

March 21, 2012, petitioners filed a reply that cited select portions of the OIG statements.

4. Petitioners' reply states that Mr. Vanecko "may have made an admission of guilt in the company of the police on May 20, 2004." Reply 17. The reply affirmatively represents that "Vanecko, for all intents, confessed to punching Koschman and causing his death." *Id.* at 18.

5. The allegation of a "confession" is a complete and utter fabrication, wholly devoid of credibility or grounding in reality. The first time this fanciful claim ever publicly surfaced was in the petitioners' March 21, 2012 reply – almost eight years after the event in question.

6. Mr. Vanecko and his counsel simply cannot turn a blind eye to the petitioners' attempt to contaminate these proceedings with a fictitious "confession." Accordingly, we respectfully move this Honorable Court to permit intervention.

7. As explained in the verified pleading accompanying this motion, Mr. Vanecko is, and has been, represented by Attorneys Terence P. Gillespie and Marc W. Martin. On or before May 20 2004, no warrant had issued for Mr. Vanecko's arrest. Nevertheless, Chicago Police Department Detective Ronald Yawger contacted Attorney Gillespie, and requested that Mr. Vanecko be voluntarily produced at the Area 3 police station. On May 20, 2004, Attorney Gillespie drove Mr. Vanecko to Area 3, and met with detectives, as well as a Commander. Attorney Gillespie characterizes his interactions with law enforcement personnel that day as unfriendly and adversarial, but professional.

8. At all material times at Area 3 on May 20, 2004, Mr. Vanecko remained in Attorney Gillespie's presence.¹ Other than supplying basic demographic information, Mr. Vanecko made no statements to any police officer. Attorney Gillespie made known that Mr. Vanecko would not be answering any substantive questions and was invoking the constitutional privilege against self-incrimination. Police could not interrogate Mr. Vanecko, and did not attempt to do so. Mr. Vanecko did not make any form of a substantive statement to police, or Assistant State's Attorney ("ASA") Darren O'Brien, a felony review supervisor who was present. Nor did Mr. Vanecko volunteer any information to the police or ASA O'Brien. In addition, Mr. Vanecko was not ever left alone anywhere in the bowels of Area 3.

9. On May 20, 2004, Attorney Gillespie was present in the room at Area 3 in which individuals viewed a lineup that included Mr. Vanecko. Attorney Gillespie recalls that the detective conducting the lineup did so in a professional manner, did not suggest anything to the viewers and allowed as much time as needed to view the lineup. No person identified Mr. Vanecko in the lineups.

10. Following the lineups, Attorney Gillespie advised ASA O'Brien that Mr. Vanecko would not make any statements or respond to questions. While visibly upset, ASA O'Brien acted professionally: he honored the invocation of constitutional rights, and did not attempt to question Mr. Vanecko.

¹ The only time when Mr. Vanecko was not in Attorney Gillespie's direct physical presence was when Mr. Vanecko appeared in the lineup (on the other side of a room that was visible through glass). At that time, Attorney Gillespie was permitted to watch the lineups.

11. A warrant for Mr. Vanecko's arrest did not issue on May 20, 2004. Mr. Vanecko thus left the police station absent having ever made any substantive statements or utterances, or exhibited the behavior described on pages 17-18 of petitioners' reply.

12. The Illinois Code of Civil Procedure provides that "[u]pon timely application anyone shall be permitted as of right to intervene in an action ... when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant will or may be bound by an order or judgment in the action." 735 ILCS 5/2-408(a)(2).

13. "The right to intervene is a remedial right and is to be liberally construed." *Citicorp Savings of Illinois v. First Chicago Trust Company of Illinois*, 269 Ill.App.3d 293, 298, 645 N.E.2d 1038 (1st Dist. 1995). In *Joyce v. Explosive Technologies International, Inc.*, 253 Ill.App.3d 613, 616, 625 N.E.2d 446 (3d Dist. 1993), the court stated:

An intervenor need only establish an injury to an enforceable right or interest which must be more than a general interest in the subject matter of the suit ... The intervenor need not assert rights sufficient to prevail ... While the decision whether to grant a petition to intervene as of right lies within the discretion of the trial court, that discretion is limited to determining timeliness, the inadequacy of representation by existing parties, and sufficiency of interest of the potential intervenor.

14. The standards for intervention have been satisfied here. Petitioners have filed a petition calling for Mr. Vanecko's prosecution on serious criminal charges. Mr. Vanecko obviously has more than a general interest in the subject matter of this litigation. A court order appointing a Special Prosecutor as suggested by petitioners would render Mr. Vanecko the subject of an extraordinary grand jury investigation conducted by private counsel.

15. A target of a criminal investigation has an enforceable due process right to expect the prosecutorial process to be free from the taint of perjury, materially false statements or undue coercion (including, we assume, media pressure). See, e.g., *People v. DiVincenzo*, 183 Ill.2d 239, 257-58, 700 N.E.2d 981 (1988); *People v. Oliver*, 368 Ill.App.3d 690, 859 N.E.2d 38 (2d Dist. 2006); *People v. Barton*, 190 Ill.App.3d 701, 708-09, 546 N.E.2d 1091 (5th Dist. 1989).

16. Here, petitioners have advanced a wildly untrue evocation of a “confession.” Any argument that the allegations posited at pages 17 and 18 of petitioners’ reply are somehow insignificant is belied by the nature of the underlying allegations, to say nothing of the tabloid-like front-page print edition of the March 22, 2012 *Chicago Sun Times*.

17. The parties in this litigation cannot, and do not, adequately represent Mr. Vanecko’s interests. The interests of the petitioners, who seek Mr. Vanecko’s criminal prosecution (at any cost as evident from its filings), and the respondent (a prosecutor’s office), plainly are not aligned with Mr. Vanecko’s. Moreover, Mr. Vanecko’s constitutional rights are personal to him, and can only be asserted by himself and/or his lawyers. Furthermore, the one person who can refute petitioners’ recent allegation that Vanecko “confessed” on May 20, 2004 is Mr. Vanecko’s lawyer. To date, counsel’s sworn statement has not been part of the record.

18. Mr. Vanecko’s attorney directly demonstrates the falsity of petitioners’ recent assertions that Mr. Vanecko “may have made an admission of guilt in the company of police on May 20, 2004” and “confessed.” Reply 17, 18. To get the truth before Court on an important matter first occasioned by the petitioners’ March 21, 2012 filing, intervention is appropriate.

WHEREFORE, based on the foregoing, and for the reasons stated in the attached petition and affidavit, Richard J. Vanecko respectfully moves this Honorable Court to enter an order permitting him to intervene and/or ordering any other equitable and appropriate relief.

Respectfully submitted,

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warranting the appointment of a Special Prosecutor. See 55 ILCS 5/3-9008.

While Mr. Vanecko has remained on the sidelines, that stance must change in light of petitioners' March 21, 2012 reply memorandum.

In a word, we must say: "*Basta!*" Petitioners' reply memorandum contains blatant falsities about Mr. Vanecko, *e.g.*, that he supposedly "confessed" and "made an admission of guilt in the company of police on May 20, 2004." Reply 17-18.

One of Mr. Vanecko's lawyers has direct personal knowledge of the events of May 20, 2004, and can unequivocally aver that petitioners' eleventh-hour claim of a "confession" is false. See Attached Affidavit of Attorney Terence P. Gillespie. It would be a miscarriage of justice to allow this Honorable Court's consideration to be influenced by made-up evidence. Accordingly, intervention is appropriate, and the petition seeking appointment of a Special Prosecutor should be denied.

ARGUMENT

A. Petitioner's March 21, 2012 Pleading

Petitioners' March 21, 2012 reply memorandum declares, "[t]here is also clear evidence in the record that Vanecko knew he was guilty of harming Koschman," Reply 17, and ultimately accuses the SAO of "conceal[ing] inculpatory evidence." *Id.* at 18. More particularly, the reply states, "the State's Attorney's interviews of Shaun Hageline, James Copeland, Scott Allen, and David Francis reveal that, on the night of May 20, 2004, when he was in the police station for the failed lineup, Vanecko may have apologized to the police for striking Koschman, telling investigating detectives, in effect, that he did not intend to kill Koschman." *Id.* at 17.

The reply purports to summarize “recent sworn statement[s]” of the aforementioned individuals. It maintains that Mr. Hageline said that an unnamed detective told the persons who had viewed lineups on May 20, 2004 that “‘this guy’ is ‘really broken up about this, he’s really sorry.’” *Id.* The reply states that Mr. Copeland “recalled the detective saying ‘we know the guy that did it, he’s in there in the other room, and he’s just bawling his eyes out, he’s a big baby ... he didn’t mean for one punch to lead to all this.’” *Id.* The reply does not quote Mr. Allen, but contends that he “confirmed that the detective had informed the Koschman group of the suspect’s admissions.” *Id.* Concerning Mr. Francis, the reply provides that he “was more equivocal in his testimony, but he also recalled the conversation.” *Id.* at 17-18.

Petitioners attribute (unfounded) fault to the police reports’ failure to memorialize the reported conversation. *Id.* Petitioners next take a giant leap, declaring that “Vanecko, for all intents, confessed to punching Koschman and causing his death.” *Id.* Petitioners also theorize that any “apology would be highly inculpatory.” *Id.* Citing no authority and casting aside all ramifications of the Fifth Amendment, petitioners assert that any failure to make statements “could potentially be used against him at trial.” *Id.*

B. Material Allegations Made for the First Time in Petitioners’ March 21, 2012 Reply Are False

There are a host of fundamental factual and legal defects in petitioners’ March 21, 2012 reply. We start with the most obvious: Vanecko did not “confess,” either directly or by implication.

As explained in Attorney Gillespie’s affidavit, he represented Mr. Vanecko in May 2004. Although there was no warrant or probable cause for Mr.

Vanecko's arrest, Attorney Gillespie agreed to the Chicago Police Department's request that Mr. Vanecko be voluntarily produced at the police station. Attorney Gillespie was present at Area 3 on May 20, 2004 in his capacity as Mr. Vanecko's lawyer. Attorney Gillespie not only drove Mr. Vanecko to Area 3, but was in Mr. Vanecko's presence at all material times at Area 3 on May 20, 2004.

Because the Fifth Amendment privilege against self-incrimination was invoked, no police officer or prosecutor substantively questioned Mr. Vanecko on May 20, 2004. Other than to provide required demographic information (*e.g.*, *People v. Fognini*, 47 Ill.2d 150, 152, 265 N.E.2d 133 (1970)), Mr. Vanecko did not make any statements to law enforcement personnel. He did not "confess" in any fashion. Furthermore, Mr. Vanecko was never left alone in a room, nor did he make any statements to law enforcement personnel outside Attorney Gillespie's presence.

Attorney Gillespie directly refutes petitioners' recent assertions, including the remarkable eleventh-hour claim that Mr. Vanecko "confessed" or somehow made inculpatory admissions to the police on May 20, 2004.³ Mr. Gillespie's affidavit concludes with the following averment:

I have read the pages 17-18 of petitioners' reply brief. I can unequivocally state that Mr. Vanecko was not in a room "bawling his eyes out," did not "apologize to detectives," did not "confess" or make any substantive statements, admissions or implied admissions to law enforcement personnel at Area 3 on May 20, 2004. The absence of police reports describing supposed "crying

³ No investigator has formally questioned Attorney Gillespie. We ascribe no fault in this. After all, Attorney Gillespie, is, and was, Mr. Vanecko's lawyer. Moreover, petitioners' accusations about a "confession" did not publicly surface until March 21-22, 2012. After reading the March 22, 2012 edition of the *Sun Times*, Mr. Vanecko's attorneys contacted ASAs handling this matter, and informed them of the false assertions in petitioners' March 21, 2012 reply memorandum.

and apologizing” or a “confession” is not surprising since that did not occur.

Unlike the Internet or a media story, no party has a right to use false evidence in a court of law. *E.g., Nix v. Whiteside*, 475 U.S. 157 (1986).⁴ As part of this fundamental proposition, the charging process must remain free from material false statements and undue coercion. The Illinois Supreme Court recognized these principles in *People v. DiVincenzo*, 183 Ill.2d 239, 257-58, 700 N.E.2d 981 (1988):

⁴ Aversion to the use of false evidence is exemplified by the United States Supreme Court’s decisions in cases such as *Napue v. Illinois*, 360 U.S. 264 (1959), and *Franks v. Delaware*, 438 U.S. 154 (1978). In *Napue*, the Court wrote, “A conviction obtained through the use of false evidence, known to be such by representatives of the State, must fall.” 360 U.S. at 269. The *Franks* Court observed that “it would be an unthinkable imposition ... [on judicial] authority if a warrant affidavit, revealed after the fact to contain deliberately or recklessly false statement, were to stand beyond impeachment.” 438 U.S. at 181. Or, as the Supreme Court earlier stated in eloquent terms:

[B]y his testimony, [the witness] has poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurity. This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity.

‘The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts ... Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted.’

The government of strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them.

Mesarosh v. United States, 352 U.S. 1, 14 (1956) (citations and footnote omitted).

The due process rights of a defendant may be violated if the prosecutor deliberately or intentionally misleads the grand jury, uses known perjured or false testimony, or presents other deceptive or inaccurate evidence ... An indictment may also be dismissed where the prosecutor has applied undue pressure or coercion so that the indictment is, in effect, that of the prosecutor rather than the grand jury ... To warrant dismissal of the indictment, defendant must therefore show that the prosecutors prevented the grand jury from returning a meaningful indictment by misleading or coercing it.

See also *United States v. Williams*, 504 U.S. 36, 46 (1992) (indictment dismissal is reserved for situations in which the underlying violation falls within “one of those ‘few, clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury’s functions,’” citing statutes prohibiting false statements and perjury before the grand jury); *People v. Oliver*, 368 Ill.App.3d 690, 859 N.E.2d 38 (2d Dist. 2006) (due process rights of defendant violated and indictment dismissal upheld where the grand jury was presented with deliberately deceptive and inaccurate testimony); *People v. Barton*, 190 Ill.App.3d 701, 708-09, 546 N.E.2d 1091 (5th Dist. 1989) (“The trial court was clearly justified in finding from the evidence that the indictment of the defendant was for political and vindictive reasons. The special prosecutor’s ‘cut and paste job’ on the transcript in presenting the defendant’s prior” grand jury testimony explained the prosecutor’s motivations in seeking an indictment, misled the grand jury and violated due process.).

It also cannot be credibly contended that a report of a “confession” is trivial. Indeed, the erroneous admission of a confession seldom amounts to harmless error. *E.g.*, *People v. St. Pierre*, 122 Ill.2d 95, 114, 522 N.E.2d 61 (1988) (“[c]onfessions carry ‘extreme probative weight,’ and therefore the admission of an unlawfully obtained confession rarely is harmless error”) (citations omitted).

This much is also evident from the tabloid-like front-page print edition of the March 22, 2012 *Sun Times*, as well as the March 23, 2012 *Sun Times* editorial entitled, "Where is police record of a sobbing man?" While irresponsible journalism and manufactured assertions of a "confession" might sell newspapers, a false report of a "confession" has no place in our criminal justice system.

Attorney Gillespie's affidavit, and the surrounding circumstances, make abundantly clear that petitioners' recent allegation that Mr. Vanecko "confessed" to police on May 20, 2004 is entirely untrue. Just as a prosecutor cannot manipulate hearsay to appear as personal knowledge, *Oliver*, 368 Ill.App.3d 690, 859 N.E.2d 38, litigants cannot take dubious, multi-layered hearsay reports of phantom occurrences and transform them into "confessions."

Due process prevents judicial deliberations from being swayed by false evidence. That is what petitioner's recent reply brief (and the ensuing *Sun Times* reports) are attempting to do. The recent reply memorandum filed by petitioners crosses the line. Intervention is warranted to prevent the integrity of these proceedings from being tainted with materially false evidence.

CONCLUSION

The Petition for Appointment of a Special Prosecutor should be denied.

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AFFIDAVIT

TERENCE P. GILLESPIE, being first duly sworn under oath, deposes and states as follows:

1. I am an attorney licensed to practice in the State of Illinois. I was so licensed in 2004. My law practice focuses on criminal defense.

2. In and around May 2004, I, along with Attorney Marc W. Martin, represented Richard J. Vanecko. Attorney Martin and myself continue to represent Mr. Vanecko.

3. In May 2004, Chicago Police Department Detective Ronald Yawger requested that I produce Mr. Vanecko at the Area 3 police station. I had no prior acquaintance with Detective Yawger.

4. On May 20, 2004, I met Mr. Vanecko at my office in downtown Chicago, and personally drove him to Area 3 located at Belmont and Western.

5. I would characterize my interactions with law enforcement personnel on that day as adversarial, but professional. I remember the Commander being very unfriendly. I did not perceive that police were treating Mr. Vanecko or myself with kid gloves. I neither observed nor experienced any favoritism or clout. I have no information or belief that anybody interceded in the investigation.

6. Other than supplying basic demographic information (*e.g.* name, address), Mr. Vanecko, at my direction, did not make any substantive statements to any police officer on May 20, 2004.

7. With the exception of Mr. Vanecko standing in a lineup on the other side of a glass wall, Mr. Vanecko was in my direct physical presence the

entire time he was present in Area 3 on May 20, 2004. Mr. Vanecko was never left alone in a room at Area 3 on May 20, 2004. At no time on May 20, 2004 were any police officers alone in a room with Mr. Vanecko outside my presence. At no time on May 20, 2004 was Mr. Vanecko standing or mingling with friends in hallways of Area 3.

8. I observed lineups held on May 20, 2004. During the lineups, Mr. Vanecko was in my line of eyesight. Detective Yawger oversaw the lineups and conducted them in a professional manner. I did not hear any police officer suggest anything inappropriate to the viewers. Viewers were given as much time as they needed. No person identified, or tentatively identified, Mr. Vanecko.

9. I also had interactions with ASA Darren O'Brien, the felony review supervisor present at Area 3 on May 20, 2004. Following the lineups, ASA O'Brien asked to question Mr. Vanecko. I advised ASA O'Brien (and the detectives present) that Mr. Vanecko would not be making any statements and would be asserting the Fifth Amendment. It is my recollection that ASA O'Brien became visibly angry in response to that decision, but acted in a professional manner and did not attempt to question Mr. Vanecko.

10. I have read the pages 17-18 of petitioners' reply memorandum (the ensuing quotes are from that memorandum). I can unequivocally state that Mr. Vanecko was not in a room "bawling his eyes out," did not "apologize to detectives," did not "confess" or make any substantive statements, admissions or implied admissions to law enforcement personnel at Area 3 on May 20, 2004. The absence of police reports describing "crying and apologizing," a

“confession,” or the making of inculpatory statements is not surprising since those events did not occur.

FURTHER THE AFFIANT SAYETH NOT

TERENCE P. GILLESPIE

Signed and subscribed
before me this 24th day
of March 2012

Notary Public