group of people consisting of Bridget McCarthy, Kevin McCarthy, Craig Denham, and Richard Vanecko resulting in the victim either being pushed or punched in self defense, which subsequently caused David Koschman to fall to the ground, striking his head, and causing his death.
>
> Due to the above information, R/D's request this Involuntary Manslaughter investigation remain in PROGRESS.

The final case supp's conclusion is at odds with Yawger's request to O'Brien in May 2004, to charge the case; as well as Yawger's request to Epach to ask O'Brien to charge the case. Indeed, despite what Yawger's final case supp says, during his 2013 testimony before the special grand jury, he stated that he really did not know if Vanecko acted in self-defense.[441] And although, following the submission and approval of Yawger's reports, the Koschman case — per

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439 *See* Clemens, Robert, Special Grand Jury Tr. at 119:15-120:1 (Apr. 24, 2013); Special Grand Jury Exhibit 123 at 6 (O'Leary, Robert, Kroll Interview Rep. (Oct. 8, 2012)); Giralamo, Anthony, IGO Interview Rep. at 4 (Dec. 21, 2012).

440 *See* Special Grand Jury Exhibit 10 (CPD001115-CPD001128) (Case Supplementary Report 3193543 (approved Nov. 10, 2004)); Yawger, Ronald, Special Grand Jury Tr. at 30:10-17 (July 15, 2013) (stating that he used Giralamo's PC login because Giralamo was not only out of town, but he was the one who initiated the original case supp; therefore, for Yawger to be able to update and edit the case supp created by Giralamo, he needed to use his partner's PC login).

441 *See* Yawger, Ronald, Special Grand Jury Tr. at 155:1-156:16 (July 15, 2013).

CPD — remained open and "in progress" from November 2004 until 2011, no investigative activity at all took place during this time.

C. The 2011 CPD Re-investigation

1. January 4, 2011, *Sun-Times* FOIA Request

On January 4, 2011, *Sun-Times* reporter Tim Novak submitted a FOIA request to the Chicago Police Department seeking:

> …copies of all police reports regarding an altercation or fight at 35 W. Division at 3:15 a.m. April 25, 2004.
>
> The incident involved David Koschman, 21, of Mount Prospect, who later died of head injuries on May 6, 2004.
>
> The police reports should contain a narrative describing the incident, as well as any other additional reports involving interviews with witnesses to the incident.
>
> Please also include the names of any witnesses, including people who were interviewed by police officers.[442]

During his interview with the OSP in 2013, Superintendent Weis, CPD Superintendent in 2011, explained that he first learned of the FOIA request and the fact that the Koschman case remained "open"[443] from CPD's General Counsel Debra Kirby.[444] According to Superintendent

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442 *See* Novak FOIA Request at IG_004500 (Jan. 4, 2011) (IG_004496-IG_004517).

443 According to Kobel, a case may be: (1) "closed, non-criminal" (for example, if a person died in a non-arson fire); (2) "cleared, closed" (for example, all offenders are in custody); (3) "cleared, open" (when some offenders remain not in custody); or (4) "cleared, closed/open, exceptional" (the offender is still outstanding but no charges will be filed). Kobel, Richard, IGO Interview Rep. at 5 (Jan. 17, 2013). According to Kobel, the Koschman case "could have been categorized as 'cleared, open, exceptional' because an offender identification was not made and no charges were sought. If an offender was identified and no charges were brought, it would have been 'cleared, closed, exceptional.'" *See* Kobel, Richard, IGO Interview Rep. at 5 (Jan. 17, 2013). According to Area 3 Det. Sobolewski, "normally" a case would have been closed after the lineups and felony reviews interviews, stating, "there would be no reason to keep it open. Once you present the evidence to the State's Attorney's office, they determine whether charges are appropriate or not. They make that decision and we have nothing to do with that decision. And if they will not prosecute, you can close the case and bar the prosecution." According to Sobolewski, the case should have been clear, closed after the lineups — meaning detectives know who the offender is but cannot prove it. Nevertheless, Sobolewski stated it was normal practice to also leave homicide cases open where the perpetrator had not been identified. Sobolewski, Andrew, IGO Interview Tr. at 55:5-57:2 (Aug. 5, 2011).

Weis, he was "shocked" the request involved an open 2004 investigation.[445] When Superintendent Weis asked Kirby why the case was still open, Kirby informed him "things just happen."[446] Superintendent Weis recalled telling his Chief of Staff, Michael Masters, that this matter made CPD look bad and to get the Koschman case resolved.[447] According to Masters, Superintendent Weis believed the case should be re-investigated and asked then Chief of Detectives Tom Byrne for recommendations on how the re-investigation should be conducted.[448]

Byrne subsequently directed Deputy Chief of Detectives Dean Andrews to review the findings of the 2004 investigation.[449] According to then-Area 3 Commander Gary Yamashiroya, he received a request from either Andrews or Byrne to produce the original homicide file for the Koschman case, so Yamashiroya instructed Area 3 Homicide Lt. Denis Walsh[450] to locate the

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444 *See* Weis, Jody, IGO Interview Rep. at 1 (May 28, 2013). As discussed in more detail below, CPD's Office of Legal Affairs would be notified of FOIA requests sent by members of the media. According to Superintendent Weis' Chief of Staff, Michael Masters, Kirby attempted to notify Superintendent Weis in person shortly after receiving the FOIA request. Prior to notifying Superintendent Weis, Kirby stopped by Masters's office in order to give him a "thirty second rundown." According to Masters, Kirby told him that the FOIA requested information relating to a case from 2003 or 2004 and the name "Vanecko" may have come up during their discussion. *See* Masters, Michael, IGO Interview Rep. at 1 (May 16, 2013).

445 *See* Weis, Jody, IGO Interview Rep. at 1 (May 28, 2013).

446 *See* Weis, Jody, IGO Interview Rep. at 1 (May 28, 2013); Masters, Michael, IGO Interview Rep. at 2 (May 16, 2013) (stating that during a conversation with Superintendent Weis, Masters, and Kirby, "The question as to why the case was still open was posed, but neither Masters nor Superintendent Weis received a satisfactory response.") When interviewed by the OSP in 2013, Kirby did not recall any specific conversations with Superintendent Weis about the Koschman matter. *See* Kirby, Debra, Kroll Interview Rep. at 4 (Feb. 15, 2013).

447 According to Superintendent Weis, he was focused on why the case was left pending and not properly closed in 2004. Superintendent Weis felt someone should have made the decision to close the case in 2004 and recalled then Superintendent Cline saying in 2004 there was insufficient evidence to charge the case. In Superintendent Weis' opinion, the Koschman case was simple and could have been wrapped up in a month. *See* Weis, Jody, IGO Interview Rep. at 1-2 (May 28, 2013).

448 *See* Masters, Michael, IGO Interview Rep. at 2 (May 16, 2013).

449 *See* Special Grand Jury Exhibit 120 at 4 (Byrne, Thomas, Kroll Interview Rep. (Jan. 9, 2013)).

450 At the time of the April 25, 2004 Koschman incident, Walsh was a lieutenant in CPD's 18th District, heading the Entertainment District Detail, a portion of which included Rush Street and Division Street. *See* O'Donnell, William, IGO Interview Rep. at 2 (Oct. 4, 2012); *see* Walsh, Denis, IGO Interview Rep. (Proffer) at 2 (Aug. 14, 2013). During his interview with the OSP, Walsh stated that the

file.[451] "Within 'a few days,'" Walsh reported back to Yamashiroya that the Koschman homicide file could not be located.[452] After Andrews requested that Area 3 make an additional effort to find the file, Yamashiroya found a manila folder with reports relating to Koschman in his own personal credenza.[453] Though, as detailed below, the manila folder Yamashiroya found was not the original Koschman homicide file. After reviewing the file found by Yamashiroya,[454] Andrews recommended the case be re-assigned to Area 5 detectives.[455]

2. Reassignment to Area 5 Detectives

According to Andrews, after reviewing the police reports from 2004, he determined that certain investigative steps had not been taken and that certain information was missing.[456] For example, Andrews concluded that despite multiple witnesses' description of the "big guy" striking Koschman, the reports did not document heights and weights of any of the people in Vanecko's group.[457] During his interview with the OSP in January 2013, Andrews stated, "[i]f

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first time he heard about the Koschman matter, or Mayor Daley's nephew's involvement, was in January 2011. Walsh, Denis, IGO Interview Rep. (Proffer) at 10 (Aug. 14, 2013).

451 *See* Special Grand Jury Exhibit 148 at 3 (Yamashiroya, Gary, Kroll Interview Rep. (Feb. 5, 2013)).

452 *See* Special Grand Jury Exhibit 148 at 3 (Yamashiroya, Gary, Kroll Interview Rep. (Feb. 5, 2013)).

453 *See* Special Grand Jury Exhibit 148 at 3 (Yamashiroya, Gary, Kroll Interview Rep. (Feb. 5, 2013)).

454 Andrews also reviewed certain police reports electronically via CHRIS. CPD maintains access logs which record the dates and times that users (as tracked by user PC Login number) access or print a case supp report logged into CHRIS. These logs are generated by running a report called a CLEAR report. According to CLEAR reports showing those who accessed Yawger's concluding case supp report (Case Supplementary Report 3193543) and Rita O'Leary's case supp report (Case Supplementary Report 3215651), Andrews accessed those police reports on January 11, 2011. *See* Special Grand Jury Exhibit 97 at CPD093727-CPD092730, CPD093737-CPD093739 (CPD093713-CPD093743) (CLEAR Report for Case Supp 3193543 and CLEAR Report for Case Supp 3215651).

455 *See* Special Grand Jury Exhibit 115 at 5 (Andrews, Dean, Kroll Interview Rep. (Jan. 30, 2013)); *See* Weis, Jody, IGO Interview Rep. at 1 (May 28, 2013); Masters, Michael, IGO Interview Rep. at 2 (May 16, 2013).

456 *See* Special Grand Jury Exhibit 115 at 5 (Andrews, Dean, Kroll Interview Rep. (Jan. 30, 2013)).

457 *See* Special Grand Jury Exhibit 115 at 5 (Andrews, Dean, Kroll Interview Rep. (Jan. 30, 2013)).

that's not there, I don't know what else isn't there, so I want it re-investigated."[458] Andrews further stated his goals were to determine a correct classification for the case and whether there was sufficient evidence to name an offender.[459] As a result, Andrews directed that witnesses be re-interviewed. Similarly, Byrne described the re-investigation as necessary because a "nexus" to Vanecko was present and "[i]t looked like all the parties involved were there. It was about connecting the dots."[460]

According to Andrews, he chose Area 5 for the re-investigation because he was previously assigned there and was familiar with Area 5 detectives.[461] Area 5 Commander Joseph Salemme subsequently chose Det. James Gilger, and his partner, Det. Nick Spanos, to conduct the re-investigation because he was told to select his "best detective." [462]

On January 13, 2011, Peterson and Andrews held a meeting at CPD's headquarters at 3510 South Michigan Avenue to officially re-assign the Koschman case to Area 5 detectives.[463]

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458 *See* Special Grand Jury Exhibit 115 at 5 (Andrews, Dean, Kroll Interview Rep. (Jan. 30, 2013)). Yawger's concluding police report in 2004 lists height and weight information for Koschman, Kevin McCarthy, and Vanecko. Special Grand Jury Exhibit 10 (CPD 001115-CPD001128) (Case Supplementary Report 3193543 (approved Nov. 10, 2004)). Andrews nevertheless explained during his interview with the OSP that he felt the descriptions in the report's narrative are too limited and stated, "I need heights and weights, I need numbers." Special Grand Jury Exhibit 115 at 8 (Andrews, Dean, Kroll Interview Rep. (Jan. 30, 2013)).

459 *See* Special Grand Jury Exhibit 115 at 5 (Andrews, Dean, Kroll Interview Rep. (Jan. 30, 2013)).

460 *See* Special Grand Jury Exhibit 120 at 5 (Byrne, Thomas, Kroll Interview Rep. (Jan. 9, 2013)).

461 *See* Special Grand Jury Exhibit 115 at 5 (Andrews, Dean, Kroll Interview Rep. (Jan. 30, 2013)). Prior to the January 13, 2011, meeting, Gilger and Andrews had a history of working together. In August 2003, Gilger was detailed to CPD's intelligence unit where Andrews was commander. Gilger, James, Special Grand Jury Tr. at 87:23-88:21 (Jan. 16, 2013). Later, when Gilger was detailed to Area 5, Andrews was again his commander. Gilger, James, Special Grand Jury Tr. at 87:23-88:21 (Jan. 16, 2013). Andrews and Cirone were personal friends. Special Grand Jury Exhibit 115 at 14 (Andrews, Dean, Kroll Interview Rep. (Jan. 30, 2013)). Gilger and Salemme also had a prior history of working together. As Gilger testified, "[w]e're very tight," having known each other for "about 25 years or even longer probably." Gilger, James, Special Grand Jury Tr. at 89:1-7 (Jan. 16, 2013).

462 *See* Special Grand Jury Exhibit 109 at 4 (Salemme, Joseph, Kroll Interview Rep. (Jan. 15, 2013)); Special Grand Jury Exhibit 115 at 8 (Andrews, Dean, Kroll Interview Rep. (Jan. 30, 2013)). Nevertheless, Area 5 Sgt. Thomas Mills stated during his interview with the OSP that "this information [the decision to select Gilger] was 'likely run up the chain of command.'" *See* Special Grand Jury Exhibit 108 at 2 (Mills, Thomas, Kroll Interview Rep. (Aug. 20, 2012)).

463 *See* Gilger, James, Special Grand Jury Tr. at 75:22-76:14, 77:3-78:21 (Jan. 16, 2013).

suspect, he's related to Daley, the investigation stopped at some point."[471]

During the meeting, according to Gilger, he asked those present whether he should contact Yawger and was instructed to not contact him.[472] When interviewed by the OSP, Andrews stated that no such instruction was given and that there was an "expectation" that Gilger would have communicated with detectives involved in the 2004 investigation.[473] Similarly, Salemme stated during his interview with the OSP in January 2013 that he presumed someone had contacted Yawger to ask about the location of the original homicide file and that he knew that Gilger and Yawger were playing "phone tag" at one point, but was unsure whether they had ever spoken.[474] Peterson also indicated that the decision of whether to contact the detectives who worked on the case in 2004 was left up to Gilger and Spanos.[475] During his interview with the OSP, Yamashiroya further described yet another scenario, stating that at the meeting there was "some talk about talking to Detective Yawger" and that Walsh was going to reach out to him.[476] During Walsh's interview with the OSP, he recalled that during this meeting

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471 *See* Special Grand Jury Exhibit 109 at 3 (Salemme, Joseph, Kroll Interview Rep. (Jan. 15, 2013)); *see also* Gilger, James Special Grand Jury Tr. at 95:20-96:7 (Jan. 16, 2013) (stating the group discussed "Basically that Vanecko had been brought in, lineups had been done and he was never picked out. Never gave a statement. And basically they asked me to reinvestigate the case."). Within CPD, ostensibly there were several procedures that may have caught an open case such as the Koschman investigation. One such process is a "homicide audit" or a "homicide audit report" — in essence a process whereby a homicide file would be examined for deficiencies. According to Andrews, because the Koschman investigation was classified as an involuntary manslaughter investigation in 2004, it would not have been the subject of a homicide audit. *See* Special Grand Jury Exhibit 115 at 9 (Andrews, Dean, Kroll Interview Rep. (Jan. 30, 2013)). Superintendent Weis and Masters further expressed disappointment that the Koschman investigation had remained open since 2004, given the institution of a process as part of Superintendent Weis' administration whereby detective area commanders and detective division personnel were responsible for identifying and accounting for open homicide investigations. *See* Weis, Jody, IGO Interview Rep. at 2 (May 28, 2013); Masters, Michael, IGO Interview Rep. at 2 (May 16, 2013).

472 *See* Gilger, James, Special Grand Jury Tr. at 83:13-15 (Jan. 16, 2013).

473 *See* Special Grand Jury Exhibit 115 at 8 (Andrews, Dean, Kroll Interview Rep. (Jan. 30, 2013)).

474 *See* Special Grand Jury Exhibit 109 at 5 (Salemme, Joseph, Kroll Interview Rep. (Jan. 15, 2013)).

475 *See* Special Grand Jury Exhibit 116 at 3 (Peterson, Steven, IGO Interview Rep. (Feb. 4, 2013)).

476 Yamashiroya said he recalled some discussion at the meeting about the need to speak with Yawger but did not know if anyone from Area 5 ever spoke with him. *See* Special Grand Jury Exhibit 148 at 5 (Yamashiroya, Gary, Kroll Interview Rep. (Feb. 5, 2013)).

Peterson, Byrne, Andrews, Yamashiroya, Walsh, Salemme, Cirone, and Gilger all attended the meeting, which occurred in Byrne's office.[464] Office of Legal Affairs attorney Bill Bazarek also attended for at least a portion of the meeting.[465] The meeting lasted approximately a half-hour to an hour.[466]

According to Andrews, he informed those present that the case was being re-assigned to Area 5 detectives in order to have a "fresh set of eyes"[467] investigate. Andrews told Area 5 detectives what evidence he thought was missing and instructed them to re-interview witnesses.[468] According to Salemme, along with explaining the re-assignment, Andrews "may have said he reviewed the file and he thought it was either chargeable or clear, closed exceptional.[469] He had some feeling after reviewing it."[470] According to Salemme, the meeting also included a brief summary of the previous investigation along the lines of "Vanecko is a

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464 *See* Special Grand Jury Exhibit 115 at 7 (Andrews, Dean, Kroll Interview Rep. (Jan. 30, 2013)); Special Grand Jury Exhibit 116 at 2 (Peterson, Steven, IGO Interview Rep. (Feb. 4, 2013)); Special Grand Jury Exhibit 148 at 4 (Yamashiroya, Gary, Kroll Interview Rep. (Feb. 5, 2013)); *but see* Special Grand Jury Exhibit 109 at 3 (Salemme, Joseph, Kroll Interview Rep. (Jan. 15, 2011)) (meeting occurred in Andrews' office). *See* Gilger, James, Special Grand Jury Tr. at 75:22-76:14; 77:3-78:21 (Jan. 16, 2013). Yamashiroya and Walsh attended from Area 3 in order to provide the case file and because the case originated as an Area 3 homicide case. Although both representatives from Area 3 and Area 5 were aware of the pending re-assignment prior to the meeting, Area 3 Commander Yamashiroya voiced some reluctance to transfer a case previously assigned to Area 3. *See* Special Grand Jury Exhibit 115 at 7 (Andrews, Dean, Kroll Interview Rep. (Jan. 30, 2013)); Cirone, Sam, Kroll Interview Rep. (Proffer) at 5 (Mar. 22, 2013); Bazarek, William, Kroll Interview Rep. at 4 (Mar. 13, 2013); Special Grand Jury Exhibit 109 at 4 (Salemme, Joseph, Kroll Interview Rep. (Jan. 15, 2013)). The case was nevertheless re-assigned to Area 5.

465 *See* Bazarek, William, Kroll Interview Rep. at 3 (Mar. 13, 2013).

466 *See* Special Grand Jury Exhibit 148 at 4 (Yamashiroya, Gary, Kroll Interview Rep. (Feb. 15, 2013)) (20-30 minutes); Special Grand Jury Exhibit 115 at 7 (Andrews, Dean, Kroll Interview Rep. (Jan. 30, 2013) (30 minutes); Special Grand Jury Exhibit 109 at 3 (Salemme, Joseph, Kroll Interview Rep. (Jan. 15, 2013)) (45-60 minutes).

467 Special Grand Jury Exhibit 116 at 3 (Peterson, Steven, IGO Interview Rep. (Feb. 4, 2013)).

468 *See* Special Grand Jury Exhibit 115 at 7 (Andrews, Dean, Kroll Interview Rep. (Jan. 30, 2013)).

469 A case may be clear, closed exceptionally where the offender is identified but there is some bar to law enforcement bringing charges. *See* Kobel, Richard, IGO Interview Rep. at 5 (Jan. 17, 2013).

470 Special Grand Jury Exhibit 109 at 5 (Salemme, Joseph, Kroll Interview Rep. (Jan. 15, 2013)); Special Grand Jury Exhibit 115 at 5 (Andrews, Dean, Kroll Interview Rep. (Jan. 30, 2013)) (Andrews decided the Koschman matter needed to be re-investigated after he reviewed the 2004 investigation).

he was ordered by a superior to talk to Yawger about CPD's 2004 investigation, which he did sometime later that month.[477]

In lieu of the original homicide file, which could not be located, Yamashiroya brought the file he found in his credenza to turn over to Area 5 detectives at the January 2011 meeting.[478] According to Salemme, the fact that the original investigative file was missing was discussed at the meeting, though others present did not recall any such discussion.[479] Area 5 detectives left the meeting with the assignment to re-investigate Koschman's death.[480]

3. Area 5's Investigation

Before the special grand jury in January 2013, Gilger testified that the "very first thing" detectives did as part of the re-investigation was visit SAO's criminal offices at 2650 South California Avenue to request the felony review file for the case.[481] Gilger's motivation for attempting to find the file was to see if O'Brien had recorded any witness statements from his interviews on May 20, 2004.[482] Gilger requested the felony review file from Brassil, then the head of the Felony Review unit. Brassil and another ASA looked up the Koschman case in

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477 Walsh, Denis, IGO Interview Rep. (Proffer) at 7, 9 (Aug. 14, 2013).

478 *See* Special Grand Jury Exhibit 148 at 4 (Yamashiroya, Gary, Kroll Interview Rep. (Feb. 5, 2013)); Special Grand Jury Exhibit 109 at 5 (Salemme, Joseph, Kroll Interview Rep. (Jan. 15, 2013)); Cirone, Sam, Kroll Interview Rep. (Proffer) at 5 (Mar. 22, 2013).

479 *See* Special Grand Jury Exhibit 109 at 5, 9 (Salemme, Joseph, Kroll Interview Rep. (Jan. 15, 2013). Cirone stated he was unsure whether there was any discussion of what was missing, but he "assume[d] there was." *See* Cirone, Sam, Kroll Interview Rep. (Proffer) at 5 (Mar. 22, 2013). Andrews stated he could not recall such a discussion. *See* Special Grand Jury Exhibit 115 at 7 (Andrews, Dean, Kroll Interview Rep. (Jan. 30, 2013)). During his interview, Yamashiroya indicated there was no discussion at the January 13, 2011 meeting regarding why the original case file could not be located. *See* Special Grand Jury Exhibit 148 at 5 (Yamashiroya, Gary, Kroll Interview Rep. (Feb. 5, 2013)).

480 According to Cirone, who supervised both Gilger and Spanos, the detectives worked exclusively on the re-investigation during this time period, and did not receive any other assignments. *See* Cirone, Sam, Kroll Interview Rep. (Proffer) at 7 (Mar. 22, 2013). Additionally, Gilger and Spanos were instructed to keep the re-investigation confidential. *See* Gilger, James, Special Grand Jury Tr. at 82:4-21 (Jan. 16, 2013); Cirone, Sam, Kroll Interview Rep. (Proffer) at 7 (Mar. 22, 2013).

481 *See* Gilger, James, Special Grand Jury Tr. at 106:17-107:2, 107:19-22, 109:13-110:3 (Jan. 16, 2013).

482 *See* Gilger, James, Special Grand Jury Tr. at 106:17-107:2, 107:19-22 (Jan. 16, 2013).

SAO's database, "PROMIS," but could not find any files.[483] Brassil informed Gilger he would attempt to locate the file but called him a couple of days later, saying SAO did not have a felony review file for the Koschman case.[484]

Gilger and Spanos conducted their first witness interview that Sunday night, January 16, 2011, when they interviewed Koschman's friend, Sazian.[485] Because Sazian was not present for the altercation on April 25, 2004, he did not provide much information regarding the incident itself.[486] Nevertheless, detectives asked Sazian whether he would submit to a polygraph examination, to which Sazian agreed.[487]

On the following Monday afternoon, January 17, 2011, Gilger and Spanos interviewed three of Koschman's friends: Allen, Copeland, and Hageline.[488] Gilger and Spanos first interviewed Copeland at his house at approximately 8:30 p.m.[489] According to the first line of Gilger's GPR, Copeland "related essentially the same account as earlier reported."[490] According to Gilger's GPR of Copeland's interview, Koschman's friends were all trying to keep Koschman away "from starting anymore trouble,"[491] when Koschman broke free and "walk[ed] back

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483 *See* Gilger, James, Special Grand Jury Tr. at 110:6-8 (Jan. 16, 2013).

484 *See* Gilger, James, Special Grand Jury Tr. at 110:8-12 (Jan. 16, 2013).

485 *See* Special Grand Jury Exhibit 75 (CPD001259) (General Progress Report re Sazian interview (approved Feb. 28, 2011)).

486 *See* Special Grand Jury Exhibit 75 (CPD001259) (General Progress Report re Sazian interview (approved Feb. 28, 2011)).

487 *See* Special Grand Jury Exhibit 75 (CPD001259) (General Progress Report re Sazian interview (approved Feb. 28, 2011)).

488 According to a General Progress Report dated January 17, 2011, Gilger may have attempted to interview Francis at approximately 6:30 p.m. and learned that Francis lived in Colorado. *See* General Progress Report re Francis (approved Feb. 28, 2011) (CPD001247).

489 *See* Special Grand Jury Exhibit 76 (CPD001252-CPD001254) (General Progress Report re Copeland interview (approved Feb. 28, 2011)).

490 *See* Special Grand Jury Exhibit 76 (CPD001252-CPD001254) (General Progress Report re Copeland interview (approved Feb. 28, 2011)).

491 Based upon the GPR of this interview, Gilger's case supp report states, "Copeland stated that they were trying to pull KOSCHMAN away from starting anymore [sic] trouble" before he was struck. *See* Special Grand Jury Exhibit 15 at CPD001231 (CPD001199-CPD001234) (Case Supplementary Report

towards the other group and. . . the largest of the male whites" in the other group punched Koschman.[492] Copeland further told Gilger he thought Koschman was "knocked out" by the punch.[493]

At approximately 9:30 p.m. on January 17, 2011, Gilger interviewed Allen (who was living in Colorado at the time) by phone.[494] According to Gilger's GPR, Allen stated that after the initial bump "everyone started arguing and yelling 'screw you'" and that the people in the other group were "the aggressors."[495] Gilger's GPR of the Allen interview also reads that Koschman "was in the thick of the argument and was also yelling."[496] According to Gilger's GPR, Allen also stated that he saw Koschman get punched by the offender, who was "clearly the

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8585610 (approved Feb. 28, 2011)). During his testimony before the special grand jury in 2012, Copeland testified this statement was not an accurate reflection of what happened the night of the incident, stating, "No. Again, I mean, I do remember, you know, gesturing and nudging him to kind of move away, but physically pulling him back, I don't remember doing that." *See* Copeland, James, Special Grand Jury Tr. at 12:16-19 (Aug. 8, 2012).

[492] *See* Special Grand Jury Exhibit 76 at CPD001252 (CPD001252-CPD001254) (General Progress Report re Copeland interview (approved Feb. 28, 2011)). Based upon the GPR of this interview, Gilger's case supp report states, "Copeland stated when KOSCHMAN walked up to this group." *See* Special Grand Jury Exhibit 15 at CPD001231 (CPD001199-CPD001234) (Case Supplementary Reports 8585610 and 858620 (approved Feb. 28, 2011)). Before the special grand jury, Copeland clarified that the statement that Koschman "walked up to this group" was inaccurate because, "he was — he didn't walk up and immediately get punched. He did make his way back over, and then we came back. And we were kind of in — the whole — both groups were kind of in the same area. And the punch occurred shortly after that." *See* Copeland, James, Special Grand Jury Tr. at 13:10-16 (Aug. 8, 2012).

[493] *See* Special Grand Jury Exhibit 76 at CPD001252 (CPD001252-CPD001254) (General Progress Report re Copeland interview (approved Feb. 28, 2011)).

[494] *See* Special Grand Jury Exhibit 77 (CPD001257-CPD001258) (General Progress Report re Allen interview (approved Feb. 28, 2011)).

[495] *See* Special Grand Jury Exhibit 77 at CPD001257 (CPD001257-CPD001258) (General Progress Report re Allen interview (approved Feb. 28, 2011)).

[496] Based upon the GPR of this interview, Gilger's case supp report states, "Allen stated he saw Koschman in the thick of the argument, who was also yelling." *See* Special Grand Jury Exhibit 15 at CPD001231 (CPD001199-CPD001234) (Case Supplementary Reports 8585610 and 858620 (approved Feb. 28, 2011)). Allen testified before the special grand jury in 2012 that the statement was inaccurate, "[b]ecause it's not like he was in the thick of the argument. It was one giant argument and we were all yelling, so no, I would not — I did not say that." *See* Allen, Scott, Special Grand Jury Tr. at 29:13-16 (Aug. 8, 2012).

biggest guy of the three."[497]

Finally, at approximately 10:30 p.m., Gilger interviewed Hageline (who was living in California at the time) by phone. According to Gilger's GPR, Hageline "saw [Koschman] get punched in the face, once in the face."[498] During his testimony before the special grand jury in 2012, Hageline clarified that, "I had stepped away from the two groups to get a cab because I didn't believe that the situation was — was going to resolve itself, so I was just stepping away to get my friends in a cab. Shortly thereafter, maybe a second or two, I had seen some kind of movement and it looked like a punch, but I didn't have a clear view of it. It was just something kind of like over my shoulder. But it seemed to be a punch."[499]

Gilger and Spanos interviewed Koschman's other friend on the scene, Francis, by telephone on January 18, 2011. Because Francis was living in Colorado, Gilger and Spanos interviewed him by phone.[500] Gilger's GPR of their interview with Francis states that he saw Koschman accidentally bump into the other group.[501] According to the GPR, after both groups started yelling at each other, Copeland and Francis attempted to break things up since he knew Koschman was "a little mad" and had "a lil temper."[502] The GPR further states that everyone

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497 *See* Special Grand Jury Exhibit 77 at CPD001258 (CPD001257-CPD001258) (General Progress Report re Allen interview (approved Feb. 28, 2011)). According to Allen's 2012 testimony before the special grand jury, he himself was not at times entirely cooperative with CPD in 2011, in that, while being interviewed by police during the re-investigation, he impolitely criticized CPD's work on the Koschman matter. *See* Allen, Scott, Special Grand Jury Tr. at 14:19-15:3, 45:7-46:6 (Aug. 8, 2012).

498 *See* Special Grand Jury Exhibit 78 at CPD001255 (CPD001255-CPD001256) (General Progress Report re Hageline interview (approved Feb. 28, 2011)). Gilger's case supp report states, "Hageline observed KOSCHMAN get punched once in the face, and he fell backwards and hit his head on the street." *See* Special Grand Jury Exhibit 15 at CPD001232 (CPD001199-CPD001234) (Case Supplementary Reports 8585610 and 858620 (approved Feb. 28, 2011)). Hageline clarified before the special grand jury that this statement was not accurate because Hageline "had stepped away from the group" and did not actually see Koschman being punched in the face. *See* Hageline, Shaun, Special Grand Jury Tr. at 25:20-21 (Aug. 8, 2012).

499 *See* Hageline, Shaun, Special Grand Jury Tr. at 15:2-11 (Aug. 8, 2012).

500 *See* Gilger, James, Special Grand Jury Tr. at 133:10-17 (Jan. 16, 2013).

501 *See* Special Grand Jury Exhibit 79 at CPD001250 (CPD001250-CPD001251) (General Progress Report re Francis interview (approved Feb. 28, 2011)).

502 *See* Special Grand Jury Exhibit 79 at CPD001250 (CPD001250-CPD001251) (General Progress Report re Francis interview (approved Feb. 28, 2011)).

was walking away and Francis thought the altercation was over, when Koschman "went at this guy."[503] Francis testified before the special grand jury in 2012 that he was not sure whether that statement was accurate stating, "I mean, I kind of don't know what 'go after' means. I mean, he kept talking to him. He didn't go after him in the terms of — in the sense that he was, like, trying to fight him or anything like that."[504] According to the GPR, Francis next saw Koschman get punched[505] such that "it looked like he was knocked off of his feet."[506] As with Sazian, detectives asked Copeland, Allen, Hageline, and Francis whether they would submit to polygraph examinations, and all agreed.[507] Ultimately, detectives did not require polygraphs of any of the witnesses.

Detectives also interviewed the two bystander witnesses, Kohler and Connolly, on January 18 and 19, 2011 respectively.[508] During his interview with Area 5 detectives on January 18, Kohler told detectives for the first time that based on seeing photos in a *Sun-Times* article, he recognized Vanecko as a high school classmate of his at Loyola Academy, but did not recognize Vanecko on the night of the incident.[509] According to Gilger's GPR of his interview with

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503 *See* Special Grand Jury Exhibit 79 at CPD001251 (CPD001250-CPD001251) (General Progress Report re Francis interview (approved Feb. 28, 2011)).

504 *See* Francis, David, Special Grand Jury Tr. at 24:18-22 (Aug. 8, 2012).

505 Before the special grand jury, Francis testified that he could not remember whether he actually saw Koschman punched. *See* Francis, David, Special Grand Jury Tr. at 25:10-12 (Aug. 8, 2012).

506 *See* Special Grand Jury Exhibit 79 at CPD001251 (CPD001250-CPD001251) (General Progress Report re Francis interview (approved Feb. 28, 2011)).

507 *See* Special Grand Jury Exhibit 76 at CPD001254 (CPD001252-CPD001254) (General Progress Report re Copeland interview (approved Feb. 28, 2011)); Special Grand Jury Exhibit 77 at CPD001258 (CPD001257-CPD001258) (General Progress Report re Allen interview (approved Feb. 28, 2011)); Special Grand Jury Exhibit 15 at CPD001232 (CPD001199-CPD001234) (Case Supplementary Reports 8585610 and 858620 (approved Feb. 28, 2011)); Special Grand Jury Exhibit 79 at CPD001251 (CPD001250-CPD001251) (General Progress Report re Francis interview (approved Feb. 28, 2011)).

508 *See* Special Grand Jury Exhibit 15 (CPD001199-CPD001234) (Case Supplementary Reports 8585610 and 858620 (approved Feb. 28, 2011)).

509 *See* Special Grand Jury Exhibit 80 at CPD001249 (CPD001248-CPD001249) (General Progress Report 323454 (approved Feb. 28, 2011)). In 2004, Kohler told Giralamo he had never seen anyone in Vanecko's group prior to the incident. *See* General Progress Report (approved May 13, 2004) (CPD001588).

Kohler, Kohler related that "pushing and shoving happened between the two groups."[510] Kohler testified before the special grand jury in 2012 that he did not believe that statement was accurate, stating, "I believe I stated that they were arguing, but I don't think I said anything about pushing or shoving at that point."[511] Similar to what he told Giralamo in 2004, Gilger's GPR records Kohler as indicating Koschman "jumped into the middle of the argument" and fell backwards.[512] Kohler clarified in his special grand jury testimony in 2012 that Koschman "jumped in and it was immediate that he came back out," that "[a]lmost immediately after Koschman moved between the two groups, he came flying back and fell straight back like a dead weight. It was like an explosion."[513]

According to Gilger's GPR of his interview with Connolly, Connolly stated the two groups were beginning to argue when Connolly and Kohler arrived.[514] The GPR indicates Connolly stated Koschman was "doing most of the talking," the argument "got really heated," and Koschman "appeared to be pushed by one of the other guys."[515] The GPR states that Connolly saw Koschman "get pushed by someone, tripped on the back of the curb, [and] fell backwards."[516] During his testimony before the special grand jury in 2012, Connolly clarified that, "It was an assumption on my part it was a push because I was — my view was impeded by the other people in the group when David stepped onto the sidewalk. And then he was — I interpreted it to be a push that caused him to fall backwards. … But I did not see a push or a

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510 *See* Special Grand Jury Exhibit 80 at CPD001248 (CPD001248-CPD001249) (General Progress Report 323454 (approved Feb. 28, 2011)).

511 *See* Kohler, Phillip, Special Grand Jury Tr. at 6:17-19 (Aug. 8, 2012).

512 *See* Special Grand Jury Exhibit 80 at CPD001248 (CPD001248-CPD001249) (General Progress Report 323454 (approved Feb. 28, 2011)).

513 *See* Kohler, Phillip, Special Grand Jury Tr. at 12:18-19 (Aug. 8, 2012); Kohler, Phillip, Special Grand Jury Tr. at 9:5-16 (July 11, 2012).

514 *See* Special Grand Jury Exhibit 81 at CPD001245 (CPD001245-CPD001246) (General Progress Report re: Connolly interview (approved Feb. 28, 2011)).

515 *See* Special Grand Jury Exhibit 81 at CPD001246 (CPD001245-CPD001246) (General Progress Report re: Connolly interview (approved Feb. 28, 2011)).

516 *See* Special Grand Jury Exhibit 81 at CPD001246 (CPD001245-CPD001246) (General Progress Report re: Connolly interview (approved Feb. 28, 2011)).

punch. I was blocked. My vision was blocked. I interpreted it to be a push."[517]

On January 21, 2011, Gilger ran into O'Brien in the hallway outside the library at SAO's offices at 2650 South California Avenue and had a one- or two-minute conversation about the Koschman case.[518] Specifically, they discussed issues with the case, including self-defense or lack of identification, or both.[519] Although reflected in the case supp concluding the 2011 re-investigation, the OSP has found no GPR memorializing this encounter.

On January 24, 2011, Gilger and Spanos went to the home of Kevin and Bridget McCarthy in an attempt to interview them.[520] Kevin McCarthy instructed his wife not to speak with the detectives.[521] Kevin McCarthy then related that he and his wife were represented by counsel and that they stood by their statements from 2004.[522] On January 27, 2011, Gilger attempted to interview Denham by phone.[523] Denham told detectives he did not have anything to add to his prior statement to police in 2004 and related "essentially the same account" that the group had been drinking, Vanecko pushed him as they both ran down the street, and he did not witness Vanecko or Kevin McCarthy punch anyone.[524]

Gilger and Spanos also attempted to interview Vanecko. On January 24, 2011, they

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517 *See* Connolly, Michael, Special Grand Jury Tr. at 9:15-10:1 (Aug. 8, 2012).

518 *See* Special Grand Jury Exhibit 15 at CPD001204 (CPD001199-CPD001234) (Case Supplementary Reports 8585610 and 8585620 (approved Feb. 28, 2011)); O'Brien, Darren, Special Grand Jury Tr. at 57:7-18 (May 8, 2013).

519 *See* Special Grand Jury Exhibit 15 at CPD001204 (CPD001199-CPD001234) (Case Supplementary Reports 8585610 and 8585620 (approved Feb. 28, 2011)); O'Brien, Darren, Special Grand Jury Tr. at 57:7-18 (May 8, 2013).

520 *See* Special Grand Jury Exhibit 15 at CPD001204 (CPD001199-CPD001234) (Case Supplementary Reports 8585610 and 8585620 (approved Feb. 28, 2011)).

521 *See* Special Grand Jury Exhibit 15 at CPD001204 (CPD001199-CPD001234) (Case Supplementary Reports 8585610 and 8585620 (approved Feb. 28, 2011)).

522 *See* Special Grand Jury Exhibit 15 at CPD001204 (CPD001199-CPD001234) (Case Supplementary Reports 8585610 and 8585620 (approved Feb. 28, 2011)).

523 *See* Special Grand Jury Exhibit 83 (CPD001244) (General Progress Report re: Denham interview (approved Feb. 28, 2011)).

524 Special Grand Jury Exhibit 83 (CPD001244) (General Progress Report re: Denham interview (approved Feb. 28, 2011)).

attempted to locate Vanecko at [redacted] South Michigan Avenue, his last known address, but were informed by a doorman that Vanecko no longer lived there.[525] On February 9, 2011, Gilger spoke with Vanecko's attorney, Marc Martin.[526] Gilger told Martin that Spanos and he wanted to speak with Vanecko about the 2004 incident, but Martin explained that his client would not be making any statements.[527] Gilger requested that Vanecko either come to Area 5 headquarters or call him on the telephone in order to personally invoke his right to remain silent.[528] Martin agreed.[529] Later that day, Gillespie called Gilger and told him that he, and not Martin, would be representing Vanecko.[530] Gillespie indicated that he would speak with his client about coming into Area 5 to make a statement.[531]

Afterward, Gilger sent an e-mail to Walsh to give him "an update on the Vanecko case . . . ."[532] In his e-mail, Gilger described his conversation with Gillespie, including that he had told him "if this is self-defense, we need to know this."[533] The e-mail further states, "I told Gillespie that Felony Review is already involved in this case, which they are, and will possibly be asked to review the case, which I know is going to be a rejection."[534] According to Gilger, he

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525 Special Grand Jury Exhibit 15 at CPD001204-CPD001205 (CPD001199-CPD001234) (Case Supplementary Reports 8585610 and 8585620 (approved Feb. 28, 2011)).

526 Special Grand Jury Exhibit 15 at CPD001206 (CPD001199-CPD001234) (Case Supplementary Reports 8585610 and 8585620 (approved Feb. 28, 2011)).

527 Special Grand Jury Exhibit 15 at CPD001206 (CPD001199-CPD001234) (Case Supplementary Reports 8585610 and 8585620 (approved Feb. 28, 2011)).

528 Special Grand Jury Exhibit 15 at CPD001206 (CPD001199-CPD001234) (Case Supplementary Reports 8585610 and 8585620 (approved Feb. 28, 2011)).

529 Special Grand Jury Exhibit 15 at CPD001206 (CPD001199-CPD001234) (Case Supplementary Reports 8585610 and 8585620 (approved Feb. 28, 2011)).

530 Special Grand Jury Exhibit 15 at CPD001206 (CPD001199-CPD001234) (Case Supplementary Reports 8585610 and 8585620 (approved Feb. 28, 2011)).

531 Special Grand Jury Exhibit 15 at CPD001206 (CPD001199-CPD001234) (Case Supplementary Reports 8585610 and 8585620 (approved Feb. 28, 2011)).

532 Special Grand Jury Exhibit 86 (CPD000464) (Gilger e-mail (Feb. 9, 2011)).

533 Special Grand Jury Exhibit 86 (CPD000464) (Gilger e-mail (Feb. 9, 2011)).

534 Special Grand Jury Exhibit 86 (CPD000464) (Gilger e-mail (Feb. 9, 2011)).

meant that the Felony Review unit "know[s] I'm working on the case. As a matter of fact, they [SAO's Felony Review unit] even consulted with Darren O'Brien on the case, so they're involved in that respect. That's what I meant here."[535] Gilger testified that what he meant by "which I know is going to be a rejection" was that based upon O'Brien's decision in 2004 — and without a statement from Vanecko, no identification of the offender in a lineup, and Vanecko's friends refusing to provide additional statements in 2011 — charges would be rejected.[536] A few days later, Martin called Gilger and told him that Vanecko would not be coming in.[537]

4. Draft Reports

On February 10, 2011, Gilger initiated a draft report in CHRIS (CPD's system for electronically storing police reports) that would form the basis of his final case supp report.[538] By February 11, 2011, Gilger had drafted the narrative section of his report concluding the 2011 re-investigation.[539] Gilger testified that this draft was a working version of the final report, but

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535 Gilger, James, Special Grand Jury Tr. at 12:16-13:4 (Jan. 23, 2013). O'Brien was not part of SAO's Felony Review unit in 2011. *See* O'Brien, Darren, IGO Interview Rep. at 2 (Feb. 5, 2013).

536 *See* Gilger, James, Special Grand Jury Tr. at 14:21-16:14 (Jan. 23, 2013) ("Well, based on what I had so far. You know, if I couldn't get Richard Vanecko in there to give me a statement, what do I have? I don't have any — I don't have any statement from the defendant in this case. I have no identification in a lineup. And the witnesses that are on Vanecko's side are asking for their lawyer, and they're not cooperating with me either.")

537 *See* Special Grand Jury Exhibit 15 at CPD001206 (CPD001199-CPD001234) (Case Supplementary Reports 8585610 and 8585620 (approved Feb. 28, 2011)). To be clear, Vanecko was not legally or constitutionally obligated to make any statement to CPD.

538 *See* Case Statuses for HK323454 at CPD006061-CPD006062 (Sept. 23, 2011) (CPD006052-CPD006064). Cirone officially reassigned the case within CHRIS on February 9, 2011. *See* Case Statuses for HK323454 at CPD006052 (Sept. 23, 2011) (CPD006052-CPD006064). Ultimately, because Gilger's final case supp report restated much of the narrative of police reports from 2004, it had to be split into two separate case supp reports, Case Supplementary Reports 8585610 and 8585620, in order to enter it into CHRIS. *See* Special Grand Jury Exhibit 116 at 5 (Peterson, Steve, IGO Interview Rep. (Feb. 4, 2013); Special Grand Jury Exhibit 108 at 4 (Mills, Thomas, Kroll Interview Rep. (Aug. 20, 2012)).

539 On February 11, 2011, Area 5 Det. Leal sent two files via e-mail to Gilger — "HK323454 narrative.doc" and "HK323454.pdf." Special Grand Jury Exhibit 89 at CPD016769 (CPD016769-CPD016827) (Leal e-mail (Feb. 11, 2011)). According to both Leal and Gilger, Leal sent this e-mail while helping Gilger transfer a draft narrative from a thumb drive to CHRIS. Leal, Emiliano, Kroll Interview Rep. at 3 (Dec. 6, 2012); Gilger, James, Special Grand Jury Tr. at 22:8-23:6 (Jan. 23, 2013). Detectives often draft their report narratives outside of CHRIS — saving it to a thumb drive, for example — because of deficiencies with CHRIS. Gilger, James, Special Grand Jury Tr. at 23:11-21 (Jan. 23,

that it reflected "what [his] thinking was" up to that date.[540] Spanos echoed this sentiment during his testimony before the special grand jury.[541]

The February 11, 2011, draft narrative concluded as follows:

> In conclusion, interviews with eyewitnesses after the incident described a tall, or taller, male white subject who punched KOSCHMAN. At the time of the incident, Richard VANECKO was 6'02" and approximately 230 pounds, which is clearly taller and heavier than Craig DENHAM, and clearly heavier than Kevin MCCARTHY. When initially interviewed, Scott ALLEN and James COPELAND stated the male white (VANECKO) who punched the victim, and the male white (DENHAM) who was arguing with KOSCHMAN, ran away together. When interviewed, HAGELINE thought the person who punched KOSCHMAN was the tallest of the three subjects that morning. The interview with DENHAM, who admitted that he and VANECKO left in a cab together and later said VANECKO was pushing him down the street before entering this cab, confirmed this fact. Interviews were conducted with Bridget and Kevin MCCARTHY and Craig DENHAM, who confirmed the fact that VANECKO and DENHAM left together. And finally, when asked to give a statement to Area 3 Detectives following his lineup, VANECKO declined on the advice of his attorney, which only cast additional suspicion on him as the person who punched David KOSCHMAN.
>
> Though [sic] the course of this lengthy investigation, it was clearly obvious that Richard VANECKO punched David KOSCHMAN, in spite of the fact that none of the eyewitnesses ever identified him as such.
>
> In view of the above, the R/Ds request this be classified as

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2013). *Compare* Special Grand Jury Exhibit 89 at CPD016770-CPD016798) (CPD016769-CPD016827) (Draft Case Supplementary Report 323454 (Feb. 11, 2011)) *with* Special Grand Jury Exhibit 15 (CPD001199-CPD001234) (Case Supplementary Reports 8585610 and 8585620 (approved Feb. 28, 2011)).

The OSP attempted to obtain e-mails from CPD for 2004 but was unsuccessful. CPD's e-mail archives date back only to 2009. *See* Ofc. Anthony Isla correspondence (Mar. 12, 2013) (CPD097080). As a result, in responding to the OSP's subpoena request for responsive e-mails, CPD was able to retrieve documents dating back only that far. *See* Anthony Isla correspondence (Mar. 12, 2013) (CPD097080).

[540] *See* Gilger, James, Special Grand Jury Tr. at 33:23-34:2 (Jan. 23, 2013).

[541] *See* Spanos, Nicholas, Special Grand Jury Tr. at 86:4-10 (Feb. 6, 2013).

CLEARED, EXCEPTIONALLY, CLOSED.[542]

Gilger's February 11, 2011, draft narrative contains no reference to Vanecko acting in self-defense.[543] Additionally, though the draft contained a placeholder for what Gilger hoped would be a report of his interview of Vanecko ("On 14 Feb 2011 at XXXX hours, Richard VANECKO ……") (ellipses in original), it contained no similar placeholder for a section concerning self-defense.[544] The draft narrative also does not reference the January 21, 2011, encounter between Gilger and O'Brien.[545]

As indicated in this draft, by February 11, 2011, Gilger had concluded that Vanecko had punched Koschman.[546] Moreover, Gilger and Spanos did not undertake any additional witness interviews or gather any additional evidence as part of their re-investigation after this date, according to their reports.[547] Although both Gilger and Spanos admitted that this draft reflected their beliefs as of February 11, 2011, their subsequent testimony characterized it as "just a draft."[548] Gilger stated: "I don't always put everything in there that I ultimately want to have in the report. . . . There were things I was going to add, and there was [sic] probably things I was

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542 Special Grand Jury Exhibit 89 at CPD016798 (CPD016769-CPD016827) (Draft Case Supplementary Report 323454 (Feb. 11, 2011)).

543 Special Grand Jury Exhibit 89 at CPD016770-CPD016798 (CPD016769-CPD016827) (Draft Case Supplementary Report 323454 (Feb. 11, 2011)).

544 Special Grand Jury Exhibit 89 at CPD016798 (CPD016769-CPD016827) (Draft Case Supplementary Report 323454 (Feb. 11, 2011)). The draft narrative concludes with the case being "cleared/closed exceptionally." According to Kobel, the "cleared/closed exceptionally" designation means the offender is still outstanding but no charges will be filed. *See* Kobel, Richard, IGO Interview Rep. at 5 (Jan. 17, 2013).

545 Special Grand Jury Exhibit 89 at CPD016770-CPD016798 (CPD016769-CPD016827) (Draft Case Supplementary Report 323454 (Feb. 11, 2011)).

546 Special Grand Jury Exhibit 89 at CPD016798 (CPD016769-CPD016827) (Draft Case Supplementary Report 323454 (Feb. 11, 2011)).

547 *See* Special Grand Jury Exhibit 15 (CPD001199-CPD001234) (Case Supplementary Reports 8585610 and 8585620 (approved Feb. 28, 2011)).

548 Gilger, James, Special Grand Jury Tr. at 22:3-4, 89:11-24 (Jan. 23, 2013); Spanos, Nicholas, Special Grand Jury Tr. at 94:24 (Feb. 6, 2013).

going to take out, you know. But at that point when I typed it in, that's what I had so far."[549] For example, Gilger testified that although he had not yet included anything about self-defense, he was planning on doing so.[550]

There is evidence suggesting that portions of Gilger's case supp report concluding the 2011 re-investigation were drafted or edited by his supervisors. Approximately 16 days after Gilger wrote the draft narrative described above, and without any intervening investigative work performed, on Sunday, February 27, 2011, at 9:54 p.m., Sgt. Sam Cirone sent an e-mail with no subject description from his personal e-mail account, "[redacted]@aol.com" to Andrews' personal e-mail account, "[redacted]@yahoo.com," and Salemme at his departmental e-mail account.[551] The entirety of the e-mail's body was as follows:

> CORRECTION #1
>
> On 21 Jan 2011, Det. GILGER spoke with ASA Darren O'Brien at the Cook County courthouse located at 2650 S. California. Det. GILGER informed ASA O'Brien that the R/Ds had re-investigated this incident and informed ASA O'Brien of the current progress of the investigation. ASA O'Brien stated he was consulted by Area 3 Detectives on possible charges, but after the consultation between his office and the police department, it was agreed that charges were not warranted because of self-defense.
>
> CORRECTION #2
>
> In view of the above, and based on the fact that David KOSCHMAN broke away from his group of friends and aggressively went after VANECKO, stating, "Fuck you! I'll kick your ass!" These aggressive actions caused VANECKO to take action and defend himself and his friends from being attacked. Due to the aforementioned reasons and through the course of this investigation, it is clear that Richard VANECKO, alone, punched David KOSCHMAN, which caused him to fall backwards and injure his head, which ultimately caused his death.

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549 Gilger, James, Special Grand Jury Tr. at 37:11-19 (Jan. 23, 2013).

550 Gilger, James, Special Grand Jury Tr. at 38:8-20 (Jan. 23, 2013).

551 *See* Special Grand Jury Exhibit 90 (CPD000391) (Cirone e-mail (Feb. 27, 2011)); Special Grand Jury Exhibit 115 at 13 (Andrews, Dean, Kroll Interview Rep. (Jan. 30, 2013)); Cirone, Sam, Kroll Interview Rep. (Proffer) at 11 (Mar. 22, 2013).

> Based on this, the R/Ds request this be classified as CLEARED, EXCEPTIONALLY, CLOSED.[552]

When interviewed pursuant to a proffer agreement in 2013, Cirone explained he sent the e-mail because in order to "exceptionally clear/close" a case, it must be reviewed by a commander and must go "up the food chain."[553] According to Cirone, he typed the e-mail in his office with Gilger present and used his personal e-mail account because "it was probably the account [he] had open."[554] With regard to how he received his supervisors' "corrections" to Gilger's draft report, Cirone stated during his interview with the OSP that he may have received a "marked on" copy from Andrews or Salemme,[555] or he may received the edits via e-mail or a phone call.[556] Cirone could not identify who actually crafted the language contained under "Correction #1" and "Correction #2" in the e-mail.[557] Because the OSP's investigation was unable to locate any drafts of Gilger's report between the February 11, 2011 draft narrative sent by Det. Emiliano Leal and this February 27, 2011, e-mail with "corrections," sent 16 days later, it is unclear what version Andrews and Salemme may have edited. As stated above, the February 11, 2011 draft lacked any mention of Gilger's meeting with O'Brien or self-defense — the subject of both "corrections" in the February 27, 2011 e-mail. Thus, the precise extent of

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552 *See* Special Grand Jury Exhibit 90 (CPD000391) (Cirone e-mail (Feb. 27, 2011)).

553 Cirone, Sam, Kroll Interview Rep. (Proffer) at 11 (Mar. 22, 2013). When asked during his interview with the OSP why Gilger's report was being edited late at night on a Sunday, Cirone stated there was no urgency to finish the reports by Monday and he was unaware of any pressure to wrap up the re-investigation prior to Superintendent Weis leaving office. *See* Cirone, Sam, Kroll Interview Rep. (Proffer) at 11-12 (Mar. 22, 2013).

554 *See* Cirone, Sam, Kroll Interview Rep. (Proffer) at 11 (Mar. 22, 2013).

555 *See* Cirone, Sam, Kroll Interview Rep. (Proffer) at 11 (Mar. 22, 2013). Between February 10, 2011, and February 28, 2011, Gilger printed out his draft case supp report approximately 11 times, although he denied sharing a draft with anyone except Spanos before it was complete. *See* Gilger, James, Special Grand Jury Tr. at 58:10-59:6, 59:11-60:2 (Jan. 23, 2013).

556 *See* Cirone, Sam, Kroll Interview Rep. (Proffer) at 11 (Mar. 22, 2013). Between 9:55 p.m. and 10:28 p.m., Andrews and Cirone exchanged several text messages and spoke for approximately 11 minutes at 10:02 p.m. AT&T Phone Records for Dean Andrews (Feb. 27, 2011) (ATT005708, ATT005721). Cirone stated he could not recall what Andrews or Salemme said in response to sending this e-mail. *See* Cirone, Sam, Kroll Interview Rep. (Proffer) at 11 (Mar. 22, 2013).

557 *See* Cirone, Sam, Kroll Interview Rep. (Proffer) at 12 (Mar. 22, 2013).

Andrews' or Salemme's edits are unknown.

When interviewed by the OSP in 2013, Andrews somewhat recalled receiving the February 27, 2011 e-mail, although he was unsure why Cirone sent the e-mail to his personal e-mail address and could not recall receiving any e-mails similar to this.[558] Andrews stated the e-mail would have been part of the review process for the report (which was submitted and approved the next day).[559] With regard to the substance of the changes, Andrews believed he "probably asked for some minor changes," including that the narrative should be more specific and should document the exchange between Koschman and Vanecko.[560] According to Andrews, he did not discuss the final report with Byrne or seek approval from a supervisor to clear/close the case exceptionally.[561]

When interviewed by the OSP in 2013, Salemme did not recall the February 27, 2011 e-mail, nor did he know why the corrections were being suggested.[562] Prior to being shown the e-mail during his interview, Salemme said his editing of the report was limited to minor issues such as spelling and typos.[563]

About 30 minutes after the e-mail containing "Correction #1" and "Correction #2," at approximately 10:22 p.m., Cirone sent another e-mail, this time only to Andrews, containing the following language:

> R/Ds concluded that David KOSCHMAN, having yelled "Fuck you! I'll kick your ass!", by breaking away from his group of

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558 *See* Special Grand Jury Exhibit 115 at 13-14 (Andrews, Dean, Kroll Interview Rep. (Jan. 30, 2013)).

559 *See* Special Grand Jury Exhibit 115 at 13 (Andrews, Dean, Kroll Interview Rep. (Jan. 30, 2013)).

560 *See* Special Grand Jury Exhibit 115 at 13 (Andrews, Dean, Kroll Interview Rep. (Jan. 30, 2013)).

561 *See* Special Grand Jury Exhibit 115 at 14 (Andrews, Dean, Kroll Interview Rep. (Jan. 30, 2013)). During his interview with the OSP in 2013, Salemme further reiterated that Andrews made the final decision to close the re-investigation exceptionally, and that the decision was not run by Byrne. *See* Special Grand Jury Exhibit 109 at 13 (Salemme, Joseph, Kroll Interview Rep. (Jan. 15, 2013)).

562 Special Grand Jury Exhibit 109 at 13 (Salemme, Joseph, Kroll Interview Rep. (Jan. 15, 2013)). With regard to the e-mail addresses listed on the e-mail, Salemme assumed that "[redacted]@aol.com" belonged to Cirone, but did not know whose e-mail address "[redacted]@yahoo.com" was. *See* Special Grand Jury Exhibit 109 at 13 (Salemme, Joseph, Kroll Interview Rep. (Jan. 15, 2013)).

563 *See* Special Grand Jury Exhibit 109 at 6 (Salemme, Joseph, Kroll Interview Rep. (Jan. 15, 2013)).

> friends and aggressively going after VANECKO was clearly the assailant in this incident. These aggressive actions caused VANECKO to take action and defend himself. This investigation has shown that Richard VANECKO, alone, punched David KOSCHMAN, which caused him to fall backwards and injure his head, which ultimately caused his death.
>
> Based on this, the R/Ds request this case be classified as CLEARED CLOSED/EXCEPTIONALLY.[564]

The language contained in this e-mail would eventually appear verbatim in Gilger's report.[565] A few minutes later, Andrews e-mailed in response: "Very nicely done."[566]

5. February 28, 2011

On Monday afternoon, February 28, 2011, Gilger submitted his concluding case supp report for the Koschman re-investigation.[567] Gilger submitted his case supp reports at the beginning of his shift that day at 3:17 p.m. (Case Supp 8585610) and 3:18 p.m. (Case Supp 8585620).[568] Four minutes later, Sgt. Thomas Mills approved the report in CHRIS.[569] Gilger testified that Mills knew nothing about the Koschman re-investigation.[570] When asked how a sergeant with no familiarity with the re-investigation was able to approve a 36-page report in four minutes, Gilger testified that Salemme probably just directed Mills to approve the report.[571] As Gilger described, "when the commander tells you just to approve the report, you know, [the

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564 *See* Cirone E-mail (Feb. 27, 2011) (AOL001831).

565 *See* Special Grand Jury Exhibit 15 at CPD001206-CPD001207 (CPD001199-CPD001234) (Case Supplementary Reports 8585610 and 8585620 (approved Feb. 28, 2011)).

566 *See* Andrews E-mail (Feb. 27, 2011) (YAH001496).

567 *See* Special Grand Jury Exhibit 15 (CPD001199-CPD001234) (Case Supplementary Reports 8585610 and 8585620 (approved Feb. 28, 2011)).

568 Special Grand Jury Exhibit 15 at CPD001199, CPD001208 (CPD001199-CPD001234) (Case Supplementary Reports 8585610 and 8585620 (approved Feb. 28, 2011)).

569 Special Grand Jury Exhibit 15 at CPD001199, CPD001208 (CPD001199-CPD001234) (Case Supplementary Reports 8585610 and 8585620 (approved Feb. 28, 2011)).

570 Gilger, James, Special Grand Jury Tr. at 61:15-62:2 (Jan. 23, 2013).

571 Gilger, James, Special Grand Jury Tr. at 62:7-63:7 (Jan. 23, 2013).

approving sergeant] is doing what he has been instructed to do."[572]

The final paragraphs of Gilger's report summarizes the conclusions of the re-investigation into Koschman's death:

> In conclusion, interviews with eyewitnesses after the incident stated the tallest of the three male subjects punched KOSCHMAN. At the time of the incident, Richard VANECKO was 6'02" and approximately 230 pounds, which is clearly taller and heavier than Craig DENHAM, and clearly heavier than Kevin MCCARTHY. When initially interviewed, Scott ALLEN and James COPELAND stated the male white since identified as (VANECKO) who punched the victim, and the male white since identified as (DENHAM) who was arguing with KOSCHMAN, ran away together. When interviewed, HAGELINE stated the male white who punched KOSCHMAN, was the tallest of the three subjects in their group. The interview with DENHAM, who admitted that he and VANECKO left in a cab together and later said VANECKO was pushing him down the street before entering this cab, confirmed this fact. Interviews were conducted with Bridget and Kevin MCCARTHY[573] and Craig DENHAM, who also confirmed the fact that VANECKO and DENHAM left together.
>
> R/Ds concluded that David KOSCHMAN, having yelled, "Fuck you! I'll kick your ass!" by breaking away from his group of friends and aggressively going after VANECKO was clearly the assailant in this incident. These aggressive actions caused VANECKO to take action and defend himself. This investigation has shown that Richard VANECKO, alone, punched David KOSCHMAN, which caused him to fall backwards and injure his head, which ultimately caused his death.
>
> Based on this, the R/Ds request this case be classified as CLEARED CLOSED/EXCEPTIONALLY.[574]

As previously noted, this conclusion was edited and approved by Gilger's supervisors, including

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572 Gilger, James, Special Grand Jury Tr. at 63:14-16 (Jan. 23, 2013).

573 As previously noted, Kevin and Bridget McCarthy did not agree to be re-interviewed during the 2011 reinvestigation. Thus, in coming to their conclusion, Gilger and Spanos relied on the interviews given by the McCarthys in 2004. *See, e.g.,* Gilger, James, Special Grand Jury Tr. at 144:10-147:7 (Jan. 23, 2013).

574 Special Grand Jury Exhibit 15 at CPD001206-CPD001207 (CPD001199-CPD001235) (Case Supplementary Reports 8585610 and 8585620 (approved Feb. 28, 2011)).

Cirone and Andrews, the night before. Whereas detectives and SAO in 2004 were unable to determine if Koschman was punched and by whom, the re-investigation concluded Vanecko had punched Koschman, but that Vanecko acted in self-defense.

According to those involved, the decision to identify Vanecko as the offender was made by Gilger and Spanos, and their supervisors supported that decision.[575] Just as police determined a re-investigation was necessary to connect the dots, CPD personnel in 2011 concluded that Vanecko was the offender through process of elimination or "connecting the dots."[576] According to Gilger, in his opinion it was "obvious" that Vanecko was the offender.[577]

Unlike the detectives in 2004, Gilger and Spanos determined that it was a punch that caused Koschman to fall, rather than a push. According to Gilger, "a punch was thrown. . . . that's my investigation of the case, I feel it was a punch rather than a shove."[578] Similarly, Spanos indicated detectives were able to determine a punch was thrown based upon witness interviews and reviewing the case file from 2004.[579]

Ultimately, however, Gilger's report concluded that Vanecko acted in self-defense. Specifically, Gilger and Spanos concluded that, "David KOSCHMAN, having yelled, 'Fuck you! I'll kick your ass!' by breaking away from his group of friends and aggressively going after VANECKO was clearly the assailant in this incident. These aggressive actions caused

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575 Cirone, Sam, Kroll Interview Rep. (Proffer) at 9 (Mar. 22, 2013); Special Grand Jury Exhibit 115 at 5, 7 (Andrews, Dean, Kroll Interview Rep. (Jan. 30, 2013)).

576 Special Grand Jury Exhibit 120 at 10 (Byrne, Thomas, Interview Rep. (Jan. 9, 2013)); Cirone, Sam, Kroll Interview Rep. (Proffer) at 6 (Mar. 22, 2013); Special Grand Jury Exhibit 116 at 4 (Peterson, Steven, IGO Interview Rep. (Feb. 4, 2013)).

577 Gilger, James, Special Grand Jury Tr. at 27:4-30:3 (Jan. 23, 2013). According to Gilger and Sgt. Cirone, Vanecko was identified as the offender "for the report" or "for reporting purposes" only. Cirone, Sam, Kroll Interview Rep. (Proffer) at 6, 13 (Mar. 22, 2013); Gilger, James, Special Grand Jury Tr. at 42:10-18 (Jan. 23, 2013). Spanos testified before the special grand jury that "just because we [Gilger and he] identified him [Vanecko] by process of eliminations [sic] through our investigation doesn't give us [CPD] probable cause to arrest him. . . ." Spanos, Nicholas, Special Grand Jury Tr. at 142:22-143:2 (Feb. 6, 2013).

578 Gilger, James, Special Grand Jury Tr. at 32:7-12 (Jan. 23, 2013).

579 Spanos, Nicholas, Special Grand Jury Tr. at 89:19-90:3 (Feb. 6, 2013).

VANECKO to take action and defend himself."[580] The report's conclusion that Vanecko acted in self-defense appears to be based on several faulty premises worth noting.

First, Gilger's report attributed a statement to Koschman in support of the conclusion that Vanecko acted in self-defense. Namely, the report concluded that Koschman yelled "Fuck you! I'll kick your ass."[581] Upon review of the rest of that police report, that phrase is nowhere attributed to Koschman or any other witness. Nor is that phrase attributed to Koschman in any of the detectives' handwritten notes or GPRs from 2011. The closest source appears to be a statement recorded in Yawger's interview of Kevin McCarthy on May 19, 2004, during which Kevin McCarthy reportedly stated "at this time the primary kid (Koschman) and another kid were still swearing, calling himself, Craig, and Richard names, and saying things like 'I'll kick your ass,' etc."[582] Kevin McCarthy admittedly lied to police in 2004 when he told police he did not know anyone involved in the altercation.[583]

Second, Gilger's report concluded that "by breaking away from his group of friends and aggressively going after VANECKO [Koschman] was clearly the assailant in this incident." This conclusion also does not seem supported by other portions of the police reports or the detectives' own handwritten notes. For example, in Gilger's handwritten GPRs of his January 17, 2011, interview with Allen, Gilger recorded that Allen informed him that Vanecko's group "were the aggressors."[584] As Gilger acknowledged during his special grand jury testimony, the failure to include this statement was a fairly important omission that was contrary to his ultimate conclusion.[585] Similarly, Gilger's report attributes a statement to Copeland that Koschman

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580 *See* Special Grand Jury Exhibit 15 at CPD001206 (CPD001199-CPD001234) (Case Supplementary Reports 8585610 and 8585620 (approved Feb. 28, 2011)).

581 *See* Special Grand Jury Exhibit 15 at CPD001206 (CPD001199-CPD001234) (Case Supplementary Reports 8585610 and 8585620 (approved Feb. 28, 2011)).

582 *See* Special Grand Jury Exhibit 10 at CPD001125 (CPD001115-CPD001128) (Case Supplementary Report 3193543 (approved Nov. 10, 2004)); General Progress Report at CPD001102 (May 19, 2004) (CPD001100-CPD001103).

583 McCarthy, Kevin, Special Grand Jury Tr. at 53:5-6 (Aug. 15, 2012).

584 *See* Special Grand Jury Exhibit 77 at CPD001257 (CPD001257-CPD001258) (General Progress Report re: Allen interview (approved Feb. 28, 2011)).

585 *See* Gilger, James, Special Grand Jury Tr. at 83:18-85:3 (Jan. 23, 2013).

"broke free" from his friends prior to being punched that is nowhere to be found in Gilger's handwritten GPRs.[586] Rather, Gilger admitted that his conclusion that Koschman ran back and lunged at Vanecko's group was based "predominantly" on police reports from 2004.[587]

Third, Gilger's report concluded that Koschman's actions "caused VANECKO to take action and defend himself." This conclusion that Vanecko acted in defense of himself, or what may have caused any of Vanecko's actions, does not appear to have any basis in the witness interviews recorded in Gilger's report. Detectives never spoke with Vanecko or took any kind of statement regarding his involvement in the incident on April 25, 2004. Moreover, Kevin McCarthy, Bridget McCarthy, and Denham all stated they did not see the moments preceding the impact in interviews with Yawger in 2004 and stood by these statements in 2011.[588] During his special grand jury testimony, Gilger also acknowledged he was "suspicious" of the McCarthys' and Denham's claims that they had their backs turned prior to the punch.[589]

Finally, there also appear to be circumstances that detectives either ignored or failed to consider. In evaluating whether Vanecko may have acted in self-defense or in defense of others, Gilger's report did not reference the height and weight disparity between Vanecko and Koschman. As recorded in Gilger's report, Vanecko stood 6'3" and weighed 230 pounds in 2004 — compared with Koschman's height of 5'5" and weight of 125 pounds.[590] Such a disparity could be relevant to an evaluation of self-defense. Despite the re-investigation's focus on obtaining "heights and weights," there is no mention of this disparity in height and weight between the offender and the victim. In fact, detectives may have believed a disparity in size

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586 *See* Gilger, James, Special Grand Jury Tr. at 82:2-83:17 (Jan. 23, 2013); Special Grand Jury Exhibit 15 at CPD001231 (CPD001199-CPD001234) (Case Supplementary Reports 8585610 and 8585620 (approved Feb. 28, 2011)); Special Grand Jury Exhibit 76 (CPD001252-CPD001254) (General Progress Report re: Copeland interview (approved Feb. 28, 2011)).

587 *See* Gilger, James, Special Grand Jury Tr. at 130:19-23 (Jan. 23, 2013).

588 *See* Special Grand Jury Exhibit 10 at CPD001123 (CPD001115-CPD001128) (Case Supplementary Report 3193543 (approved Nov. 10, 2004)); Special Grand Jury Exhibit 15 at CPD001204-CPD001205 (CPD001199-CPD001234) (Case Supplementary Reports 8585610 and 8585620 (approved Feb. 28, 2011)).

589 *See* Gilger, James, Special Grand Jury Tr. at 157:6-11 (Jan. 23, 2013).

590 *See* Special Grand Jury Exhibit 15 at CPD001208 (CPD001199-CPD001234) (Case Supplementary Reports 8585610 and 8585620 (approved Feb. 28, 2011)).

"does not matter."[591] As another example, an affirmative defense such as self-defense must be raised by a putative defendant and necessarily negates any issue of lack of identification — i.e., one cannot say they did not strike the victim, but if they did, they acted in self-defense.[592]

Several other aspects of Gilger's report call into question its reliability. On page 13 of Case Supplementary Report 8585610, Gilger supplies for the first time an explanation for why no work was performed on the Koschman investigation between April 25, 2004, and May 6, 2004. Following a recitation of Rita O'Leary's April 25, 2004, telephone interview of Michael Connolly and immediately preceding the pronouncement of Koschman's death, the report states, "Efforts were being made to interview the additional witnesses that were at the scene of the incident."[593] During his testimony before the special grand jury, Gilger stated, "Well, I'm guessing they were probably going to try to find the phone numbers, or the — or find the addresses. The names and — well, they already had the names, but probably phone numbers or addresses."[594] Neither Andrews, Salemme, nor Cirone knew the basis for Gilger's statement that efforts were being made to interview the additional witnesses that were at the scene of the incident.[595] The OSP's investigation has not uncovered any efforts on behalf of anyone at CPD to interview additional witnesses between April 25, 2004, and May 6, 2004.

Additionally, despite drawing very different conclusions from Yawger, detectives in 2011 expressed differing conclusions regarding the thoroughness of CPD's investigation in 2004. According to Andrews, the 2004 investigation was thorough, as nothing "substantially different"

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591 Cirone, Sam, Kroll Interview Rep. (Proffer) at 12 (Mar. 22, 2013).

592 *See People v. Zapata*, 808 N.E.2d 1064, 1069-70 (Ill. App. Ct. 1st Dist. 2004); *People v. Moore*, 797 N.E.2d 217, 225 (Ill. App. Ct. 2d Dist. 2003). Under Illinois law, self-defense is an "affirmative defense under which a defendant admits to the offense but denies responsibility." *People v. McLennon*, 957 N.E.2d 1241, 1245 (Ill. App. Ct. 2d Dist. 2011). As stated by the court in *People v. Urioste*, 736 N.E.2d 706, 714 (Ill. App. Ct. 5th Dist. 2000), "where a defendant contests guilt based upon self-defense, compulsion, entrapment, necessity, or a plea of insanity, identity ceases to be the issue."

593 *See* Special Grand Jury Exhibit 15 at CPD001220 (CPD001199-CPD01234) (Case Supplementary Reports 8585610 and 8585620 (approved Feb. 28, 2011)).

594 Gilger, James, Special Grand Jury Tr. at 120:22-121:2 (Jan. 23, 2013).

595 *See* Special Grand Jury Exhibit 115 at 11 (Andrews, Dean, Kroll Interview Rep. (Jan. 30, 2013)); Special Grand Jury Exhibit 109 at 7 (Salemme, Joseph, Kroll Interview Rep. (Jan. 15, 2013)); Cirone, Sam, Kroll Interview Rep. (Proffer) at 15 (Mar. 22, 2013).

was uncovered in 2011.[596] Byrne indicated he did not know why the investigation was not closed in 2004, but refused to criticize the 2004 investigation since he was not present when decisions were made.[597] Even further up the chain of command, Peterson opined that the 2004 investigation by CPD was not a thorough investigation and involved "poor, shoddy detective work."[598] Perhaps most tellingly, Gilger testified it was "absurd" to reject charges on the basis of self-defense where one cannot even identify the offender.[599] As noted previously, despite identifying Vanecko as the person who punched Koschman, detectives in 2011 reached the same conclusion of self-defense as detectives in 2004, without any additional evidence supporting such a conclusion.[600]

The same day that Gilger submitted his final case supplementary report concluding that the case should be cleared/closed exceptionally, Tim Novak, Chris Fusco, and Carol Marin, reporters from the *Sun-Times*, published the first in a series of articles about Koschman's death entitled "*Who Killed David Koschman? A Watchdog's Investigation.*"[601] The front-page article detailed its findings regarding red flags or inconsistencies with the 2004 investigation into Koschman's death and revealed that CPD had conducted a re-investigation in 2011.[602] Notable in this article are reports by witnesses Hageline and Copeland that CPD and SAO descriptions in earlier statements by those entities of Koschman as an aggressor in the incident is "not how it

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596 *See* Special Grand Jury Exhibit 115 at 11 (Andrews, Dean, Kroll Interview Rep. (Jan. 30, 2013)).

597 *See* Special Grand Jury Exhibit 120 at 7 (Byrne, Thomas, Kroll Interview Rep. (Jan. 9, 2013)).

598 *See* Peterson, Steven, IGO Interview Tr. at 50:15-22, 83:18-84:6, 102:2-4, 108:2-3 (Jan. 10, 2012); Peterson, Steven, IGO Interview Rep. at 8 (Feb. 4, 2013).

599 *See* Gilger, James, Special Grand Jury Tr. at 150:22-151:5 (Jan. 16, 2013).

600 *See* Special Grand Jury Exhibit 15 (CPD001199-CPD001234) (Case Supplementary Reports 8585610 and 8585620 (approved Feb. 28, 2011)).

601 Special Grand Jury Exhibit 142 (NEWS000022-NEWS000027) (Novak, Fusco, Marin, *Who Killed David Koschman? A Watchdog's Investigation* (Feb. 28, 2011)).

602 Special Grand Jury Exhibit 142 (NEWS000022-NEWS000027) (Novak, Fusco, Marin, *Who Killed David Koschman? A Watchdog's Investigation* (Feb. 28, 2011)).

happened."[603]

The *Sun-Times* on February 28, 2011, also reported that Deputy Police Superintendent Ernest Brown stated that "the investigation into David Koschman's death was never technically re-opened."[604] According to quotes attributed to Brown, the case had only remained open due to an "administrative oversight."[605] He is reported as stating that the goal of the re-investigation was to conduct a "comprehensive review of the entire investigative process as it stood."[606] He went on to tell the *Sun-Times* that this review "revealed that the facts of that investigation remained unchanged since it was initially investigated."[607] Brown told the *Sun-Times* that the case would be "closed shortly."[608]

6. Case Officially Closed

On March 1, 2011, the *Sun-Times* published two more articles regarding Koschman's

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603 *See* Special Grand Jury Exhibit 142 at NEWS000027 (NEWS000022-NEWS000027) (Novak, Fusco, Marin, *Who Killed Daivd Koschman? A Watchdog's Investigation* (Feb. 28, 2011)) (reporting SAO's press statement that "All witnesses who were questioned indicated that Koschman was the aggressor and had initiated the physical confrontation by charging at members of the other group after they were walking away" and Superintendent Cline's statement "At the best, it was mutual combatants....If the other person is the aggressor, then Vanecko has the right to defend himself.")

604 Spielman, Fusco, Novak, *Police Brass: No Special Treatment* (Feb. 28, 2011) (NEWS000014-NEWS000015).

605 Spielman, Fusco, Novak, *Police Brass: No Special Treatment* (Feb. 28, 2011) (NEWS000014-NEWS000015).

606 Spielman, Fusco, Novak, *Police Brass: No Special Treatment* (Feb. 28, 2011) (NEWS000014-NEWS000015).

607 Spielman, Fusco, Novak, *Police Brass: No Special Treatment* (Feb. 28, 2011) (NEWS000014-NEWS000015).

608 Spielman, Fusco, Novak, *Police Brass: No Special Treatment* (Feb. 28, 2011) (NEWS000014-NEWS000015). As CPD concluded its re-investigation, IGO opened up its own investigation on February 28, 2011, amid the allegations of police misconduct. Specifically, the IGO began to look into allegations that unknown CPD employees obstructed justice and "covered up a homicide investigation involving a nephew of the mayor." IGO Case Initiation Rep. at IG_007245 (Feb. 28, 2011) (IG_007244-IG_007344). The IGO's investigation was motivated by the initial article published in the *Sun-Times*, and more specifically, by the report that there were inconsistencies between statements witnesses made to *Sun-Times* reporters versus statements recorded in CPD police reports.

death, including an editorial piece calling for the appointment of a special prosecutor.[609] The same day, Gilger submitted another report officially closing the Koschman re-investigation in CHRIS.[610] As with Gilger's police report submitted on February 28, 2011, detectives classified the case as "CLEARED CLOSED/EXCEPTIONALLY."

According to CPD policy, "[a]n exceptional clearance is the solving of a criminal offense when the offender was not arrested, was not charged, or was not turned over to the court for prosecution due to unusual circumstances. Detectives must identify the offender, exhaust all investigative leads, and do everything possible to clear a case by arrest before exceptionally clearing the case."[611] Detective Division Special Order 96-5 further provides guidance based upon the federal Uniform Crime Reporting handbook concerning when a case can be cleared/closed exceptionally, stating, "Detectives must list in their Supplementary Report the facts that support their decision to exceptionally clear a case. Below are some guidelines for the four questions, which must be answered "yes."

> 1. The investigation must identify the offender.
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> 2. The investigation must disclose enough information to support an arrest, charge, and turning over to a court for prosecution.
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> 3. The offender's exact location is known; an arrest could be made now.
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> 4. There is a reason outside of law enforcement control, which

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609 Novak, Fusco, Marin, *Years After Death Involving Daley's Nephew, Mom's Anguish Won't End* (Mar. 1, 2011) (NEWS000030-NEWS000033); Chicago Sun-Times, *Editorial: Chicago Police Must Get to Bottom of This* (Mar. 1, 2011) (NEWS000028-NEWS000029).

610 *See* Special Grand Jury Exhibit 102 (CPD001182-CPD001186) (Case Supplementary Report 8616466 (approved Mar. 1, 2011)). Coinciding with the Koschman investigation being cleared/closed exceptionally was the departure of Superintendent Weis and a transition in CPD administration. Superintendent Weis stepped down as CPD Superintendent on March 1, 2011. According to Peterson and Masters, the period surrounding the submission of Gilger's report was a period of transition. Special Grand Jury Exhibit 116 at 4-5 (Peterson, Steven, IGO Interview Rep. (Feb. 4, 2013); Masters, Michael, IGO Interview Rep. at 9 (May 16, 2013)). The next day, on March 2, 2011, Terry Hilliard took over as interim CPD Superintendent and served in that capacity until the new administration took office.

611 *See* Special Grand Jury Exhibit 74 at CPD002830-CPD002831 (CPD002822-CPD002842) (CPD Detective Division Special Order 96-5).

prevents an arrest, charge, and prosecution."[612]

Thus, under Detective Division policy, in order to exceptionally clear/close the Koschman investigation in 2011, detectives needed to identify an offender.[613] Similarly, the investigation would have had to disclose enough evidence to support an arrest, charge, and turning over of the case to court for prosecution. In light of these requirements, Gilger testified the Koschman investigation was closed in violation of Special Order 96-5 based upon his belief in a lack of sufficient information to support an arrest, charge, and turning over of the case for prosecution.[614]

Special Order 96-5 further dictates who must approve exceptional clearances in homicide cases. The order provides that "[i]n murder investigations, if the Felony Review Unit has rejected charges against the offender, the detective will list in the Supplementary Report the reasons for the rejection and the facts which support the arrest of the offender. The detective will request an exceptional clearance for the case. Approval for exceptionally cleared homicide cases is the responsibility of the area commander and the appropriate field group deputy chief."[615] As Deputy Chief Andrews acknowledged, his role as the only person authorized to approve the exceptional clear/closing of the Koschman investigation.[616] According to Andrews, he did not discuss the fact that the case would be exceptionally cleared/closed with any of his supervisors or

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612 *See* Special Grand Jury Exhibit 74 at CPD002832-CPD002833 (CPD002822-CPD02842) (CPD Detective Division Special Order 96-5) (emphasis added).

613 *See* Special Grand Jury Exhibit 115 at 6 (Andrews, Dean, Kroll Interview Rep. (Jan. 30, 2013)).

614 *See* Gilger, James, Special Grand Jury Tr. at 98:20-99:3, 108:19-109:1 (Jan. 23, 2013); *see also* Sullivan, Karen, Kroll Interview Rep. at 3 (Feb. 5, 2013).

615 *See* Special Grand Jury Exhibit 74 at CPD002833-CPD002834 (CPD002822-CPD002842) (CPD Detective Division Special Order 96-5).

616 *See* Special Grand Jury Exhibit 115 at 8 (Andrews, Dean, Kroll Interview Rep. (Jan. 30, 2013)); *see also* Cirone, Sam, Kroll Interview Rep. (Proffer) at 13 (Mar. 22, 2013). In light of Andrews' sole authority to approve the exceptional clear/closing of the Koschman matter, on March 10, 2011, nine days after Gilger officially closed Area 5's re-investigation, Walsh submitted a memorandum to Andrews attaching police reports concluding the re-investigation for Andrews' review and approval. *See* Walsh Memo to Andrews (Mar. 10, 2011) (CPD060760-CPD060770). Walsh's memorandum stated that "The analysis of the investigation supports the findings. The offender has been identified and it has been determined that the offender was taking actions to defend himself. The case will be Exceptionally Cleared/Closed, Other Exceptional Clearance." *See* Walsh Memo to Andrews at CPD060760 (Mar. 10, 2011) (CPD060760-CPD060770).

anyone else in the command staff, including Byrne or Masters.[617]

In 2011, despite Superintendent Weis' stated desire to have the case presented to SAO for a charging decision, CPD never officially presented the case for charges or submitted it to SAO's Felony Review unit.[618]

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[617] *See* Special Grand Jury Exhibit 115 at 8, 14 (Andrews, Dean, Kroll Interview Rep. (Jan. 30, 2013)). Andrews additionally stated that as of January 2013, he had not reported (to the Uniform Crime Reports published by the FBI) the Koschman investigation as a cleared case, and would not do so until the OSP concluded its investigation. Andrews explained, however, that this was significant only for statistical purposes. Special Grand Jury Exhibit 115 at 14-15 (Andrews, Dean, Kroll Interview Rep. (Jan. 30, 2013)).

The case was also reclassified from an involuntary manslaughter to second-degree murder. Andrews indicated that as part of the re-investigation, his goals were to determine both whether there was sufficient evidence to name an offender and a correct classification for the case. *See* Special Grand Jury Exhibit 115 at 5 (Andrews, Dean, Kroll Interview Rep. (Jan. 30, 2013)). Since detectives were able to name an offender, all that remained was determining a proper classification. Last active in 2004, the Koschman investigation was left open as an involuntary manslaughter investigation. *See* Special Grand Jury Exhibit 10 at CPD001128 (CPD001115-CPD001128) (Case Supplementary Report 3193543 (approved Nov. 10, 2004)). In 2011, following some internal debate among Peterson, Byrne, Andrews, and Salemme, the case was reclassified as second-degree murder. *See* Special Grand Jury Exhibit 15 (CPD001199-CPD001234) (Case Supplementary Reports 8585610 and 8585620 (approved Feb. 28, 2011)); Special Grand Jury Exhibit 115 at 11 (Andrews, Dean, Kroll Interview Rep. (Jan. 30, 2013)); Special Grand Jury Exhibit 120 at 9 (Byrne, Thomas, Kroll Interview Rep. (Jan. 9, 2013)); Special Grand Jury Exhibit 116 at 6 (Peterson, Steven, IGO Interview Rep. (Feb. 4, 2013); Special Grand Jury Exhibit 109 at 10 (Salemme, Joseph, Kroll Interview Rep. (Jan. 15, 2013)). According to Special Order 96-5, it is CPD policy that, "Detectives will not reclassify offenses or incidents unless there is adequate justification; they will document such justification in the Supplementary Report. Detectives will base reclassifications upon facts, not upon unsubstantiated assumptions or opinions." Special Grand Jury Exhibit 74 at CPD002828 (CPD002822-CPD002842) (CPD Detective Division Special Order 96-5). Nevertheless, in practice, it appears reclassification is largely for statistical purposes and specifically in this case was largely "academic." Special Grand Jury Exhibit 109 at 10 (Salemme, Joseph, Kroll Interview Rep. (Jan. 15, 2013)).

[618] *Compare* Weis, Jody, IGO Interview Tr. at 23:7-15 (Nov. 14, 2011) ("I don't know if, what detective presented it to her but I, I, I recall that the case was presented to the State's Attorney and I don't know if it was Felony Review or whomever and I believe the decision was made that they were not going to charge and then I think Anita may have changed her mind after that but my recollection was that the facts were presented to the State's Attorney, someone there, and the decision was made not to charge, that it was not a crime"); Weis, Jody, IGO Interview Rep. at 1 (May 28, 2013) (Superintendent Weis stated he wanted new detectives from a different detective area to look into the Koschman matter from "A to Z" and get the case to SAO's Felony Review unit for a decision); *with* Spanos, Nicholas, Special Grand Jury Tr. at 77:9-18 (Feb. 6, 2013); Gilger, James, Special Grand Jury Tr. at 11:23-12:2 (Jan. 23, 2013); Special Grand Jury Exhibit 115 at 12 (Andrews, Dean, Kroll Interview Rep. (Jan. 30, 2013)); Special Grand Jury Exhibit 120 at 10 (Byrne, Thomas, Kroll Interview Rep. (Jan. 9, 2013)) ("In 2004 the state's attorney did not charge; it was not presented in 2011"); Kirk, Daniel, IGO Interview Rep. at 5 (Mar. 26, 2013). At the same time, there is some indication that SAO asked CPD "to be looped in" regarding the progress of the

7. The Missing CPD Koschman Homicide File

At CPD, every homicide case is supposed to have a corresponding permanent master homicide case file ("homicide file"). CPD does not have an established policy for how (nor where) homicide files are to be kept; instead, each detective area is left to develop its own protocol and filing system.[619] Homicide files typically contain, often in chronological order, the key CPD documentation (e.g., original GPRs, finalized and approved case supps, etc.)[620] that has been created since the inception of the case. While CPD homicide files are not kept under lock and key,[621] they are typically housed together in an organized fashion at the detective area, and access to them is generally restricted to those detectives (and their superiors) assigned to the particular matter. Detectives consider homicide files to be "sacrosanct," and therefore, they should not be left out in the open unattended.[622]

a. Creating and Maintaining Homicide Files at Area 3

At Area 3, the detective area which handled the 2004 Koschman homicide investigation, the filing methodology for homicide cases has changed slightly throughout the relevant time period (2004-2011).[623] Det. Nicholas Rossi, who has been employed at Area 3 since 1995 and whose primary duties since 2004 include organizing (e.g., indexing) and maintaining the Area's

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re-investigation and was getting police reports as the re-investigation progressed. Special Grand Jury Exhibit 109 at 7-8 (Salemme, Joseph, Kroll Interview Rep. (Jan. 15, 2013)). According to Andrews, SAO received case supplementary reports and was kept up to date on the status of the re-investigation and its progress. Special Grand Jury Exhibit 115 at 12 (Andrews, Dean, Kroll Interview Rep. (Jan. 30, 2013)).

619 Chasen, Michael, IGO Interview Rep. at 1 (Nov. 27, 2012); Rossi, Nicholas, Kroll Interview Rep. (Proffer) at 3 (Feb. 13, 2013); Molloy, James, Kroll Interview Rep. at 3 (Dec. 7, 2012).

620 Rossi, Nicholas, Kroll Interview Rep. (Proffer) at 4 (Feb. 13, 2013).

621 Clemens, Robert, Special Grand Jury Tr. at 26:15-23 (Apr. 24, 2013) (describing how detectives could remove files by checking them out through a log); Day, Edward, IGO Interview Rep. at 2 (Nov. 29, 2012) (describing how cabinets were not locked); Rybicki, Richard, Special Grand Jury Tr. at 28:1-6 (Mar. 27, 2013) (describing how cabinets were rarely locked).

622 *See, e.g.,* Clemens, Robert, Kroll Interview Rep. at 3 (Apr. 10, 2013). Before the special grand jury, Yawger testified that it is "very uncommon" for a homicide file to go missing as happened with the Koschman case and that he had never had a homicide file "go missing." *See* Yawger, Ronald, Special Grand Jury Tr. at 160:13-19 (July 15, 2013).

623 Rossi, Nicholas, Kroll Interview Rep. (Proffer) at 3 (Feb. 13, 2013).

homicide files, explained to the OSP some of the differences he has observed.[624] For example, according to Rossi, since at least 2011, Area 3 (now consolidated with other detective areas into Area North) has created and stored homicide files in white three-ring binders.[625] Rossi recalled that Area 3 homicide files were historically maintained in blue (and periodically black) folders in which the documents were secured with metal fasteners and clips, as opposed to three-ring binders.[626] Others recall blue three-ring binders being used in 2004 as well.[627] According to Rossi, the different-colored folders or binders do not signify anything, and were simply the result of CPD purchasing decisions made over the years.[628]

Furthermore, in 2004, Area 3's homicide files were primarily stored on a bookcase and in file cabinets located in the sergeants' office.[629] Generally speaking, homicide files were arranged in chronological order and were labeled by RD # and by the name of the subject whose death was being investigated.[630] According to CPD personnel, if Area 3 detectives needed to access a permanent homicide file, they were required to log such use by both "checking out" and "checking in" the homicide file by recording their name on a piece of paper kept in the

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624 Rossi, Nicholas, Kroll Interview Rep. (Proffer) at 3 (Feb. 13, 2013).

625 Rossi, Nicholas, Kroll Interview Rep. (Proffer) at 3 (Feb. 13, 2013); *see also* Special Grand Jury Exhibit 148 at 7 (Yamashiroya, Gary, Kroll Interview Rep. (Feb. 5, 2013)).

626 Rossi, Nicholas, Kroll Interview Rep. (Proffer) at 3 (Feb. 13, 2013); Sobolewski, Andrew, IGO Interview Tr. at 42-45 (Aug. 5, 2011); Redman, Charles, IGO Interview Rep. (Proffer) at 2-3 (Oct. 31, 2012) (homicide files were not kept in three-ring binders, but were kept in a file with two posts on top). Walsh, Denis, IGO Interview Rep. (Proffer) at 3, 10 (Aug. 14, 2013) (stating that based on his knowledge of how Area 3 homicide files were stored in 2004, none were ever kept in blue three-ring binders, but instead were organized in a flip-folder that had a blue cardboard cover).

627 Rossi, Nicholas, Kroll Interview Rep. (Proffer) at 3 (Feb. 13, 2013); *see also* Skelly, Thomas, Kroll Interview Rep. at 4 (Nov. 15, 2012).

628 Rossi, Nicholas, Kroll Interview Rep. (Proffer) at 3 (Feb. 13, 2013).

629 Skelly, Thomas, Kroll Interview Rep. at 4 (Nov. 15, 2012); Day, Edward, IGO Interview Rep. at 2 (Nov. 29, 2012); Rossi, Nicholas, Kroll Interview Rep. (Proffer) at 2 (Feb. 13, 2013); Rybicki, Richard, Special Grand Jury Tr. at 108:9-17 (Mar. 27, 2013).

630 Rossi, Nicholas, Kroll Interview Rep. (Proffer) at 3 (Feb. 13, 2013).

sergeants' office.[631] However, adherence to such a procedure does not appear to have been consistent.[632] Lastly, homicide files for open cases were to be indefinitely retained in the sergeants' office.[633]

b. The Various Versions of the Koschman Homicide File

The subsections below explore issues related to the various versions of the Koschman homicide file that were discovered in, or after, January 2011.

i. Commander Yamashiroya's Credenza File

In response to the January 4, 2011, FOIA request the *Sun-Times* submitted to CPD, Andrews ordered Yamashiroya to gather the Koschman homicide file so it could be provided to those at Area 5 who would be handling the re-investigation. In response, Yamashiroya instructed Walsh to locate Area 3's Koschman homicide file.[634] A few days later, Walsh reported to Yamashiroya that he was unable to locate the file.[635]

In response, Yamashiroya reported to Byrne and Andrews that the Koschman homicide file could not be found.[636] According to Yamashiroya, Andrews instructed Yamashiroya to make another effort to find the homicide file.[637] Yamashiroya complied and even conducted his own personal search (which according to Yamashiroya, occurred approximately one day after

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631 Clemens, Robert, Special Grand Jury Tr. at 26:15-23 (Apr. 24, 2013); Day, Edward, IGO Interview Rep. at 2 (Nov. 29, 2012); Sobolewski, Andrew, IGO Interview Rep. at 42:9-20 (Aug. 5, 2011); Molloy, James, Kroll Interview Rep. at 3 (Dec. 7, 2012).

632 Yawger, Ronald, IGO Interview Tr. at 56:21-57:1 (July 1, 2011).

633 Redman, Charles, IGO Interview Rep. (Proffer) at 2 (Oct. 31, 2012). Closed homicide files were stored permanently at the investigating detective area or at CPD's Records Division. Molloy, James, Kroll Interview Rep. at 3 (Dec. 7, 2012); Special Grand Jury Exhibit 120 at 5 (Byrne, Thomas, Kroll Interview Rep. (Jan. 9, 2013)).

634 Special Grand Jury Exhibit 148 at 3 (Yamashiroya, Gary, Kroll Interview Rep. (Feb. 5, 2013)); Walsh, Denis, IGO Interview Rep. (Proffer) at 3 (Aug. 14, 2013) (stating that he (Walsh) enlisted some of his Area 3 colleagues to help him search for the Koschman homicide file).

635 Special Grand Jury Exhibit 148 at 3 (Yamashiroya, Gary, Kroll Interview Rep. (Feb. 5, 2013)); *see* Walsh, Denis, IGO Interview Rep. (Proffer) at 3 (Aug. 14, 2013).

636 Special Grand Jury Exhibit 148 at 3 (Yamashiroya, Gary, Kroll Interview Rep. (Feb. 5, 2013)).

637 Special Grand Jury Exhibit 148 at 3 (Yamashiroya, Gary, Kroll Interview Rep. (Feb. 5, 2013)).

Walsh informed him he could not locate the Koschman homicide file).[638] According to Yamashiroya, during his search, he discovered a manila folder in his office credenza which contained copies of certain CPD reports from the Koschman case.[639] However, the file found in Yamashiroya's office credenza was not the original, nor complete, Koschman homicide file; for example, it did not contain original GPRs or an index.[640]

ii. Original Koschman Homicide File (Blue Three-Ring Binder)

Because Yamashiroya and Walsh did not find the original Area 3 Koschman homicide file during their searches in January 2011, Area 5's re-investigation (conducted by detectives Gilger and Spanos) started (on January 13, 2011) and ended (on February 28, 2011) without detectives ever receiving or reviewing the original file.[641]

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638 Special Grand Jury Exhibit 148 at 3-4 (Yamashiroya, Gary, Kroll Interview Rep. (Feb. 5, 2013)).

639 Special Grand Jury Exhibit 148 at 3 (Yamashiroya, Gary, Kroll Interview Rep. (Feb. 5, 2013)). Yamashiroya's office previously belonged to Byrne when he was Area 3 Commander. Special Grand Jury Exhibit 148 at 3 (Yamashiroya, Gary, Kroll Interview Rep. (Feb. 5, 2013)). According to Yamashiroya, Walsh was present when he found the file in his office credenza. Special Grand Jury Exhibit 148 at 3 (Yamashiroya, Gary, Kroll Interview Rep. (Feb. 5, 2013)); Walsh, Denis, IGO Interview Rep. (Proffer) at 8 (Aug. 14, 2013) (stating that he does not recall if he was present when Yamashiroya found the credenza file). Former Area 3 Commander Chasen did not recall having his own personal Koschman file in his office, but presumes he did because it was a "heater case," which required him to keep his superiors apprised. Chasen, Michael, IGO Interview Rep. at 9 (Nov. 27, 2012).

640 Special Grand Jury Exhibit 148 at 4 (Yamashiroya, Gary, Kroll Interview Rep. (Feb. 5, 2013)); Special Grand Jury Exhibit 109 at 9 (Salemme, Joseph, Kroll Interview Rep. (Jan. 15, 2013)). Furthermore, as part of its investigation, the OSP retrieved and reviewed the file found in Yamashiroya's office credenza and discovered it contained three documents that have not been discovered elsewhere. The first is a CPD CLEAR report run by Yawger (who is identified by his PC Login ID number "PC0N556") on April 25, 2004, at 11:43 a.m. (approximately eight hours after the incident on Division Street) accessing criminal arrest records for Kevin McCarthy. *See* McCarthy, Kevin CLEAR Rep. (Apr. 25, 2004) (CPD001679). The second is the Rita O'Leary draft case supp, which according to Rita O'Leary she typed on April 25, 2004 (the final case supp was not submitted until she returned from furlough on May 20, 2004), with Yawger's handwritten notes. *See* Special Grand Jury Exhibit 14 at CPD001619 (CPD001616-CPD001619) (Draft Case Progress Report 323454 (drafted Apr. 25, 2004)). The third is a document entitled "Koschman Report Summary," which appears to be a rough summary of the investigative steps Area 3 took in 2004 related to the Koschman matter. *See* Koschman Report Summary HK323454 at CPD004594 (CPD004491-CPD004659).

641 At the time Gilger and Spanos conducted their 2011 re-investigation, they only had the benefit of Yamashiroya's credenza file, as well as any 2004 CPD reports existing in CHRIS. *See* Gilger, James, Special Grand Jury Tr. at 84:12-85:14, 91:3-6 (Jan. 16, 2013).

On June 29, 2011, four months after Gilger and Spanos finished their investigation, Walsh reportedly "found" the original Koschman homicide file.[642] According to Walsh, he located the original blue binder Koschman homicide file "on a wooden shelf in [Area 3's] Violent Crimes Sergeants office."[643] The blue binder was reportedly sitting (conspicuously displayed) on a shelf (that had been searched previously) near other Area 3 homicide files which were all housed in white, as opposed to blue, three-ring binders.[644] During Walsh's interview

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642 Walsh, Denis, IGO Interview Rep. (Proffer) at 4 (Aug. 14, 2013); *see also* Internal memorandum from Walsh to Byrne re Koschman File (June 30, 2011) (CPD007132). Yawger testified before the special grand jury that, in 2004, "manila-type expandable" files were used to keep original homicide files and that when he last saw the original homicide file for the Koschman case, it was not in a blue binder. Yawger, Ronald, Special Grand Jury Tr. at 133:20-135:4, 135:23-136:2 (July 15, 2013).

643 Walsh, Denis, IGO Interview Rep. (Proffer) at 4 (Aug. 14, 2013); Internal memorandum from Walsh to Byrne re Koschman File (June 30, 2011) (CPD007132). Besides containing original GPRs, another distinction between the blue binder Walsh reported finding and the other Koschman case files the OSP has discovered during its investigation is that the blue binder contains a table of contents and an investigative file inventory – something to be expected in an original Area 3 homicide file. According to Rossi, he likely created this particular table of contents and inventory. Rossi, Nicholas, Kroll Interview Rep. (Proffer) at 4-6 (Feb. 13, 2013). It should be noted that the documents in the Koschman blue binder homicide file are not in the same order as its table of contents, which indicates that the file may have been rearranged at some point. Walsh told the OSP during his interview that, after he discovered the Koschman blue binder homicide file, he never altered or rearranged it in any way. Walsh, Denis, IGO Interview Rep. (Proffer) at 11 (Aug. 14, 2013). Finally, the blue binder homicide file also contained a single undated GPR that on the front side had Giralamo's PC Login username and password, as well as the word "Vanecko" and the phone number "908-3121." On the back side of the GPR the words, "V Dailey Sister Son" are written. Special Grand Jury Exhibit 92 (CPD001052-CPD001053) (General Progress Report for HK323454). According to phone record subscriber information obtained through a special grand jury subpoena, the phone number "312-908-3121" was associated with Northwestern University in 2004; however, according to the subpoena response, the phone number was not attributed to a particular individual. (*See* AT&T Phone Records (ATT003455-ATT003457)). Yawger testified before the special grand jury in 2013 that he authored this GPR and that he "scribbled" the phrase "V Dailey Sister Son" on the back of the GPR on May 13, 2004, when he was told of Vanecko's involvement during his interview of Bridget McCarthy. Yawger, Ronald, Special Grand Jury Tr. at 73:7-17 (July 15, 2013).

However, the blue binder does not contain the GPRs from Rita O'Leary's April 25, 2004, witness interviews, nor Yawger's GPRs from O'Brien's May 20, 2004, interviews of the McCarthys and Denham.

644 Special Grand Jury Exhibit 116 at 3, (Peterson, Steven, IGO Interview Rep. (Feb. 4, 2013)); Peterson, Steven, IGO Interview Rep. at 37 (Jan 10, 2012); *see also* Special Grand Jury Exhibit 146 at 9 (photograph of the wooden bookshelf where the Koschman blue binder homicide file was allegedly found amongst the white binders).

with the OSP, he stated that Area 3 Sgt. Thomas Flaherty[645] was the only other person in the sergeants' office when he (Walsh) discovered the original blue binder Koschman homicide file.[646] Flaherty told the OSP that, although he could not recall the exact date,[647] he was indeed in the sergeants' office when Walsh retrieved a blue binder from the bookshelf which Walsh immediately told him was the missing Koschman homicide file.[648]

According to a June 30, 2011, memorandum authored by Walsh to Byrne,[649] on June 29,

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645 Flaherty and Walsh are both former Area 4 violent crimes detectives, and from approximately 1996 through 1998 they were CPD partners. *See* Walsh, Denis, IGO Interview Rep. (Proffer) at 2; 4 (Aug. 14, 2013); Flaherty, Thomas, Kroll Interview Rep. at 1-2 (Aug. 21, 2013).

646 Walsh, Denis, IGO Interview Rep. (Proffer) at 3-4 (Aug. 14, 2013).

647 Flaherty explained to the OSP that Walsh instructed him to independently record the date and time Walsh found the blue binder on the bookshelf, an instruction Flaherty told the OSP he did not follow. Flaherty, Thomas, Kroll Interview Rep. at 2 (Aug. 21, 2013).

648 Flaherty, Thomas, Kroll Interview Rep. at 2 (Aug. 21, 2013). According to CPD records, Flaherty was assigned to Area 3 and working the third watch on June 29, 2011. *See* CPD Attendance & Assignment Record, Det. Div. Area 4 at CPD097424 (CPD097424-CPD097431) (June 29, 2011). Furthermore, the OSP, in an attempt to corroborate or potentially disprove Walsh's and Flaherty's statements made to the OSP surrounding Walsh's finding of the Koschman homicide file on June 29, 2011, sought cell phone records and cell phone tower information via special grand jury subpoenas and court orders. The available responsive records the OSP received and reviewed in response to these efforts did not contradict the statements Walsh or Flaherty made to the OSP when interviewed in 2013. Additionally, according to Flaherty, he was alone in the sergeants' office when he observed Walsh walk into the room and watched him pull a blue binder from the bookshelf. Flaherty, Thomas, Kroll Interview Rep. at 2 (Aug. 21, 2013). Flaherty recalled Walsh exclaiming profanities indicating Walsh's surprise that he had just discovered the missing Koschman homicide file. Flaherty, Thomas, Kroll Interview Rep. at 2 (Aug. 21, 2013). Flaherty stated that Walsh informed him that the binder he had found was the missing file "everyone was looking for". Flaherty, Thomas, Kroll Interview Rep. at 2 (Aug. 21, 2013). Flaherty told the OSP that he (Flaherty) did not examine the binder Walsh had discovered, nor did he ever speak to Walsh again about the blue binder Koschman homicide file. Flaherty, Thomas, Kroll Interview Rep. at 2 (Aug. 21, 2013). Flaherty explained to the OSP that before Walsh discovered the binder, he (Flaherty) knew the Koschman homicide file was missing, but that he was never personally asked to search for it. Flaherty, Thomas, Kroll Interview Rep. at 2 (Aug. 21, 2013). Flaherty further explained that he (Flaherty) never spoke to Yamashiroya about Walsh discovering the blue binder. Flaherty, Thomas, Kroll Interview Rep. at 2 (Aug. 21, 2013).

649 According to Yamashiroya, Walsh first reported the discovery of the blue binder Koschman homicide file to him, and then to Byrne. Special Grand Jury Exhibit 148 at 6 (Yamashiroya, Gary, Kroll Interview Rep. (Feb. 5, 2013)); *see* Walsh, Denis, IGO Interview Rep. (Proffer) at 5 (Aug. 14, 2013). Yamashiroya stated that Walsh called him at home the night Walsh discovered the missing Koschman homicide file. Yamashiroya, Gary, Kroll Interview Rep. at 1 (Aug. 21, 2013). According to Yamashiroya, he (Yamashiroya) then called Byrne. Yamashiroya, Gary, Kroll Interview Rep. at 2 (Aug. 21, 2013). During his interview with the OSP, Walsh stated that when he first reported the discovery of

2011 at 9:39 p.m., Walsh "while looking for another file . . . located a blue binder/file that contained what is believed to be the original file" for the Koschman homicide investigation.[650] Walsh's June 30, 2011 memorandum makes no mention of Flaherty's presence when he (Walsh) found the blue binder Koschman homicide file on June 29, 2011.[651] During his interview with the OSP, Walsh stated that, in his opinion, there was no reason to memorialize in his June 30, 2011 memorandum the fact that Flaherty was present when the blue binder was discovered.[652] According to Walsh, he "did not think Tom's [Flaherty] presence was germane. Tom didn't find [the missing blue binder]. I found it and Tom was there when I found it."[653] But according to Yamashiroya, had he known someone else besides Walsh was present in the sergeants' office at

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the blue binder to Yamashiroya that he (Walsh) informed him (Yamashiroya) that Flaherty was in the sergeants' office when he (Walsh) found the blue binder. *See* Walsh, Denis, IGO Interview Rep. (Proffer) at 7 (Aug. 14, 2013). However, according to Yamashiroya, he does not remember Walsh ever telling him that anyone else was present in the sergeants' office when he (Walsh) discovered the missing Koschman homicide file. (Yamashiroya, Gary, Kroll Interview Rep. at 1-2 (Aug. 21, 2013). Walsh also told the OSP that he "probably" also informed Byrne and Andrews that Flaherty was present when he (Walsh) found the blue binder. Walsh, Denis, IGO Interview Rep. (Proffer) at 7 (Aug. 14, 2013). Furthermore, according to Walsh, after he discovered the Koschman blue three-ring homicide binder, he asked Byrne to take and maintain the file, but Byrne refused and ordered Walsh to keep it. Walsh, Denis, IGO Interview Rep. (Proffer) at 5 (Aug. 14, 2013). In response, according to Walsh, he then locked the file in a cabinet in his Area 3 office and later took the file home and placed it in his personal safe for some period of time, until William Bazarek (First Assistant General Counsel to CPD) told him that keeping an original homicide file at his home was not a good decision. Walsh, Denis, IGO Interview Rep. (Proffer) at 5 (Aug. 14, 2013). Byrne instructed Walsh to record the discovery of the Koschman homicide file in a memorandum. Special Grand Jury Exhibit 120 at 12 (Byrne, Thomas, Kroll Interview Rep. (Jan. 9, 2013)). According to Yamashiroya, he (Yamashiroya) told Walsh a memorandum should be written to document the finding of the missing Koschman binder. Yamashiroya, Gary, Kroll Interview Rep. at 2 (Aug. 21, 2013). Yamashiroya signed and approved the Walsh to Byrne June 30, 2011 memorandum authored by Walsh. *See* Yamashiroya, Gary, Kroll Interview Rep. at 2 (Aug. 21, 2013); Internal memorandum from Walsh to Byrne re Koschman File (June 30, 2011) (CPD007132).

650 Internal memorandum from Walsh to Byrne re Koschman File (June 30, 2011) (CPD007132); Walsh, Denis, IGO Interview Rep. (Proffer) at 4 (Aug. 14, 2013). Witnesses have confirmed that the collective understanding at CPD is that Walsh found the original Koschman homicide file when he discovered the blue binder in June 2011. *See, e.g.,* Peterson, Steven, IGO Interview Tr. at 36-37 (Jan 10, 2012); Cirone, Sam, Kroll Interview Rep. (Proffer) at 15 (Mar. 22, 2013); Special Grand Jury Exhibit 148 at 6 (Yamashiroya, Gary, Kroll Interview Rep. (Feb. 5, 2013)).

651 Internal memorandum from Walsh to Byrne re Koschman File (June 30, 2011) (CPD007132).

652 Walsh, Denis, IGO Interview Rep. (Proffer) at 4 (Aug. 14, 2013).

653 Walsh, Denis, IGO Interview Rep. (Proffer) at 6 (Aug. 14, 2013).

the exact moment Walsh found the binder, he (Yamashiroya) "would have [] suggested [that fact] be included" in the Walsh to Byrne June 30, 2011 memorandum.[654]

Former Deputy Superintendent Peterson stated "common sense" dictates that someone had to have placed (after the original search efforts in January 2011[655] were unsuccessful) the blue binder Koschman homicide file on the shelf (next to all the white binders) knowing it would be found.[656] When interviewed by the OSP, Walsh stated the blue three-ring binder was "clearly" "put there" by someone to be easily discovered.[657]

Even though, according to Walsh, as soon as he discovered the missing Koschman original homicide file, he knew an internal investigation would be conducted into the incident,[658] it was not until July 20, 2011, approximately three weeks after Walsh reported finding the blue binder Koschman homicide file, that he initiated, upon a superior's instruction, a written CPD Internal Affairs Department ("IAD") complaint.[659] In the complaint, he stated that he had located what he believed was the original Koschman homicide file in an area that "had been [previously] searched numerous times in an effort to locate said file."[660] As Walsh reported, the original Koschman homicide file "believed to have been lost was obviously not lost" and instead had been "removed and returned in violation of department rules and regulations" by an

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654 *See* Yamashiroya, Gary, Kroll Interview Rep. at 2 (Aug. 21, 2013).

655 Walsh, Denis, IGO Interview Rep. (Proffer) at 4 (Aug. 14, 2013) (stating that he had "given up" looking for the missing Koschman homicide file in January or February 2011).

656 Peterson, Steven, IGO Interview Tr. at 61 (Jan 10, 2012).

657 Walsh, Denis, IGO Interview Rep. (Proffer) at 4 (Aug. 14, 2013).

658 *See* Walsh, Denis, IGO Interview Rep. (Proffer) at 4 (Aug. 14, 2013).

659 Walsh, Denis, IGO Interview Rep. (Proffer) at 5-6 (Aug. 14, 2013); Walsh memorandum re Initiation of CL # 1047119 (July 20, 2011) (CPD005770). During his interview with the OSP, Walsh could not recall which of his superiors ordered him to file the IAD complaint, but Walsh stated it was either Byrne, Andrews, or Yamashiroya. Walsh, Denis, IGO Interview Rep. (Proffer) at 6 (Aug. 14, 2013). According to Yamashiroya, it was Byrne that ordered Walsh to secure a CR # so an internal investigation could be conducted into the missing (now found) Koschman homicide file. Yamashiroya, Gary, Kroll Interview Rep. at 2 (Aug. 21, 2013).

660 Walsh memorandum re Initiation of CL # 1047119 (July 20, 2011) (CPD005770).

"Unknown Chicago Police Officer."[661] Despite what Walsh wrote, during his interview with the OSP, he stated he did not necessarily agree with his superior's order for him to file an IAD complaint, noting that "on its face is there a real rule violation?"[662] IAD categorized its investigation as a "misuse of Department records."[663]

On August 24, 2011, and in response to Walsh's complaint, IAD Sgt. Richard Downs interviewed Walsh.[664] Downs' interview of Walsh lasted 10 minutes.[665] It was the only interview IAD conducted in response to Walsh's complaint. During the interview, Walsh did not disclose that Flaherty was in the sergeants' office on June 29, 2011, at the moment he (Walsh) discovered the missing Koschman homicide file.[666] According to Walsh, Downs simply did not ask him during the interview if anyone else was with him (Walsh) when he found the missing Koschman homicide file.[667] When the OSP asked Walsh why he did not aid Downs' investigation by informing him (Downs) of Flaherty's presence (regardless of whether he was asked), Walsh stated that, in his opinion, "you don't volunteer things" to IAD.[668] The very next day, Downs submitted his IAD investigative report to his commanding officer for approval.[669] Downs' report concluded that "[b]ased on the available evidence gathered in this investigation, and the inability to identify any accused," the allegation is "Not Sustained."[670] IAD conducted no other investigative work on the matter. Its investigation into Walsh's complaint ended one

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661 Walsh memorandum re Initiation of CL # 1047119 (July 20, 2011) (CPD005770); *see also* Internal Affairs Face Sheet (July 20, 2011) (CPD001791-CPD001792).

662 Walsh, Denis, IGO Interview Rep. (Proffer) at 5-6 (Aug. 14, 2013).

663 Internal Affairs Face Sheet at CPD001791 (July 20, 2011) (CPD001791-CPD001792).

664 Walsh IAD Interview Tr. at 1797-99 (Aug. 24, 2011) (CPD001784-CPD001810).

665 Walsh, Denis, IGO Interview Rep. (Proffer) at 6 (Aug. 14, 2013); Walsh IAD Interview Tr. at 1797-99 (Aug. 24, 2011) (CPD001784-CPD001810).

666 Walsh, Denis, IGO Interview Rep. (Proffer) at 6 (Aug. 14, 2013).

667 Walsh, Denis, IGO Interview Rep. (Proffer) at 6 (Aug. 14, 2013).

668 Walsh, Denis, IGO Interview Rep. (Proffer) at 6 (Aug. 14, 2013).

669 Downs memorandum at CPD001800 (Aug. 25, 2011) (CPD001784-CPD001810).

670 Summary Rep. Digest CL # 1047119 at CPD001801-CPD001803 (Aug. 25, 2011) (CPD001784-CPD001810).

day after it began.

iii. Det. Yawger's "Working File"

During the course of its investigation, the OSP learned that, besides maintaining one permanent and original homicide file for each Area 3 homicide investigation, Area 3 detectives also typically kept their own personal "working file" for each case they were assigned.[671] The typical "working file" contains copies of reports and GPRs for the detective's use when performing tasks related to an investigation.[672]

On June 30, 2011 (the day after Walsh "found" the purportedly original Koschman homicide file), Yawger (who retired from CPD in 2007) visited Area 3 and reportedly found his 2004 Koschman "working file."[673] According to Yawger, he called Walsh to make arrangements to copy the original Koschman homicide file so he could prepare for his interview with the IGO, which was scheduled to (and did) occur the next day (July 1, 2011).[674] While Yawger waited to

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671 *See, e.g.*, Chasen, Michael, IGO Interview Rep. at 1-2 (Nov. 27, 2012); Redman, Charles, IGO Interview Rep. (Proffer) at 3 (Oct. 31, 2012).

672 *See, e.g.*, Chasen, Michael, IGO Interview Rep. at 1-2 (Nov. 27, 2012); Redman, Charles, IGO Interview Rep. (Proffer) at 3 (Oct. 31, 2012). In theory, according to Rossi, the permanent and original file mirrored the information that was in the working file, and vice versa. Rossi, Nicholas, Kroll Interview Rep. (Proffer) at 3 (Feb. 13, 2013).

673 Furthermore, as discussed above, Nanci Koschman and her attorney (Loretto Kennedy) met with Yawger in July 2004, at Area 3 headquarters to discuss the case. During Kennedy's telephonic interview with the OSP on January 2, 2013, she recalled that Yawger had a manila file folder with him during this meeting that was about an inch and a half thick. Kennedy, Loretto, IGO Interview Rep. at 1 (Jan. 2, 2013). According to Kennedy, neither she nor Mrs. Koschman were permitted to view Yawger's manila file during the meeting, and in fact, when Kennedy requested a copy, Yawger told her that she needed to subpoena the documents or file a FOIA request. Kennedy, Loretto, IGO Interview Rep. at 2 (Jan. 2, 2013).

674 Yawger, Ronald, Special Grand Jury Tr. at 98:23-99:2 (July 15, 2013); Yawger, Ronald, IGO Interview Tr. at 54:21-55:2 (July 1, 2011). As previously noted, IGO opened up its own investigation amid the allegations of police misconduct on February 28, 2011, 14 months prior to the appointment of the Special Prosecutor. Furthermore, in a letter dated March 10, 2011, IGO requested from CPD "[c]opies of any and all unredacted documentation" related to the David Koschman investigation, RD# HK-323454. (Grossman letter to Price (Mar. 10, 2011) (CCSAO_014410).) On March 28, 2011, CPD responded via letter, stating the following: "In response to your written request of March 10, 2011 for copies of any and all unredacted documents related to the David Koschman investigation, please find enclosed materials provided to the Office of Legal Affairs by the Record Services Division." (Price letter to Grossman (Mar. 28, 2011) (IG_007571).) CPD's letter to IGO did not mention that the materials

meet with Walsh,[675] he went into Area 3's detective locker room, where he found his Koschman "working file" in a box labeled with his (Yawger's) name on it.[676] Walsh submitted a second memorandum to Byrne on June 30, 2011, regarding Yawger's visit to Area 3, which stated in part: "On 30Jun11 at approximately 1420 hours [2:20 p.m.] the R/Lt. [Walsh] met with Retired Detective Ronald Yawger who turned over to the undersigned a file which contained reports relative to the Koschman investigation."[677]

According to Yamashiroya, there were approximately 20 file cabinets in the men's locker room at Area 3 that detectives stored files in (and on top of) in June 2011.[678] However, it remains unclear why Yawger's "working file" was not discovered in CPD's initial searches in 2011 of Area 3, especially because according to Yamashiroya, the locker room area had

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produced to IGO did not include original files, that CPD was aware that the original Koschman homicide file was missing, and/or that CPD personnel had already searched for the original file.

675 When Yawger arrived at Area 3, a sergeant informed him that Walsh would be in a meeting for another hour. Yawger, Ronald, Special Grand Jury Tr. at 99:9-14 (July 15, 2013).

676 Yawger, Ronald, IGO Interview Rep. at 1 (July 1, 2011); Peterson, Steven, IGO Interview Tr. at 38:21-24 (Jan. 10, 2012). Before the special grand jury, Yawger testified that while employed at Area 3, he used two lockers and "two full drawers of files" in the detectives' locker room. Yawger, Ronald, Special Grand Jury Tr. at 99:16-100:2 (July 15, 2013). When Yawger retired in 2007, he cleaned out the lockers, but not the file drawers. Yawger, Ronald, Special Grand Jury Tr. at 99:20-21 (July 15, 2013). Yawger testified that while in the locker room at Area 3 on June 30, 2011, the file drawers he previously used were occupied by current detectives, but that above those file drawers were two boxes with his name written on them. Yawger, Ronald, Special Grand Jury Tr. at 100:3-7 (July 15, 2013). According to Yawger, he found his working file in one of the two boxes. Yawger, Ronald, Special Grand Jury Tr. at 100:12-16 (July 15, 2013).

According to Yawger, Yamashiroya and Walsh would not permit him to keep his working file, but they did allow him to make copies, which he did. *See* Yawger, Ronald, IGO Interview Tr. at 55:9-11; 60:1-16 (July 1, 2011); *see also* Epach, Thomas, IGO Interview Rep. at 1 (Jan. 31, 2013) (According to Epach, Yawger also sent him copies of certain Koschman CPD reports in 2011); Special Grand Jury Exhibit 149 (police reports Yawger sent to Epach in 2011). Before the special grand jury, Yawger testified that Yamashiroya refused to let Yawger remove his working file from Yamashiroya's office. Yawger, Ronald, Special Grand Jury Tr. at 101:16-18 (July 15, 2013). Yawger testified that he thinks Walsh explained that he could not remove the working file because of an "IAD beef." Yawger, Ronald, Special Grand Jury Tr. at 101:20-102:17 (July 15, 2013). As noted previously, that an IAD complaint with regard to the missing blue binder was first filed on July 20, 2011, nearly three weeks after its discovery. When interviewed by the OSP, Walsh stated he never told Yawger on June 30, 2011, that an IAD investigation was underway. Walsh, Denis, IGO Interview Rep. (Proffer) at 8 (Aug. 14, 2013).

677 Walsh memorandum re Yawger file (June 30, 2011) (CPD007131).

678 Special Grand Jury Exhibit 148 at 8-9 (Yamashiroya, Gary, Kroll Interview Rep. (Feb. 5, 2013)).

previously been searched.[679] During his interview with the OSP, Yamashiroya stated that it was both "embarrassing" and "shocking" that missing files (both the discovery of the "original" Koschman homicide file as well as Yawger's "working file") were turning up with little explanation for their sudden appearance.[680] During his interview, Walsh told the OSP that he was "surprised" that Yawger gave him a second set of Koschman files only one day after the Koschman blue three-ring binder had been discovered.[681]

The OSP obtained phone records indicating Yawger communicated with Walsh (or Area 3) by phone or text message no less than six times from January 2011 through June 2011, including a more than four-minute telephone conversation[682] with Area 3 (and possibly Walsh himself)[683] one day before Walsh reportedly found the missing "original" Koschman homicide file, and two days before Yawger himself "discovered" his Koschman "working file" in Area 3's locker room.[684] When the OSP asked Walsh about these phone and text messages between

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679 Special Grand Jury Exhibit 148 at 8-9 (Yamashiroya, Gary, Kroll Interview Rep. (Feb. 5, 2013)). According to Walsh, the locker room at Area 3 had previously been searched, but only for the original Koschman homicide file, not for Yawger's "working file." *See* Walsh, Denis, IGO Interview Rep. (Proffer) at 7 (Aug. 14, 2013).

680 Special Grand Jury Exhibit 148 at 8 (Yamashiroya, Gary, Kroll Interview Rep. (Feb. 5, 2013)). Yamashiroya also stated it was unusual that Yawger found his file years after his retirement. Special Grand Jury Exhibit 148 at 9 (Yamashiroya, Gary, Kroll Interview Rep. (Feb. 5, 2013)).

681 Walsh, Denis, IGO Interview Rep. (Proffer) at 7 (Aug. 14, 2013).

682 *See* AT&T Phone Records for Ronald Yawger (June 28, 2011) (ATT003756). Before the special grand jury, Yawger testified that he did not recall speaking with Walsh on June 28, 2011, and had "no idea who I spoke to" that day. Yawger, Ronald, Special Grand Jury Tr. at 96:20-97:13 (July 15, 2013).

683 Yawger, Ronald, Special Grand Jury Tr. at 97:14-98:3 (July 15, 2013).

684 Phone records indicate that months earlier, on January 4, 2011, the same day the *Sun-Times* issued a FOIA request to CPD regarding the Koschman case, Yawger called Area 3. *See* AT&T Phone Records for Ronald Yawger (Jan. 4, 2011) (ATT003683). Then, on January 18, 2011 (a few days after CPD made the decision to re-investigate the Koschman matter), Walsh twice used his Blackberry to call Yawger's cell phone twice. AT&T Phone Records for Ronald Yawger (Jan. 18, 2011) (ATT003690). Furthermore, a little over a week later, Walsh texted Yawger's cell phone. AT&T Phone Records for Ronald Yawger (Jan. 26, 2011) (ATT004652). Lastly, on April 20, 2011, five days after IGO sent a written request to CPD for "[a]ny and all original detective interview notes [GPRs] from the David Koschman investigation," Walsh used his Blackberry to once again call Yawger's cell phone. AT&T Phone Records for Ronald Yawger (Apr. 20, 2011) (ATT003729); Grossman letter (April 15, 2011) (CCSAO_014412).

Yawger and himself, he could not recall contacting Yawger in 2011, except in January 2011 when, as discussed above, Walsh was instructed by his superiors (shortly after the decision was made by CPD to have Area 5 re-investigate the case) to speak with Yawger regarding his work on the 2004 CPD investigation.[685]

iv. Det. Clemens' Discovery

During the course of its investigation, the OSP learned of yet another version of the Koschman homicide file at Area 3 (which had not been identified or reported previously by CPD, SAO or IGO). Although the OSP has not been able to locate this additional version, Clemens' special grand jury testimony vividly describes a Koschman homicide file he found in 2011 which is different from the "credenza file" Yamashiroya discovered, the "blue three-ring binder" Walsh found, and the "working file" Yawger located.

According to Clemens' testimony before the special grand jury, between late February 2011 and late July 2011,[686] he found a Koschman homicide file on a table near the photocopier in the detective area at Area 3.[687] According to Clemens, no other homicide files were on the table where he found the file.[688] Because personnel at Area 3 frequent the area where Clemens found the Koschman homicide file, he believed that if the file had been on the table for any substantial amount of time, a colleague would have discovered it before he did.[689]

Clemens testified before the special grand jury that the Koschman homicide file he found was contained in a blue hardcover "flip binder" (not a three-ring binder) with what he described

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685 Walsh, Denis, IGO Interview Rep. (Proffer) at 7 (Aug. 14, 2013).

686 According to Clemens' 2013 special grand jury testimony, he likely found the Koschman homicide file at some point between February 28, 2011, when the *Sun-Times* first started publishing articles in 2011 about the Koschman case, but before he read any articles regarding missing files and the Koschman case. Clemens, Robert, Special Grand Jury Tr. 49:10-51:12 (Apr. 24, 2013); *see also* Clemens, Robert, Kroll Interview Rep. (Proffer) at 11 (Oct. 25, 2012). The *Sun-Times* story "*Who Killed David Koschman? A Watchdog's Investigation* was first published on February 28, 2011. Special Grand Jury Exhibit 142 (NEWS000022-NEWS000027) (Novak, Fusco, Marin, *Who Killed David Koschman? A Watchdog's Investigation*, *Sun-Times* (Feb. 28, 2011)). The *Sun-Times* first reported missing files related to the Koschman investigation on July 25, 2011. Novak, Fusco, *More Missing Files in David Koschman Case, Cops Still Close It* (July 25, 2011) (NEWS000193).

687 Clemens, Robert, Special Grand Jury Tr. at 30:16-20 (Apr. 24, 2013).

688 Clemens, Robert, Special Grand Jury Tr. at 49:7-9 (Apr. 24, 2013).

689 Clemens, Robert, Special Grand Jury Tr. at 48:7-14 (Apr. 24, 2013).

as a "mailing label" or "Avery label" with the name "Koschman" on it.[690] Clemens described the dimensions of the spineless folder as 9.5 inches wide, 11-12 inches long, and 2-2.5 inches thick.[691] While Clemens testified that he did not open the binder to review its contents, he noted the documents had two holes in them and were fastened in the flip binder via two metal spindles[692] (a description other detectives have provided when asked how Area 3 kept permanent homicide files in 2004).[693] When shown a color photo of the "original" Koschman homicide file Walsh reportedly found in 2011 (the blue three-ring binder), Clemens testified that the photo depicted something different than the file he found at Area 3 in 2011 (because the Koschman homicide file he found was not a three-ring binder).[694]

According to Clemens, homicide files were not to be left unattended "on the floor" at Area 3.[695] After finding the Koschman homicide file, he brought it to Walsh.[696] Clemens testified that he brought the file to Walsh because he was "certainly aware of its importance"[697] due to the fact that the Koschman case had been the subject of newspaper articles.[698] Clemens testified that when he gave Walsh the homicide file, he told Walsh, "you don't want this out on the floor," to which Walsh responded, "this thing's got legs."[699] Clemens testified he is unsure whether Walsh's comment was meant to indicate that the Koschman homicide file Clemens had

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690 Clemens, Robert, Special Grand Jury Tr. at 35:10-38:3, 59:5, 40:12-17 (Apr. 24, 2013).

691 Clemens, Robert, Special Grand Jury Tr. at 35:10-38:3; 64:14-18 (Apr. 24, 2013).

692 Clemens, Robert, Special Grand Jury Tr. at 35:10-38:3, 41:1-5, 58:4-9 (Apr. 24, 2013).

693 *See* Rossi, Nicholas, Kroll Interview Rep. (Proffer) at 3 (Feb. 13, 2013); Sobolewski, Andrew, IGO Interview Tr. at 44 (Aug. 5, 2011); Redman, Charles, IGO Interview Rep. (Proffer) at 2-3 (Oct. 31, 2012).

694 Clemens, Robert, Special Grand Jury Tr. at 60-64 (Apr. 24, 2013).

695 Clemens, Robert, Kroll Interview Rep. (Proffer) at 11 (Oct. 25, 2012).

696 Clemens, Robert, Special Grand Jury Tr. at 41:7-9 (Apr. 24, 2013).

697 Clemens, Robert, Special Grand Jury Tr. at 44:17-22 (Apr. 24, 2013).

698 Clemens, Robert, Kroll Interview Rep. (Proffer) at 11 (Oct. 25, 2012).

699 Clemens, Robert, Special Grand Jury Tr. at 40:20-22, 42:9-11 (Apr. 24, 2013).

just given him "has legs," or whether Walsh meant that the entire Koschman case "has legs."[700] According to Clemens, Walsh did not express any surprise or shock when he gave him the Koschman homicide file that he had found.[701] When the OSP interviewed Walsh and informed him of Clemens' grand jury testimony, Walsh stated he had no memory of any of Clemens' assertions, and further stated he did not recall Clemens ever handing him a Koschman file or any document connected to the Koschman investigation.[702]

There is no mention of Clemens' 2011 discovery of the Koschman homicide file in any CPD records. For example, Walsh's June 2011 internal CPD memoranda regarding the discovery of additional Koschman files do not mention it, nor does Walsh's July 2011 IAD complaint, nor does IAD's August 2011 investigative findings report (which included IAD's interview of Walsh).[703]

v. Det. Gilger and Det. Spanos Review the Homicide Files "Discovered" by Lt. Walsh and Det. Yawger

On July 20, 2011, the same day that Walsh filed his IAD complaint, he also informed Area 5 detectives Gilger and Spanos (both of whom had conducted the Koschman case re-investigation) of the existence of the Koschman homicide files Yawger and he had discovered approximately three weeks earlier.[704]

Gilger and Spanos, later that same evening (July 20, 2011), and in response to Walsh's

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700 Clemens, Robert, Special Grand Jury Tr. at 42-43 (Apr. 24, 2013).

701 Clemens, Robert, Kroll Interview Rep. (Proffer) at 11 (Oct. 25, 2012). Clemens classified his discovery of the Koschman file as a "non-event." Clemens, Robert, Special Grand Jury Tr. at 42:21-22 (Apr. 24, 2013). He said he described finding the file as a "non-event" because at the time, he did not know any files related to the Koschman case were missing. Clemens, Robert, Special Grand Jury Tr. at 66:4-19 (Apr. 24, 2013) (testifying that had he read newspaper articles regarding the missing files, and that if he had found the file after reading such articles, it would have been a "significant event" that would have affected to whom he reported his discovery of the file).

702 Walsh, Denis, IGO Interview Rep. (Proffer) at 2-3 (Aug. 14, 2013).

703 Clemens was never interviewed by IAD; Clemens, Robert, Special Grand Jury Tr. at 56:16-18 (Apr. 24, 2013).

704 Walsh memorandum re Initiation of CL # 1047119 (July 20, 2011) (CPD005770). Special Grand Jury Exhibit 91 at CPD001197-CPD001198 (CPD001187-CPD001198) (Case Supplementary Report HK323454 (approved Sept. 1, 2011)).

notification, went to Area 3's headquarters to review the recently discovered homicide files.[705] After reviewing the files, Gilger and Spanos determined that neither file changed their conclusions about the case (as had been memorialized in their February 28, 2011 case supp).[706] In fact, in a report memorializing their review of the file, Gilger wrote that "none of the new information would have changed the outcome of the investigation," therefore, the Koschman case would remain "CLEARED EXCEPTIONALLY, CLOSED."[707]

D. CPD 2011 Re-investigation and the Mayor's Office

During the course of the OSP's investigation, it discovered evidence demonstrating that the Office of the Mayor ("Mayor's Office") was involved in CPD's response to the *Sun-Times* January 4, 2011 FOIA request, as well as certain CPD press statements regarding the 2011 Koschman case re-investigation. However, there is no evidence gathered by the OSP that demonstrates that then-Mayor Daley directed his staff's actions. Mayor Daley, when interviewed by OSP, stated that he learned about the Koschman incident "sometime" after it occurred, although he was unable to say exactly when.[708] Mayor Daley also stated that he had

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[705] Special Grand Jury Exhibit 91 at CPD001197-CPD001198 (CPD001187-CPD001198) (Case Supplementary Report HK323454 (approved Sept. 1, 2011)).

[706] Special Grand Jury Exhibit 15 at CPD001206-CPD001207 (CPD001199-CPD001234) (Case Supplementary Reports 8585610 and 8585620 (approved Feb. 28, 2011)); Special Grand Jury Ex. 91 at CPD001197-CPD001198 (CPD001187-CPD001198) (Case Supplementary Report HK323454 (approved Sept. 1, 2011)).

[707] Special Grand Jury Exhibit 91 at CPD001198 (CPD001187-CPD001198) (Case Supplementary Report HK323454 (approved Sept. 1, 2011)) (listing those materials that Gilger and Spanos reported as "discovered" in the blue three-ring binder, as: (1) chronological table of contents; (2) investigative file inventory; (3) crime scene processing reports related to the lineup photos; (4) GPR with Giralamo's PC Login Username and Password, the word "Vanecko" with a phone number and then "V Dailey Sister Son" on the back; (5) copy of Yawger's May 12, 2004 GPR from the Allen interview (with additional legible printing that says "at one point, three guys said fuck it, let's go. Victim says, yeah, you better back down"); (6) morgue photos; *see also* Special Grand Jury Exhibit 151 at 15 (Hehner, Walt, IGO Interview Rep. (Jan. 30, 2013)) (agreeing that the Yawger "working file" did not "shed any light" on the investigation).

[708] Mayor Daley, Richard M., IGO Interview Rep. at 1 (Apr. 26, 2013). According to Matthew Crowl (Former Mayoral Deputy Chief of Staff for Public Safety), he was informed by someone at CPD of Mayor Daley's nephew's involvement in the incident on Division Street and immediately informed Mayor Daley in person of what he had heard. Crowl, Matthew, IGO Interview Rep. at 2 (April 25, 2013). While Crowl was uncertain of the exact date, he believed he became aware of the Koschman matter shortly after the incident. Crowl, Matthew, IGO Interview Rep. at 2 (Apr. 25, 2013). It was not clear

made it clear to his staff and the public that because he was Vanecko's uncle, he had recused himself from any involvement in the Koschman matter.[709]

On January 4, 2011, an unknown member of CPD's FOIA[710] unit forwarded Novak's January 4, 2011, FOIA request to CPD First Assistant General Counsel Bill Bazarek, CPD General Counsel Debra Kirby, CPD Legal Affairs James McCarthy, CPD Legal Affairs Terrence

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whether Mayor Daley was already aware of the incident when Crowl made the disclosure to him. Crowl, Matthew, IGO Interview Rep. at 2 (Apr. 25, 2013). At his interview with the OSP, Mayor Daley did not recall Crowl advising him of the incident. Mayor Daley, Richard M., IGO Interview Rep. at 1 (Apr. 26, 2013).

[709] Mayor Daley told the OSP he never had substantive discussions with his staff about the law enforcement investigations into Koschman's homicide nor did he ever direct anyone how to handle the matter. The OSP's interviews of his staff confirmed these statements by Mayor Daley. He stated he was not aware of how the *Sun-Times* FOIA request was handled, nor was he aware his staff had any involvement therein. Mayor Daley said that when he was mayor, at any time that he heard news involving his family members, his immediate response, in substance was "no comment, and no interference with City affairs." He further explained, he is "elected with the public's trust" which he stated he would never "jeopardize." He characterized his actions as "recusing" himself from the matter. Mayor Daley, Richard M., IGO Interview Rep. at 1 (Apr. 26, 2013).

Additionally, the OSP interviewed four members of CPD who were assigned to Mayor Daley's security detail in April 2004, including both lower-ranking security specialists and higher-ranking commanders. Each officer interviewed denied having any personal knowledge of the Koschman incident, or of the response to or investigation of the Koschman incident. *See* Weingart, Carol, Kroll Interview Rep. at 4 (Dec. 6, 2012); Roti, Sam, IGO Interview Rep. at 2-3 (Dec. 17, 2012); Thompson, Brian, Kroll Interview Rep. at 5-6 (Feb. 8, 2013); Keating, James, IGO Interview Rep. at 3 (Mar. 11, 2013).

[710] The e-mail "from" line simply said: foia@chicagopolice.org. The function of CPD's FOIA Department is to handle all requests for information, including requests from the media. O'Brien, Rory, Kroll Interview Rep. (Proffer) at 2 (Jan. 15, 2013). Since 2010, the department has accepted FOIA requests through e-mail, which can arrive via links on CPD and city's websites. No matter the source, the e-mail requests are routed to a single inbox that all FOIA officers can access. When requests are received they are printed out, time and date stamped, entered into the department's FOIA log (a database used to track who is working on a request and when a response is sent), and placed in a bin. Individual FOIA officers then pull requests from the bin to process them. An officer typically handles five requests at a time. Sandoval, Matthew, Kroll Interview Rep. (Proffer) at 2-3 (Jan. 11, 2013).

In processing a request, the officer first determines what exactly is being requested, whether a responsive record exists, and whether any records are exempt from release. FOIA officers are also responsible for redacting information as necessary — e.g., any information that would invade someone's privacy or allow a witness to be identified. Sandoval, Matthew, Kroll Interview Rep. (Proffer) at 3 (Jan. 11, 2013); O'Brien, Rory, Kroll Interview Rep. (Proffer) at 5 (Jan. 15, 2013). Redaction decisions are sometimes made by the City Law Department, but it is not the case that they are always approved by the Mayor's Office. *See* O'Brien, Rory, Kroll Interview Rep. (Proffer) at 2, 5 (Jan. 15, 2013). After determining what redactions are needed, the officer prepares a letter summarizing the information being provided, or, alternatively, why the request is being denied. Sandoval, Matthew, Kroll Interview Rep. (Proffer) at 3 (Jan. 11, 2013).

Collins, Commanding Officer Chicago News Affairs Lt. Maureen Biggane, City Law Department attorney Karen Coppa, and City Law Department FOIA Ofc. Jennifer Hoyle.[711] On January 11, 2011, Sgt. Melinda Polan e-mailed Bazarek informing him that Ofc. Rory O'Brien would be handling Novak's FOIA request, that the case involved "Vanecko-mayor's nephew," and asking whether Bazarek thought "Chief of Staff or anyone else [should] be notified?"[712]

On January 10, 2011, at 5:02 p.m., Hoyle e-mailed Rosa Escareno and Jodi Kawada (both Deputy Press Secretaries in the Mayor's Office) informing them of the *Sun-Times* FOIA request, as follows:[713]

> **From:** Hoyle, Jennifer
> **Sent:** Monday, January 10, 2011 05:02 PM
> **To:** Escareno, Rosa; Kawada, Jodi
> **Subject:** FOIA issue
>
> Could one of you guys give me a call regarding the following item that was on the agenda for Thursdays' FOIA meeting? The meeting was cancelled so we didn't get a chance to discuss it but I want to give someone a head's up. If you google this guy's name, you'll understand why.
>
> **#411:** Tim Novak (Sun Times) submitted a request to CPD for all police reports regarding a fight at 35 W. Division at 3:15 am on April 25, 2004 involving David Koschman, 21, who later died of head injuries. The request was submitted on January 4th and the response is due January 11th.
>
> **Notes:** Novak is interested in one of the bystanders to this fight.

When asked by the OSP, Hoyle stated that she had no concerns about giving the Mayor's Office a "heads up" about a story involving the mayor's nephew, since she wanted them to be

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711 E-mail from foia@chicagopolice.org (Jan. 4, 2011) (CPD011991). When requests are submitted by members of the media, the FOIA officers are instructed — pursuant to departmental "practice" — to notify members of specific departments, including CPD News Affairs, City News Affairs, CPD Law, City Law, and the Records Division. Sandoval, Matthew, Kroll Interview Rep. (Proffer) at 4 (Jan. 11, 2013); O'Brien, Rory, Kroll Interview Rep. (Proffer) at 2 (Jan. 15, 2013). At one time, the practice was to notify the different departments only about newsworthy events, but now — and in 2011 — the departments are notified whenever any media request is received. Sandoval, Matthew, Kroll Interview Rep. (Proffer) at 2-4 (Jan. 11, 2013). The FOIA Department maintains an additional list of departments that are notified when a FOIA request is approved, and/or when a draft FOIA response is to be circulated. O'Brien, Rory, Kroll Interview Rep. (Proffer) at 2 (Jan. 15, 2013).

712 Polan e-mail (Jan. 20, 2011) (CPD000702). According to Bazarek, "Chief of Staff" referred to the Chief of Staff of CPD, who at that time was Mike Masters. Bazarek had no recollection of notifying Masters about the FOIA request. Bazarek, William, Kroll Interview Rep. at 6-7 (Mar. 13, 2013).

713 Hoyle e-mail (Jan. 10, 2011) (MAYOR_OFFICE022541).

prepared in case the mayor was asked a question about it.[714] The next morning Escareno e-mailed Hoyle, copying Kawada, asking "who is the bystander??"[715] Kawada thereafter responded to Escareno, copying Hoyle, telling her that "Rosa [I']ll brief u [sic] on this."[716]

A few minutes later, Hoyle sent Escareno two e-mails: the first attaching the *Chicago Tribune's* May 22, 2004 article about Vanecko's presence at the April 25, 2004 incident,[717] and the second stating as follows:[718]

From: Hoyle, Jennifer <[redacted]@cityofchicago.org>
Sent: Tuesday, January 11, 2011 10:15 AM
To: Escareno, Rosa <[redacted]@ex.cityofchicago.org>
Subject: one more thing

Media outlets reported in 2004 that no one would be charged in connection with Dave Koschman's death. I doubt that Novak realizes he will be getting reports with the witnesses names redacted. I think that he believes that because this case is closed, CPD would not redacted any of the reports and that he would have access to all of the information, including the names of witnesses. That would give the Sun Times the opportunity to write a story with new information.

On January 13, 2011, a discussion of the *Sun-Times* FOIA request took place at the weekly FOIA meeting at the City's Law Department. Another, more detailed, discussion of the request took place at the January 20, 2011 FOIA meeting. Hoyle recalled that the discussion was more detailed at the second meeting because, by then, the participants were aware of the re-investigation.[719] At the second meeting, it was decided that the *Sun-Times* FOIA request would be denied because the Koschman case was an open investigation.[720] The attendees also discussed press strategy, deciding that the official response would be to inform the *Sun-Times* that it would get the requested information "in a little while" if the investigation was to be closed

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714 Hoyle, Jennifer, Kroll Interview Rep. at 3 (Jan. 18, 2013).

715 Hoyle e-mail (Jan. 10, 2011) (DOIT011671).

716 Kawada e-mail (Jan. 11, 2011) (DOIT011721).

717 Hoyle e-mail (Jan. 11, 2011) (MAYOR_OFFICE022542).

718 Hoyle e-mail (Jan. 11, 2011) (MAYOR_OFFICE022543).

719 Hoyle, Jennifer, Kroll Interview Rep. at 3 (Jan. 18, 2013).

720 Hoyle, Jennifer, Kroll Interview Rep. at 3 (Jan. 18, 2013).

(which Hoyle believed would occur in a few weeks).[721]

Meanwhile, on January 18, 2011, just five days after Gilger and Spanos were told to reinvestigate the Koschman incident, Biggane sent the following e-mail to members of the Mayor's Office, including Press Secretary Jackie Heard, Kawada, Escareno, and Assistant Press Secretary Lance Lewis:[722]

> **From:** Biggane, Maureen C. [mailto [redacted]@chicagopolice.org]
> **Sent:** Tuesday, January 18, 2011 12:19 PM
> **To:** Kawada, Jodi; Lewis, Lance; Escareno, Rosa
> **Cc:** Heard, Jackie
> **Subject:** FOIA Request
>
> FYI: Tim Novak has requested through FOIA reports on an investigation from 2004, where an individual died after late night brawl near downtown bars--- he fell to the pavement and hit his head. **Of note:** one of the kids involved in the Mayor's nephew (Richard Vanecko). No charges were filed, but the case remains open. His FOIA is being denied based on the status (open investigation), but the case in expected to be closed in the near future.

That same day, Escareno responded to Biggane advising her that "Maureen, we are aware of this request and have been in touch w/Jenny Hoyle on this matter. I believe the names are being redacted from the report."[723]

Information about a law enforcement case is not routinely released in response to a FOIA request if the police investigation is "open" or "ongoing," or, if a matter has been indicted and is awaiting trial.[724] As discussed above, the Koschman case re-investigation was ordered by Superintendent Weis early in January 2011, and Gilger and Spanos were assigned the matter on or about January 13, 2011. Biggane's January 18, 2011 e-mail was sent five days after the re-investigation began and six weeks prior to its ending; yet its implication is that, though the investigation had just started, CPD knew it would soon end. Further, the e-mail arguably seems to suggest that when the re-investigation ended, the file would be closed, charges would not be returned, and a substantive response to the *Sun-Times* FOIA request would have to be made.[725]

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721 Hoyle, Jennifer, Kroll Interview Rep. at 3 (Jan. 18, 2013).

722 Biggane e-mail (Jan. 18, 2011) (CPD030339).

723 Escareno e-mail (Jan. 18, 2011) (MAYOR_OFFICE000464).

724 *See* 5 ILCS 140/7(1)(d)(i) and (vii) (West 2011) (exempting from disclosure records that would interfere with an investigation or law enforcement proceeding).

725 Escareno e-mail (Jan. 18, 2011) (MAYOR_OFFICE000464).

When interviewed by the OSP in 2013, Biggane stated she did not remember who told her the Koschman case was "expected to be closed in the near future."[726] Biggane speculated it might have been Chief of Staff Mike Masters or the Chief of Detectives (Byrne).[727] In explaining her January 18, 2011 e-mail, Biggane stated that her language should not be read to mean that CPD already knew the conclusion of the Koschman re-investigation.[728] Instead, she simply meant that the case would be resolved "one way or the other."[729] Biggane further explained that her use of the phrase in the "near future" meant only that the case was "a priority," not that it would actually be closed in a matter of days.[730] Biggane stated that when she sent this e-mail, she sensed the re-investigation would not take long.[731] According to Biggane, "everyone recognized it should not have been open all these years."[732]

On February 24, 2011, Biggane e-mailed Andrews a press statement that was to be issued

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726 Biggane, Maureen, Kroll Interview Rep. at 5 (Mar. 14, 2013).

727 *See* Biggane, Maureen, Kroll Interview Rep. at 5 (Mar. 14, 2013).

728 Biggane, Maureen, Kroll Interview Rep. at 6 (Mar. 14, 2013).

729 Biggane, Maureen, Kroll Interview Rep. at 6 (Mar. 14, 2013).

730 Biggane, Maureen, Kroll Interview Rep. at 6 (Mar. 14, 2013).

731 Biggane, Maureen, Kroll Interview Rep. at 6 (Mar. 14, 2013).

732 Biggane, Maureen, Kroll Interview Rep. at 6 (Mar. 14, 2013). When the OSP asked Biggane if there was pressure to close the case by a certain date so FOIA materials could be produced, she responded "[t]hat wouldn't come from my office. I don't recall being told that." Biggane, Maureen, Kroll Interview Rep. at 10 (Mar. 14, 2013). In response, the OSP showed Biggane the e-mail in which Escareno references Biggane's comments that CPD was trying to close the case in consideration of a FOIA deadline, and then the OSP asked Biggane why CPD would want to have a case closed by the FOIA deadline. Biggane, Maureen, Kroll Interview Rep. at 10 (Mar. 14, 2013). Biggane responded that she did not know. Biggane, Maureen, Kroll Interview Rep. at 10 (Mar. 14, 2013).

Additionally, according to Biggane, e-mails like her January 18, 2011, e-mail to Kawada and others (MAYOR_OFFICE000464) were sent to the Mayor's Office every day. Biggane, Maureen, Kroll Interview Rep. at 4-5 (Mar. 14, 2013). It was the "policy" under Masters to make the Mayor's Office aware of anything that might lead to questions from the press. Biggane, Maureen, Kroll Interview Rep. at 4-5 (Mar. 14, 2013). It was not unusual for the Mayor's Office to be involved in FOIA response discussions if the request might result in press attention. Hoyle, Jennifer, Kroll Interview Rep. at 3 (Jan. 18, 2013). In this instance, Biggane did not think it was inappropriate for CPD to be discussing the Koschman reinvestigation with the Mayor's Office because it was "protocol," and because she was not giving them "any details." Biggane, Maureen, Kroll Interview Rep. at 7 (Mar. 14, 2013).

by CPD to the *Sun-Times* relating to the January 4, 2011 FOIA request. In the first line of her e-mail, Biggane advises Andrews that "Below is the final statement as edited and approved by the Mayopr's [sic] Press office. . . ."[733]

On March 2, 2011, Escareno contacted Biggane, asking her to call her about CPD's FOIA response (to Novak's January 4, 2011 FOIA request) slated to go out later that day.[734] As Escareno put it: "This cannot go out until Law and our office [Mayor's Office] has reviewed."[735] Biggane explained that CPD had to turn over the reports immediately.[736] Escareno responded:[737]

Escareno, Rosa

From: Escareno, Rosa
Sent: Wednesday, March 02, 2011 3:19 PM
To: Biggane, Maureen C.; Heard, Jackie
Cc: Hoyle, Jennifer; Kawada, Jodi
Subject: RE: CPD FOIA

Importance: High

Maureen,
When we spoke about this case last week, you mentioned a FOIA was due on Friday, which was the reason you indicated CPD was trying to have the case would close by that day. However, I was not aware that either the same or a different FOIA was also being considered this week for the same case. We need to review the information before it is turned over. Please send a copy ASAP:
BTW,
-- Who's requesting the FOIA
-- What's specifically being requested
-- When was it submitted and when is it due

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733 Andrews e-mail (Feb. 24, 2011) (CPD000405). Andrews responded by asking Biggane to call him. Andrews e-mail (Feb. 24, 2011) (CPD000405). About an hour and a half later, Biggane sent, without comment, a revised version of the statement. Biggane e-mail (Feb. 24, 2011) (CPD000403).

734 Escareno e-mail (Mar. 2, 2011) (MAYOR_OFFICE022624).

735 Escareno e-mail (Mar. 2, 2011) (MAYOR_OFFICE022624).

736 Escareno e-mail (Mar. 2, 2011) (MAYOR_OFFICE022624).

737 Escareno e-mail (Mar. 2, 2011) (MAYOR_OFFICE022626).

Biggane then responded:[738]

From: Biggane, Maureen C. [mailto [redacted]@chicagopolice.org]
Sent: Wednesday, March 02, 2011 03:34 PM
To: Escareno, Rosa
Subject: Re: NOVAK FOIA

Rosa-

The original FOIA was denied, because the case was still opened. We wanted to get the case closed so they could get the FOIA request fulfilled. However, they appealed the denial, and we have been told by PAC to turn it over. The requester is Tim Novak at the ST. The case was closed as of last night.

On March 3, 2011, Biggane sent an e-mail to Escareno informing her that "The Vanecko thing has been pressing. Just FYI--we are meeting with the State's [Attorney's] office on this later today."[739] Later that evening, following the meeting at SAO, Biggane sent another e-mail to Escareno, Kawada, Hoyle, and Heard explaining that "We and CCSAO remain in concurrence. Therefore, the file is to be released tomorrow."[740]

On March 4, 2011, the *Sun-Times* received certain CPD reports (that had been created through that date) related to the Koschman matter (both from the 2004 investigation and the 2011 re-investigation)[741] in response to Novak's January 4, 2011 FOIA.[742]

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738 Biggane e-mail (Mar. 2, 2011) (CPD009233).

739 Biggane e-mail (Mar. 3, 2011) (MAYOR_OFFICE022632).

740 Biggane e-mail (Mar. 3, 2011) (MAYOR_OFFICE022637).

741 The OSP has found no indication that, in producing these materials to the *Sun-Times*, CPD disclosed that it was not the original investigative file, that CPD was aware that the original Koschman file was missing, and/or that CPD personnel had already searched for the original file.

742 Rory O'Brien had previously, on January 18, 2011, sent Novak correspondence stating that, in response to his January 4, 2011 FOIA request, CPD would be producing *only* the redacted General Offense Case Report. O'Brien correspondence (Jan. 18, 2011) (CPD004835). The response would omit "crime scene details, witness and suspect names and statements [that] would interfere with the Department's ongoing criminal investigation . . . [and] [t]he names, home addresses and telephone numbers, and other identifying information that is unique to the witnesses and any suspect involved in this incident . . . ." O'Brien correspondence (Jan. 18, 2011) (CPD004835). The decision by CPD to limit the FOIA response to the General Offense Case Report was appealed by the *Sun-Times* pursuant to the procedures set forth in the Illinois FOIA statute. Ultimately, the decision by CPD to *only* provide the *Sun-Times* the General Offense Case Report was overruled by an Illinois Attorney General Public Access Counselor, and thus, CPD was instructed to provide the *Sun-Times* all reports regarding the Koschman matter. *See* Biggane e-mail to T. Novak (Mar. 4, 2011) (CPD038485-CPD038487).

E. SAO's Involvement in 2011 and 2012

1. Press Inquiries

Just as *Sun-Times* reporters were pursuing records from CPD, they similarly issued several FOIA requests to SAO seeking records related to the Koschman case. On January 24, 2011, Novak submitted a FOIA request to SAO seeking to "inspect the state's attorney's records and files regarding the death of David Koschman . . . ."[743] Paul Castiglione, SAO's Executive Assistant State's Attorney for Policy in 2011, responded to Novak's request the next day, January 25, 2011, stating "[h]aving searched the State's Attorney's files and records, we have no documents that are responsive to your request."[744]

According to State's Attorney Alvarez's Chief of Staff, Dan Kirk, the *Sun-Times* FOIA request prompted SAO to determine who at SAO would be most knowledgeable about the Koschman case.[745] During his interview with the OSP, Kirk recalled attending a meeting less than one week after the FOIA request where he was briefed on the case and the media's interest.[746] State's Attorney Alvarez explained that between January 24, 2011 (the day the FOIA request was made to SAO), and February 23, 2011 (the day SAO issued a press statement), her staff, including Valentini and Sally Daly (SAO's Director of Communications), and she were trying to gather all the facts.[747] She stated that SAO requested the investigative file from CPD

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743 Novak FOIA request (Jan. 24, 2011) (CCSAO_024527).

744 Castiglione letter to Novak (Jan. 25, 2011) (CCSAO_024528). Following the initial FOIA request in January 2011, on March 16, 2011, the *Sun-Times* issued another FOIA request that asked for specific files related to the Koschman matter, including, among other things, felony review logs, correspondence, or memoranda between State's Attorney Devine, Milan, State's Attorney Alvarez, and O'Brien, minutes and records regarding SAO staff meetings about the Koschman case, and telephone records for State's Attorney Devine, Milan, State's Attorney Alvarez, and O'Brien for the time period of April 25, 2004 to May 31, 2004. Novak e-mail (Mar. 16, 2011) (CCSAO_024529). On March 29, 2011, SAO denied these requests, in part, on the grounds that production of felony review logs would be unduly burdensome and, in part, on the grounds that no responsive documents were found. Castiglione letter at CCSAO_024532 (Mar. 29, 2011) (CCSAO_024531-024532).

745 Kirk, Daniel, IGO Interview Rep. at 3 (Mar. 26, 2013).

746 Kirk, Daniel, IGO Interview Rep. at 3 (Mar. 26, 2013).

747 Alvarez, Anita, IGO Interview Rep. at 2 (Apr. 29, 2013).

and O'Brien was spoken to, but not by her.[748] Walt Hehner, Chief Deputy State's Attorney in 2011, attended an O'Brien "de-brief" meeting along with Sally Daly, Kirk, and Boliker in February 2011.[749] At the time, O'Brien still served as an ASA but was no longer head of the Felony Review unit.[750]

According to Kirk, O'Brien told those present at the meeting that, in 2004, he was called to Area 3 by someone at CPD either directly or through the Felony Review unit dispatcher.[751] Kirk recalled that O'Brien described interviewing witnesses but that he did not formally review the case.[752] Kirk further recalled that when asked the location of the Felony Review folder, O'Brien stated he did not know if he made one or not and, if he did make one, where it would be.[753] At the end of the meeting, Hehner directed O'Brien to scour all of the files, and

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748 Alvarez, Anita, IGO Interview Rep. at 2 (Apr. 29, 2013).

749 Special Grand Jury Exhibit 151 at 6 (Hehner, Walter, IGO Interview Rep. (Mar. 11, 2013)). Kirk recalled that he attended this meeting along with State's Attorney Alvarez, Sally Daly, and "probably Hehner." Kirk, Daniel, IGO Interview Rep. at 4 (Mar. 26, 2013).

750 After leaving the Felony Review unit in 2008, O'Brien had a six-month stint as the head of Branch 66 (supervising grand jury proceedings related to homicide and sex crimes) and then became chief of the municipal court division overseeing suburban courts. *See* O'Brien, Darren, IGO Interview Rep. at 2 (Feb. 5, 2013).

751 Kirk, Daniel, IGO Interview Rep. at 4 (Mar. 26, 2013). Before the special grand jury in 2013, as part of his testimony, O'Brien read a statement which, in part, stated, "[m]y best recollection was that there were two telephone calls. Both calls may have occurred the day of the lineups on May 20, 2004, or one call occurred the day before the lineups and the other call occurred the day of the lineups. I'm not sure if I was paged by the caller directly or received a call through the Felony Review dispatcher." O'Brien, Darren, Special Grand Jury Tr. at 30 (May 8, 2013).

752 Kirk, Daniel, IGO Interview Rep. at 4 (Mar. 26, 2013); *see also* Special Grand Jury Exhibit 151 at 6 (Hehner, Walter, IGO Interview Rep. (Mar. 11, 2013)) (According to Hehner, O'Brien stated that the detective was looking for legal advice, and that there was no criminal charge requested to be approved or rejected).

753 Kirk, Daniel, IGO Interview Rep. at 4 (Mar. 26, 2013); Special Grand Jury Exhibit 151 at 6 (Hehner, Walter, IGO Interview Rep. (Mar. 11, 2013)) (recalling O'Brien could not remember if he "did a file or not"). Before the special grand jury in 2013, as part of his testimony, O'Brien read a statement which, in part, stated, "I'm sure I had a Felony Review folder with me when I went out to Area 3 for the Koschman case, and that I started one by writing down the known case information before I interviewed the witnesses. A majority of the folder would have been left blank because the information necessary to complete it did not exist. I probably brought the folder back to the Felony Review office after my interviews to await further contact from CPD regarding any new developments in the case. Due to the number of witnesses I interviewed for the Koschman matter on May 20, 2004, it was possible I used four

warehouses, for the Felony Review folder, and to find the file.[754] Valentini was also directed to perform an exhaustive search to find the folder.[755]

On February 21, 2011, Novak sent an e-mail to Sally Daly stating, "[w]e're revisiting this case as is the police department. We would like to sit down and discuss the facts of the case as we understand them with State's Attorney Alvarez and Darren O'Brien."[756] During an interview with the OSP, O'Brien recalled that SAO "powers that be" told O'Brien to do a telephonic interview with the *Sun-Times* — an interview which subsequently occurred on March 3, 2011.[757]

In a statement issued by SAO to the *Sun-Times* on February 23, 2011, apparently based upon what O'Brien told his superiors, SAO stated, "all witnesses who were questioned indicated that Koschman was the aggressor and had initiated the physical confrontation by charging at members of the other group after they were walking away."[758] The statement further provided that, "[a]s for the current status of the case, the Cook County State's Attorney's Office has not received any information or had any inquiries from the Chicago Police Department or any of the witnesses in connection with this case in the nearly seven years that have elapsed since the

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or five Felony Review folders because each folder only had room for biographical information for two witnesses." O'Brien, Darren, Special Grand Jury Tr. at 32-33 (May 8, 2013).

754 Special Grand Jury Exhibit 151 at 6 (Hehner, Walter, IGO Interview Rep. (Mar. 11, 2013)).

755 Special Grand Jury Exhibit 151 at 6 (Hehner, Walter, IGO Interview Rep. (Mar. 11, 2013)); Kirk, Daniel, IGO Interview Rep. at 5 (Mar. 26, 2013).

756 Novak e-mail to Sally Daly at CCSAO_028227 (Feb. 21, 2011) (CCSAO_028226-CCSAO_028228). Although the exact timing is unclear, Novak followed up his FOIA request with several phone calls. *See* Daly, Sally, IGO Interview Rep. at 2 (Mar. 28, 2013). Sally Daly subsequently forwarded Novak's e-mail to Fabio Valentini, SAO's Chief of the Criminal Prosecutions Bureau in 2011, approximately two hours later, among other things, wondering how reporters obtained O'Brien's name. Novak e-mail to Sally Daly (Feb. 21, 2011) (CCSAO_028226-CCSAO_028227). Valentini sent an e-mail to Sally Daly in response which, in part, states, "I would bet that they got Darren's name from the police reports. The reports lay out that we were contacted, we interviewed available witnesses, and gave the advice that the police sought." Valentini e-mail to Sally Daly (Feb. 21, 2011) (CCSAO_028226). Based upon these e-mails, as of February 21, 2011, at least certain members of State's Attorney Alvarez's staff had reviewed police reports from 2004.

757 O'Brien, Darren, IGO Interview Rep. (Proffer) at 14 (Feb. 20, 2013).

758 Alvarez e-mail to Sally Daly, Boliker, Hehner, and Kirk (Feb. 23, 2011) (CCSAO_028208); Special Grand Jury Exhibit 142 at NEWS000027 (NEWS000022-NEWS000027) (Novak, Fusco, Marin, *Who Killed David Koschman? A Watchdog's Investigation*, *Sun-Times* (Feb. 28, 2011)).

incident."[759] However, it appears that at least some SAO supervisors knew of the re-investigation shortly after it began in January 2011.[760]

On March 3, 2011, *Sun-Times* reporters Novak, Fusco, and Marin published an article in the series regarding Koschman entitled, "*Witness in Daley Nephew Case Says Koschman Wasn't the Aggressor.*"[761] The article quoted Connolly as stating, "The state's attorney said all the witnesses involved said that David was the aggressor. That was a flat-out lie," and "[w]hat I saw was David definitely being mouthy....I did not see David attempting to attack the other person. He was definitely moving toward the taller guy but not in an aggressive fashion. From what I recall, he was probably moving in to say something else."[762] The article also quoted O'Brien's

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[759] Alvarez e-mail to Sally Daly, Boliker, Hehner, and Kirk (Feb. 23, 2011) (CCSAO_028208). In an e-mail providing the statement to the *Sun-Times* on February 23, 2011, Sally Daly indicated that SAO was declining the *Sun-Times*' request for an on-camera interview of State's Attorney Alvarez. Sally Daly explained that while SAO had not been informed by CPD "in any official capacity," that they had reopened the case, SAO was "not comfortable granting an interview if CPD considers the case open --- with potential new facts or information out there that we are unaware of at this point." Sally Daly's e-mail further noted that, "it appears that since the death of Mr. Koschman in 2004, his family has never attempted to contact the CCSAO with any concerns or questions about the case. Nor have any of the witnesses called or reached out to indicate any new facts or different accounts of the events of that evening. Until your inquiry — nearly seven years later — the case has been entirely dormant from our perspective." Her e-mail further stated, "I realize your level of intrigue is piqued by the fact that we cannot currently locate any paperwork on the case, but we are continuing to search the files in our warehouse to see if anything is available. Regardless, the State's Attorney's involvement in this case is memorialized in CPD reports and is consistent with the version of facts and the recollection of the Assistant State's Attorney who provided the advice to CPD in 2004." Sally Daly e-mail to Novak (Feb. 23, 2011) (CCSAO_033625-CCSAO_033626).

[760] Before the special grand jury in 2013, O'Brien testified that he learned about the existence of CPD's re-investigation when he spoke with Gilger on January 21, 2011. O'Brien, Darren, Special Grand Jury Tr. at 57:7-9 (May 8, 2013). As noted previously, Gilger's case supp report records their meeting as occurring on January 21, 2011, or roughly one month prior to SAO's press statement that it had not received any information from CPD. Special Grand Jury Exhibit 15 at CPD001204 (CPD001199-CPD001234) (Case Supplementary Reports 8585610 and 8585620 (approved Feb. 28, 2011)). The "very first thing" Gilger did as part of his re-investigation in January 2011 was visit the head of SAO's Felony Review unit to inquire about the Felony Review folder for the Koschman case. Gilger, James, Special Grand Jury Tr. at 106:22-107:2, 107:19-107:22 (Jan. 16, 2013).

[761] Tim Novak, et al., *Witness in Daley Nephew Case Says Koschman Wasn't the Aggressor* (Mar. 3, 2011) (NEWS000036-NEWS000037).

[762] Tim Novak, et al., *Witness in Daley Nephew Case Says Koschman Wasn't the Aggressor* at NEWS000036 (Mar. 3, 2011) (NEWS000036-NEWS000037).

statements defending his handling of the matter in 2004 from the interview given to *Sun-Times* reporters via a conference call earlier that day.[763]

2. March 3, 2011 Meeting with CPD

On the afternoon of March 3, 2011, Denise Perri, CPD Chief of Staff Masters' administrative assistant, sent a calendar invite to Masters, Biggane, Peterson, Byrne, Marya Vidricko (an SAO administrative assistant), and Kirk for a meeting at SAO's offices at 69 West Washington.[764] The meeting was scheduled for 5 p.m. in the main conference room at SAO. Although State's Attorney Alvarez stopped by the meeting to greet those present, she did not attend.[765] Peterson, Byrne, Masters, and Biggane attended from CPD, while Kirk and Sally Daly attended from SAO. The subject line for the calendar invite was "[sic] Vaneko."

According to Sally Daly, the meeting lasted only 15-20 minutes and the purpose was for CPD personnel to bring SAO "the Koschman file."[766] During his interview with the OSP, Kirk stated that CPD brought with them recent case supp reports and informed SAO that it intended to release these police reports in response to FOIA requests that CPD had received.[767]

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763 O'Brien is quoted in the newspaper article as saying, "'This was a case that had three major problems, in my opinion, before I could even think about pulling the trigger on charging anybody….There was contrary information given about the contact that was made between somebody in Vanecko's group and Koschman. Some people said it was a shove. Some people said it was a punch. . . . I couldn't find anybody that could identify the shover or pusher.' Koschman's friends 'told me that Koschman — even though he was a little guy — when he was drinking, he was an aggressive type of personality…And, in this particular case, he was the aggressor. He would not let it go….If the case was there, and we could have charged it, we would've charged it, no matter who it is.'" Tim Novak, et al., *Witness in Daley Nephew Case Says Koschman Wasn't the Aggressor* at NEWS000037 (Mar. 3, 2011) (NEWS000036-NEWS000037). However, O'Brien admitted under oath that none of the witnesses told him that Koschman took a swing at Vanecko or "something like that." O'Brien, Darren, Special Grand Jury Tr. at 115:8-18 (May 8, 2013). According to O'Brien, "none of the witnesses told me Koschman threw punches or made physical contact with Vanecko immediately before Koschman was struck." O'Brien, Darren, Special Grand Jury Tr. at 40:6-9 (May 8, 2013).

764 Perri e-mail (Mar. 3, 2011) (CPD037531).

765 Daly, Sally, IGO Interview Rep. at 2-3 (Mar. 28, 2013); Alvarez, Anita, IGO Interview Rep. at 3 (Apr. 29, 2013).

766 Daly, Sally, IGO Interview Rep. at 2-3 (Mar. 28, 2013).

767 Kirk, Daniel, IGO Interview Rep. at 6 (Mar. 26, 2013). As noted earlier, Biggane advised the Mayor's Office of this meeting and SAO's concurrence to produce records in response to the *Sun-Times* FOIA request.

3. State's Attorney Alvarez Calls for an Independent Investigation

On March 19, 2011, State's Attorney Alvarez issued a statement dismissing the need for a new investigation into the Koschman death,[768] but reversed her position five days later. On March 24, 2011, *Sun-Times* reporters Marin and Novak interviewed State's Attorney Alvarez on camera regarding the Koschman case.[769] During the interview, reporters raised the fact that some witnesses denied statements attributed to them in police reports and that one witness claimed he identified Vanecko in a lineup on May 20, 2004.[770] According to State's Attorney Alvarez, based on these new allegations, she indicated she would be open to an independent investigation.[771]

Also on March 24, 2011, the *Sun-Times* published an article with excerpts from the interview with State's Attorney Alvarez.[772] During the interview, State's Attorney Alvarez stated, "I think there should be an independent police investigation." State's Attorney Alvarez suggested she would welcome review by an independent agency such as the Illinois State Police ("ISP"); although she indicated that she did not "believe we have a good faith and legal basis to bring charges." State's Attorney Alvarez further explained during the interview, "Before we take something to the grand jury, we have to have a good-faith basis that a crime occurred and that the person we are seeking a true bill of indictment for did it." With regard to using a grand

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768 On March 19, 2011, in a *Sun-Times* article entitled, "*Alvarez: Not Enough Evidence to Charge Daley Nephew,*" SAO issued a statement which, in part, read, "The contradictory statements made by witnesses seven years after the actual incident do not allow us to discount the statements that those same witnesses made to Chicago police detectives during the course of the initial investigation and within weeks of the incident. At this time, we are unaware of any new evidence that would enable us to bring charges, and therefore we could not bring the case to a grand jury." *See* Novak, Fusco, Marin, *Alvarez: Not Enough Evidence to Charge Daley Nephew* (Mar. 19, 2011) (NEWS000071).

769 Alvarez, Anita, IGO Interview Rep. at 5 (Apr. 29, 2013). Kirk, Boliker, Hehner, and Sally Daly were also present for the interview. Daly, Sally, IGO Interview Rep. at 4 (Mar. 28, 2013); Special Grand Jury Exhibit 151 at 8 (Hehner, Walter, IGO Interview Rep. (Mar. 11, 2013)).

770 Alvarez, Anita, IGO Interview Rep. at 5 (Apr. 29, 2013).

771 Alvarez, Anita, IGO Interview Rep. at 5 (Apr. 29, 2013). According to Kirk, reporters for the *Sun-Times* initially did not hear this remark. According to State's Attorney Alvarez's staff, it was only after they followed up with Novak and Marin as they were near the elevator bank when the reporters became aware and subsequently set up their equipment again to finish the interview. *See* Kirk, Daniel, IGO Interview Rep. at 8 (Mar. 26, 2013).

772 Novak, Marin, *Alvarez: Investigate CPD Handling of Death Involving Daley Nephew* (Mar. 24, 2011) (NEWS000080).

jury, State's Attorney Alvarez stated, "We're not there at this point. It would be unethical for me to go to a grand jury at this point. I don't know if there was a crime committed here based on the facts we have. It could be justifiable."[773]

According to State's Attorney Alvarez and her staff, she discussed the possibility of referring the matter to an independent investigative agency prior to March 24, 2011.[774] State's Attorney Alvarez considered referring the matter to an independent agency because she felt CPD could not fairly investigate the alleged police misconduct aspect of the case.[775] According to Kirk, SAO's initial thought was to send the case to either the FBI or the South Suburban Major Crime Taskforce.[776] It was determined, however, that both of these organizations lacked the necessary jurisdiction.[777] The Illinois Attorney General's Office was also considered, but since Yawger worked there, it too presented a potential conflict.[778]

According to Hehner, SAO also evaluated the possibility of appointing someone from its own Special Prosecutions Bureau or petitioning for the appointment of a special prosecutor.[779] In fact, State's Attorney Alvarez directed one of her top appellate prosecutors, Alan Spellberg, to research the appointment of a special prosecutor.[780] In a memorandum dated March 10, 2011, Spellberg detailed his research regarding the rules and standards for appointing a special

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773 Novak, Marin, *Alvarez: Investigate CPD Handling of Death Involving Daley Nephew* (Mar. 24, 2011) (NEWS000080).

774 Boliker, Shauna, IGO Interview Rep. at 3 (Mar. 25, 2013); Alvarez, Anita, IGO Interview Rep. at 5-6 (Apr. 29, 2013); Kirk, Daniel, IGO Interview Rep. at 8 (Mar. 26, 2013); Special Grand Jury Exhibit 151 at 8 (Hehner, Walter, IGO Interview Rep. (Mar. 11, 2013)).

775 Alvarez, Anita, IGO Interview Rep. at 5-6 (Apr. 29, 2013).

776 Kirk, Daniel, IGO Interview Rep. at 8-10 (Mar. 26, 2013).

777 Kirk, Daniel, IGO Interview Rep. at 10 (Mar. 26, 2013); Special Grand Jury Exhibit 151 at 8 (Hehner, Walter, IGO Interview Rep. (Mar. 11, 2013)).

778 Kirk, Daniel, IGO Interview Rep. at 8-9 (Mar. 26, 2013); Special Grand Jury Exhibit 151 at 8 (Hehner, Walter, IGO Interview Rep. (Mar. 11, 2013)). This observation raises the question of why SAO did not have a similar conflict based upon O'Brien's continued employment at SAO.

779 Kirk, Daniel, IGO Interview Rep. at 10 (Mar. 26, 2013); Special Grand Jury Exhibit 151 at 8 (Hehner, Walter, IGO Interview Rep. (Mar. 11, 2013)).

780 Alvarez, Anita, IGO Interview Rep. at 3 (Apr. 29, 2013).

prosecutor, including whether political ties to another person alone were sufficient to warrant the appointment of a special prosecutor.[781] Spellberg's memorandum did not conclude one way or another whether a special prosecutor should be appointed in the case but discussed the application of Section 3-9008 of the Counties Code, which provides that:

> Whenever the State's attorney is sick or absent, or unable to attend, or is interested in any cause or proceeding, civil or criminal, which it is or may be his duty to prosecute or defend, the court in which said cause or proceeding is pending may appoint some competent attorney to prosecute or defend such cause or proceeding[.][782]

While State's Attorney Alvarez was not involved in the Koschman case in 2004, she was the Chief Deputy State's Attorney at that time. Her current First Assistant and Chief Deputy, Boliker and Hehner, were also supervisors at SAO in 2004.[783] Further, O'Brien, who was Felony Review supervisor in 2004, was also a supervisor under State's Attorney Alvarez after she became State's Attorney in 2008. In his April 6, 2012 Order appointing a special prosecutor, Judge Toomin determined that SAO possessed an institutional conflict of interest requiring the appointment of a special prosecutor.[784]

According to Kirk, State's Attorney Alvarez ultimately decided not to seek a special prosecutor but to have her office keep the case. She did decide for investigative purposes only to refer the case to ISP because in her mind it had previously investigated crimes involving CPD personnel, had the necessary resources, had a good working history with SAO, and was known for conducting thorough investigations.[785] However, State's Attorney Alvarez chose ISP even though she knew that Hiram Grau — who was employed as a CPD Deputy Superintendent in

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781 Spellberg memo re Rules for Appointing a Special State's Attorney or Convening a Grand Jury (Mar. 10, 2011) (CCSAO_019628-CCSAO_019630).

782 *See* 55 ILCS 5/3-9008 (West 2011).

783 In 2004, Boliker was chief of the Sex Crimes Division and Hehner was Deputy Chief of Narcotics. Boliker, Shauna, IGO Interview Rep. at 1 (Mar. 25, 2013); Special Grand Jury Exhibit 151 at 1 (Hehner, Walter, IGO Interview Rep. (Mar. 11, 2013)).

784 Order by J. Toomin at 33, Apr. 6, 2012.

785 Kirk, Daniel, IGO Interview Rep. at 8-9 (Mar. 26, 2013).

2004[786] and as Deputy Chief of the Investigations Bureau at SAO in 2011 — would soon become the agency's director.[787] According to State's Attorney Alvarez, she knew prior to March 22, 2011 that Grau would be taking over at ISP, but she believed the transition would take several months, and if Grau did arrive before the ISP's investigation of the Koschman case was over, ISP could have "walled" Grau off from the case.[788]

During his interview with the OSP, Kirk recalled that he was the first to reach out to ISP.[789] According to Kirk, on the afternoon of the March 24, 2011, *Sun-Times* interview, he called ISP First Deputy Director Jack Garcia and told him about the proposed referral.[790] According to Kirk, Garcia told him to send everything SAO had on the Koschman case to ISP Interim Director Patrick Keen.[791] Kirk also recalled that during this call, Kirk flagged the issue of Grau taking over as Director of ISP, but that Garcia assured Kirk it would not be a problem — either ISP would be able to conduct the entire investigation before Grau was confirmed, or Grau

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786 In 2004, Grau reported to Superintendent Cline and had oversight over CPD's Detective Division. When interviewed by the OSP in 2012, Molloy, Chief of Detectives in 2004 and directly under Grau, recalled that while he did not discuss the case with Grau, he recalled leaving a copy of the detectives' police report "detailing what [went] on the night of the lineup" in a sealed envelope for Grau. Molloy, James, Kroll Interview Rep. at 5 (Dec. 7, 2012). Nevertheless, when asked about Molloy leaving a copy of a police report for him in 2004, Grau stated he did not recall receiving a report from Molloy and indicated he had no involvement in the Koschman case. Grau, Hiram, IGO Interview Rep. at 2-3 (Dec. 19, 2012).

787 Boliker, Shauna, IGO Interview Rep. at 4 (Mar. 25, 2013); Kirk, Daniel, IGO Interview Rep. at 9 (Mar. 26, 2013); Special Grand Jury Exhibit 151 at 5 (Hehner, Walter, IGO Interview Rep. (Mar. 11, 2013)); Keen, Patrick, IGO Interview Rep. at 2 (Jan. 10, 2013); Alvarez, Anita, IGO Interview Rep. at 6 (Apr. 29, 2013). Grau told the OSP that he has never spoken with State's Attorney Alvarez about the Koschman case. *Id.* According to State's Attorney Alvarez, she never spoke with Grau about her communications with ISP or Keen. Alvarez, Anita, IGO Interview Rep. at 7 (Apr. 29, 2013).

788 Alvarez, Anita, IGO Interview Rep. at 6 (Apr. 29, 2013). According to Grau, he informed State's Attorney Alvarez as soon as he accepted the ISP nomination. Grau, Hiram, IGO Interview Rep. at 3 (Dec. 19, 2012). On April 6, 2011, the *Sun-Times* published an article by Michael Sneed, "*Hot Potato?*," discussing SAO's referral to ISP and quoting Kirk as stating, "Hiram [Grau] still is not in charge of the Illinois State Police — and they certainly had enough time during the past few weeks to re-interview witnesses and finish their probe before he [Grau] got there." Michael Sneed, "*Hot Potato?*" at NEWS000117 (Apr. 6, 2011) (NEWS000116-NEWS000118).

789 Kirk, Daniel, IGO Interview Rep. at 9 (Mar. 26, 2013).

790 Kirk, Daniel, IGO Interview Rep. at 9 (Mar. 26, 2013).

791 Kirk, Daniel, IGO Interview Rep. at 9 (Mar. 26, 2013).

would be walled off from the investigation.[792]

On March 24, 2011, SAO also sent a letter to Keen signed by State's Attorney Alvarez.[793] The letter notes that "according to new information brought to my attention, some witnesses now suggest that the versions of events attributed to them in CPD reports from 2004 were not accurate including one witness who now claims that his observations during one of the lineups were not accurately memorialized," and requests that ISP "initiate and conduct an independent investigation of this matter in its entirety."[794] The letter additionally states, "To be clear, at this point, I have no objective evidence to support the notion that there was any misfeasance or malfeasance on the part of investigators in this case. However, with this new information, it is my belief that an independent investigation from a separate police agency is clearly warranted to ensure that we reach the truth in this case."

On March 25, 2011, State's Attorney Alvarez sent a letter thanking Keen for accepting the referral of the Koschman case pursuant to her March 24, 2011 letter and their conversation "early this afternoon."[795] Along with that letter, SAO sent copies of what it believed "to be the complete Chicago Police Department investigative file."[796] According to Keen, although the package was received by Keen's Chief of Staff, Jessica Trame, no one at the agency opened or reviewed it.[797] According to Keen, ISP awaited further direction from the Governor's Office on

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792 Kirk, Daniel, IGO Interview Rep. at 9 (Mar. 26, 2013).

793 Alvarez letter to Keen (Mar. 24, 2011) (ISP000013-ISP000014).

794 Alvarez letter to Keen (Mar. 24, 2011) (ISP000013-ISP000014).

795 Alvarez letter to Keen (Mar. 25, 2011) (CCSAO_033312).

796 Alvarez letter to Keen (Mar. 25, 2011) (CCSAO_033312). State's Attorney Alvarez asked Boliker to oversee the logistics of the referral. To that end, Boliker obtained a copy of the Koschman file from Salemme, which she photocopied and had sent to ISP. *See* Alvarez, Anita, IGO Interview Rep. at 6 (Apr. 29, 2013); Boliker, Shauna, IGO Interview Rep. at 6 (Mar. 25, 2013). At this point, CPD did not inform SAO that the Koschman materials it provided SAO did not include original files, that CPD was aware that the original Koschman homicide file was missing, and/or that CPD personnel had already searched for the original file. It was not until July 22, 2011, that CPD provided SAO with the missing Koschman files Walsh and Yawger discovered on June 29 and 30, 2011. Alvarez letter to Ferguson (July 22, 2011) (IG_001737).

797 Keen, Patrick, IGO Interview Rep. at 2-3 (Jan. 10, 2013). According to Keen, the file sent by SAO remained unopened in Trame's office.

whether it would actually go through with an independent investigation.[798]

When interviewed by the OSP, Grau stated that sometime around March 25, 2011, the day after State's Attorney Alvarez referred the case to Keen, he called Keen and told him to decline the referral from SAO.[799] According to Grau, he considered recusing himself but determined that the situation would present a conflict of interest since he was a former SAO and CPD employee.[800] During his interview with the OSP, Grau stated that on March 28, 2011, he sent a letter to Governor Pat Quinn (which he may have hand-delivered to the Governor's Chicago Office)[801] that "given [his] impending appointment as Director of ISP, ISP must decline to conduct this review."[802] In his letter, Grau explained that the appearance of a conflict of interest would undermine the effect of ISP's review and recommended "that Cook County State's Attorney Alvarez should request a complete review of this matter by the Federal Bureau of Investigation."[803] According to Grau, no one suggested that he write the letter and the

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798 Keen, Patrick, IGO Interview Rep. at 2-3 (Jan. 10, 2013). On March 25, 2011, at approximately 3:19 p.m., Trame sent an e-mail to others at ISP stating, "The Governor's office has made the decision that we will be re-investigating this death. [Interim] Director Keen has spoken w SA Alvarez and she is fedexing the case file to this office." *See* Trame e-mail to Mark Piccoli, Rob Haley, and Luis Tigera (Mar. 25, 2011) (ISP000025). Also on March 25, 2011, Novak sent a request to ISP seeking a statement on SAO's letter referring the Koschman case. In response, Isaiah Vega, of ISP's Public Information Office, sent Novak a statement that read, "[a]t the State's Attorney's request, we will review the matter. The primary purpose of the State's Attorney's Office's request and of our review will be investigating the 2004 incident." When Novak subsequently requested an interview with Grau, Vega forwarded the request to an employee of the Governor's Press Office, Grant Klinzman. Klinzman subsequently sent a statement "approved for use" to Vega, which stated, "[w]hile he was not personally involved in CPD's investigation of the 2004 incident, out of an abundance of caution Mr. Grau will be recusing himself from the State Police's review of the matter." This e-mail chain was forwarded on to Keen. Trame e-mail to Keen (Mar. 25, 2011) (ISP000042-ISP000043).

799 Grau, Hiram, IGO Interview Rep. at 3-4 (Dec. 19, 2012); Keen, Patrick, IGO Interview Rep. at 4 (Jan. 10, 2013). According to Grau, Keen told him that he had already accepted the referral. Grau, Hiram, IGO Interview Rep. at 3 (Dec. 19, 2012).

800 Grau, Hiram, IGO Interview Rep. at 3-4 (Dec. 19, 2012); Keen, Patrick, IGO Interview Rep. at 4 (Jan. 10, 2013).

801 According to Grau, he probably hand-delivered the letter to the Governor's offices in Chicago. Grau, Hiram, IGO Interview Rep. at 4 (Dec. 19, 2012).

802 Grau letter to Quinn (Mar. 28, 2011) (OSP_003196).

803 Grau letter to Quinn (Mar. 28, 2011) (OSP_003196).

decision to write it was his own.[804]

Ultimately, ISP rejected the referral of the Koschman case. According to Keen, ISP waited approximately 7-10 days before the Governor's Office communicated that ISP should send the case back.[805] According to Kirk, approximately 7-10 days after SAO sent the package of police reports, Garcia called him and, without giving any explanation, hinted that ISP may send the case back to SAO.[806]

On April 4, 2011, Keen sent a letter to State's Attorney Alvarez rejecting the referral.[807] Keen's letter stated, "I have determined that the Illinois State Police is not the appropriate entity to conduct the requested review of the 2004 investigation. Accordingly, the case file is enclosed and is being returned for further handling as you deem appropriate, whether by naming an independent, special prosecutor who, unlike ISP, if warranted, could convene a grand jury to hear statements made under oath, or by referring the matter to another criminal justice entity with similar powers."[808] Upon learning of ISP's decision, State's Attorney Alvarez called Keen to express her disappointment; he too provided no explanation for the rejection.[809]

According to Kirk, ISP's rejection of SAO's referral resulted in a "scramble" to find an investigative partner, which led to SAO's decision to partner with IGO and its investigation into the Koschman matter that it began the previous month.[810] By early September 2011, IGO had

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804 Grau, Hiram, IGO Interview Rep. at 3-4 (Dec. 19, 2012). Grau did not speak with anyone from SAO before writing the letter to Governor Quinn. Grau, Hiram, IGO Interview Rep. at 4 (Dec. 19, 2013).

805 Keen, Patrick, IGO Interview Rep. at 4 (Jan. 10, 2013). In response to a subpoena from the special grand jury, ISP asserted attorney-client privilege over approximately 10 documents (including e-mails and handwritten notes) that involved communications with the Governor's Office or personnel in the General Counsel's Office of the Governor's Office.

806 Kirk, Daniel, IGO Interview Rep. at 9 (Mar. 26, 2013). According to Keen, he subsequently called Kirk to confirm that ISP was not taking the Koschman case but did not provide a reason for the rejection. Keen, Patrick, IGO Interview Rep. at 5 (Jan. 10, 2013).

807 Keen letter to Alvarez (Apr. 4, 2011) (ISP000012).

808 Keen letter to Alvarez (Apr. 4, 2011) (ISP000012).

809 Alvarez, Anita, IGO Interview Rep. at 6 (Apr. 29, 2013); Kirk, Daniel, IGO Interview Rep. at 9-10 (Mar. 26, 2013); Keen, Patrick, IGO Interview Rep. at 5-6 (Jan. 10, 2013).

810 Kirk, Daniel, IGO Interview Rep. at 10 (Mar. 26, 2013). As ISP considered whether or not to accept SAO's referral of the Koschman case, Cook County Inspector General Patrick Blanchard

gathered and reviewed certain documents and conducted several witness interviews.

In early September 2011, representatives from both the IGO and SAO met to discuss the use of SAO's grand jury in order to further the IGO's investigation.[811] Between September and December 2011, SAO and IGO shared information about the investigation and discussed the order in which witnesses would be called before the grand jury. Prior to any witnesses testifying before SAO's grand jury, on December 14, 2011, Nanci Koschman, Susan Pazderski (Koschman's maternal aunt), and Richard Pazderski (Koschman's uncle) filed a petition for the appointment of a special prosecutor with the Circuit Court of Cook County.[812] SAO first obtained grand jury subpoenas for witnesses to appear on January 18, 2012, after the petition for the appointment of a special prosecutor had been filed, and approximately nine months after SAO had decided to initiate an investigation.[813]

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attempted to initiate an investigation of his own into SAO's handling of the Koschman case. On March 30, 2011, Blanchard, accompanied by Steven Cyranoski of the Cook County Inspector General's Office ("CCIGO"), met with Kirk, Boliker, Hehner, and Castiglione from SAO. Kirk told Blanchard that CCIGO did not have jurisdiction to investigate SAO. *See* Blanchard, Patrick, Kroll Interview Rep. at 5-7 (Dec. 19, 2012). At the meeting, Kirk also stated that SAO could not locate a felony review folder for the Koschman case, but that O'Brien went down to Area 3 that day and simply failed to fill one out. Blanchard, Patrick, Kroll Interview Rep. at 5 (Dec. 19, 2012); Blakey, Jack, Kroll Interview Rep. at 2-4 (May 9, 2013); *see also* Kirk, Daniel, IGO Interview Rep. at 4 (Mar. 26, 2013).

811 Mahoney, John, Kroll Interview Rep. at 4-5 (Mar. 7, 2013). By September 2011, IGO had issued document requests to CPD and formally subpoenaed SAO seeking records related to the Koschman case. IGO had also interviewed witnesses, including Koschman's friends: Allen, Copeland, Francis, and Hageline.

812 *In re Appointment of Special Prosecutor*, No. 2011 Misc. 46, Petition to Appoint a Special Prosecutor in the Matter of the Death of David Koschman (Dec. 22, 2011) (Locke E. Bowman and Alexa Van Brunt of the Roderick MacArthur Justice Center at Northwestern University School of Law and G. Flint Taylor of the People's Law Office represented Mrs. Koschman, Mrs. Pazderski, and Mr. Pazderski). The petition for the appointment of a special prosecutor argued, in part, that State's Attorney Alvarez maintained a "clear political — and personal — interest in the case" based upon her public statements defending "the work of the Chicago Police and the Cook County State's Attorney's Felony Review unit, insisting to *Sun-Times* reporters that there was insufficient evidence to charge Vanecko." *In re Appointment of Special Prosecutor*, No. 2011 Misc. 46, Petition to Appoint a Special Prosecutor in the Matter of the Death of David Koschman at 19-20 (Dec. 22, 2011).

813 SAO issued its first grand jury subpoenas on Jan. 18, 2012 to Lt. Walsh, Det. Rita O'Leary, Ofc. Tremore, Det. Clemens, Craig Denham, Kevin McCarthy, and Bridget McCarthy. Mahoney, John, Kroll Interview Rep. at 11 (Mar. 7, 2013); *see also* SAO Grand Jury Subpoenas (Jan. 18, 2011) (CCSAO_013735 (Walsh); CCSAO_013743 (Rita O'Leary); CCSAO_013742 (Tremore); CCSAO_013744 (Clemens); CCSAO_013746 (Denham); CCSAO_013749 (Kevin McCarthy); CCSAO_013750 (Bridget McCarthy)). While SAO interviewed several witnesses, only two witnesses

4. State's Attorney's Office's Response to the Petition for the Appointment of a Special Prosecutor

When interviewed by the OSP in 2013, Boliker indicated that in the days following the filing of the petition for the appointment of a special prosecutor, State's Attorney Alvarez's staff met and decided to file an opposition to the petition.[814] On January 6, 2012, WLS-890 radio talk show host Bill Cameron interviewed State's Attorney Alvarez. Part of the interview included several questions regarding the Koschman matter. During the interview, State's Attorney Alvarez indicated it was still unclear whether SAO would be opposing the petition. State's Attorney Alvarez commented on the strength of the case, stating:

> Mayor Daley didn't have a good relationship with the rank-and-file CPD and that's the truth, there are you know, but you have to look at what occurred in this case in the simple fact, you know, people looked at lineups and did not identify [sic] any prosecutor knows that's a fatal flaw in your case if you don't have identification and any defense attorney would be doing backflips if his client did not get identified in a case, so there are flaws — there are serious flaws...You know, we're not even sure who threw the punch and that's the conflicting evidence that we have looked at. At the time this happened no one identified him as being the one, and we don't even know if it was [sic] punch or push.

State's Attorney Alvarez's comments regarding a lack of certainty that Koschman was punched contrasted with CPD's conclusions in 2011 that Vanecko alone punched Koschman and Scott Allen and James Copeland's statements in 2004 and 2011, as the only two witnesses who saw the moment of impact, that Koschman was punched. Judge Toomin noted that comments such as these by State's Attorney Alvarez arguably call into question whether SAO could have independently reviewed the matter.[815]

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testified before a grand jury. *See* Blakey, Jack, Kroll Interview Rep. at 3 (May 9, 2013). On February 15, 2012, SAO had Rita O'Leary read a prepared statement before the grand jury. O'Leary, Rita, SAO Grand Jury Tr. (Feb. 15, 2012) (CCSAO_018589). On Feb. 21, 2012, Megan McDonald also testified before a grand jury. McDonald, Megan, SAO Grand Jury Tr. (Feb. 21, 2012) (CCSAO_017540).

814 Boliker, Shauna, IGO Interview Rep. at 4 (Mar. 25, 2013).

815 *See* Order by J. Toomin at 29, Apr. 6, 2012. Former State's Attorney Devine recalled commenting to State's Attorney Alvarez (sometime after SAO's involvement became public in 2011) that

On January 31, 2012, SAO filed its brief opposing the appointment of a special prosecutor, relying heavily on witness statements given by Koschman's friends in arguing a lack of an evidentiary basis for the appointment.[816] On April 6, 2012, Judge Toomin granted Nanci Koschman's petition for a Special Prosecutor and on April 23, 2012, appointed Dan Webb as Special Prosecutor. As a result of the Court's rulings, SAO ceased its investigation and cooperated in transitioning the case to the OSP. However, SAO continued to comment on the case.

Indeed, on April 24, 2012, one day after the appointment of the Special Prosecutor, in a *Chicago Tribune* article entitled, "*Investigator Has Many Targets Koschman Case Involves Cops, Prosecutors, Daley Clout*," reporters noted that, "According to Kirk, Alvarez's chief of staff at that time [in 2004], there was no admissible evidence that could have been used to file charges."[817] However, when interviewed by the OSP in 2013, Kirk acknowledged that there was in fact some evidence that would be admissible at trial and that he had based his statements to the *Chicago Tribune* on what he learned from O'Brien and Hehner — and without conducting an extensive review of the police reports or speaking with any witnesses or detectives.[818]

On December 3, 2012, the special grand jury indicted Vanecko for involuntary manslaughter in connection with Koschman's death. State's Attorney Alvarez made a statement that same day that SAO's grand jury investigation had been looking into the case for "months, almost close to a year."[819] When interviewed by the OSP, State's Attorney Alvarez explained

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"This [the Koschman case] was on my watch, you don't need to wear the jacket on this." Devine, Richard, IGO Interview Rep. at 6 (Apr. 9, 2013).

816 *See In re Appointment of Special Prosecutor*, No. 2011 Misc. 46, People's Resp. to the Pet. To Appoint a Special Pros. at 15-37 (Jan. 31, 2012). Additionally, in response to petitioner's motion to compel witness statements recorded by IGO's investigators, on February 21, 2012, SAO filed a brief with Judge Toomin warning, "The wholesale disclosure of the information that Petitioners request would disrupt the ongoing criminal investigation and further undermine an already dim prospect of any future criminal prosecution." In re Appointment of Special Prosecutor, No. 2011 Misc. 46, People's Response to Petitioners' Motion to Compel at 8 (Feb. 21, 2012); Fusco, Novak, *State's Attorney: Releasing Koschman Transcripts Would 'Undermine' Case* (Feb. 22, 2012) (NEWS000310).

817 Jason Meisner and Steve Mills, *Investigator Has Many Targets Koschman Case Involves Cops, Prosecutors, Daley Clout* at NEWS000408 (Apr. 24, 2012) (NEWS000406-NEWS000411).

818 Kirk, Daniel, IGO Interview Rep. at 7-8 (Mar. 26, 2013).

819 Dan Mihalopoulos, *Alvarez: State's Attorney Office Did Nothing Wrong* at NEWS000522 (Dec.

that she meant IGO's investigation had lasted a year, even if her office had not utilized the grand jury for the whole period.[820] While IGO conducted over 30 interviews in 2011 and early 2012, SAO did not use the grand jury at all in 2011 and conducted six interviews in 2011 and early 2012. Between January and April 2012, SAO presented one witness and one statement of a witness before a grand jury.

V. LEGAL ANALYSIS

A. Three Levels of Scienter (State of Mind): Recklessness, Knowledge, and Intent

There are three relevant levels of scienter (state of mind), relating to the criminal statutes at issue, which are defined in the Illinois Criminal Code: recklessness,[821] knowledge,[822] and intent.[823]

1. Recklessness

"Recklessness" is a mental state involving a degree of criminal liability below that of knowledge or intent,[824] and is defined by the Illinois Criminal Code as follows:

> A person is reckless or acts recklessly when that person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statute defining the offense, and that disregard constitutes a gross deviation from the standard of care that a reasonable person would exercise in the situation. . . .[825]

3, 2012) (NEWS000522-NEWS000523).

820 Alvarez, Anita, IGO Interview Rep. at 8 (Apr. 29, 2013).

821 720 ILCS 5/4-6 (West 2013).

822 720 ILCS 5/4-5 (West 2013).

823 720 ILCS 5/4-4 (West 2013).

824 *People v. Higgins*, 229 N.E.2d 161, 163-64 (Ill. App. Ct. 5th Dist. 1967).

825 720 ILCS 5/4-6 (West 2013); *see also* Illinois Pattern Jury Instruction 5.01 ("A person acts recklessly when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.") (*citing People v. Baier*, 203 N.E.2d 633 (Ill. App. Ct. 1st Dist. 1964)).

2. Knowledge

The Illinois Criminal Code defines the mental state of "knowledge" as follows:

> A person knows, or acts knowingly or with knowledge of:
>
> (a) The nature or attendant circumstances of his or her conduct, described by the statute defining the offense, when he or she is consciously aware that his or her conduct is of that nature or that those circumstances exist. Knowledge of a material fact includes awareness of the substantial probability that the fact exists.
>
> (b) The result of his or her conduct, described by the statute defining the offense, when he or she is consciously aware that that result is practically certain to be caused by his conduct. . . .
>
> When the law provides that acting knowingly suffices to establish an element of an offense, that element also is established if a person acts intentionally.[826]

3. Intent

The Illinois Criminal Code defines "intent" as follows:

> A person intends, or acts intentionally or with intent, to accomplish a result or engage in conduct described by the statute defining the offense, when his conscious objective or purpose is to accomplish that result or engage in that conduct.[827]

Under Illinois law, every sane person is presumed to intend all the natural and probable results of his or her own deliberate act.[828]

B. Scienter (State of Mind) Requirements of Relevant Criminal Statutes

As noted above, the four Illinois criminal statutes primarily evaluated by the Special Prosecutor were: (1) official misconduct; (2) obstructing justice; (3) conspiracy; and (4) tampering with public records. The definitions of each of these crimes, including their criminal intent (scienter) requirements, follows:

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826 720 ILCS 5/4-5 (West 2013); *see also* Illinois Pattern Jury Instruction 5.01.

827 720 ILCS 5/4-4 (West 2013); s*ee also* Illinois Pattern Jury Instruction 5.01A.

828 *People v. Shields*, 127 N.E.2d 440, 443 (Ill. 1955); *People v. Varnell*, 370 N.E.2d 145, 146 (Ill. App. Ct. 2d Dist. 1977); *People v. Smith*, 219 N.E.2d 82, 86-87 (Ill. App. Ct. 1st Dist. 1966).

Official Misconduct: A public officer or employee violates Illinois' official misconduct statute when he does any of the following in his official capacity: (a) *[i]ntentionally or recklessly* fails to perform any mandatory duty as required by law; (b) *[k]nowingly* performs an act which he knows he is forbidden by law to perform; (c) *[w]ith intent* to obtain a personal advantage for himself or another, he performs an act in excess of his lawful authority; or (d) [s]olicits or *knowingly* accepts for the performance of any act a fee or reward which he knows is not authorized by law . . . .[829]

Obstructing Justice: A person obstructs justice when, *with intent* to prevent the apprehension or obstruct the prosecution or defense of any person, he *knowingly* commits any of the following acts: (a) destroys, alters, conceals or disguises physical evidence, plants false evidence or furnishes false information; (b) induces a witness having knowledge material to the subject at issue to leave the State or conceal himself; (c) possesses knowledge material to the subject at issue, leaves the State or conceals himself or herself.[830]

Conspiracy: A person commits the offense of conspiracy when, *with intent* that an offense be committed, he or she agrees with another to the commission of that offense. No person may be convicted of conspiracy to commit an offense unless an act in furtherance of that agreement is alleged and proved to have been committed by him or her or by a co-conspirator. . . .[831]

Tampering with Public Records: A person commits tampering with public records when he or she *knowingly*, without lawful authority, and *with the intent* to defraud any party, public officer or entity, alters, destroys, defaces, removes or conceals any public record. . . .[832]

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829 *See* 720 ILCS 5/33-3(a)-(d) (West 2013) (emphasis added).

830 720 ILCS 5/31-4 (West 2013) (emphasis added).

831 720 ILCS 5/8-2(a) (West 2013) (emphasis added)

832 720 ILCS 5/32-8(a) (West 2013) (emphasis added).

C. Prosecution of Conduct Committed in 2004 is Barred by the Statute of Limitations

As of the Special Prosecutor's appointment on April 23, 2012, approximately eight years had passed since the incident on Division Street. As a result, in evaluating[833] whether criminal charges should be brought against any CPD or SAO employees for conduct occurring during the initial investigation into Koschman's death in 2004, the Special Prosecutor was required to contend with the reality that many potential criminal charges were likely barred by Illinois' statute of limitations, 720 ILCS 5/3-5.[834] The Special Prosecutor was also required to consider his burden of proof. Under Illinois law, where an indictment on its face shows that an offense was not committed within the applicable limitation period, the prosecutor must allege those facts that invoke an exception to the statute of limitations and ultimately must prove that exception beyond a reasonable doubt at trial.[835]

Aside from specifically enumerated offenses such as murder or involuntary manslaughter, 720 ILCS 5/3-5(b) requires that any prosecution for an offense not so enumerated "must be commenced within 3 years after the commission of the offense if it is a felony, or within one year and 6 months after its commission if it is a misdemeanor." Thus, a prosecution for a felony violation of state law official misconduct, obstructing justice, conspiracy, or tampering with public records statutes is time-barred if not brought within three years — with only limited circumstances in which the three-year limitations period set forth in 720 ILCS 5/3-5(b) may be extended or tolled (temporarily halted). As detailed below, the Special Prosecutor evaluated whether such circumstances might apply in this matter, including the following

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833 The Special Prosecutor's evaluation was limited to state (and not federal) criminal law violations.

834 A statute of limitations is a "statute establishing a time limit for prosecuting a crime, based on the date when the offense occurred." Black's Law Dictionary (9th ed. 2009); *see also Toussie v. United States*, 397 U.S. 112, 114 (1970) ("The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature had decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity.").

835 *See* Illinois Pattern Jury Instructions (Criminal) § 24-25.23; *People v. Morris*, 135 Ill. 2d 540, 546 (1990); *People v. Pacheco*, 338 Ill. App. 3d 616, 617-18 (Ill. App. Ct. 2d Dist. 2003); *People v. Gwinn*, 255 Ill. App. 3d 628, 631 (Ill. App. Ct. 2d Dist. 1994).

exceptions or tolling provisions applicable to the three-year limitations period, but ultimately concluded that none applied.

1. Public Misconduct

First, Illinois law provides for an extension to the three-year limitations period in cases involving an "offense based upon misconduct in office by a public officer or employee."[836] Specifically, 720 ILCS 5/3-6(b) provides that "[a] prosecution for any offense based upon misconduct in office by a public officer or employee may be commenced within one year after discovery of the offense by a person having a legal duty to report such offense, or in the absence of such discovery, within one year after the proper prosecuting officer becomes aware of the offense." However, 720 ILCS 5/3-6(b) further states that "in no such case is the period of limitation so extended more than 3 years beyond the expiration of the period otherwise applicable." Thus, even assuming the three-year statute of limitations period for an offense such as official misconduct could be extended based upon delayed discovery of the crime, the limitations period for any such offense committed in 2004 expired six years later, in 2010, prior to the Special Prosecutor's appointment.[837]

2. Out-of-State Residency

Second, Illinois law provides that the "period within which a prosecution must be commenced does not include any period in which . . . [t]he defendant is not usually and publicly resident within this State."[838] As to individuals who were putative targets of the Special Prosecutor's investigation into acts stemming from conduct that occurred in 2004, this tolling provision did not apply.

3. Continuous Conduct

Third, under Illinois law, where a defendant is charged with an offense comprised of a

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836 720 ILCS 5/3-6(b) (West 2013).

837 *See People v. Grever*, 353 Ill. App. 3d 736, 769 (Ill. App. Ct. 2d Dist. 2004) ("the longest period of limitations for the offense of official misconduct is six years (three years for the Class 3 felony (720 ILCS 5/3–5(b) (West 1998)) plus a three-year extension under section 3–6(b) because the offense is based upon misconduct in office by a public officer or employee (720 ILCS 5/3–6(b) (West 1998)).''), *overruled in part on other grounds by People v. Grever*, 222 Ill.2d 321 (Ill. 2006)); *see also People v. Stevens*, 66 Ill. App. 3d 138, 139 (1978).

838 720 ILCS 5/3-7(a) (West 2013).

overt act in furtherance of that conspiracy.[842] As a result, the Special Prosecutor evaluated both: (a) whether there was evidence of a conspiracy in 2004 with a limitations period tolled by subsequent overt acts in furtherance of that conspiracy, and (b) whether there was evidence of a continuing conspiracy that spanned both 2004 and 2011 (and thus the limitations period would have commenced in 2011).

a. Evidence of a Conspiracy in 2004 with a Limitations Period Tolled by Subsequent Overt Acts

As noted above, the limitations period for a conspiracy offense commences at the time of the last overt act in furtherance of that conspiracy. Nevertheless, where the criminal purpose of a conspiracy has been attained, a subsequent overt act or conspiracy to conceal the initial conspiracy "may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment."[843] Thus, assuming (for purposes of determining whether the statute of limitations would bar such a claim) the existence of a conspiracy in 2004, the Special Prosecutor would be barred from charging that conspiracy absent additional subsequent overt acts in furtherance of that conspiracy, aside from mere silence. In other words, if police and/or prosecutors conspired to obstruct justice in 2004, the Special Prosecutor could not charge that conspiracy without an additional subsequent overt act.

While the Special Prosecutor and the OSP reviewed records (such as access logs recording when police personnel accessed police reports) and interviewed witnesses which might have provided evidence of an intervening overt act (occurring after 2004 and within three years prior to the Special Prosecutor's appointment in 2012), the Special Prosecutor's investigation did not reveal any evidence of activity on behalf of police or prosecutors that might have served to toll the limitations period for any conspiracy that occurred in 2004.

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842 *See People v. Isaacs*, 37 Ill. 2d 205, 218 (1967); *People v. Drury*, 250 Ill. App. 547, 574-75 (Ill. App. Ct. 3d Dist. 1928).

843 *People v. Criswell*, 12 Ill. App. 3d 102, 105 (Ill. App. Ct. 1st Dist. 1973) ("allowing such a conspiracy to conceal to be inferred or implied from mere acts of concealment would result in a great widening of the scope of conspiracy prosecutions, since it would extend the life of a conspiracy indefinitely").

b. Evidence of a Conspiracy Spanning Both 2004 and 2011

The Special Prosecutor's investigation also did not uncover evidence to prove beyond a reasonable doubt the existence of a conspiracy that spanned from the initial investigation into Koschman's death in 2004 through the re-investigation in 2011. In order for there to be a conspiracy, there must be an agreement of some kind.[844] Additionally, in order to prove the offense of conspiracy, while unnecessary to demonstrate all co-conspirators were acquaintances or took part in all overt acts in furtherance of the conspiracy,[845] a prosecutor must still demonstrate the existence of a conspiracy and each co-conspirator's specific intent to join that conspiracy.[846] The Special Prosecutor's investigation did not uncover sufficient evidence to prove beyond a reasonable doubt that the same conspiracy existed in both 2004 and 2011 in connection with Koschman's death.

As detailed herein, the Special Prosecutor's investigation revealed that the same individuals involved with the investigation into Koschman's death in 2004 were not involved in CPD's re-investigation or SAO's involvement with the case in 2011. While the Special Prosecutor's investigation revealed some contact between certain of those individuals (for example, communications between Yawger and Walsh in 2011 concerning the missing Koschman homicide file), there was insufficient evidence to prove the existence of an agreement or the specific intent of any individual to join such an agreement. While the destruction or

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844 *People v. Foster*, 457 N.E.2d 405, 408-09 (Ill. 1983); *People v. Ambrose*, 329 N.E.2d 11, 14 (Ill. App. Ct. 3d Dist. 1975); *People v. Cohn*, 193 N.E. 150, 153 (Ill. 1934); *see also People v. Lattimore*, 955 N.E.2d 1244 (Ill. App. Ct. 1st Dist. 2011); *People v. Chambers*, 303 N.E.2d 24, 27 (Ill. App. Ct. 3d Dist. 1973); *People v. Rudd*, 970 N.E. 2d 580, 583-84 (Ill. App. Ct. 5th Dist. 2012).

845 *People v. Cohn*, 193 N.E. 150, 153 (Ill. 1934) ("It [is] not necessary that [a co-conspirator] should be acquainted with all the others engaged in the conspiracy. The doing of some act or the making of some agreement showing [his or her] intent to be a participant [is] sufficient."); *People v. Buffman*, 636 N.E.2d 783, 790 (Ill. App. Ct. 1st Dist. 1994) ("Conspirators need not have entered the conspiracy at the same time or have taken part in all its actions to be criminally accountable for acts in furtherance of conspiracy.")

846 *People v. Foster*, 457 N.E.2d 405, 408-09 (Ill. 1983); *People v. Ambrose*, 329 N.E.2d 11, 14 (Ill. App. Ct. 3d Dist. 1975) ("definition of agreement implies an intent to agree between a minimum of two people"); *People v. Cohn*, 193 N.E. 150, 153 (Ill. 1934); *see also People v. Lattimore*, 955 N.E.2d 1244 (Ill. App. Ct. 1st Dist. 2011) (Intent may be inferred (1) from the defendant's conduct surrounding the act and (2) from the act itself); *People v. Chambers*, 303 N.E.2d 24, 27 (Ill. App. Ct. 3d Dist. 1973); *People v. Rudd*, 970 N.E. 2d 580, 583-84 (Ill. App. Ct. 5th Dist. 2012).

concealment of evidence or case files related to the Koschman case could constitute an overt act in furtherance of a theoretical prior conspiracy in 2004 to obstruct justice,[847] the Special Prosecutor's investigation did not uncover evidence sufficient to prove such a conspiracy beyond a reasonable doubt.

D. The Events of 2011-2012: Evaluating Whether Employees of CPD and SAO Violated Illinois Criminal Law

1. Prosecution is Not Barred by the Applicable Statute of Limitations

As noted previously, unlike the events which occurred in 2004, any state law violations (e.g., for official misconduct, obstructing justice, conspiracy, or tampering with public records), by employees of CPD and SAO relating to acts that occurred in 2011-2012 are not barred by the applicable three-year statute of limitations as of the date of this report.

2. Summary of the Evidence from 2011-2012 Which Was Thoroughly Reviewed for Potential Criminal Charges

Generally, there are two types of evidence available to a prosecutor to prove criminal intent beyond a reasonable doubt: documentary evidence and testimonial evidence. Furthermore, criminal intent can be proven either directly or indirectly (i.e., inferred from circumstantial evidence). The Special Prosecutor and his office have analyzed all available documentary and testimonial evidence in this case — whether direct or circumstantial — for anything tending to show that any individual recklessly, knowingly, or intentionally violated Illinois law by suppressing and concealing evidence, furnishing false evidence, or generally impeding the investigation into Koschman's death. Having reviewed over 300,000 pages of documents obtained pursuant to special grand jury subpoenas, including e-mails, phone records, internal memoranda, and CPD report access logs, the Special Prosecutor has found no documentary evidence proving beyond a reasonable doubt that any employees of CPD or SAO recklessly, knowingly, or intentionally violated Illinois law during their participation in the Koschman matter in 2011 and 2012. Likewise, after questioning nearly 150 witnesses, the Special Prosecutor has identified no testimonial evidence proving beyond a reasonable doubt that any employees of CPD or SAO recklessly, knowingly, or intentionally violated Illinois law during their participation in the Koschman matter in 2011 and 2012.

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847 *See People v. Peebles*, 457 N.E.2d 1318, 1322 (Ill. App. 1st Dist. 1983).

self-defense. First, according to Gilger and Spanos' concluding case supp, which is based upon the witness statements they memorialized in their 2011 GPRs, "Copeland stated that they were trying to pull KOSCHMAN away from starting anymore [sic] trouble" before he was struck. But during his testimony before the special grand jury in 2012, Copeland testified this statement was not an accurate reflection of what happened the night of the incident, stating, "No. Again, I mean, I do remember, you know, gesturing and nudging him to kind of move away, but physically pulling him back, I don't remember doing that." Second, Gilger's GPR of the 2011 Allen interview stated that Koschman "was in the thick of the argument and was also yelling." But, when Allen appeared before the special grand jury in 2012, he testified that the statement was inaccurate "[b]ecause it's not like [Koschman] was in the thick of the argument. It was one giant argument and we were all yelling, so no, I would not—I did not say that." Finally, according to the GPR of the 2011 Kohler interview, Kohler stated "pushing and shoving happened between the two groups." Third, in 2012 before the special grand jury, Kohler testified that he did not believe that statement was accurate: "I believe I stated that they were arguing, but I don't think I said anything about pushing or shoving at that point."

Additionally, although Gilger and Spanos' concluding case supp in 2011 states that Koschman yelled "Fuck you! I'll kick your ass," this precise language is not supported by any of the interviews in either 2004 or 2011. Indeed, Gilger and Spanos incorporated this misstated and unattributed quote into their 2011 concluding case supp, without making it clear who provided it or when. The closest source for this language appears to be a statement recorded in Yawger's interview of Kevin McCarthy on May 19, 2004, during which Kevin McCarthy stated "at this time the primary kid (Koschman) and another kid were still swearing, calling himself [McCarthy], Craig [Denham], and Richard [Vanecko] names, and saying things like 'I'll kick your ass,' etc." Kevin McCarthy never provided a statement to Gilger and Spanos, and to the extent Gilger and Spanos were relying on a paraphrased statement from Kevin McCarthy made not to them, but rather to the 2004 CPD detectives, the trustworthiness of that statement is undermined by the fact that Kevin McCarthy lied to CPD in 2004 on at least two occasions.

Finally, Gilger and Spanos' concluding case supp did not relate the fact that in his 2011 interview, Allen, one of only two people at the scene of the incident who saw the physical contact between Vanecko and Koschman, stated that Vanecko and his group "were the aggressors." Allen's statement undermines CPD's 2011 determination that Vanecko acted in

self-defense. Even Gilger himself acknowledged during his special grand jury testimony in 2013 that the failure to include this particular statement from Allen in the concluding case supp was a fairly important omission that was contrary to CPD's 2011 determination that Vanecko acted in self-defense.

ii. Dept. Chief Andrews, Cmdr. Salemme and Sgt. Cirone

The Special Prosecutor's investigation identified limited evidence that was arguably consistent with a theory that certain CPD commanding officers engaged in criminal activity, with requisite criminal intent, to manufacture a phony self-defense determination. As detailed above in Section IV., C., the Special Prosecutor obtained two versions of Gilger and Spanos' concluding case supp—an initial draft from on or about February 11, 2011, and the final draft from on or about February 28, 2011. The earlier draft made no mention of self-defense, while the later draft concluded that Vanecko had acted in self-defense. Furthermore, the Special Prosecutor obtained e-mails sent during the time in between these two drafts (February 27, 2011) in which Andrews and Cirone discussed "corrections" related to the subject matter of self-defense. Salemme was copied on one of these e-mails.

iii. The Special Prosecutor's Decision Not to Seek Charges Against Det. Gilger, Det. Spanos, Dept. Chief Andrews, Cmdr. Salemme, and Sgt. Cirone

Because of their direct involvement in handling CPD's 2011 re-investigation of the Koschman case, the OSP focused on the acts of Gilger, Spanos, Andrews, Salemme and Cirone in evaluating whether any state law criminal wrongdoing occurred. Andrews and Salemme voluntarily cooperated with the OSP's investigation, Cirone was interviewed by the OSP pursuant to a proffer agreement and Gilger and Spanos were compelled to testify pursuant to court-ordered "use immunity."

During the course of his investigation, it became apparent to the Special Prosecutor that in order to understand what happened during CPD's 2011 re-investigation of the Koschman case, the special grand jury would have to hear testimony from the detectives who handled the 2011 re-investigation. Because those detectives, Gilger and Spanos, refused to testify voluntarily before the special grand jury based upon their Fifth Amendment privilege, the OSP thought it

was necessary, in order to fulfill Judge Toomin's mandate, to seek court-ordered "use immunity" to compel their testimony.[848]

Concerning the evidence against Gilger and Spanos, all the issues identified by the Special Prosecutor are, *at most*, slight circumstantial evidence of wrongdoing—that is, none directly proves that either detective broke the law. During their testimony before the Special Grand Jury, both Gilger and Spanos characterized their February 11, 2011 draft case supp as "just a draft." Gilger further explained to the special grand jury that he "do[es not] always put everything in there that I ultimately want to have in the report. . . . There were things I was going to add, and there was [sic] probably things I was going to take out, you know. But at that point when I typed it in, that's what I had so far." Gilger also explained to the special grand jury that although he had not yet included anything about self-defense, he was planning on doing so. Overall, both Gilger's and Spanos' special grand jury testimony indicates that the inclusion in the February 28, 2011 concluding case supp that Vanecko had acted in self-defense was their own (and not influenced by their commanding officers).

As for the evidence against Andrews, Salemme, and Cirone, none directly proves that any of these individuals violated Illinois law. In addition, these officers provided plausible non-criminal explanations for why they sent the "corrections" e-mails. During his interview with the OSP, Cirone stated he sent the e-mails because supervisor approval is a routine requirement for exceptionally clear/closing a case, stating that in such instances it must be reviewed by a commander "up the food chain". Additionally, Cirone could not identify who actually crafted the language contained in the "corrections" e-mails. Further, Cirone told the OSP that Gilger was with him in his office when Cirone sent the "corrections" e-mails, and that he used his personal e-mail account because "it was probably the account [he] had open" – the OSP discovered nothing to contradict these assertions. Andrews also corroborated Cirone's story when interviewed by the OSP, explaining that the e-mail exchange would have been part of the review process for the report. With regard to the substance of the changes, Andrews told the OSP he "probably asked for some minor changes," including that the case supp narrative be more specific and document the exchange between Koschman and Vanecko. Furthermore, when interviewed by the OSP, Salemme could not recall the single "corrections" e-mail that he

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[848] *See* footnote 25, *supra*, regarding grants of immunity.

received, nor did he know why those specific corrections were being suggested, but he did say his editing of the report was limited to only minor issues – such as spelling and typos.

Significantly, the Special Prosecutor's investigation was unable to locate any drafts of Gilger's report between the February 11, 2011 draft narrative and the February 27, 2011 e-mail with "corrections," sent 16 days later. As a result, it is unclear which version Andrews and Salemme may have edited. As stated above, the February 11, 2011 draft lacked any mention of self-defense — the subject of one of the "corrections" in the February 27, 2011 e-mail. Thus, the precise extent of Andrews' or Salemme's edits are unknown and could not be proved.

Therefore, it is the Special Prosecutor's opinion that he cannot prove beyond a reasonable doubt that Gilger, Spanos, Andrews, Salemme or Cirone engaged in criminal activity, with requisite criminal intent, to manufacture a phony self-defense determination.[849]

b. Whether the Facts and Circumstances Surrounding Lt. Walsh's 2011 Discovery of the Missing CPD Original Koschman Homicide File Amount to Criminal Misconduct

As discussed above in Section IV, C. 7., at CPD, every homicide case is supposed to have a corresponding permanent master homicide case file, and at Area 3, homicide files were primarily stored on a bookcase and in file cabinets located in the sergeants' office where they were indefinitely retained until the case was closed. But, that was not the case for the original Koschman homicide file.

As we now know, after CPD received the January 4, 2011 *Sun-Times* FOIA request surrounding the Koschman case, Andrews ordered Area 3 to gather the original Koschman homicide file so it could be provided to those at Area 5 who would be handling the 2011 CPD re-investigation. In response, Yamashiroya and Walsh searched for, but could not find, the original Koschman homicide file. In fact, it was not until June 29, 2011, four months after Gilger and Spanos finished Area 5's re-investigation, that Walsh reportedly found the original Koschman homicide file.

The Special Prosecutor's investigation identified certain evidence that is arguably consistent with the theory that the facts and circumstances surrounding Walsh's 2011 discovery

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849 The OSP has concluded that the facts and testimony do not objectively establish self-defense, which issue will be addressed at Vanecko's trial. This conclusion, however, does not mean that the OSP can prove beyond a reasonable doubt that CPD personnel's incorrect interpretation of facts and testimony as it relates to self-defense constitutes criminal obstruction of justice.

of the missing CPD original Koschman homicide file amount to criminal misconduct. That evidence is discussed below.

i. Lt. Walsh's Discovery of the Original Koschman Homicide File (Blue Three-Ring Binder)

To begin, and as discussed in detail above, through events which all occurred in 2011, Walsh was tied to three other files at issue in this case besides his June 29, 2011 discovery of the original CPD Koschman homicide file, specifically: (1) Yamashiroya told the OSP that Walsh was present in January 2011, when Yamashiroya discovered the Koschman "credenza file" (*see* Section IV., C., 7., b., i.); (2) Yawger was visiting Walsh at Area 3 on June 30, 2011, when he (Yawger) discovered his Koschman "working file" in the detective locker room (*see* Section IV., C., 7., b., iii.); and (3) Clemens, sometime between late February 2011 and late July 2011, allegedly found and immediately turned over to Walsh another version of the Koschman homicide file he found at Area 3 (*see* Section IV., C., 7., b., iv.).

In following up on Walsh's connection to the four files at issue, the Special Prosecutor and his office further discovered that Walsh reportedly found the original Koschman homicide file conspicuously displayed (a blue binder surrounded by only white binders) on a wooden shelf in Area 3's sergeants' office (an area that had been searched numerous times previously). While certainly possible, it is somewhat improbable that Walsh would ultimately find the original Koschman homicide file in Area 3's sergeants' office – a small room that is frequently occupied by CPD sergeants, often 24 hours a day.

In addition, it seemed counterintuitive to the Special Prosecutor and his office that Walsh would not have wanted to memorialize in writing (thus providing him an avenue in which his story could independently be corroborated) that he was not alone when he discovered the missing Koschman homicide file (the most critical and sought-after police file from a "heater case" which had already received scrutiny both inside and outside of CPD). Be that as it may, it was not until the OSP's questioning of Walsh in August 2013 that, likely for the first time,[850] Walsh

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[850] During his interview with the OSP, Walsh stated that when he first reported the discovery of the blue binder to Yamashiroya he informed Yamashiroya that Flaherty was in the sergeants' office when he found the blue binder. However, Yamashiroya told the OSP that he does not remember Walsh ever telling him that anyone else was present in the sergeants' office when he discovered the missing Koschman homicide file. Indeed, according to Yamashiroya, had he known someone else besides Walsh was present in the sergeants' office at the exact moment Walsh found the binder, he would have suggested that fact be included in the Walsh to Byrne June 30, 2011 memorandum.

mentioned he was not alone at the moment he found the Koschman homicide file, but rather was with Flaherty (his former CPD partner and close friend). Indeed, Walsh's June 30, 2011, memorandum to Byrne in which he memorialized his June 29, 2011 finding of the Koschman homicide file neglected to mention Flaherty's presence. Instead, Walsh told the OSP that, in his opinion, there was no reason to mention that Flaherty was with him.

Furthermore, even though Walsh was instructed by a superior to file the July 20, 2011, IAD complaint (which alleged that the original Koschman homicide file that was "believed to have been lost was obviously not lost" and instead had been "removed and returned in violation of department rules and regulations" by an "Unknown Chicago Police Officer"), he himself demonstrated an apparent lack of forthrightness during IAD's investigation – behavior more likely expected by a person who sees himself as a target of the investigation, as opposed to that of a person who filed the complaint initiating the investigation. For example, during Walsh's August 24, 2011 IAD interview regarding the disappearance and ultimate discovery of the Koschman homicide file, he once again did not disclose that Flaherty was in the sergeants' office on June 29, 2011 at the moment he (Walsh) discovered the file. Walsh told the OSP that in his opinion, unless specifically asked, "you don't volunteer things" to IAD.

ii. The Special Prosecutor's Decision Not to Seek Charges Against Lt. Walsh

For several reasons, the Special Prosecutor determined he would not be able to prove beyond a reasonable doubt at trial that Walsh recklessly, knowingly, or intentionally violated Illinois law during his participation in the Koschman matter in 2011. Because Walsh refused to voluntarily be interviewed by the OSP, the OSP thought it was necessary, in order to fulfill Judge Toomin's mandate, to conduct his interview pursuant to a proffer agreement.

During the course of the Special Prosecutor's investigation, their was not a single witness or document discovered by the OSP that directly contradicted Walsh's statement that he actually and honestly found (i.e., without any nefarious orchestration of events) the missing original Koschman homicide file on June 29, 2011. While the 2013 special grand jury testimony of Det. Clemens, as detailed above in Section IV., C., 7., b., iv., arguably undermines the truthfulness of Walsh's statements regarding his June 29, 2011 discovery of the original Koschman homicide file, Clemens' testimony has not been substantiated by others, was denied by Walsh, and the binder Clemens allegedly found (which Clemens described to the special grand jury as a blue

hardcover "flip binder", as opposed to the blue three-ring binder Walsh found) has never been discovered by CPD, SAO, IGO, or the OSP. Furthermore, even though Walsh told the OSP that after finding the original Koschman homicide file that he took it to his house for some period of time to store for safekeeping in his personal safe, there is no way for the OSP to determine what documents in the binder (e.g., GPRs), if any, may have been altered, added, or removed by Walsh.

Additionally, the OSP interviewed Flaherty in order to see whether he would corroborate Walsh's statement that Flaherty was with Walsh when he (Walsh) found the original Koschman homicide file. During his interview with the OSP, Flaherty substantiated Walsh's statement, and explained that he was indeed in the sergeants' office when Walsh retrieved a blue binder from the bookshelf, which Walsh immediately told him was the missing Koschman homicide file. In an attempt to independently verify Flaherty's statement, the OSP reviewed CPD records and determined that Flaherty, a sergeant, was in fact assigned to Area 3 and working the third watch on June 29, 2011. Moreover, the OSP, in yet a further attempt to corroborate or potentially disprove both Walsh's and Flaherty's statements made to the OSP that they were together in Area 3's sergeants' room on June 29, 2011 at the precise moment Walsh found the missing homicide file,[851] sought cell phone records and cell phone tower information via special grand jury subpoenas and court orders. The available responsive records the OSP received and reviewed in response to these efforts did not contradict the statements Walsh or Flaherty made to the OSP when interviewed in 2013.

The Special Prosecutor and his office agree with what former Deputy Superintendent Peterson explained during his interview with the OSP—that common sense dictates that someone had to have placed the blue binder Koschman homicide file on the shelf (next to all the white binders) knowing it would be found. However, without any actual testimonial or documentary evidence demonstrating that Walsh played some nefarious role in arranging his discovery of the original Koschman homicide file (or perhaps that he earlier prevented its discovery, or perhaps altered the file in some fashion after its discovery), there is nothing close to proof beyond a reasonable doubt that would support charges against Walsh. Therefore charges are not warranted.

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[851] According to Walsh's June 30, 2011 memorandum, he found the missing original Koschman homicide file at exactly 9:39 p.m., on June 29, 2011.

c. The Special Prosecutor's Decision Not to Seek Charges Against Any Employee of SAO

Lastly, the Special Prosecutor identified no evidence of any kind suggesting that any employee of SAO recklessly, knowingly, or intentionally violated Illinois law during their participation in the Koschman matter in 2011 and 2012. As such, charges were not sought.

VI. CONCLUSION

The evidence discussed in this report supports the findings by Judge Toomin in his April 6, 2012, Memorandum of Opinion and Order in which he decided to appoint a special prosecutor, wherein he stated:

> Section 7-1 of the Illinois Criminal Code provides:
>
> 'A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force. However, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another, or the commission of a forcible felony.' 720 ILCS 5/7-1 (West 2002).
>
> Inherent in the ability to raise a legitimate claim of justifiable force is the requirement that a person seeking to avail himself of the defense be able to present some evidence of six salient factors, to wit: (1) force was threatened against a person; (2) the person threatened was not the aggressor; (3) the danger of harm was imminent; (4) the threatened force was unlawful; (5) the person actually and subjectively believed a danger existed that required the use of force applied; and (6) the person's beliefs were objectively reasonable. *People v. Jeffries,* 164 Ill. 2d 104, 127-28, 646 N.E.2d 587, 598 (1995); *People v. Lee,* 311 Ill. App. 3d 363, 367, 724 N.E.2d 557, 561 (2000).
>
> Here, the viability of the self-defense claim imputed to Vanecko by the police and [SAO] rests solely upon the oft-repeated conclusion that Koschman was the aggressor. Yet, that determination derives from conflicting statements provided by Koschman's companions as well as independent witnesses suggesting that Koschman was verbally rather than physically aggressive. Vanecko's friends provided no meaningful insight, claiming their backs were turned

when Koschman was struck. However, even assuming Koschman was the aggressor, that determination should only be the start of the inquiry. Adherence to the salient factors noted would have been far more telling. First, there is no credible evidence that Koschman employed any physical force against Vanecko. On the contrary, the quoted materials from the [IGO] investigation incorporated in petitioners' reply clearly undermine that claim. Second, there is only conflicting evidence that Koschman was the aggressor, albeit verbally. Third, there is no indication that there was any danger of imminent harm to Vanecko, particularly given the disparity in size between himself (6'3", 230 pounds) and Koschman (5'5", 140 pounds). Fourth, the submissions before this court are barren of any suggestion, much less evidence, that Vanecko actually and subjectively believed that a danger existed that required the use of force he applied. If nothing else, one aspect of the police investigation is uncontroverted, no police officer or [SAO] prosecutor ever interviewed or spoke to Vanecko. In fact, Detective Yawger, in an interview with the *Sun-Times*, lamented how Vanecko's attorney frustrated his efforts to speak with his client after initially promising Yawger that Vanecko would talk to investigators.

Yet, it is the existence of a person's subjective belief that the evidence must show. *People v. Malvin Washington*, Ill. Sup. Ct., No. 110283, January 20, 2012 ¶ 48. In the absence of such evidence, an objective observer might well express amazement as to how the police or [SAO] could so blithely divine the subjective feelings of Vanecko. Clearly, they could not. Under these circumstances, the public could well conclude that the entire claim of self-defense came not from Vanecko, but, rather, was conjured up in the minds of law enforcement. A discerning citizen could well surmise that it simply is an argument made of whole cloth. Whether Vanecko may, in fact, have a valid claim of self-defense should properly be for him to raise, not the police.

[SAO's] concurrence in what one might charitably characterize as a rather creative exercise of the police investigative processes offers little confidence in [SAO's] ability to conduct the kind of objective 'fresh look' that this matter requires. This is not to suggest that there is merit to petitioners' claim of political or personal interest. Nonetheless, [SAO's] efforts to denigrate the evidence against Vanecko, coupled with [SAO's] recurring calls for an independent investigation evokes a decided interest in the matter sufficient to warrant appointment of a special prosecutor.[852]

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852 Order by J. Toomin at 30-32, Apr. 6, 2012.

VII. WINSTON & STRAWN INVESTIGATIVE PERSONNEL

Special Prosecutor Dan K. Webb is the Chairman of Winston & Strawn LLP, and the former United States Attorney for the Northern District of Illinois. This matter is the fourth time Mr. Webb has served as a special prosecutor.

Mr. Webb was principally assisted in the investigation by Winston & Strawn attorneys and Deputy Special Prosecutors Stephen J. Senderowitz, Daniel D. Rubinstein, Derek J. Sarafa, Matthew J. Hernandez, and Sean G. Wieber. Mr. Senderowitz is a former Assistant United States Attorney and has previously served as a deputy special prosecutor on another matter. Mr. Rubinstein is a former Assistant United States Attorney.

In addition, valuable assistance was provided by other Winston & Strawn attorneys, including: Jennifer L. Bekkerman, Andrew C. Erskine, Matthew R. Carter, Thomas G. Weber, Shannon T. Murphy, Jared L. Hasten, Solana P. Flora, and Katherine V. Boyle.

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

IN RE APPOINTMENT OF SPECIAL PROSECUTOR	)	No. 2011 Misc. 46
	)	The Honorable Michael P. Toomin

CITY OF CHICAGO'S MOTION TO CLARIFY PROTECTIVE ORDER OF JUNE 12, 2012

The City of Chicago respectfully moves for this Court to clarify its Order entered on June 14, 2012. In support of its motion, the City states as follows:

1. The City of Chicago Police Department ("CPD") and the Department of Law ("Law") (collectively the "City") are public bodies as defined by the Illinois Freedom of Information Act ("FOIA"). See 5 ILCS 140/2(a).

2. On February 6, 2014, the City received FOIA requests from Mr. Tim Novak for copies of all grand jury subpoenas received from the Office of the Special Prosecutor Dan K. Webb in the investigation of David Koschman's death, as well as documents and records provided by the City in response to those grand jury subpoenas. See Exhibit 1.

3. The City denied Mr. Novak's request in letters dated February 11 and 14, 2014. In the letters, it was explained that all responsive documents were exempt from disclosure pursuant to 5 ILCS 140/7(1)(a) of FOIA which exempts "[i]formation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." Because the requested documents were subject to a Protective Order entered by this Court

on June 14, 2012, and were produced pursuant to a grand jury subpoena, the request was denied. The City's letter also noted that, "should the Protective Order be modified or vacated," the City "reserves the right to raise additional exemptions under FOIA." See Exhibit 2.

4. Mr. Novak appealed the denials to the Public Access Counselor ("PAC") of the Office of the Illinois Attorney General. See Exhibit 3.

5. The PAC is statutorily able to review FOIA responses by a public body and issue opinions concerning the public body's response. 5 ILCS 140/9.5(a).

6. The PAC, pursuant to 5 ILCS 140/9.5(c), requested that the City provide the PAC with a "copy of the protective order referenced in the City's response." See Exhibit 4.

7. On March 21, 2014, the City filed a Motion asking this Court to release the Protective Order from under seal so that the City would be able to fulfill the PAC's request to review the Protective Order without violating the terms of the seal and Protective Order. See Exhibit 5.

8. After a hearing on March 27, 2014, this Court released the Protective Order from under seal. In the order issued on that day, the Court noted that the June 14, 2012, order "[b]y its terms, sealed *all Grand Jury materials* and precluded their dissemination or disclosure." See Exhibit 6. (emphasis added).

9. In addition, the June 14, 2012, order stated that the "Protective Order shall apply to *all Grand Jury materials*, including but not limited to subpoenas, target letters, and other correspondence related to the service of a Grand Jury subpoena, sent by the Office of the Special Prosecutor to any individual or entity in connection with this investigation." See Exhibit 7. (Emphasis added).

10. The June 14, 2012, and March 27, 2014, Protective Orders and the March 27, 2014, hearing transcript were forwarded to the PAC along with the City's response letter. In that letter, to the PAC, the City asserted:

> *The Protective Order demonstrates, by clear and convincing evidence, that the release by the City of every document sought in Mr. Novak's FOIA requests is prohibited. ... The June 14, 2012 Protective Order states that:*
>
> - *The order applies to all Grand Jury materials (par. 1).*
> - *Anyone receiving Grand Jury materials cannot disseminate said materials (par 2).*
> - *Any papers, documents and transcripts containing or revealing grand jury materials shall be filed under seal. (par. 4)*

See Exhibit 8.

11. On June 5, 2014, the PAC issued a decision. In that decision, the PAC found that while it was clear that the subpoenas sent to the City were protected, it was not clear from the June 14, 2012, Protective Order that the documents produced by the City in response to the subpoenas were protected. The PAC noted that:

> *We do recognize, however, that the protective order remains in effect and the City argues that the disclosure of records furnished in response to a grand jury subpoena would infringe upon the restrictions of the protective order. Although counsel for the Sun-Times, during the hearing on whether to unseal the protective order itself, invited the court to respond to the question of whether the protective order extended to copies of documents in the possession of the City and CPD, Judge Toomin did not address the issue. Consequently, although we find that the plain language of the protective order does not prohibit the disclosure of records that were provided by the City and CPD to the special prosecutor, that is an issue that the City may ultimately seek to have the court resolve: Therefore, we conclude that the City and CPD must either provide the responsive documents to Mr. Novak, or alternatively, return to the court to seek clarification of the limits of the protective order upon which they have based their denial of Mr. Novak's FOIA requests.*

See Exhibit 9.

12. The City disagrees with the PAC's assertion that the documents sought by Mr. Novak ("all documents and records the city provided to the Office of the Special Prosecutor in

the Koschman case") (see Exhibit 1), may not be protected by this Court's June 14, 2012 protective order.

13. The PAC's interpretation that the Grand Jury subpoenas are protected but that the documents produced in response to those very same subpoenas is illogical. Production of the documents clearly includes responsive documents the City provided to the Special Prosecutor and, thus, reveal what the subpoenas requested, thereby revealing the substance of the subpoenas issued by the Special Prosecutor.

14. In addition, the PAC neglected a basic rule of statutory construction: the use of the term "including but not limited to" does not in any way limit the order to only those items specifically enumerated. See People v. Perry, 224 Ill.2d 312 (2007) ("The legislature has on many occasions used the phrases "including but not limited to" or "includes but is not limited to" to indicate that the list that follows is intended to be illustrative rather than exhaustive." Id. at 330) *See also* Gem Electronics v. Department of Revenue, 286 Ill App. 668 (4th Dist., 1996). ("The words "include" or "including" are ordinarily terms of enlargement rather than restriction and indicate that items enumerated in a statute are not meant to be exclusive." Id. at 667.) *See also* Paxson v. Board of Education, 276 Ill.App.3d 912 (1st Dist. 1995) ("We, too, find the word "including", in its most commonly understood meaning, to be a term of enlargement, not of limitation." Id. at 920.) Therefore, the phrase "*all Grand Jury materials*, including but not limited to" as used in the Protective Order clearly prohibits the release of the records sought by Mr. Novak. (emphasis added).

15. Though the Protective Order clearly prohibits release of the documents sought by Mr Novak in his original request, given the opinion of the PAC, it is prudent to seek clarification from this Court.

Therefore, the City requests that this court conclusively state that the records the City produced pursuant to the grand jury subpoenas are covered by the June 14, 2012, Protective Order and cannot be produced.

Dated: June 18, 2014

Respectfully submitted,

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

IN RE APPOINTMENT OF SPECIAL PROSECUTOR	)	**No. 2011 Misc. 46**
	)	**The Honorable Michael P. Toomin**

ORDER

The City of Chicago moves for entry of an order clarifying the protective order entered by this Court on June 14, 2012. The subject order was unsealed at the City's request on March 25, 2014. That action was prompted by the determination of the Public Access Counselor ("PAC") of the Office of the Illinois Attorney General that the appeal of the denial of a Freedom of Information Act ("FOIA") request submitted by the Chicago Sun-Times required a review of the June 14, 2012, order. Thereafter, on June 4, 2014, the PAC issued a letter announcing his determination on the matter. The PAC stated, in pertinent part, as follows:

> "[W]e request that the [City of Chicago] and [Chicago Police Department] either disclose the records requested by Mr. Novak (except for any subpoenas issued by the grand jury investigating Mr. Koschman's death and sent by the special prosecutor), subject only to permissible redactions … or seek judicial clarification of the limits of the protective order issued on June 4, 2012 [*sic*]."

The City chose the latter option, which brings us to the motion now before this Court.

In the wake of the findings of the PAC, the City's motion reiterates its resistance to making the disclosures sought by Mr. Novak. This is borne out by the prayer for relief contained in the motion seeking clarification:

> "Therefore, the City requests that this court conclusively state that the records the City produced pursuant to the grand jury subpoenas are covered by the June 14, 2012, Protective Order and cannot be produced."

Having carefully considered the protective order, the initiating FOIA request, the findings of the PAC, the City's present motion, and the Sun-Times response, it is evident that the request for clarification has substantial merit.

As a starting point, consideration is directed to Mr. Novak's FOIA request setting the stage for this controversy. That request read:

> "Under the Illinois Freedom of Information Act, we are seeking:
>
> 1. copies of all subpoenas city officials received from the Officer [*sic*] of the Special Prosecutor Dan K. Webb in the investigation of David Koschman's death.
>
> 2. all documents and records the city provided to the Office of the Special Prosecutor in the Koschman case."

Notably, the City and the PAC are in agreement insofar as the grand jury subpoenas are concerned. Specifically, they are not obtainable by way of a FOIA request such as the one submitted by Mr. Novak.* Taking that conclusion a step further, the City asserts that providing the documents tendered to the Office of the Special Prosecutor pursuant to grand jury subpoenas

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* Although the Sun-Times challenges the PAC's determination that the subpoenas issued by the Special Prosecutor are not subject to disclosure, the efficacy of that ruling is not before this Court and is more properly cognizable on administrative review.

would, in effect, violate the scope of the protective order by disclosing matters before the Special Grand Jury.

Concededly, the documents tendered to the Office of the Special Prosecutor in response to its subpoena remain within the possession of the City or the CPD. That a grand jury subpoena was issued for them did not change the character or intrinsic value of those documents. As observed in *Board of Education v. Verisario*, "The mere fact that a particular document is reviewed by a grand jury does not convert it into a matter occurring before the grand jury within the meaning of section 112-6(b)." 143 Ill. App. 3d 1000, 1007 (2nd Dist. 1986). Rather, the character of those documents was altered only upon being produced to the Office of the Special Prosecutor. Upon such production, they were subsumed within the broader universe of grand jury material and impliedly became subject to the statutory provisions governing grand jury materials and the protective order.

Importantly, "if a document is sought for its own sake, for its intrinsic value in the furtherance of a lawful investigation, rather than to learn what took place before the grand jury, and if the disclosure will not seriously compromise the secrecy of the grand jury investigation, disclosure is not prohibited." *Verisario*, 143 Ill. App. 3d at 1008. Here, however, Mr. Novak's request is tied by its very terms to the subpoenas issued by the Office of the Special Prosecutor and essentially seeks to learn what took place before the Special Grand Jury. As such, if the City complied with the request in its present format, doing so would violate this Court's protective order.

A similar result obtained in *In re: Matter of Special February, 1975 Grand Jury;Appeal of James E. Baggot*, 662 F.2d 1232 (1981), where the Internal Revenue Service sought disclosure

of "certain evidence generated by the grand jury investigation" to further its determination of Baggot's tax liability. *Baggot*, 662 F.2d at 1233. There, the Court of Appeals for the Seventh Circuit found Baggot's statement to the grand jury, made as part of a plea agreement with the government after Baggot received a grand jury subpoena, was "too grand jury related to be artificially distinguished from the transcript of its reading to the grand jury." *Baggot*, 662 F.2d at 1237-38. Consequently, the court held the statement was governed by Rule 6(e) of the Federal Rules of Criminal Procedure, which governs the recording and disclosing of grand jury proceedings in the federal criminal system. *Baggot*, 662 F.2d at 1238.

Here, as in *Versiario* and *Baggot*, the relevant documents in the possession of the City or the CPD, appear to be sought for their own sake, but remain obtainable through other channels. However, those items cannot be identified as grand jury materials without compromising the intrinsic provisions of the protective order. If some or all the documents related to the death of David Koschman and subsequent investigations were sought via FOIA request or subpoena in a matter not connected with the work of the Special Prosecutor, such documents could be produced by the City or the CPD, subject to any other applicable restrictions or prohibitions. What the City or CPD, as custodians of those records, cannot do is to identify or characterize any of those documents as materials provided to the Office of the Special Prosecutor.

In summary, although this Court does not question Mr. Novak's entitlement to production of the documents that may have become grand jury materials, he is not entitled to know what documents and materials in the possession of the City and CPD were tendered pursuant to grand jury subpoena. The protective order was implemented as a means to protect the sanctity of the investigation of the Office of the Special Prosecutor and the work of the special grand jury. Mr.

Novak cannot make an end-run around the terms and purpose of the order by drafting his FOIA request in a manner calculated to reveal what took place before the Special Grand Jury. Accordingly, this Court clarifies the scope of the protective order to include the identification or characterization of documents obtained through grand jury subpoena and, therefore, not subject to disclosure as such.

IT IS THEREFORE ORDERED that the City of Chicago's motion is **GRANTED** insofar as it calls upon this Court to clarify the terms of the June 14, 2012, protective order to prohibit the identification and characterization of documents disseminated to the Office of the Special Prosecutor in furtherance of its investigation into the death of David Koschman. The June 14, 2012, protective order, which remains in full force and effect, limits only the identification of any documents or other records as being grand jury materials.

DATE: JUN 25 2014

ENTERED: _____
Michael P. Toomin,
Judge of the
Circuit Court of Cook County

ENTERED
JUDGE MICHAEL P. TOOMIN-0501
JUN 25 2014
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

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

BETTER GOVERNMENT ASSOCIATION,
Plaintiff,

v.

OFFICE OF THE SPECIAL PROSECUTOR DAN K. WEBB, CITY OF CHICAGO LAW DEPARTMENT, CITY OF CHICAGO MAYOR'S OFFICE, CHICAGO POLICE DEPARTMENT,
Defendants.

No. 15 CH 4183

Judge Mary L. Mikva

Calendar 6

OPINION

This matter is before the Court on the motions filed by both sets of Defendants, the Office of the Special Prosecutor Dan K. Webb ("OSP") and the City Defendants, which includes the City of Chicago Law Department, Mayor's Office and Police Department ("City") to dismiss the complaint filed by the Better Government Association ("BGA") alleging violations of the Illinois Freedom of Information Act ("FOIA"), 5 ILCS 140/1 *et seq*. For the following reasons, OSP's motion is GRANTED and the City's motion is DENIED.

1. On January 23, 2015, BGA sent FOIA requests to both the OSP and City seeking a variety of documents related to a Grand Jury proceeding in which Judge Michael P. Toomin appointed Dan K. Webb as a Special Prosecutor on April 23, 2012, and empaneled a Grand Jury to investigate the 2004 killing of David Koschman. Specifically, BGA seeks disclosure from OSP of: (1) documents sufficient to show the names of everyone interviewed in relationship to this investigation; (2) copies of all statements by and communications with Daley family members and their attorneys or former corporation counsel Mara Georges; and (3) copies of any and all itemized invoices and billing records for the special prosecutor's team. From the City, BGA seeks: (1) copies of any and all subpoenas issued to the City Defendants regarding this investigation; (2) any and all emails between special prosecutor Dan Webb's office and the City Defendants in regard to the investigation; and (3) any indexes of records produced to OSP in regards to the investigation. On January 30, 2015, OSP denied BGA's request in full. On February 6, 2015, the City advised BGA that there are no such indexes and denied the remaining requests. BGA has advised the Court that it does not challenge the City's contention and accordingly only the first two requests to the City are at issue.
2. Judge Toomin entered two Orders that relate to the documents BGA seeks. On June 14, 2012, at the request of OSP, Judge Toomin entered a protective order ("Protective Order") that barred disclosure of "all Grand Jury materials, including but not limited to

subpoenas, target letters and other correspondence . . . ." *In re Appointment of Special Prosecutor*, 2011 Misc. 46, Order of June 14, 2012. The Protective Order provided that any individuals or entities who received Grand Jury materials from OSP were "precluded from disseminating that material or information contained therein." Two years later, Judge Toomin entered another Order ("Clarifying Order") in response to the City's request that he clarify his Protective Order in light of a FOIA request the City received from the Sun-Times. *In re Appointment of Special Prosecutor*, 2011 Misc. 46, Order of June 25, 2014. In the Clarifying Order, Judge Toomin held that FOIA did not require the City to disclose "documents and records the city provided to the Office of the Special Prosecutor in the Koschman case . . . pursuant to grand jury subpoena" because such a disclosure would "make an end-run around the terms and purpose of [the Protective] order by drafting [a] FOIA request in a manner calculated to reveal what took place before the Special Grand Jury." The Clarifying Order did not specifically address the disclosure of subpoenas issued to the City, but did mention the Public Access Counselor ("PAC") opinion exempting subpoenas from disclosure. Judge Toomin's Clarifying Order did make clear that, in his view, the Grand Jury Secrecy Act, 725 ILCS 5/112-6 ("Grand Jury Act"), protected requests for information both from the OSP and from third parties that the OSP communicated with regarding the investigation.

3. BGA's FOIA claims require an analysis of the intersection between FOIA, the Grand Jury Act and Judge Toomin's Orders issued as a part of the grand jury proceeding.
4. FOIA provides that public records of a public body shall be disclosed pursuant to a FOIA request with certain enumerated exemptions. The relevant exemption for purposes of the instant motions directs that the following shall be exempt from inspection or copying:

> Information specifically prohibited from disclosure by federal or State law or rule and regulations implementing federal or State law.

5 ILCS 140/7(1)(a).

5. Illinois FOIA is modeled after federal law and therefore Illinois courts frequently consult federal cases in interpreting its provisions. *See Cooper v. Dep't of the Lottery*, 266 Ill. App. 3d 1007, 1012 (1994) ("[C]ase law construing the Federal statute should be used in Illinois to interpret our own FOIA.").
6. Section 112-6, "Secrecy of proceedings" of the Grand Jury Act, specifically prohibits disclosure of matters occurring before the grand jury "other than the deliberations and vote of any grand juror" unless such disclosure is made by the State's Attorney in the performance of his or her official duties, or to "such government personnel as are deemed necessary by the State's Attorney in the performance of such State's Attorney's duty to enforce State criminal law." 725 ILCS 5/112-6(b), (c)(1)(a)–(b). The Grand Jury Act also provides that the State's Attorney shall "promptly" advise the court that has impaneled the grand jury of the names of any persons to whom any disclosure has been made. *Id.* at (c)(2). The Grand Jury Act further provides:

> 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.

Id. at (c)(3).

7. The Illinois Grand Jury Act was modeled after Rule 6(e) of the Federal Rules of Criminal Procedure, and therefore our courts often find federal case law "instructive" in interpreting this statute. *Bd. of Educ. v. Verisario*, 143 Ill. App. 3d 1000, 1005 (2d Dist. 1986).
8. BGA contends that FOIA is a law that "so directs" within the meaning of section (c)(3) of the Grand Jury Act, such that a valid FOIA request cannot ever be denied on the basis of Grand Jury Act secrecy. The Defendants, on the other hand, view the Grand Jury Act as a State law that specifically prohibits the disclosure of material that would otherwise be subject to FOIA disclosure pursuant to section 7(1)(a). 5 ILCS 140/7(1)(a). The Court agrees with the Defendants on this. The Court does not view FOIA as the kind of specific law that would "direct" the disclosure of otherwise confidential grand jury materials. Rather, the Grand Jury Act is the kind of specific statutory exemption contemplated by section (7)(1)(a). At least one Illinois appellate court decision has expressly held that the Grand Jury Act "is a state law that prohibits the disclosure of grand jury transcripts without a court order and thus exempts them from [FOIA]." *Taliani v. Herrmann*, 2011 IL App (3d) 090138, ¶13. This is in accord with federal FOIA cases, which recognize that Rule 6(e) of the Federal Rules of Criminal Procedure qualifies as a "statute" for the purposes of federal FOIA and thus material within the confines of the grand jury secrecy rule are exempt from disclosure. *See, e.g., Butler v. U.S. DOJ*, 368 F. Supp. 2d 776, 785 (E.D. Mich. 2005) ("Document 1 was properly withheld pursuant to exemption (b)(3)[of federal FOIA] which provides that an agency may withhold documents 'specifically exempted from disclosure by statute . . . .'" (citing *Rugiero v. U.S. DOJ*, 257 F.3d 534, 549 (6th Cir. 2001)).
9. Even if the Grand Jury Act exempts from disclosure under FOIA materials "occurring before the grand jury," BGA next argues that the documents requested are not materials that were *presented* before the grand jury and thus not exempt from disclosure. The secrecy protections of the Grand Jury Act protect from disclosure "the essence of what takes place in the grand jury room." *Verisario*, 143 Ill. App. 3d at 1007. The purpose of the statute is "to protect the identity of witnesses or jurors, the substance of the testimony, the strategy or direction of the investigation, the deliberations or questions of the jurors and the like." *Id.* The court in *Verisario* also prohibited from disclosure those records that would "reveal the direction and purpose of the grand jury investigation." *Id.* at 1008.
10. The Court agrees with OSP that all of BGA's requests to OSP are protected from disclosure under the Grand Jury Act and the reasoning of *Verisario*. Documents sufficient to show the names of everyone interviewed in relationship to this investigation and statements by and communications with Daley family members and their attorneys or

former corporation counsel Mara Georges would clearly reveal the direction, strategy and purpose of the grand jury investigation. In addition, copies of any and all itemized invoices and billing records for the special prosecutor's team would also necessarily reveal the strategy and direction of the investigation. While the amount that was spent by the City for the OSP is apparently easily obtained as a public record, BGA seeks these more detailed billing records precisely in the hopes that they will reveal the actions of the investigators themselves and that is plainly what is protected under the Grand Jury Act.

11. On the other hand, in reference to the FOIA requests to the City, the language of the Grand Jury Act does not extend to protecting persons who provide information to the Grand Jury, unless such person is a State's Attorney or government personnel as provided in section (c)(1) of the Grand Jury Act who has been promptly disclosed as such to the judge that impaneled the grand jury. 725 ILCS 5/112-6(c)(1)–(2). The City does not contend that it or anyone from the City has been so designated. While the language of the Grand Jury Act may prohibit disclosure of materials received by the special prosecutor in response to a subpoena, nothing in the Act extends to the individuals or entities themselves who were the recipients of such subpoenas.
12. Although private citizens who are recipients of a grand jury subpoena "usually prefer to remain silent about the matter," there is nothing to prohibit them from "disclos[ing] its existence and content." *Better Gov't Assoc'n v. Blagojevich*, 386 Ill. App. 3d 808, 814 (4th Dist. 2008). When the recipient of a grand jury subpoena is a public body subject to FOIA, the *Blagojevich* court held that the recipient had no discretion to refuse to disclose that document in response to a FOIA request. Although *Blogojevich* dealt with Federal Rule of Criminal Procedure 6(e), Rule 6(e) and the Illinois Grand Jury Act both protect specifically designated parties, neither of which include recipients of a grand jury subpoena. *Compare* 725 ILCS 5/112-6(b), (c), *with* Fed. R. Crim. Pro. 6(e). The *Blagojevich* court expressly refused to follow federal courts that had extended grand jury secrecy to documents in the hands of other parties not listed in Rule 6(e) simply because those documents had been created by a grand jury or the prosecutor such as subpoenas, transcripts, and lists of documents. 386 Ill. App. 3d at 814–15.
13. Although *Blogojevich* dealt specifically with subpoenas, the court's reasoning would appear to extend to BGA's request for emails between OSP and the City in regard to the investigation. The court's reasoning was that, while a private citizen has every right to keep secret the receipt of a grand jury subpoena, "FOIA eliminates such discretion from the recipient of a federal grand jury subpoena if that recipient is a public official subject to FOIA's requirements." *Id.* at 817. If this Court follows the reasoning and holding of *Blogojevich*, this Court sees nothing in the language of the Grand Jury Act that would protect the City from complying with BGA's two FOIA requests.
14. The City does not contend that the Grand Jury Act itself creates an applicable FOIA exemption. Rather, the City's contention is that Judge Toomin's Orders create a FOIA exemption that it can rely on to refuse to make this disclosure to BGA. In the City's view,

Judge Toomin's Orders are "State law" under 5 ILCS 140/7(1)(a). This Court agrees with the City that Judge Toomin's Orders, which expressly prohibit using a FOIA request to "end run" confidentiality regarding the direction and purpose of the Grand Jury investigation, would exempt from disclosure BGA's two FOIA requests to the City seeking correspondence between the City and OSP and any subpoenas OSP issued to the City. However, this would provide the City protection from a FOIA request only if Judge Toomin's Orders constitute "State law" under FOIA exemption 7(1)(a).

15. The City and BGA take opposing positions on whether a court order is "State law" for purposes of the 7(1)(a) FOIA exemption. The City points out that common law, including decisions and judgments of the courts, are a part of Illinois' law. The City also stresses that it is legally required, at risk of contempt, to obey Judge Toomin's Orders. The City reminds this Court that the initial Protective Order was not requested by the City but rather requested by OSP. As precedent, the City relies on *GTE Sylvania, Inc. v. Consumers Union of the United States Inc.*, in which the Supreme Court held that the federal FOIA statute did not compel an agency to provide documents in response to a FOIA request where that agency was expressly prohibited from releasing those records by an injunctive order issued in a different district court. 445 U.S. 375, 386–87 (1980). The Supreme Court in *GTE Sylvania* reasoned that the documents had not been "improperly withheld," which is what FOIA requires before a government defendant can be required to produce documents in response to a FOIA request. *Id.* at 387.
16. BGA argues that the 7(1)(a) FOIA exemption makes no mention of court orders. BGA points out that the FOIA exemptions are to be read narrowly. BGA also cites two Illinois cases in which courts have refused to allow a public body to rely on a court order to exempt documents from disclosure in response to a FOIA request. *Watkins v. McCarthy*, 2012 IL App (1st) 100632 (2012); *Carbondale Convention Ctr., Inc. v. City of Carbondale*, 245 Ill. App. 3d 474 (5th Dist. 1993). BGA distinguishes *GTE Sylvania* and also argues that it is not binding or even helpful, since Illinois FOIA cases have not focused on the statutory requirement that a document must be "improperly" withheld before it is ordered produced. *But see*, 5 ILCS 140/11(d) ("The circuit court shall have the jurisdiction to enjoin the public body from withholding public records and to order the production of any public records *improperly* withheld from the person seeking access.") (emphasis added).
17. In the two Illinois cases that BGA relies on the courts found that the court order relied on by the public body did not support a 7(1)(a) FOIA exemption based upon the specific facts of the case. In *Watkins,* the court concluded that even if it were to accept that the protective order was "a federal law" under section 7(1)(a), the protective order would no longer be applicable because the federal suit in which it had been entered had been dismissed. 2012 Ill. App (1st) 100632 at ¶43. In *Carbondale*, the protective order at issue was obtained "in part" by the FOIA defendant's efforts to prevent disclosure of the sought after agreement. 245 Ill. App. 3d at 477. On that basis, the court concluded that

allowing the defendant to refuse a FOIA request based on that order "contradicts the purpose and intent of [FOIA] under which the exemptions are intended as shields rather than swords . . . ." *Id.*

18. The facts that persuaded the courts in *Watkins* and *Carbondale* also have some force here. As in those cases, the need for secrecy has been diminished and the City itself helped to procure the "secrecy" it now seeks to rely on. In an Order dated November 4, 2014, in response to a criminal defendant's request to intervene and obtain information relating to the grand jury investigation pursuant to section 112-6(c)(3) of the Grand Jury Act, Judge Toomin acknowledged that since the special grand jury had been discharged for more than a year, the importance of secrecy had been "mitigated" and the threshold for disclosure "reduced." *In re Appointment of Special Prosecutor,* 2011 Misc. 46, Order of November 4, 2014. Nevertheless, applying the "three-prong particularized-need test" articulated in *Douglas Oil Company v. Petrol Stops Northwest* for requests pursuant to Federal Rule 6(e), Judge Toomin still denied the disclosure of such documents. *See* 441 U.S. 211, 222 (1979); *Verisario,* 143 Ill. App. 3d at 1009; Order of November 4, 2014. Since the special grand jury has now been discharged for over two years, the importance of secrecy has been even further "mitigated." In addition, while the City did not obtain the original Protective Order nor was it a party to that proceeding, it did seek the subsequent clarification of that order where Judge Toomin specifically held that a FOIA request to the City was exempt because of the Grand Jury Act.
19. In this Court's view, while *GTE Sylvania* should be followed to the extent that the City should not be required to disobey a court order, it does not support the City's argument that a court order alone creates a FOIA exemption. The Court agrees with BGA that a protective order, entered in a case in which the FOIA requestor is not a party, cannot create a blanket FOIA exemption. The possibilities for abuse are apparent. As BGA argues, and the concurrence pointed out in *Carbondale*, "if one were to carry this argument to the extreme, all information regarding the affairs of government would be legally exempt from disclosure as long as the government could find a judge to sign an order prohibiting disclosure." 245 Ill. App. 3d at 479.
20. In addition to the reasoning that moved the courts in *Watkins* and *Carbondale* to refuse to view the court orders there as creating an exemption under FOIA, this Court believes that there is an additional problem with allowing the City to rely on Judge Toomin's Orders here. Those Orders represent Judge Toomin's interpretation of the statute and the scope of Grand Jury Act protection. That interpretation, while certainly well-reasoned, is at odds with the appellate court's reasoning in *Blagojevich.* Simply put, Judge Toomin viewed grand jury secrecy as extending to those who provide information to a grand jury. *Blagojevich* holds that grand jury secrecy extends only to specifically designated people and not to individuals or entities that provide information to the grand jury. The court in *Blagojevich* held that government parties that provide information to a grand jury are not exempted from a FOIA request. This Court does not believe that the City can rest on a

court order that appears, at least to this Court, to rest on an interpretation of the Grand Jury Act that is inconsistent with an appellate court opinion.

21. As this Court has consistently promised the parties, it will not put the City in a position where it would be forced to disobey another court order to comply with this one. In this Court's view, the City would, under FOIA, have to provide the documents that BGA has requested. The City is precluded from doing this by Judge Toomin's Orders. Since this Court refused to transfer this case to Judge Toomin at the outset, which is what the City and OSP requested, all the parties now appear to agree that this dilemma is best addressed after this Court concluded its own analysis of the FOIA request and the asserted exemptions. This has now been done. This Court's own suggestion would be for BGA to seek a modification of the June 14, 2012, and June 25, 2014 Orders on a motion to intervene before Judge Toomin. This would allow Judge Toomin to address this issue and then the final order on BGA's motion to intervene could be appealed together with this Order if the orders conflict. However, the Court is open to any other procedure another party wishes to suggest. Accordingly, the parties should be prepared to address this at the next status, which is set for December 21, 2015, at 9:45 a.m.

ENTERED:

Mary L Mikva 1890

Judge Mary L. Mikva, #1890
Circuit Court of Cook County, Illinois
County Department, Chancery Division

ENTERED
JUDGE MARY LANE MIKVA - 1890
DEC 17 2015
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

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

IN RE APPOINTMENT OF SPECIAL PROSECUTOR	)	**No. 2011 Misc. 46**
	)	**The Honorable Michael P. Toomin**

MEMORANDUM OF OPINION AND ORDER

In the case at hand, this Court weighs the competing doctrines of grand jury secrecy and disclosures mandated under the Illinois Freedom of Information Act (FOIA). Movant, the City of Chicago (City), seeks modification of this Court's orders prohibiting dissemination of grand jury materials in the above-entitled matter. The City's objective in pursuing this remedy is to resolve the "dilemma" resulting from an order entered against it by a Chancery judge in a FOIA action brought by the Better Government Association (BGA).

The City contends that the Chancery court order conflicts with the proactive orders entered by this Court thereby exposing the City to the sanction of contempt if it continues to comply with the provisions of the protective orders. Strategically speaking, the City seeks this relief in order to avoid the uncertainty of an interlocutory appeal of the Chancery court order. In response, the Office of the Special Prosecutor (OSP), relying upon its statutory duty to safeguard the grand jury material from improper disclosures, urges this Court to deny the City's request.

BACKGROUND

The facts and circumstances giving rise to the issues presented here have been oft-repeated. The chronology of events commenced in the spring of 2004. On April 24, 2004, David Koschman and a group of his friends left their homes in the suburbs for a night out in the "Rush Street" area of Chicago. While walking between establishments, Koschman and his friends were involved in an altercation with another group, including Richard J. Vanecko, a nephew of then-Mayor Richard M. Daley. When it concluded, Koschman was left with critical cranio-cerebral injuries that ultimately caused his death. Although the identities of the members of the second group, including Vanecko, were discovered by authorities shortly thereafter, no charges were filed against anyone for causing Koschman's death.

Renewed interest in the matter began in earnest on February 28, 2011, when the Chicago Sun-Times and WMAQ-TV, Channel 5 published and broadcast numerous reports concerning the events leading up to Koschman's death and the parties involved. The focal point of those reports was Vanecko and his alleged role in what transpired. As a result of this coverage, re-investigations were commenced by the Chicago Police Department and the Cook County State's Attorney's Office during 2011. Once again, no charges were filed.

On December 14, 2011, Koschman's mother, aunt, and uncle jointly filed a "Petition to Appoint a Special Prosecutor in the Matter of the Death of David Koschman." This Court granted the petition on April 6, 2012. Thereafter, Dan K. Webb, a former United States Attorney, was appointed as Special Prosecutor and directed to investigate: (1) whether criminal charges should be brought in connection with the homicide of David Koschman in the spring of 2004; and (2) whether employees of the Chicago Police Department and the Cook County State's

Attorney Office deliberately suppressed and concealed evidence and, generally, impeded the Koschman death investigation.

In implementing his charge, Mr. Webb requested and was granted the authority to empanel a special grand jury. Webb also moved for a protective order prohibiting disclosure or dissemination of grand jury materials to anyone other than authorized persons. That order was entered by this Court on June 14, 2012 and encompassed:

> "Grand Jury materials, including but not limited to subpoenas, target letters, and other correspondence related to the service of a Grand Jury Subpoena, sent by the Office of the Special Prosecutor (OSP) to any individual or entity in connection with this investigation."

Additionally, the order directed that any individual or entity receiving such material should be provided with a copy of the protective order.

On December 3, 2012, the OSP completed the first phase of its assignment with the return of an indictment charging Richard J. Vanecko with the involuntary manslaughter of David Koschman. The second phase of the OSP's engagement was completed on September 18, 2013, by the submission of Mr. Webb's 162-page report, entitled, "The Death of David Koschman: Report of the Special Prosecutor Dan K. Webb." No additional prosecutions were commenced or recommended and the Special Grand Jury was discharged upon publication of Webb's report.

Essentially, the Report was the culmination of a multi-faceted investigation conducted over the course of approximately 17 months, involving 146 witnesses. The investigation included over 22,000 documents, totaling more than 300,000 pages, gathered from numerous sources and consisting of a broad array of types of materials. Many of these documents were obtained by Grand Jury Subpoena, while others were gathered through search warrants issued by

this Court. On the motion of Dan Webb, this Court temporarily sealed the Report prohibiting its public dissemination until completion of Vanecko's prosecution in order to preserve his fair trial rights.

Vanecko was arraigned on December 10, 2012, and entered a plea of not guilty. Following pre-trial proceedings as well as negotiations with the OSP, on January 31, 2014, Vanecko changed his plea to guilty of involuntary manslaughter. He was sentenced to a 30-month term of probation subject to the condition he serve 120 days in confinement, with the first 60 days spent in custody, followed by 60 days on home confinement with electronic monitoring. Additionally, Vanecko was fined $624, and ordered to pay $20,000 in restitution to Koschman's family.

The Special Prosecutor's report remained under seal during the pendency of Vanecko's proceedings. Following imposition of Vanecko's sentence, on February 4, 2014, the Office of the Special Prosecutor, with this Court's concurrence, publically released the report of its efforts.

On June 25, 2014, this Court granted the City's request to clarify OSP's earlier protective order. This action was occasioned by a FOIA request made to the City by Tim Novak of the Chicago Sun-Times, seeking copies of subpoenas received from the OSP together with all records the City provided to the OSP in the Koschman case. Novak's request was denied by the City and he sought a review of the denial by the Public Access Counselor (PAC) of the Office of the Illinois Attorney General. The PAC agreed, in part, with the City, concluding that the grand jury subpoenas were covered by the protective order and, thereby, not subject to disclosure. However, the PAC also determined that the City, which included the City generally and the Police Department specifically, should either disclose the materials sought by Novak or seek a clarification of the terms of the protective order. The City declined the PAC's invitation to

disclose the subject materials and, instead, moved this Court for an order clarifying the protective order.

In granting the City's motion, this Court found that Novak was entitled to the documents he sought for their own sake, for their intrinsic value in the furtherance of a lawful investigation, rather than to learn what took place before the Special Grand Jury. However, this Court cautioned:

> "[Novak] is not entitled to know what documents and materials in the possession of the City and CPD were tendered pursuant to grand jury subpoena. The protective order was implemented as a means to protect the sanctity of the investigation of the Office of the Special Prosecutor and the work of the special grand jury. Mr. Novak cannot make an end-run around the terms and purpose of the order by drafting his FOIA request in a manner calculated to reveal what took place before the Special Grand Jury. Accordingly, this Court clarifies the scope of the protective order to include the identification or characterization of documents obtained through grand jury subpoena and, therefore, not subject to disclosure as such." (In re Appointment of Special Prosecutor, 2011 Misc. 46, Order of June 25, 2014, pp. 4-5.)

Consequently, the City's motion to clarify was granted with the caveat that the protective order, "limits only the identification of any documents or other records as being grand jury materials." (In re Appointment of Special Prosecutor, 2011 Misc. 46, Order of June 25, 2014, p. 5.) To this Court's knowledge, no appeal was taken from the clarifying order.

On March 15, 2015, the BGA initiated its suit in chancery against the City of Chicago and the Office of the Special Prosecutor. The proceedings were brought in response to the City

and the OSP's denials of the BGA's requests for documents under the Freedom of Information Act (FOIA) (5 ILCS 140/1 *et seq.* (West 2014)). The BGA sought correspondence, subpoenas, and billing records from OSP related to the Special Prosecutor's investigation and its intersection with the City, various city departments, and city employees. The BGA's requests to the City were three-fold in that identical requests were made to the City's Law Department, the Office of the Mayor, and the Chicago Police Department. Those requests sought to discover any and all materials transmitted by these City entities, as well as any individual employees or their attorneys, to the OSP or Special Grand Jury during the course of the investigation. The BGA argued that the denials by the City and the OSP violated FOIA because the materials requested were not protected from public disclosure by any of the statutory exemptions.

As the Chancery case proceeded, both the City and the OSP moved to dismiss the BGA's complaint. The Office of the Special Prosecutor argued the exemptions contained in section 7(1)(a) of FOIA (5 ILCS 140/7(1)(a) (West 2014)) constituted affirmative matter defeating the BGA's claim and warranting dismissal of the cause of action. In the alternative, the OSP argued that the matter, if not dismissed, should be transferred to this Court to resolve the BGA's claims. The City's motion to dismiss argued: (1) the BGA's complaint failed to state a cause of action; (2) FOIA should not logically compel the City to violate a court order in order to comply with its requirements; and (3) the FOIA exemptions defeat the BGA's claims.

Before addressing the motions to dismiss, the Chancery judge denied the OSP's motion to transfer the matter to this Court. Thereafter, the parties completed briefing on the motions to dismiss and argued them before the court. On December 17, 2015 an order was entered granting the OSP's motion to dismiss. The court reasoned the Special Prosecutor's denial of the BGA's

requests was supported by terms of the Grand Jury Act, which protected the requested documents from disclosure.

The City's motion to dismiss was denied. The court concluded that the City could not avail itself of the protections of the Grand Jury Act based on its status as a recipient of a grand jury subpoena. Given the significance of the Chancery court's ruling to the presentation of the instant motion, we present the concluding paragraph *in haec verba*:

> **"As this Court has consistently promised the parties, it will not put the City in a position where it would be forced to disobey another court [*sic*] order to comply with this one. In this Court's view, the City would, under FOIA, have to provide the documents that BGA has requested. The City is precluded from doing this by Judge Toomin's Orders. Since this Court refused to transfer this case to Judge Toomin at the outset, which is what the City[1] and OSP requested, all the parties now appear to agree that this dilemma is best addressed after this Court concluded its own analysis of the FOIA request and the asserted exemptions. This has now been done. This Court's own suggestion would be for BGA to seek a modification of the June 14, 2012, and June 24, 2014 Orders on a motion to intervene before Judge Toomin. This would allow Judge Toomin to address this issue and then the final order on BGA's motion to intervene could be appealed together with this Order if the orders conflict. However, this Court is open to any other procedure another party wishes to suggest."** (BGA v. OSP *et al.*, Order of December 17, 2015, ¶21.)

[1] While the City may have made such a request at some point, it was not made in its motion to dismiss the BGA's complaint.

The BGA declined the Chancery judge's invitation to intervene in these proceedings, electing instead to file a response to the City's motion to modify the protective orders. The City, on the other hand, essentially opted to follow the Chancery judge's suggestion. The City's election to do so appears to demonstrate a considerable shift in strategy from its earlier efforts to withhold dissemination of records produced pursuant to grand jury subpoenas in the proceedings to clarify this Court's original protective orders.

ANALYSIS

At the outset, we recognize that this case presents a textbook example of the competing doctrines of secrecy and disclosure. As a threshold matter, it is well-settled that judicial proceedings in the United States are open to the public in criminal cases by constitutional command and in civil cases by force of tradition. *In re Krynicki*, 983 F.2d 74, 75 (7th Cir. 1992). The First Amendment provides a presumption that there is a right of access to proceedings and documents which have historically been open to the press and general public and where access would serve a significant positive role in the functioning of the particular process in question. *United States v. Corbett*, 879 F.2d 224, 228 (7th Cir. 1989). Thus, to the extent that the First Amendment embraces a right of access, it does so to ensure that this constitutionally protected discussion of government affairs is an informed one. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604-05, 102 S. Ct. 2613, 2619, 73 L. Ed. 2d 248, 256 (1982).

Yet, authorities of many stripes compel a recognition that grand jury proceedings are not within that class of places and processes to which historical tradition provides a presumption of access. *Cf. Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8, 106 S. Ct. 2735, 2740, 92 L. Ed. 2d 1, 9-10 (1986) ("*Press-Enterprise II*"). "[T]he grand jury is an institution separate from the courts, over whose functioning the courts do not preside." *United States v. Williams*, 504

U.S. 36, 47, 112 S. Ct 1735, 1742, 118 L. Ed. 2d 352, 365 (1992). " 'The federal grand jury is a constitutional fixture in its own right[.]' " *United States v. Chanen*, 549 F.2d 1306, 1312 (9th Cir. 1977), quoting *Nixon v. Sirica*, 487 F.2d 700, 712 n. 54 (D.C. Cir. 1973). "In fact the whole theory of its function is that it belongs to no branch of institutional Government, serving as a kind of buffer or referee between the Government and the People." *Williams*, 504 U.S. at 47, 112 S. Ct. at 1742, 118 L. Ed. 2d at 365.

The Grand Jury's origins are rooted in the Assizes of Clarendon, an assemblage convened by Henry II in 1166, establishing its role as an accusatory body sworn to "make true answer to the question [of] whether any man is reputed to have been guilty of murder, robbery, larceny or harboring criminals since the king's coronation." Where an accusation was found, those ill-fated souls went "to the ordeal." 1 F. Pollock & F. Maitland, History of English Law 151-52 (2nd Ed. 1899); *Ex Parte Bain*, 121 U.S. 1, 10-11, 7 S. Ct. 781, 786-87, 30 L. Ed. 849, 852-53 (1887). As in our time, after receiving its charge by the presiding judge, the Grand Jury of old heard evidence solely on behalf of the prosecution, "for the finding of an indictment is only in the nature of an enquiry or accusation, to which is afterwards to be tried and determined." 4 W. Blackstone, Commentaries on the Laws of England 300 (1769).

Prevailing precedent teaches that the grand jury is an investigative body whose purpose is to investigate and determine whether or not there is a reasonable belief that a crime has been committed. *United States v. Wortman*, 26 F.R.D. 183, 204 (N.D. Ill. 1960). Its adoption by the Founders as the sole method for preffering charges in serious criminal cases shows the high place it held as an instrument of justice. *Costello v. United States*, 350 U.S. 359, 362, 78 S. Ct. 406, 408, 100 L. Ed. 2d 397, 402 (1956). "The American grand jury, like that of England, 'has convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no

one because of prejudice and to free no one because of special favor.' " *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400, 79 S. Ct. 1237, 1241, 3 L. Ed. 2d 1323, 1327 (1959), quoting *Costello*, 350 U.S. at 362, 78 S. Ct. at 408, 100 L. Ed. 2d at 402. The Constitution, statutes, and case law recognize the primary and nearly exclusive role of the grand jury in the institution of compulsory disclosure. *People v. DeLaire*, 240 Ill. App. 3d 1012, 1023, 610 N.E.2d 1277, 1284 (2nd Dist. 1993).

It is well-settled that there are some kinds of government operations, such as grand jury proceedings, "that would be totally frustrated if conducted openly." *Press-Enterprise II*, 478 U.S. at 8-9, 106 S. Ct. at 2740, 92 L. Ed. 2d at 10. Since the 17th century, grand jury proceedings have been closed to the public and records of such proceedings have been kept from the public eye. *Douglas Oil Company v. Petrol Stops Northwest*, 441 U.S. 211, 218 n. 9, 99 S. Ct 1667, 1673 n. 9, 60 L. Ed. 2d 156, 164 n. 9 (1979). The veil of secrecy surrounding the grand jury is fundamental to our criminal procedure. *Pittsburgh Plate Glass*, 360 U.S. at 399, 79 S. Ct. at 1241, 3 L. Ed. 2d at 1327; see also *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 300, 111 S. Ct. 722, 727-28, 112 L. Ed. 2d 795, 807 (1991). This dynamic "serves to protect the identities of witnesses or jurors, the substance of testimony, the strategy or direction of the investigation, deliberations or questions of the jurors, and the like." *Securities and Exchange Commission v. Dresser Industries, Inc.*, 628 F.2d 1368, 1382 (D.C. Cir. 1980); *Board of Education v. Verisario*, 143 Ill. App. 3d 1000, 1007, 493 N.E.2d 355, 359 (2nd Dist. 1986).

This abiding principle of grand jury secrecy inheres in Illinois with equal force; that grand jury proceedings are surrounded in secrecy to prevent the escape of those under indictment, to ensure free deliberations, to prevent subornation of perjury, to encourage disclosure by witnesses, and to protect the innocent from unwarranted exposure. *Socialist*

Workers Party v. Grubisic, 619 F.2d 641, 643 (7th Cir. 1980). Here, both the City and the BGA contend that the completion of Mr. Vanecko's prosecution warrants modification of this Court's protective orders. This assertion is meritless. Although some of the reasons for secrecy are removed after indictment, others are not. Thus, our experience instructs that the purpose of secrecy is designed to assure freedom of deliberation of future grand juries and the participation of future witnesses, as well as to provide these assurances to those who appeared in a pending matter. *People v. French*, 61 Ill. App. 2d 439, 442, 209 N.E.2d 505, 507 (2nd Dist. 1965).

Although the passage of time may be considered, as it relates to a particular grand jury, judges must also consider the possible effects upon the functioning of future grand juries. As the Supreme Court noted in *Douglas Oil*:

> "Persons called upon to testify will consider the likelihood that their testimony may one day be disclosed to outside parties. Fear of future retribution or social stigma may act as powerful deterrents to those who would come forward and aid the grand jury in the performance of its duties." *Douglas Oil*, 441 U.S. at 222, 99 S. Ct. at 1674, 60 L. Ed. 2d at 167.

In *United States v. Procter & Gamble*, the Supreme Court earlier cautioned, "The grand jury as a public institution serving the community might suffer if those testifying today knew that the secrecy of their testimony would be lifted tomorrow." *United States v. Procter & Gamble*, 356 U.S. 677, 682, 78 S. Ct. 983, 986, 2 L. Ed. 2d 1077, 1082 (1958).

Implicitly, grand jury secrecy "is 'as important for the protection of the innocent as for the pursuit of the guilty.' " *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 424, 103 S. Ct. 3133, 3138, 77 L. Ed. 2d 743, 753 (1983). "To make public any part of its proceedings would inevitably detract from its efficacy." *Pittsburgh Plate Glass*, 360 U.S. at 400, 79 S. Ct. at

1241, 3 L. Ed. 2d at 1327. Although the law recognizes the public's right to inspect and copy public records and documents, including judicial records or documents, there simply is no correlative right of access to grand jury materials. *United States v. McDougal*, 559 F.3d 837, 840 (8th Cir. 2009); *United States v. Smith*, 123 F.3d 140, 156 (3rd Cir. 1997).

In *People ex rel. Sears v. Romiti*, 50 Ill. 2d 51, 58, 277 N.E.2d 705, 708 (1971), our supreme court recognized that the federal rule was the model for the Illinois Grand Jury Act. Given that it contains similar, though not identical guideposts, federal case law may be helpful in identifying the universe of recipients to whom disclosures of grand jury materials may be made. *Verisario*, 143 Ill. App. 3d at 1005, 493 N.E.2d at 357.

Federal Rule of Criminal Procedure 6(e) imposes no obligation of secrecy on persons other than grand jurors, interpreters, court reporters, operators of recording devices and transcribers, government attorneys, and persons to whom authorized disclosures are made. Fed. R. Crim. P. 6(e)(2). Thus, disclosures may expressly be made to an attorney for the government for use in the performance of such attorney's duty and to those government personnel who assist in such performance. Permissive disclosures may also be made where so directed by a court preliminarily to or in connection with another judicial proceeding. Fed R. Crim. P. 6(e)(3)(E)(i). However, parties seeking material under Rule 6(e) must establish that the material sought is needed to avoid a possible injustice in that proceeding, that the need for disclosure is greater than the need for continued secrecy, and the request is structured to cover only materials so needed. *Douglas Oil Co.*, 441 U.S. at 222, 99 S. Ct. at 1674, 60 L. Ed. 2d at 167; *Procter & Gamble*, 356 U.S. at 683, 78 S. Ct. at 987, 2 L. Ed. 2d at 1082. The application of this standard accommodates both the continuing need for secrecy of the grand jury materials and the needs of the party whose cause may be prejudiced without them. *Grubisic*, 619 F.2d at 644.

Sections 112-6(c)(1)(a) and (b) of the Illinois Code of Criminal Procedure likewise allow disclosures to a State's Attorney for use in the performance of the prosecutor's duties and to government personnel deemed necessary to assist in such performance. Also, permissive disclosures may be made when the court, preliminary to or in connection with another judicial proceeding, directs such in the interests of justice or when a law so requires. 725 ILCS 5/112-6(c)(1)(a) & (b) (West 2014).

Yet, it is doubtful that these exemptions from secrecy requirements can aid or advance the moving parties' position here. Neither the City nor the BGA have identified any disclosures for use by a prosecutor in the performance of his duties. Nor have they directed this Court to any judicial proceeding that could trigger the permissive disclosures under either federal or state law. Moreover, it is axiomatic that absent any judicial proceeding in which the grand jury material is required, Rule 6(e)(3)(E) is inapplicable. *U.S. v. Campbell*, 324 F.3d 497, 500 (7th Cir. 2003), see *In re Biaggi*, 478 F.2d 489, 492 (2nd Cir. 1973) ("[O]bviously the permission to disclose for use in connection 'a judicial proceeding' does not encompass a proceeding instituted solely for the purpose of accomplishing disclosure.").

Notwithstanding the absence of any exemptions allowing the dissemination of the grand jury materials sought here, neither the City nor the BGA speak to the daunting sanctions the Special Prosecutor or this Court could face in adherence to these questionable requests. Indeed, Blackstone confirmed the rooted lineage of sanctions traditionally visited upon those guilty of unauthorized disclosures:

> "Anciently it was held, that if one of the grand jury disclosed to any person indicted the evidence that appeared against him, he was thereby made an

accessory to the offense, if felony; and in treason a principal." 4 W. Blackstone, Commentaries on the Laws of England 126 (1769).

Following in that wake, Section 112-6(d) of the Illinois Grand Jury Act provides, "Any grand juror or officer of the court who discloses, other than to his attorney, matters occurring before the Grand Jury … shall be punished as a contempt of court[.]" 725 ILCS 5/112-6(d) (West 2014). Thus, in *Taliani v. Herrman*, 2011 IL App. (3rd) 090138 ¶13, 956 N.E.2d 550, 553 (2011), the court concluded that, had the State's Attorney provided the requested grand jury documents in the absence of a court order to do so, he "would have violated state law."

Turning now from the strictures of grand jury law, we consider the competing doctrine of disclosure mandated by the Illinois Freedom of Information Act. FOIA is bottomed on our legislature's declaration that all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees. 5 ILCS 140/1 (West 2014). The purpose of the Information Act is to open government records to the light of public scrutiny. *Bowie v. Evanston Community Consolidated School District No. 65*, 128 Ill. 2d 373, 378, 538 N.E.2d 557, 559 (1989). For this reason, under the Act, "Public records are presumed to be open and accessible." *Southern Illinoisan v. Dept. of Public Health*, 218 Ill. 2d 390, 415-16, 844 N.E.2d 1, 3 (2006) (internal quotations omitted).

The Illinois FOIA was originally patterned after the federal Freedom of Information Act, 5 U.S.C. §552 *et seq*. *Uptown People's Law Center v. Dept. of Corrections*, 2014 IL App. (1st) 130161 ¶10, 7 N.E.3d 102, 104. Accordingly, case law construing the federal statute should be used in Illinois to interpret our own FOIA. *Cooper v. Ill. Dept. of the Lottery*, 266 Ill. App. 3d 1007, 1012, 640 N.E.2d 1299, 1303 (1st Dist. 1994).

In construing the federal Act, the Supreme Court has recognized that the Act seeks " 'to establish a general philosophy of full agency disclosure, unless information is exempted under clearly delineated statutory language.' " *EPA v. Mink*, 410 U.S. 73, 80 n. 6, 93 S. Ct. 827, 832 n. 6, 35 L. Ed. 2d 119, 128 n. 6 (1973) (internal citation omitted). However, these "limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Department of Air Force v. Rose*, 425 U.S. 352, 361, 96 S. Ct. 1592, 1599, 48 L. Ed. 2d 11, 21 (1976).

Although government concededly has an abiding interest in upholding access to the conduct of public business, in this Court's view FOIA arguably has no place at the table in resolving the debate presented in the matter at hand. First, FOIA defines a "public body" as any legislative, executive, administrative or advisory bodies of the State and its various subdivisions, which are supported in whole or in part by tax revenue or which expend tax revenue. 5 ILCS 140 /2 (West 2014).

Markedly, however, the detailed enumeration of "public bodies" lacks any express or implied designation of the grand jury. In *Copley Press, Inc. v. Administrative Office of Courts*, the plaintiff sought an order under FOIA compelling disclosure of documents maintained in connection with an electronic reporting system operated by pre-trial services, an agency accountable to the Chief Judge of the 19th Judicial Circuit and recognized by statute as an arm of the court. The *Copley* court found that the lack of any designation of the courts or judiciary as "public bodies" in the Information Act evinced a legislative intent to exclude the judiciary from its disclosure requirements. *Copley Press, Inc. v. Administrative Office of Courts*, 271 Ill. App. 3d 548, 553, 648 N.E.2d 324, 327-28 (2nd Dist. 1995) ("It is a maxim of statutory construction

that when a statute enumerates certain items, that enumeration excludes all other items although there are not negative words of prohibition.").

Significantly, in *Nelson v. Kendall County*, the Supreme Court of Illinois confirmed this exemption for the judicial branch, while recognizing that it has not been limited to actual courts:

> "It has been extended to include court-affiliated entities which perform judicial functions, such as pretrial services [*Copley*, 271 Ill. App. 3d at 553-54, 648 N.E.2d at 327-28.] and nonjudicial components of the judicial branch, such as the clerks of the courts (*Newman, Raiz & Shelmadine, LLC v. Brown*, 394 Ill. App. 3d 602, 606, 915 N.E.2d 782[, 785-86 …] (2009).)." *Nelson v. Kendall County*, 2014 IL 116303, ¶29, 10 N.E.3d 893, 900.

These same principles guide our analysis here, excluding the grand jury as a public body subject to the requirements of the Act. Historically, the Grand Jury was recognized as an investigative body whose purpose was to investigate and determine whether or not there was a reasonable belief that a crime has been committed. *United States v. Wortman*, 26 F.R.D. 183, 204 (N.D. Ill. 1960). "The whole theory of its function is that it belongs to no branch of institutional government, serving as a kind of buffer … between the Government and the People." *United States v. Williams*, 504 U.S. 36, 47, 112 S. Ct 1735, 1742, 118 L. Ed. 2d 352, 365 (1992). "The … grand jury is a constitutional fixture in its own right." *U.S. v. Chanen*, 549 F.2d 1306, 1312 (9th Cir. 1977), quoting *Nixon v. Sirica*, 487 F.2d 700, 712 n. 54 (D.C. Cir. 1973).

In Illinois, the existence and scope of grand jury operations is of a hybrid nature, premised upon the powers of our several branches of government. Constitutionally, the grand jury owes its existence and the power to bring charges to the legislature. Ill. Const. of 1970, Art.

I, §7 (West 2014). Moreover, its continued recognition reposes in the legislature, which "may abolish the grand jury or further limit its use." Ill. Const. of 1970, Art. I, §7 (West 2014); see also *People v. Franklin*, 80 Ill. App. 3d 128, 132, 398 N.E.2d 1071, 1074 (1st Dist. 1979).

Essentially, the Illinois Grand Jury Act manifests a legislative intention to encompass functions that are clearly of a judicial nature. First, section 112-2(b) of the Grand Jury Act provides that "The Grand Jury shall be impaneled, sworn and instructed as to its duties by the court. The court shall select and swear one of the grand jurors to serve as the foreman." 725 ILCS 5/112-2(b) (West 2014). Also, "At any time for cause shown the court may excuse a grand juror either temporarily or permanently and … may impanel another person in place of the grand juror excused." 725 ILCS 5/112-3(c) (West 2014). Likewise, upon a showing of good cause, the court may appoint investigators, the duties and tenure of which shall be determined by the court. Additionally, the clerk of the court is authorized to keep such records of Bills of Indictment and No Bills as may be prescribed by rule of the Supreme Court. 725 ILCS 5/112-5(a) & (b) (West 2014).

To be sure, our Grand Jury Act envisions executive functions as well. Consistent with his constitutional duty to prosecute all criminal actions, the State's Attorney shall present evidence before the Grand Jury. 725 ILCS 5/112-4(a) (West 2014). Where nine grand jurors concur that the evidence before them constitutes probable cause that a person has committed an offense, the Grand Jury Act directs the State's Attorney to prepare a Bill of Indictment. 725 ILCS 5/112-4(d) (West 2014). Conversely, when the evidence does not warrant the return of an indictment, the State's Attorney is authorized to prepare a memorandum to such effect, entitled a "No Bill." 725 ILCS 5/112-4(e) (West 2014). Notwithstanding these executive functions, the

historical and operational attributes of the Grand Jury arguably place it outside the executive branch and thus removed from the application of the Freedom of Information Act.

Second, the nature and scope of matters occurring before grand juries do not constitute public records as defined in section 2(c) of the Act. 5 ILCS 140/2(c) (West 2014). To qualify as a public record under the plain language of FOIA the communication must: (1) pertain to the transaction of public business and must have been either (2) prepared by a public body, (3) prepared for a public body, (4) used by a public body, (5) received by a public body, (6) possessed by a public body, or (7) controlled by a public body. *City of Champaign v. Madigan*, 2013 IL App. (4th) 120662 ¶30, 992 N.E.2d 629, 636.

Even assuming FOIA is determined to be applicable to matters occurring before grand juries, judicial decisions have exempted records from FOIA disclosure where the plain language contained in a state or federal statute revealed that public access to the records was not intended. *Kibort v. Westrom*, 371 Ill. App. 3d 247, 256, 862 N.E.2d 609, 617 (2nd Dist. 2007). Based upon this rationale, in *Silets v. United States Department of Justice*, 945 F.2d 227, 230 (7th Cir. 1991), the Seventh Circuit Court of Appeals determined that Fed. R. Crim. P. 6(e)(2) was a "statute" for purposes of this exemption. *Silets v. United States Department of Justice*, 945 F.2d 227, 230 (7th Cir. 1991) ("Subsection (b)(3) prevents 'disclosure [that] would "tend to reveal some secret aspect of the grand jury's investigation" such . . . as "the identities of witnesses or . . . the substance of testimony, . . ." ' "). An identical result obtained in *Taliani v. Herrman*, 2011 IL App. (3rd) 090138 ¶13, 956 N.E.2d 550, 553 (2011) ("Section 112-6 of the Code of Criminal Procedure of 1963 … is a state law that prohibits the disclosure of grand jury transcripts without a court order and thus exempts them from the Act."); see also *In re Wade*, 969 F.2d 241, 246 (7th

Cir. 1992) (exemption citing Fed. R. Crim. P. 6(e) was a proper basis for withholding documents that would disclose grand jury proceedings upon which part of FOIA request rested.).

In this Court's view, BGA's reliance on *Better Government Association v. Blagojevich*, 386 Ill. App. 3d 808, 899 N.E.2d 382 (4th Dist. 2008), is misplaced insofar as it is offered to justify dissemination of the subject Special Grand Jury material at bar. In that case, as here, the BGA's request was brought under Illinois law. However, the exemption relied upon by our former governor was based upon federal law. As Federal Rule 6(e) imposed no secrecy obligation upon any person other than certain designated individuals that did not include the Governor, the *Blagojevich* court found no impediment to the disclosure. Conversely, the hallmark of our grand jury statute is a blanket prohibition of disclosure of grand jury matters, other than the deliberations and vote of any grand juror, followed by an enumeration of those to whom disclosures may be made. 725 ILCS 5/112-6(c)(1) & (2) (West 2014). Under federal grand jury law, the disclosures sought in the instant case might well be made; whereas, under state law they arguably could not.

Additionally, in *Blagojevich*, as distinguished from the instant case, there were no protective orders that served to implement the protection of grand jury secrecy. Curiously, the City, in the Chancery proceedings, did not contend that the Grand Jury Act, in fact, created an applicable FOIA exemption. Rather, the City argued that the protective orders entered by this Court were indeed "State law" under 5 ILCS 140/7(1)(a) exempting the requested material from production. The City continues to recognize the protective orders as "State law," while urging their modification to permit the disclosures directed by the Chancery court.

Notably, the City continues to argue that protective orders are properly characterized as injunctions. See *Skolnick v. Altheimer & Gray*, 191 Ill. 2d. 214, 221, 730 N.E.2d 4, 11 (2000)

(protective order prohibiting dissemination of confidential information in discovery deemed an injunction for purposes of Ill. Sup. Ct. R. 307(a)(1).) In *GTE Sylvania, Inc. v. Consumers Union of the United States*, 445 U.S. 375, 386-87, 100 S. Ct. 1194, 1201-02, 63 L. Ed. 2d 467, 477-78 (1980), the Supreme Court held that federal law did not compel a safety commission to provide documents in response to a FOIA request where a federal district court injunction barred disclosure of those materials.

In this proceeding, the City invites this Court to reassess whether changed circumstances justify continuation of the Protective Orders as they relate to the subpoenas and correspondence sought by the BGA. Those circumstances include the risks the Chancery judge's order imposes on the City, the completion of the OSP's investigation, and the conclusion of Richard Vanecko's prosecution. The City's prayer for relief requests that this Court not only release those materials sought by the BGA in its FOIA proceeding, but also adds attachments to the correspondence responsive to the BGA request. Although the BGA does not oppose the relief the City seeks, it now pushes the envelope by demanding release of all Grand Jury records compiled by the OSP in course of its engagement.

The City's invitation to modify the protective orders has been considered and is now denied. Concededly, this Court has the power to modify its own orders whether or not they be in the nature of injunctions. However, the movants have offered no compelling reason warranting such modification. The mere fact that the protective orders may now conflict with the recently decreed conclusions of a Chancery judge provides no legal basis for the modification sought and is of little consequence to this Court. Accordingly, the protective orders implemented by this Court to uphold the salutary protections of grand jury secrecy shall continue to enjoin the City from releasing the materials as sought in this proceeding.

CONCLUSION

Essentially, the City and the BGA are asking this Court to abrogate the long-standing protections implemented to maintain grand jury secrecy in proceedings such as these. Yet, adherence to the fundamental principles urged by the Office of the Special Prosecutor supports the prior orders of this Court denying access to matters occurring before the Special Grand Jury. The City has failed to present any compelling authority or argument warranting modification of the protective orders prohibiting disclosure of the fruits of the Special Grand Jury's labor. Likewise, the BGA's response, bereft of any relevant precedent, is simply an abbreviated rendition of wishful platitudes. Historically, grand jury proceedings are closed and the veil of secrecy traditionally cloaks the matters occurring therein. Were this Court to order the disclosures sought by these movants, albeit under the tenuous arguments offered, a dangerous precedent could be set – a precedent that would threaten to erode the integrity of more than 800 years of well-settled grand jury traditions.

IT IS HEREBY ORDERED that the City of Chicago's Motion to Modify Orders Entered by the Court on June 14, 2012 and June 25, 2014 is DENIED.

ENTERED: _____
Judge of the Circuit Court of Cook County

DATE: April 13, 2016

ENTERED
JUDGE MICHAEL P. TOOMIN-0501
APR 13 2016
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

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No. 122949

IN THE SUPREME COURT OF ILLINOIS

BETTER GOVERNMENT ASSOCIATION,	)	Appeal from the Appellate
	)	Court, First District, No. 1-16-1376
	)	
Plaintiff-Appellant,	)	
	)	
-vs-	)	There on appeal from the Circuit Court of
	)	Cook County, Chancery Division, Illinois
	)	No. 15 CH 4183
CITY OF CHICAGO LAW DEPARTMENT,	)	
CITY OF CHICAGO MAYOR'S OFFICE,	)	
CHICAGO POLICE DEPARTMENT,	)	
OFFICE OF THE SPECIAL PROSECUTOR,	)	
	)	
	)	Hon. Mary L. Mikva, Judge Presiding
Defendants-Appellees.	)	

NOTICE OF FILING

To: Counsel of Record

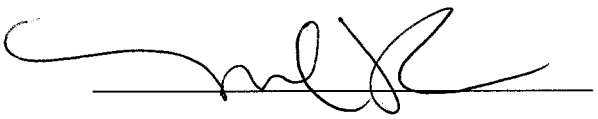
Please take notice that an electronic copy of Plaintiff-Appellant's Motion for Leave to File *Instanter* and his Opening Brief was submitted to the Clerk's Office for filing on February 23, 2018. On that same date counsel for Plaintiff-Appellant sent to opposing counsel for Defendants Office of the Special Prosecutor Dan K. Webb, City of Chicago Law Department, City of Chicago Mayor's Office, and Chicago Police Department by electronic mail a copy of the brief. The original and twelve (12) copies of the brief will be sent to the Clerk of the Supreme Court upon receipt of the electronically submitted filed stamped brief.

/s/ Matthew Topic
MATTHEW TOPIC
Attorney for Plaintiff-Appellant

CERTIFICATE OF FILING/SERVICE

STATE OF ILLINOIS)
)
COUNTY OF COOK)

The undersigned, being first duly sworn on oath, deposes and says that s/he personally had emailed the attached Motion, Brief and Argument to opposing counsel for Defendants Office of the Special Prosecutor, Dan K. Webb, City of Chicago Law Department, City of Chicago Mayor's Office, and Chicago Police Department. An electronic copy of the brief was submitted to the Clerk's Office for filing on February 23, 2018. The original (12) copies of the brief will be sent to the Clerk of the Supreme Court upon receipt of the electronically submitted filed stamped brief.



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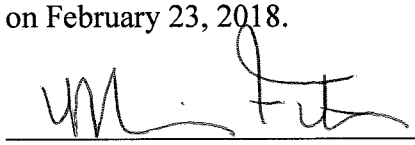
on February 23, 2018.



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