

IN RE APPOINTMENT OF SPECIAL PROSECUTOR

**The Honorable
Michael P. Toomin**

Dan K. Webb, as Special Prosecutor in this matter, respectfully requests that the Court temporarily seal the Special Prosecutor's Report, dated September 18, 2013, and in support thereof states as follows:

1. On April 23, 2012, the Court appointed Mr. Webb as a Special Prosecutor and ordered him to investigate, “(1) whether criminal charges should be brought against any person in connection with the homicide of David Koschman in the spring of 2004, and (2) 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 Mr. Koschman’s death.”
2. The Court further ordered that “at the conclusion of his investigation, the Special Prosecutor shall submit a final report to the 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. A special grand jury was empaneled in June 2012. Mr. Webb and the Special Grand Jury completed their first investigative assignment when, on December 3, 2012, an indictment was returned against Richard J. Vanecko for involuntary manslaughter in connection

with David Koschman's death. The trial of that case will likely commence early next year, and the State will be represented by Special Prosecutor Webb and his team.

4. The second investigative assignment by the Court to the Special Prosecutor has now been completed, with the discharge of the Special Grand Jury. No additional indictments have been sought because the applicable statute of limitations bars any prosecutions under state law for Chicago Police Department ("CPD") and Cook County State's Attorney's Office actions taken in 2004 and there is insufficient evidence to prove beyond a reasonable doubt any state criminal law violations as to actions taken by CPD personnel in 2011.

5. The Special Prosecutor has filed herewith a 162-page report with the Court entitled *The Death of David Koschman: Report of the Special Prosecutor Dan K. Webb* ("the Report") detailing the evidence that was gathered by the Special Grand Jury, and the Special Prosecutor's analysis thereof. It is the opinion and belief of the Special Prosecutor that the contents of the Report could lead to significant pretrial publicity and exposure which could adversely impact Mr. Vanecko's right to a fair trial.

6. Under both the United States and the Illinois Constitutions, a criminal defendant is entitled to a jury that is impartial, which means "a jury capable and willing to decide the case solely on the evidence before it." *People v. Olinger*, 176 Ill. 2d 326, 353 (1997), quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982).

7. Jury exposure to information about a case—from pretrial publicity, for example—is not alone sufficient to demonstrate prejudice to a defendant, because jurors need not be totally ignorant of the facts and issues involved in a case. *People v. Sutherland*, 155 Ill. 2d 1, 15-16 (1992), citing *Irvin v. Dowd*, 366 U.S. 717 (1961). The question instead turns on whether as a result of adverse pretrial publicity, it "appears there are reasonable grounds to believe that the

prejudice alleged [by the defendant] actually exists and that by reason of the prejudice there is a reasonable apprehension that the accused cannot receive a fair and impartial trial.” *People v. Williams*, 40 Ill. 2d 522, 531 (1968).

8. The Illinois Supreme Court has held that, in most cases, a rigorous *voir dire* can be used to protect against jury bias caused by exposure to external information. *See, e.g., People v. Kirchner*, 194 Ill. 2d 502 (2000); *Sutherland*, 155 Ill. 2d 1. However, in some circumstances, pretrial publicity can be so intense that it threatens the ability of a defendant to select an impartial jury in the venue in which his trial is set to take place. *See, e.g., People v. Taylor*, 101 Ill. 2d 377 (1984); *Irvin v. Dowd*, 366 U.S. 717 (1961); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Marshall v. United States*, 360 U.S. 310 (1959).

9. Further, the Illinois Rules of Professional Conduct (“IRPC”) provide additional guidance. IRPC 3.6(a) states: “A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and would pose a serious and imminent threat to the fairness of an adjudicative proceeding in the matter.”

10. The comments to IRPC 3.6(a) provide:

It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public

concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

11. IRPC 3.8(f) provides: “The prosecutor in a criminal case shall . . . except for statements that are necessary to inform the public of the nature and extent of the prosecutor’s action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that pose a serious and imminent threat of heightening public condemnation of the accused[.]”

12. The comments to IRPC 3.8 provide: “In 1924, the Illinois Supreme Court reversed a conviction for murder, noting that: ‘The state’s attorney in his official capacity is the representative of all the people, including the defendant, and it was as much his duty to safeguard the constitutional rights of the defendant as those of any other citizen.’ *People v. Cochran*, 313 Ill. 508, 526 (1924).”

13. Here, while there is a strong public interest that supports the immediate release of the Report, there is an overriding interest in protecting the defendant’s right to a fair trial. Because of the keen public interest in this case, it is likely that release of the detailed evidence set forth in the Report could result in significant and continuing publicity adverse to Mr. Vanecko’s defense. While the trial in *People v. Vanecko* has not been scheduled, the trial judge, the Honorable Maureen McIntyre, has indicated that it will likely commence early next year. It is reasonable to assume that, were the Report to be released immediately, news coverage of the details contained therein would be intense and would continue up to and throughout the trial, thereby creating significant potential for prejudice to Mr. Vanecko’s right to a fair trial.

14. In the event the Court grants this motion, the Report should be sealed from any dissemination, including to the defense. While the Report contains evidentiary detail, that detail

is derived from documents that have been provided by the Office of the Special Prosecutor to the defense through discovery in *People v. Vanecko* (including all of the Special Grand Jury transcripts of witness testimony and corresponding exhibits). In addition, the Report contains factual analysis by the Special Prosecutor which represents work product and the attorney work product privilege therefore applies to the Report, while it is under seal.

15. Moreover, since the submission of the Report was mandated by the Court's Order, it should further order that neither the act of submitting the Report nor any subsequent release of the Report, if unsealed, would constitute a waiver of any privilege applicable to the Special Prosecutor related to its investigation, the Report, or its prosecution of Richard J. Vanecko.

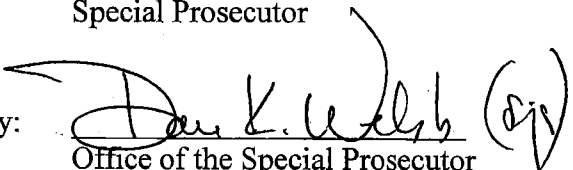
Wherefore, for the foregoing reasons, the Special Prosecutor requests that the Court temporarily seal the Report until after Mr. Vanecko's trial concludes.

Date: September 18, 2013

Respectfully submitted,

DAN K. WEBB
Special Prosecutor

By:

 (sj)
Office of the Special Prosecutor
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, IL 60601
Tel: (312) 558-5600
Fax: (312) 558-5700
DWebb@winston.com

