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DOROTHY BROWN  
CLERK OF THE CIRCUIT COURT  
OF COOK COUNTY, IL

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

PEOPLE OF THE STATE OF ILLINOIS, )  
 ) Case No. 17 CR 4286  
v. )  
 ) Judge Vincent Gaughan  
JASON VAN DYKE, )  
 )  
 )  
Defendant. )

**REPORTER JAMIE KALVEN’S MOTION TO QUASH SUBPOENA**

As this Court is aware, there are procedural and substantive rules in place in the State of Illinois to protect reporters from revealing their sources except in limited circumstances. Defendant Van Dyke has made no effort to comply with them. In fact, Defendant has failed even to articulate precisely what testimony he seeks or why it is relevant to a fact of consequence in this case, let alone file the required written application to divest Mr. Kalven of his reporter’s privilege rights or to comply with the special witness doctrine that applies to reporters. Moreover, the subpoena is no more than an unjustified fishing expedition and should be quashed even independent of Mr. Kalven’s status as a reporter.

**I. SUMMARY OF THE ARGUMENTS**

(1) The subpoena—which Defendant has explained to be seeking any “reports and/or information [Mr. Kalven] received about this case”—is an improper fishing expedition. *E.g.*, *People v. Shukovsky*, 128 Ill. 2d 210, 225 (1988); *People v. Enis*, 194 Ill. 2d 361, 415 (2000).

(2) Mr. Kalven is a reporter, and the subpoena seeks disclosure of a source, which is broadly defined under applicable law. As a result, Defendant must file a written application to divest Mr. Kalven of his reporter’s privilege rights and has failed to do so. Mr. Kalven will respond to the application if and when it is filed. 735 ILCS 5/8-903; *In re Special Grand Jury*

*Investigation of Alleged Violation of the Juvenile Court Act*, 104 Ill. 2d 419, 424 (1984); *People v. Slover*, 323 Ill. App. 3d 620, 624, 625 (2001).

(3) Reporters are also protected under the special witness doctrine, regardless of whether a subpoena seeks disclosure of a source, which similarly requires a showing by Defendant that has not been offered. *People v. Palacio*, 240 Ill. App. 3d 1078, 1102 (1993).

## II. FACTUAL BACKGROUND

### A. These Proceedings

On the morning of October 16, 2017, Mr. Kalven was served with a subpoena to appear to testify in this case the following morning. An attorney who represents Mr. Kalven on other matters promptly notified Defendant's counsel that Mr. Kalven could not appear on such short notice. In response, Defendant's counsel offered no explanation for the needlessly short notice, but instead told Mr. Kalven's attorney that failure to appear on less than a day's notice "really won't look good for Jamie." Because of the exceedingly short notice and the reporter's privilege and other legal issues implicated by Defendant's subpoena, Mr. Kalven was unable to appear at the October 17 hearing. While the subject matter of potential testimony from Mr. Kalven was discussed at that hearing—including various wide-ranging claims from Defendant's counsel that, among other things, Mr. Kalven somehow jointly participated in a witness interview with FBI agents—Defendant failed to articulate precisely what testimony he seeks from Mr. Kalven or how it is relevant to any issues in this case.

After the October 17 hearing, Mr. Kalven retained the undersigned counsel. Mr. Kalven's counsel explained in an October 23 letter to Defendant's counsel that Mr. Kalven would be asserting his Reporter's Privilege Act rights, as well as other potential privileges. The letter also explained the requirements to divest a reporter of his or her privilege and asked Defendant to specify precisely what he wants from Mr. Kalven and why it is relevant, and to



follow the proper procedures if he intended to divest Mr. Kalven of his privilege and compel Mr. Kalven to reveal a confidential source.

Following the October 25 court hearing, which included discussions of this issue and set out a briefing schedule to address it, Mr. Kalven's counsel again asked Defendant's counsel to specify exactly what testimony is being sought and exactly why it is relevant. The entirety of the response is as follows: "We need to know what reports and/or information he received regarding this case, and when he received it."

Mr. Kalven's counsel asked for more specifics, including identification of exactly what statements are claimed to be protected by *Garrity*, not duplicative of unprotected statements, and claimed to have been provided to Mr. Kalven based on the unidentified reports to which Defendant's counsel has alluded at various times. Mr. Kalven's counsel also asked for an explanation of how Mr. Kalven's receipt of any such information would even be relevant.

No response was received.

**B. Mr. Kalven's Status as a Reporter**

Defendant's counsel has acknowledged in open court that Mr. Kalven is a reporter. Nonetheless, for completeness, and in light of certain insinuations by one of Defendant's attorneys, Mr. Kalven provides the following summary of his activities as a reporter related to the Laquan McDonald matter. Mr. Kalven also notes that he has extensively reported on other instances and forms of police misconduct and other issues. *See, e.g.,* Invisible Institute, The View From the Ground, *available at* <https://invisible.institute/the-view-from-the-ground>.

On February 10, 2015—approximately four months after Jason Van Dyke shot 17-year-old Laquan McDonald sixteen times and killed him, and, according to subsequent charges that have been filed and the findings of the City's Police Accountability Task Force, after multiple officers lied about what occurred—Mr. Kalven published the article *Sixteen Shots* in the widely

read and regularly published online magazine Slate.<sup>1</sup> In that article, Mr. Kalven described the official narrative of what occurred based on public statements by FOP spokesman Pat Camden and CPD, which was that Laquan lunged at the officers with a knife, leaving them no choice but to kill him. The article noted that while CPD's official account was that Laquan died of a chest wound, the autopsy revealed that he was actually shot sixteen times in various parts of his body. Mr. Kalven also reported that a witness had, on his own initiative, recounted his story to IPRA, that it diverges sharply from what CPD and individual officers claimed to have happened, and that police at the scene neither interviewed the witness nor even asked for his name. The article reported that a confidential source told Mr. Kalven that dash-cam video had captured the incident. Finally, the article recounted the history of findings of allegedly justified shootings by the Independent Police Review Authority, overwhelmingly of black people and at a rate of several per month.

Mr. Kalven has won a number of awards as a journalist. *Sixteen Shots* was awarded the 2015 George Polk Award for Local Reporting, the 2015 Chicago Headline Club's Watchdog Award, and the 2015 Richard H. Driehaus Award for Investigative Reporting.<sup>2</sup> Mr. Kalven won two of the awards again in 2016 for *Code of Silence*, which reported on widespread police misconduct and its systematic enablement and encouragement by top CPD brass.<sup>3</sup> *Code of*

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<sup>1</sup> See Jamie Kalven, *Sixteen Shots*, available at [http://www.slate.com/articles/news\\_and\\_politics/politics/2015/02/laquan\\_mcdonald\\_shooting\\_a\\_recently\\_obtained\\_autopsy\\_report\\_on\\_the\\_dead.html](http://www.slate.com/articles/news_and_politics/politics/2015/02/laquan_mcdonald_shooting_a_recently_obtained_autopsy_report_on_the_dead.html).

<sup>2</sup> See Chicago Tribune, *Local Journalist Wins Polk Award for Laquan McDonald Reporting*, available at <http://www.chicagotribune.com/entertainment/movies/ct-polk-award-chicago-journalist-met-20160215-story.html>.

<sup>3</sup> Code of Silence also won two major national awards: the Hillman Prize for the best work of social justice reporting to appear on the Web in 2016 and the Eppy Award for the best work of investigative reporting to appear on the Web in 2016. The Sidney Hillman Foundation Website, available at <http://www.hillmanfoundation.org/hillman-prizes/2017-hillman-prize-web>



*Silence* was published in The Intercept, which is another widely read online news source that publishes on a regular basis, and whose editorial staff includes Glenn Greenwald, who broke the Edward Snowden/NSA story.<sup>4</sup>

There can be no serious question that Mr. Kalven is a reporter.

**C. Defendant's Prior Incorrect Claims About Mr. Kalven**

While, as discussed below, Mr. Kalven is under no obligation to divulge anything to Defendant at this point, the only "reports about this case" that Mr. Kalven has ever received are those that were released by the City under FOIA (which were then widely reported) on December 31, 2015, which was the first time Mr. Kalven saw them. Nor has Mr. Kalven ever been told anything by anyone about any statements made by Defendant (whether allegedly protected under *Garrity* or otherwise), other than reading about the inaccurate accounts repeated by Pat Camden and CPD immediately after the shooting occurred. Nor is there any truth to the outlandish claim that Mr. Kalven and the FBI jointly interviewed any witnesses—not that Defendant has even shown any relevance of such a hypothetical event.

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journalism; Robservations, Robert Feder Website (Oct. 27, 2017 Posting) available at <http://www.robertfeder.com/2017/10/27/robservations-jen-sabella-leaves-dnainfo-onion/>.

<sup>4</sup> See Chicago Tribune, *Tribune*, *Jamie Kalven Honored at Lisagor Awards*, available at <http://www.chicagotribune.com/news/local/breaking/ct-tribune-lisagor-awards-list-winners-20170513-story.html>.

### III. ARGUMENT

#### A. Even Independent of Mr. Kalven's Status as a Reporter, Defendant is Engaged in an Improper Fishing Expedition

While use of subpoenas by a criminal defendant is certainly permitted as a general matter, their use is not limitless. Among other limitations, a subpoena—whether it is issued to a reporter or anyone else—may not be used to conduct a “fishing expedition.” *E.g.*, *People v. Shukovsky*, 128 Ill. 2d 210, 225 (1988); *People v. Abrams*, 2015 IL App (1st) 133746, ¶ 39; *People v. Daniels*, 346 Ill. App. 3d 350, 364 (2004); *People v. Mitchell*, 297 Ill. App. 3d 206, 209 (1998); *see also People v. Enis*, 194 Ill. 2d 361, 415 (2000) (applying rule against fishing expeditions to post-conviction discovery). In *Enis*, for example, a subpoena was ruled to be an improper fishing expedition because the defendant “did not claim a *Brady* violation. Rather, defendant simply argued that there may exist something in the police file that police withheld, which could lead to exculpatory evidence. Under these circumstances we conclude that defendant’s subpoena was little more than a fishing expedition and that the circuit court did not abuse its discretion in granting the State’s motion to quash.” 194 Ill. 2d at 415.

Defendant’s articulation of what he is seeking from Mr. Kalven here makes clear that the subpoena is no more than an improper fishing expedition. Rather than identify precisely what non-duplicative *Garrity*-protected statements Mr. Kalven is alleged to have received and how they are relevant, Defendant seeks to learn of any and all “reports and/or information [Mr. Kalven] received about this case.” Like the discovery proponent in *Enis*, Defendant here has not claimed that Mr. Kalven received, let alone disclosed, any specific non-duplicative *Garrity*-protected statements. Instead, Defendant simply hopes that compelling Mr. Kalven to testify will uncover some *Garrity* issue. Thus, as in *Enis*, the subpoena in this case should be quashed as an improper fishing expedition. In fact, the Court has already quashed similar efforts by Defendant



to hunt for alleged “leaks” through subpoenas to the FBI, IPRA, and others. While much focus has been placed on the reporter’s privilege issues as to Mr. Kalven, the subpoena can and should be quashed for the same reason as the others.

**B. Defendant Has Not Complied with the Reporter’s Privilege Act**

As Mr. Kalven has already made clear to Defendant’s counsel, Mr. Kalven asserts the full scope of his rights under the Reporter’s Privilege Act to protect any sources, as that term is defined by statute and interpreting case law, from disclosure. Under the Act, “[n]o court may compel any person to disclose the source of any information obtained by a reporter except as provided” by other terms in the Act. 735 ILCS 5/8-901. As explained by our state Supreme Court, “[t]he reporter’s privilege has evolved from a common law recognition that the compelled disclosure of a reporter’s sources could compromise the news media’s First Amendment right to freely gather and disseminate information.” *In re Special Grand Jury Investigation of Alleged Violation of the Juvenile Court Act*, 104 Ill. 2d 419, 424 (1984).

“In any case, except a libel or slander case, where a person claims the [reporter’s privilege], the person, party, body or officer seeking the information so privileged may apply in writing . . . for an order divesting the person named therein of such privilege and ordering him or her to disclose his or her source of the information.” 735 ILCS 5/8-903.

“Reporter” is defined as “any person regularly engaged in the business of collecting, writing or editing news for publication through a news medium on a full-time or part-time basis[.]” 735 ILCS 5/8-902(a). “News medium” means, among other things, “any newspaper or other periodical issued at regular intervals whether in print or electronic format and having a general circulation[.]” 735 ILCS 5/8-902(b). As discussed above, Mr. Kalven clearly meets the definition of a reporter.

“Source” is a broadly defined term covering “the person or means from or through which the news or information was obtained.” 735 ILCS 5/8-902(d). This is decidedly *not* limited to the name of a specific person, but also includes other “means.” *Id.* For example, photographs have been found to be within the scope of “source” under the Act. *People v. Slover*, 323 Ill. App. 3d 620, 624, 625 (2001) (finding that trial court erred as matter of law in holding to the contrary). As explained in *Stover*, a “means” is “something useful or helpful to a desired ends,” and since photographs were a useful means to collect newsworthy information, they qualified as a “source” under the Act. *Id.* “By defining ‘source’ to include a ‘means,’ the legislature clearly intended the privilege to protect more than simply the names and identities of witnesses, informants, and other persons providing news to a reporter.” *Id.* Nor is it even necessary that a source be confidential to be a “source.” *Id.* Here, Defendant asks Mr. Kalven to disclose “what reports and/or information he received regarding this case.” This is plainly within the scope of “source” and “means.”

Mr. Kalven claims his privilege, as a reporter, not to disclose his sources related to his reporting on the shooting of Laquan McDonald by Jason Van Dyke or the subsequent false narrative put forward by CPD and officers on the scene. Because Defendant seeks the disclosure of a source obtained by a reporter, and because Mr. Kalven claims his Reporter’s Privilege Act rights, Defendant is required under Section 8-903 of the Reporter’s Privilege Act to file a written application to divest Mr. Kalven of his privilege. 735 ILCS 5/8-903. That application must allege: (1) the name of the reporter; (2) the specific information sought; (3) the relevancy of the information to the proceedings; and (4) a specific public interest that would be adversely affected if the factual information sought were not disclosed. 735 ILCS 5/8-904.



In ruling upon such an application, a court must consider: (1) the nature of the proceedings; (2) the merits of the claim or defense; (3) the adequacy of the remedy otherwise available; (4) the relevancy of the source; and (5) the possibility of establishing by other means that which it is alleged the source requested will tend to prove. 735 ILCS 5/8-904. To divest a reporter's privilege, a court must also find that "all other available sources of information have been exhausted" and that "disclosure of the information sought is essential to the protection of the public interest involved." 735 ILCS 5/8-907(2).

Mr. Kalven will await the filing of a proper written application by Defendant, which will presumably be included in Defendant's response to this motion, before addressing any of these considerations. Suffice it to say for present purposes, without limiting the arguments that he may make in response to the required application, that Mr. Kalven disputes that the information being sought is relevant to any fact of consequence in this case, disputes that there are no other available sources of whatever it is that Defendant is seeking, and disputes that the public interest would be served by requiring Mr. Kalven to disclose any sources.

On the last point, it should be noted that Mr. Kalven's reporting set off a chain of events that ultimately resulted in long-overdue admissions by the City that the Chicago Police Department is fundamentally broken and badly needs reform. *See generally* Police Accountability Task Force, Recommendations for Reform: Restoring Trust Between the Chicago Police and the Communities They Serve, Executive Summary (noting, among many other things, that initial reports of the Laquan McDonald shooting were "superficial and false"; that "CPD's own data gives validity to the widely held belief the police have no regard for the sanctity of life when it comes to people of color"; and that "[e]very stage of investigations and discipline is plagued by serious structural and procedural flaws that make real accountability nearly

impossible”).<sup>5</sup> Anything that might dissuade others in the future from coming forward to report about police misconduct or any other governmental misconduct—including Defendant’s fishing expedition into what he calls “leaks”—should not be lightly undertaken.

**C. The Special Witness Doctrine Protects Reporters From Testifying At All Unless a Party Makes a Showing that Defendant Has Not Made**

Finally, reporters in Illinois are also protected by the special witness doctrine. The doctrine applies not only to prosecutors, judges, and defense attorneys as witnesses, but also to reporters. *People v. Palacio*, 240 Ill. App. 3d 1078, 1102 (1993) (“The special witness doctrine extends to reporter[.]”); *see also, e.g., People v. Paris*, 295 Ill. App. 3d 372, 377 (1998) (noting applicability to reporters). The special witness doctrine is not limited to the disclosure of sources; indeed, it is not even limited to reporters. *See generally id.* Under the special witness doctrine, when a party subpoenas a special witness for any reason in a criminal case, “the trial court should conduct a hearing to determine whether it will permit those subpoenas to stand.” *Paris*, 295 Ill. App. 3d at 377; *see also Palacio*, 240 Ill. App. 3d at 1096. The party seeking the testimony must “make a plausible showing that [the] testimony sought [is] material and favorable to his defense[.]” *Palacio*, 240 Ill. App. 3d at 1096-97. To make such a showing, the party seeking the testimony must state the specific testimony the reporter is expected to give and “must specifically state why that testimony is not only relevant, but *necessary* to the party’s case,” as well as explaining what efforts were made to obtain the same evidence through alternative means. *Id.* (emphasis in original).

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<sup>5</sup> Available at [https://chicagopatf.org/wp-content/uploads/2016/04/PATF\\_Final\\_Report\\_Executive\\_Summary\\_4\\_13\\_16-1.pdf](https://chicagopatf.org/wp-content/uploads/2016/04/PATF_Final_Report_Executive_Summary_4_13_16-1.pdf).



Thus, in addition to the written application required under the Reporter's Privilege Act, Defendant must also comply with the enhanced subpoena requirements under the special witness doctrine. Mr. Kalven will await Defendant's purported showing and will address it if and when it is offered.

#### IV. CONCLUSION

For these reasons, the subpoena should be quashed.

RESPECTFULLY SUBMITTED,

*/s/ Matthew V. Topic*

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**CERTIFICATE OF SERVICE**

I certify that on November 3, 2017, I served a copy of Reporter Jamie Kalven's Motion to Quash Subpoena by email to Daniel Herbert (dan.herbert@danherbertlaw.com) and Sam Gregs (samsgreg@co.kane.il.us) with copies by U.S. mail.

*/s/ Matthew V. Topic*