No. _____

In The
Supreme Court of the United States

LOUIS A. BIANCHI, individually and in his official capacity as McHenry County State's Attorney, MICHAEL P. COMBS, individually and in his official capacity as McHenry County Assistant State's Attorney, COUNTY OF McHENRY, and McHENRY COUNTY STATE'S ATTORNEY'S OFFICE,

Petitioners,

v.

KIRK CHRZANOWSKI,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When an assistant state's attorney testified against the State's Attorney pursuant to a subpoena, concerning alleged improper influence by the State's Attorney as to a plea agreement entered into between the assistant state's attorney and a defense attorney, was the assistant state's attorney acting within his job duties such that his speech was not protected by the First Amendment to the Constitution of the United States?

2. Were the contours of any First Amendment protections that might have attached to the assistant state's attorney's testimony sufficiently clear such that a reasonable official would understand that by taking adverse employment action against the assistant state's attorney, the official's actions would be violating the assistant state's attorney's free speech right?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	3
REASONS FOR ALLOWANCE OF THE WRIT	6
I. REVIEW IS WARRANTED TO CORRECT THE SEVENTH CIRCUIT'S MISAPPLICATION OF *GARCETTI* AND TO CLARIFY THAT A PUBLIC EMPLOYEE DOES NOT HAVE A FREE SPEECH RIGHT WHEN THE TESTIMONY IS RELATED TO HIS OFFICIAL DUTIES	8
II. REVIEW IS WARRANTED BECAUSE IT CANNOT BE SAID THAT THE RIGHT ALLEGED TO HAVE BEEN INFRINGED WAS CLEARLY ESTABLISHED WHERE THE COURTS OF APPEALS ARE DIVIDED ON THE QUESTION OF WHETHER A PUBLIC EMPLOYEE IS ACTING PURSUANT TO HIS OFFICIAL DUTIES AS OPPOSED TO ACTING AS A PRIVATE CITIZEN WHEN HE GIVES SWORN TRUTHFUL TESTIMONY	14
CONCLUSION	18

TABLE OF CONTENTS – Continued

Page

TABLE OF APPENDICES

Appendix A – Opinion of the United States Court of Appeals for the Seventh Circuit, Dated and Decided on August 2, 2013 .....App. 1

Appendix B – Order of the United States District Court for the Northern District of Illinois, Western Division, Dated and Filed on July 6, 2012 .....App. 20

Appendix C – Illinois Rules of Professional Conduct, Rules 8.3 and 8.4 .....App. 29

Appendix D – First Amended Complaint, filed in the United States District Court for the Northern District of Illinois, Western Division, on April 4, 2012 .....App. 33

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Creighton, 483 U.S. 635 (1987).....17

Brady v. Maryland, 373 U.S. 83 (1963).....6

Fairley v. Andrews, 578 F.3d 518 (7th Cir. 2009).....14

Garcetti v. Ceballos, 547 U.S. 410 (2006).....*passim*

Green v. Barrett, 226 F.App'x 883 (11th Cir. 2007).....14, 15

In re Himmel, 125 Ill. 2d 531 (1988).....9

Kiehle v. County of Cortland, 486 F.App'x 222 (2d Cir. 2012).....14

Reilly v. City of Atl. City, 532 F.3d 216 (3d Cir. 2008).....14

Tamayo v. Blagojevich, 526 F.3d 1074 (7th Cir. 2008).....15, 16, 17

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

United States Constitution, Amendment I.....*passim*

28 U.S.C. § 1291 5

28 U.S.C. § 1331 5

28 U.S.C. § 1343(a).....5

28 U.S.C. § 1367 5

42 U.S.C. § 1983 .....2, 4, 5, 15

55 ILCS 5/3-9005(a)(1) 8

TABLE OF AUTHORITIES – Continued

Page

Federal Rules of Civil Procedure, Rule 12(b)(6).....5

Illinois Rules of Professional Conduct, Rule 8.3... 2, 8-9

Illinois Rules of Professional Conduct, Rule 8.4... 3, 8-9

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 2013 WL 3958456 (7th Cir., August 2, 2013) (App. at 1). The Seventh Circuit reversed the July 6, 2012, judgment of the United States District Court for the Northern District of Illinois, which had dismissed the complaint in its entirety. The District Court's opinion is reported at 2012 WL 2680800 (App. at 20).

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S. § 1254(1). The Seventh Circuit's opinion was rendered on August 2, 2013 (App. at 1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Title 42 United States Code, Section 1983

Civil Action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Illinois Rules of Professional Conduct

(See App. at 29-32 for the below rules set forth in their entirety)

RULE 8.3 Reporting Professional Misconduct

A lawyer possessing knowledge not otherwise protected as a confidence by these Rules or by law that another lawyer has committed a violation of Rule 8.4(a)(3) or (a)(4) shall report such knowledge

to a tribunal or other authority empowered to investigate or act upon such violation.

* * *

RULE 8.4 Misconduct

(a) A lawyer shall not:

* * *

(3) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(4) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

* * *

STATEMENT OF THE CASE

Respondent, Kirk Chrzanowski, claims that he was discharged from his employment as an assistant state's attorney in McHenry County, Illinois, in retaliation for his testimony against the State's Attorney of McHenry County (App. at 33-52). The subject matter of Chrzanowski's testimony related to a plea agreement that Chrzanowski had negotiated with an assistant public defender (App. at 53-83). Chrzanowski had been assigned to handle the drug prosecution of Jeremy Reid (App. at 56). During the pendency of the *Reid* case, Chrzanowski engaged in plea negotiations with Reid's court-appointed counsel, and ultimately the two attorneys presented a fully-negotiated

plea agreement to a judge for entry (App. at 58-67). Pursuant to that negotiated plea agreement, Reid pled guilty to a felony drug offense and was sentenced to the Illinois Department of Corrections (App. at 66-67).

Chrzanowski later testified, pursuant to a subpoena, before a grand jury concerning an allegation that petitioner, Louis Bianchi, the McHenry County State's Attorney, had improperly influenced the negotiated plea deal in the *Reid* case. Bianchi was indicted by the grand jury, and, on August 21, 2011, Chrzanowski testified in the prosecution's case-in-chief in the case of *People v. Louis A. Bianchi*, McHenry County case number 11 CF 169, concerning the plea negotiations of the *Reid* case (App. at 53-83).

On December 2, 2011, Chrzanowski was questioned by Petitioners, Louis Bianchi and Michael Combs (App. at 4). Chrzanowski was questioned by Combs about his grand jury and trial testimony in the case against Bianchi. *Id*. Bianchi asked for Chrzanowski's resignation and, when he refused to resign, Bianchi terminated him (App. at 5).

Following his discharge, Chrzanowski filed a complaint on January 17, 2012, in the United States District Court for the Northern District of Illinois, Western Division, invoking federal jurisdiction, by alleging claims arising under 42 U.S.C. § 1983 and the First Amendment to the United States Constitution. (Chrzanowski also included state law claims in his complaint, which were voluntarily dismissed on

motion of Chrzanowski, subsequent to his filing of a first amended complaint.) The district court had subject-matter jurisdiction over Chrzanowski's Section 1983 claims pursuant to 28 U.S.C. §§ 1343(a) and 1331, and, over his state law claims pursuant to 28 U.S.C. § 1367.

Respondents filed a motion to dismiss the complaint pursuant to Federal Rules of Civil Procedure Rule 12(b)(6), and on April 4, 2012, plaintiff filed his First Amended Complaint, again alleging claims under 42 U.S.C. § 1983 and the First Amendment (App. at 33). On April 27, 2012, the defendants again moved for dismissal pursuant to Rule 12(b)(6). On July 6, 2012, the district court dismissed Chrzanowski's claims, on the grounds that he testified pursuant to his official duties as an assistant state's attorney, such that his speech was not protected by the First Amendment; the court also held, alternatively, that petitioners were entitled to qualified immunity because any First Amendment protections afforded to Chrzanowski's testimony were not clearly established (App. at 27-28). Respondent filed a timely notice of appeal in the Seventh Circuit Court of Appeals on August 2, 2012 and that Court had jurisdiction over the district court's final judgment pursuant to 28 U.S.C. § 1291.

On August 2, 2013, the Seventh Circuit Court of Appeals reversed the judgment of the district court, holding that Chrzanowski's testimony was not made pursuant to his official duties as a prosecutor and

that testimony given pursuant to a subpoena is a clearly-established right protected by the First Amendment (App. at 27-28).

REASONS FOR ALLOWANCE OF THE WRIT

The Seventh Circuit's affording of First Amendment protections to a prosecutor's testimony concerning a case that the prosecutor handled is an important question of federal law. The Seventh Circuit's misapplication of this Court's analysis in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), has contributed to a confounding inconsistency in First Amendment jurisprudence. The practical result of the Seventh Circuit's departure from this Court's precedent is that an assistant district attorney in Los Angeles County, California is without First Amendment free speech rights when fulfilling his ethical obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), but an assistant state's attorney in McHenry County, Illinois is afforded First Amendment free speech protections when testifying concerning discussions he had, observations he made, and actions he took regarding a plea agreement that he negotiated (App. at 53-83).

Review by this Court is necessary on this important federal question in order to rectify the conflict between this Court's decision in *Garcetti* and that of the Seventh Circuit in the instant case. This Court

should grant certiorari to clarify whether, and under what circumstances, a public employee is entitled to free speech protection when testifying under oath to matters surrounding his employment duties.

Furthermore, the courts of appeals are divided on the issue of whether First Amendment protections are automatically triggered when a public employee provides truthful testimony under oath. The Third and Seventh Circuits have opined that sworn testimony by a government employee is protected free speech, whereas the Second and Eleventh Circuits do not afford First Amendment protection to sworn testimony that is made pursuant to the government employee's official duties. Due to this split in the circuits, it cannot be said that any right to free speech in the context of this case was so clearly established that qualified immunity was inapplicable. The district court correctly concluded that any such right was not clearly established (App. at 27). While the Seventh Circuit rejected the district court's conclusion and found instead that it was a clearly established right, such a holding is contradicted by the circuit split and the Seventh Circuit's own muddled case law (App. at 18-19).

I. REVIEW IS WARRANTED TO CORRECT THE SEVENTH CIRCUIT'S MISAPPLICATION OF *GARCETTI* AND TO CLARIFY THAT A PUBLIC EMPLOYEE DOES NOT HAVE A FREE SPEECH RIGHT WHEN THE TESTIMONY IS RELATED TO HIS OFFICIAL DUTIES.

The Seventh Circuit misapplied the analysis in *Garcetti* when it rejected the district court's conclusion that Chrzanowski's testimony was without First Amendment protection (App. at 1, *et seq*.). Specifically, the district court had determined that Chrzanowski's testimony was "part of his official duties and responsibilities as an assistant state's attorney" because "an assistant state's attorney [is] obligated to pursue all criminal offenses, even those allegedly perpetrated by his supervisors. . . ." (App. at 24), citing to 55 ILCS 5/3-9005(a)(1) (West 2010). The district court had also concluded that "it was part of [Chrzanowski's] responsibilities to see that the actions of his fellow prosecutors, including Bianchi, were consistent with applicable ethics rules and the appropriate administration of justice" (App. at 24-25).

The Seventh Circuit erroneously characterized the district court's focus on Chrzanowski's general professional obligations as "misguided" (App. at 13). Furthermore, the court of appeals ignored altogether the mandatory ethical obligations applicable to Illinois-licensed attorneys set forth in the Illinois Rules of Professional Conduct. *See* Illinois Rules of

Professional Conduct, Rules 8.3(a) & 8.4 (2010); *In re Himmel*, 125 Ill. 2d 531, 541 (1988) (Illinois lawyers have an obligation to report knowledge of alleged conduct by an attorney involving dishonesty, fraud, deceit or misrepresentation). In its analysis, the Seventh Circuit did acknowledge this Court's holding in *Garcetti* that "[w]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti v. Ceballos*, 547 U.S. at 421 (App. at 6). The analysis, however, that the Seventh Circuit employed in attempting to distinguish *Garcetti* is fatally flawed.[1] Specifically, the Court of Appeals erred when it rejected the notion that Chrzanowski's testimony was made pursuant to his official duties and opined that his official duties as a prosecutor could not be so inclusive as to encompass the proper administration of justice (App. at 8-12).

Essentially, the Seventh Circuit found that Chrzanowski was paid simply to prosecute crimes (App. at 10-11), whereas the district court described the duties of a prosecutor as being the service of the

[1] During oral argument in this cause, Judge Easterbrook characterized *Garcetti* as follows: "[t]hat's the distinction between *Garcetti* and the rest of the world. *Garcetti* says that things you do on the job are not covered by the First Amendment, and things you do off the job are, even if it's the same person." *Chrzanowski v. Bianchi*, 12-2811, Oral Argument, 4/5/2013, www.CA7.USCourt.gov.

people of his county "in the proper administration of justice" (App. at 24). In rejecting the district court's description of a prosecutor's function, the Seventh Circuit relied heavily on Justice Souter's dissent in *Garcetti*, as well as the majority's comments in addressing that dissent. *Garcetti*, 547 U.S. at 431 n.2 (Souter, J., dissenting) (App. at 8, 10). In its opinion, the Seventh Circuit – *sans* a page number citation – claimed that the *Garcetti* Court "expressly rejected the argument that job descriptions such as those at issue here (*e.g*. 'a general obligation to ensure sound administration' of public institutions) could place otherwise protected speech outside the ambit of the First Amendment"[2] (App. at 10). This statement is a mischaracterization of this Court's opinion. Toward the end of the *Garcetti* opinion, this Court addressed dissenting Justice Souter's suggestion – not an argument – that "*employers* can restrict employees' rights by creating excessively broad job descriptions." *Garcetti*, 547 U.S. at 424, referring to post, at 1965, n.2 (Souter, J., dissenting) (emphasis added). There is no allegation in *Chrzanowski* that an employer-generated job description is at issue and, thus, the

[2] The language which the Seventh Circuit included in this sentence without a page citation – "a general obligation to ensure sound administration" – does not appear in the majority's opinion. Thus, contrary to the Seventh Circuit's conclusion, there is no indication that the majority in *Garcetti* disapproved of the use of this type of job description for certain public sector jobs.

Seventh Circuit mischaracterized the majority's comments in this regard (App. at 10).

Indeed, the role of a prosecutor in the criminal justice system is common knowledge amongst the public, such that it is self-evident that a prosecutor should adhere to applicable ethical rules and serve the people of his county in the proper administration of justice. The Seventh Circuit acknowledged that there was no difficulty in reaching a determination of the duties of this particular public sector job (App. at 11).

However, by reducing the description of a prosecutor's job duties to an excessively narrow description – the prosecution of crimes – the Seventh Circuit's analysis leads to a vastly different conclusion than this Court's result in *Garcetti* (App. at 10). In *Garcetti*, Richard Ceballos, who was an assistant district attorney in Los Angeles County, alleged that his First Amendment rights were violated when he suffered adverse employment actions following his authorship of a disposition memorandum which emphasized police misconduct on the part of an affiant of a search warrant. *Garcetti*, 547 U.S. at 414. This Court held that Ceballos was not entitled to First Amendment protections for the speech included in the disposition memorandum, which Ceballos had prepared pursuant to his official duties as a prosecutor. *Garcetti*, 547 U.S. at 421-24. However, if the Seventh Circuit's *Chrzanowski* analysis were to be applied to the *Garcetti* case it would change the outcome in *Garcetti*, for the reasoning would be as follows: Ceballos was not

paid to investigate inaccuracies in a search warrant affidavit at the request of defense counsel, he was not paid to document the officer's alleged misrepresentations in a memorandum, and he was not paid to testify about those purported falsehoods as a defense witness at a suppression hearing; rather, he was simply paid to prosecute crimes. Thus, under the Seventh Circuit's analysis, Ceballos's speech in his disposition memorandum would receive First Amendment protections – a result contrary to this Court's conclusion.

Just as this Court found that Ceballos did not act as a private citizen when he wrote his disposition memorandum regarding a pending case, so too, Chrzanowski did not act as a private citizen when he testified at the prosecution of his employer concerning a case for which Chrzanowski was vested with the primary responsibility. *Garcetti*, 547 U.S. at 421. As demonstrated by the transcript of the prosecution of Louis Bianchi, Chrzanowski's testimony concerned a plea deal on the *Jeremy Reid* case – a plea deal that Chrzanowski negotiated with an assistant public defender (App. 53, *et seq*.). Chrzanowski's testimony was centered on his communications with the public defender on the *Reid* case, his discussions with Louis Bianchi about the *Reid* case, his discussions with his supervisor concerning the *Reid* case, and his discussions with the arresting officer on the *Reid* case (App. 53, *et seq*.). Thus, the content of Chrzanowski's testimony clearly arose out of his duties as an assistant state's attorney in McHenry County.

As noted by the district court, Chrzanowski's speech was unprotected regardless of whether he was testifying under subpoena, since his duty to cooperate with a criminal prosecution (regardless of the subject of that prosecution) emanated from his duties as a prosecutor and his ethical obligation as an attorney (App. at 27). As this Court held in *Garcetti*, "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen." *Garcetti*, 547 U.S. at 421-22. Furthermore, "the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities." *Garcetti*, 547 U.S. at 424.

Accordingly, this Court should grant review to correct the Seventh Circuit's misapplication of *Garcetti* and to clarify the restrictions on First Amendment protections when a public employee makes a statement pursuant to his official duties.

II. REVIEW IS WARRANTED BECAUSE IT CANNOT BE SAID THAT THE RIGHT ALLEGED TO HAVE BEEN INFRINGED WAS CLEARLY ESTABLISHED WHERE THE COURTS OF APPEALS ARE DIVIDED ON THE QUESTION OF WHETHER A PUBLIC EMPLOYEE IS ACTING PURSUANT TO HIS OFFICIAL DUTIES AS OPPOSED TO ACTING AS A PRIVATE CITIZEN WHEN HE GIVES SWORN TRUTHFUL TESTIMONY.

This Court should grant review on this issue of significant constitutional import, since the courts of appeals are divided as to whether First Amendment protections are automatically triggered when a public employee provides truthful testimony under oath. The Third Circuit is in parity with the Seventh Circuit, in that it has held that when a government employee testifies truthfully he is acting as a citizen. *Reilly v. City of Atl. City*, 532 F.3d 216, 231 (3d Cir. 2008); *accord, Fairley v. Andrews*, 578 F.3d 518, 524 (7th Cir. 2009). In contrast, the Eleventh Circuit and the Second Circuit have held that, when a public employee speaks pursuant to his official duties, it is speech unprotected by the First Amendment, irrespective of whether the statements occur during sworn testimony. *Green v. Barrett*, 226 F.App'x 883, 886 (11th Cir. 2007); *Kiehle v. County of Cortland*, 486 F.App'x 222, 224 (2d Cir. 2012).

In *Green*, the chief jailer of a county jail testified at a court hearing concerning cell door lock issues and other security deficiencies of the jail. A day later, the

sheriff fired her. *Green*, 226 F.App'x at 884. The Eleventh Circuit found that the sheriff's firing of Green did not violate her First Amendment right to free speech, because she testified concerning the unsafe conditions of the jail, in her official capacity as chief jailer. *Id*. at 886. The court went on to further find that, even assuming her speech was protected, this was not clearly established by this Court's precedent, nor the Eleventh Circuit's precedent at the time the sheriff fired Green. *Id*. Thus, the Eleventh Circuit concluded that the sheriff was entitled to qualified immunity on Green's Section 1983 claim. *Id*. at 887.

So too, in the instant case did the district court properly find that "it cannot be said that the right was so clearly established that defendants cannot avail themselves of qualified immunity" (App. at 27). That any First Amendment protections which attached to Chrzanowski's speech were not clearly established at the time he testified is made evident by the Seventh Circuit's own precedent, upon which the district court relied.

In *Tamayo v. Blagojevich*, 526 F.3d 1074, 1078-80 (7th Cir. 2008), a case factually analogous to the case at bar, the Seventh Circuit concluded that the Interim Administrator of the Illinois Gaming Board was speaking pursuant to her official duties when she testified before the Illinois House Gaming Committee regarding misconduct by the Governor of the State of Illinois and another official. The Seventh Circuit affirmed the district court's judgment dismissing

Tamayo's First Amendment claim. *Tamayo*, 526 F.3d at 1091.

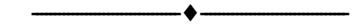
In *Chrzanowski*, the district court relied heavily upon *Tamayo* in reaching its determination that his testimony was not the speech of a private citizen, but rather, that of a public official (App. at 25). The district court noted that the Seventh Circuit had emphasized that Tamayo "had a duty to see that the law was administered properly," *Tamayo*, 526 F.3d at 1091, and that Tamayo's responsibility "encompassed a duty to bring alleged wrongdoing within her agency to the attention of the relevant public authorities." *Tamayo*, 526 F.3d at 1091 (App. at 25).

While the district court quoted the Seventh Circuit's language in *Tamayo* accurately, the Seventh Circuit in *Chrzanowski* retreated from its words in an attempt to distinguish *Tamayo*, by stating its "holding did not rest on these broad and general characterizations of Tamayo's" duties (App. at 18). Irrespective of the fact that the broad and general characterizations were the court's own words, the Seventh Circuit explained its *Tamayo* decision by stating that Tamayo could not avail herself of First Amendment protections because she "as a practical matter, was expected to engage in such speech in the regular course of her employment" (App. at 18). While the *Chrzanowski* Court claimed that "[t]estifying before the House Gaming Committee was an important part of the job of a high-ranking official like Tamayo," the Seventh Circuit did not provide any citation from *Tamayo* to support such a conclusion (App. at 18). Indeed, there

is no indication from the *Tamayo* decision itself that Jeannette Tamayo had ever testified before the House Gaming Committee previous to her testimony for which she was allegedly fired, let alone any support for the statement that it was an "important part" of her job to testify.

Based on the Seventh Circuit's own precedent in *Tamayo*, as well as the circuit-split, it cannot be said that the right at issue here was clearly established at the time Chrzanowski was terminated. The right, assuming it existed, was not so "particularized" that it would have been known to the State's Attorney or the assistant state's attorney. That is, it cannot be said that "[t]he contours of the right . . . [were] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

As the courts of appeals are now divided on the proper application of the holding in *Garcetti* to sworn testimony, this case warrants the Court's review.



CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 12-2811

KIRK CHRZANOWSKI,

Plaintiff-Appellant,

v.

LOUIS A. BIANCHI, *et al*.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Western Division.
No. 12 C 50020 – **Philip G. Reinhard**, *Judge*.

ARGUED APRIL 5, 2013 – DECIDED AUGUST 2, 2013.

Before EASTERBROOK, *Chief Judge*, and FLAUM and WOOD, *Circuit Judges*.

WOOD, *Circuit Judge*. From January 2006 until he lost his job in December 2011, Kirk Chrzanowski was an assistant state's attorney in the McHenry County State's Attorney's Office. Problems arose for Chrzanowski in early 2011, when a special prosecutor began investigating suspected wrongdoing by Chrzanowski's boss, McHenry County State's Attorney Louis Bianchi. Bianchi allegedly had improperly influenced the handling of cases involving his relatives

and political allies. Under command of a subpoena, Chrzanowski testified before the grand jury, and later, after receiving another subpoena, he testified at Bianchi's trial. A few months after the trial, Chrzanowski was called into Bianchi's office, interrogated about his testimony by Bianchi and another prosecutor, Michael Combs, and fired. Chrzanowski believes that this was "in retaliation for his truthful testimony." He filed suit a month later, alleging that Bianchi and Combs violated his rights under the First Amendment and various state statutes.

The defendants moved to dismiss Chrzanowski's § 1983 claims, arguing that the First Amendment's protections do not apply to any of his testimony because his statements were given "pursuant to [his] official duties" as a public employee. *See Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). The district court agreed, holding that Chrzanowski had not presented a valid constitutional claim; in the alternative, the court held that the defendants were entitled to qualified immunity, since any First Amendment protections that might have attached to his testimony were not "clearly established" at the time. We reverse.

I

Our analysis relies on the facts contained in Chrzanowski's complaint, which at this stage we accept as true and construe in Chrzanowski's favor. *Justice v. Town of Cicero*, 577 F.3d 768, 771 (7th Cir. 2009).

Chrzanowksi [sic] began working in the McHenry County State's Attorney's Office as an assistant state's attorney in January 2006. Initially he was assigned to the Office's misdemeanor division, but eventually he assumed responsibility for prosecuting more serious drug offenses and other felonies. He received positive performance reviews and raises in 2006, 2007, 2008 (twice), 2009 and 2010.

In early 2011, Chrzanowksi [sic] received a subpoena to testify before a grand jury. He complied and gave sworn testimony concerning allegations that Bianchi had improperly influenced a negotiated plea in a case for which Chrzanowski was principally responsible. On February 24, 2011, the grand jury returned an indictment against Bianchi on charges of official misconduct in violation of 720 ILCS 5/33-3(b). Chrzanowski was listed as a potential trial witness on April 6, 2011, and he received a trial subpoena two months later. He testified in the prosecution's case-in-chief on August 1, 2011.

From the outset, Bianchi and his allies were concerned by Chrzanowski's cooperation with the investigation. Upon learning of the grand jury subpoena, Ron Salgado, the chief investigator in the McHenry County State's Attorney's Office (and a friend and political ally of Bianchi), tried to speak with Chrzanowski. Chrzanowski avoided his calls. Terry Ekl, Bianchi's defense counsel, also tried to contact Chrzanowski after the special prosecutor identified Chrzanowski as a potential trial witness, but again Chrzanowski ignored requests to discuss the Bianchi

investigation. On cross-examination at Bianchi's trial, Ekl pointedly brought up Chrzanowski's refusal to discuss the case before the trial:

> Q: And you didn't feel that you owed your boss any obligation to talk to his lawyer before this trial, right?
>
> A: My only obligation is to tell the truth here, sir.

Over the same period, Bianchi began placing memoranda and notes in Chrzanowski's personnel file; these notes bore little relation to Chrzanowski's work performance. For instance, on June 6, 2011, Bianchi placed a negative report in Chrzanowski's file because Chrzanowski failed to introduce Bianchi to "two college females" who were interning in the office. "He never would have thought of introducing me to them had I not stopped him and made a point of it," Bianchi wrote. Chrzanowski was unaware of these additions to his personnel file and did not have an opportunity to contest them.

On December 2, 2011, Chrzanowski was summoned from his regular courtroom duties to Bianchi's office. There, Bianchi and Combs "confronted and interrogated" Chrzanowski about his grand jury and trial testimony. They presented him with transcripts of the proceedings and eventually Bianchi asked for Chrzanowski's resignation. When Chrzanowski refused, Bianchi told him, "You're terminated. Get out." Chrzanowski alleges that he was "fir[ed] in

retaliation for his truthful testimony against . . . Bianchi."

Chrzanowski responded to these events by filing suit in federal court, asserting claims against Bianchi and Combs pursuant to 42 U.S.C. § 1983 and state law. The defendants moved to dismiss the complaint in its entirety, arguing that Chrzanowski failed to state a valid First Amendment claim and that his state counts should be dismissed once the federal claim disappeared. Relying heavily on this court's decision in *Tamayo v. Blagojevich*, 526 F.3d 1074 (7th Cir. 2008), the district court concluded that, when testifying against Bianchi, Chrzanowski was "a public employee . . . speak[ing] pursuant to [his] official duties," and not "a private citizen [speaking] on a matter of public concern." The First Amendment offers no protection to "expressions [public] employees make pursuant to their professional duties," *Garcetti*, 547 U.S. at 426, and accordingly, the district court dismissed the § 1983 claim under Federal Rule of Civil Procedure 12(b)(6). In the alternative, the court held that "if the conclusion that there was no constitutional violation is incorrect, it cannot be said that the right was so clearly established that defendants cannot avail themselves of qualified immunity." The court then granted Chrzanowski's request voluntarily to dismiss the remaining state law claims. This appeal followed.

II

In *Garcetti v. Ceballos*, the Supreme Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." 547 U.S. at 421. In that case, a deputy district attorney alleged that supervisors had penalized him for writing an internal "disposition memorandum" that highlighted police misconduct in a pending criminal prosecution. *Id*. at 420. The plaintiff also asserted that he was punished for speaking out about the case in other settings: for instance, discussing the matter with his supervisors, testifying truthfully at a hearing in which the defendant challenged the validity of a search warrant, and delivering a speech about the case at a bar meeting. The Court limited its opinion to the question whether the memorandum warranted First Amendment protection. The dispositive fact, it explained, was that writing such "disposition memoranda" was exactly what the plaintiff was employed to do in his capacity as a "calendar deputy." *Id*. at 421. The Court highlighted the fact that "the parties . . . [did] not dispute that Ceballos wrote his disposition memo pursuant to his employment duties." *Id*. at 424. Disciplinary action on the basis of such speech does not offend the First Amendment because "[r]estricting employee speech that owes its existence to a public employee's professional responsibilities does not

infringe any liberties the employee might have enjoyed as a private citizen." *Id*. at 421-22.

Although the *Garcetti* Court chose not to "articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate," *id*. at 424, it did provide guidance on the subject. Public employee speech does not lose First Amendment protection because it concerns the subject matter of the employee's job. *Id*. at 421. To the contrary, the Court reaffirmed that public employees are often "the members of a community most likely to have informed and definite opinions" on matters of public concern, and that it remains "essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." *Id*. (quoting *Pickering v. Bd. of Ed. of Township High School Dist. 205, Will Cnty.*, 391 U.S. 563, 572 (1968)). Likewise, public employees' speech is not subject to restriction simply because it occurs inside the office, since "[m]any citizens do much of their talking inside their respective workplaces." *Id*. at 420-421. In other words, speech does not "owe[ ] its existence to a public employee's professional responsibilities" within the meaning of *Garcetti* simply because public employment provides a factual predicate for the expressive activity; rather, *Garcetti* governs speech that is made "pursuant to official duties" in the sense that it is "government employees' work product" that has been "commissioned or created" by the employer. *Id*. at 422 (citing *Rosenberger v.*

Rector and Visitors of Univ. of Va., 515 U.S. 819, 833 (1995)).

In assessing whether a public employee is speaking as an employee or as a citizen, the Court emphasized that "[t]he proper inquiry" must be "a practical one." *Id*. at 424. The dissenting Justices voiced concern that public employers might begin "defining [employees'] job responsibilities expansively" in an effort to remove protected speech from the First Amendment's purview (*e.g.*, "investing [employees] with a general obligation to ensure sound administration" of public institutions), *id*. at 431 n.2 (Souter, J., dissenting), but the majority forcefully rejected "the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions. *Id*. at 424. Instead, the Court explained that we must ask whether the speech is part of the employee's "daily professional activities." *Id*. at 422; *see also Ceballos v. Garcetti*, 361 F.3d 1168, 1189 (9th Cir. 2004) (O'Scannlain, J., specially concurring) ("[W]hen public employees speak in the course of carrying out their *routine*, required employment obligations, they have no personal interest in the content of that speech that gives rise to a First Amendment right.") (emphasis added).

In *Fairley v. Fermaint*, 471 F.3d 826 (7th Cir. 2006) (*Fairley I*), rehearing denied 482 F.3d 897 (7th Cir. 2007) (*Fairley II*), we had occasion to consider how *Garcetti* applies to testimony that state employees give in lawsuits filed by third parties, as contrasted with statements made as part of their duties at

work. There, we held that "[a]ssistance to prisoners and their lawyers in litigation is not part of a guard's official duties." *Fairley I*, 471 F.3d at 829; *Fairley v. Andrews*, 578 F.3d 518, 524-25 (7th Cir. 2009) (*Fairley III*). Indeed, we thought this principle so well established that we denied qualified immunity to the defendants, taking the facts in the light most favorable to the plaintiffs. *Fairley II*, 482 F.3d at 902-03. In language that applies equally to this case, we observed in *Fairley III* that "[e]ven if offering (adverse) testimony is a job duty, courts rather than employers are entitled to supervise the process. A government cannot tell its employees what to say in court, see 18 U.S.C. § 1512, nor can it prevent them from testifying against it." 578 F.3d at 525.

With these considerations in mind, we turn to the speech at issue in Chrzanowski's complaint.

III

Chrzanowski alleges that he was interrogated and dismissed "in retaliation for his truthful [grand jury and trial] testimony." The district court concluded that his testimony was "part of his official duties and responsibilities as an assistant state's attorney" because "an assistant state's attorney [is] obligated to pursue all criminal offenses, even those allegedly perpetrated by his supervisors." See 55 ILCS 5/3-9005(a)(1) ("The duty of each State's attorney shall be . . . to commence and prosecute all actions, suits, indictments and prosecutions, civil and criminal, in

the circuit court for his county, in which the people of the State or county may be concerned."). Since it was "part of [Chrzanowski's] job to serve the people of McHenry County in the proper administration of justice . . . , it was part of those duties as a prosecutor that obligated [him] to cooperate in the pursuit of any criminal charges involving his supervisors, including testifying as a material witness if necessary." In relevant respects, the district court found this case to be a replica of *Garcetti*: "there can be no question . . . , after *Gacretti* [sic], that [Chrzanowski] was acting and speaking in his role as prosecutor as opposed to a private citizen when he testified."

This conclusion follows only if one places dispositive weight on an "excessively broad job description[ ]" without assessing, as a practical matter, what "task[s] [Chrzanowski] was paid to perform" in the course of his "daily professional activities." *Id*. at 422. This is precisely what the *Garcetti* Court instructed us not to do when evaluating employee-speech claims. Indeed, the Court expressly rejected the argument that job descriptions such as those at issue here (*e.g.*, "a general obligation to ensure sound administration" of public institutions) could place otherwise protected speech outside the ambit of the First Amendment. Instead, we must ask whether the public employee spoke "because that is part of what [the public employee] was employed to do." *Id*. at 421.

So what is an assistant state's attorney "assigned to a felony trial courtroom" employed to do? Prosecute felonies. In the course of that work, Chrzanowski

presumably engaged in a wide range of expressive activity: the work of a prosecutor entails making opening and closing statements to juries, filing reports with supervisors, perhaps speaking to reporters after a high-profile verdict. It is even possible that in the course of his employment Chrzanowski testified before a grand jury as an "investigating witness," though Illinois courts have emphasized that "this practice could be subject to abuse and is not encouraged." *People v. Bissonnette*, 313 N.E.2d 646, 649 (Ill. Ct. App. 1974). But appearing as an "investigating witness" is a far cry from giving eyewitness testimony under subpoena regarding potential criminal wrongdoing that Chrzanowski happened to observe while on the job. The McHenry County State's Attorney's Office does not pay Chrzanowski to witness crimes and then testify about them; it pays him to prosecute crimes. And when there is a potential conflict of interest, as with an investigation into wrongdoing by other members of the McHenry County State's Attorney's Office, those prosecutorial responsibilities are assigned to a special prosecutor with a healthy measure of independence. See 55 ILCS 5/3-9008. Although there may be cases where a judge will have an "imperfect understanding of the precise duties associated with a public sector job when all he or she knows is a job title," *Huppert v. City of Pittsburg*, 574 F.3d 696, 719 (9th Cir. 2009) (Fletcher, J., dissenting), thus requiring further development of the factual record before a determination can be made, this case presents no such difficulty.

To be sure, Chrzanowski was called as a witness to discuss his employment with the McHenry County State's Attorney's Office, and his testimony focused exclusively on "allegation[s] that . . . Bianchi had improperly influenced and/or arranged a negotiated plea in a case for which [Chrzanowski] was principally responsible." But the fact that his testimony "concern[ed] the subject matter of [his] employment" does not mean that Chrzanowski's speech "owe[d] its existence" to his official responsibilities as the *Garcetti* Court used the phrase. 547 U.S. at 421. His speech was no different from that of a schoolteacher who writes a newspaper editorial criticizing the School Board and superintendant, *Pickering*, 391 U.S. at 566, or of an assistant district attorney who speaks with her co-workers about potential corruption within the District Attorney's office, *Connick v. Myers*, 461 U.S. 138, 149 (1983). *See also Garcetti*, 547 U.S. at 424 (affirming that the "statements or complaints . . . at issue in cases like *Pickering* and *Connick* [were] made outside the duties of employment."). Like Chrzanowski, the plaintiffs in both of these cases were disciplined for sharing information learned and opinions formed in the course of their public employment. Chrzanowski worked in the criminal justice system and his speech occurred in the course of judicial proceedings. Nonetheless, when he spoke out about potential or actual wrongdoing on the part of his supervisors, he too was speaking "outside the duties of employment."

IV

The *Fairley* line of cases provides an independent reason why Chrzanowski's case is not governed by *Garcetti*: the speech for which Chrzanowski was penalized was given under subpoena, both before the grand jury and at trial, in an action filed by a third party. The district court found this fact irrelevant, because "[t]he subpoena was merely a procedural mechanism to obtain his presence at the grand jury and trial and did not detract from his overarching duty to cooperate in the criminal prosecution as an assistant state's attorney and public employee." As we already have explained, this focus on Chrzanowski's general professional obligations is misguided; we are to look only at whether particular speech is "made pursuant to official duties" (and, thus, not "as a citizen") in a more limited sense. When a public employee gives testimony pursuant to a subpoena, fulfilling the "general obligation of [every] citizen to appear before a grand jury or at trial," *Branzburg v. Hayes*, 408 U.S. 665, 686 (1972), he speaks "as a citizen" for First Amendment purposes. *See also Fairley III*, 578 F.3d at 524-25.

Careful attention to the reasoning behind *Garcetti* shows why this is so. Typical public employee speech cases require a "balanc[ing] between the interests of the [public employee] and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568; see also *Garcetti*, 547 U.S. at 417-20. The general public also shares an

important interest in the government employee's ability to speak freely, since public employees contribute to civil discussion by adding their well-informed views. *Garcetti*, 547 U.S. at 419; *id*. at 420 ("The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it.") (quoting *San Diego v. Roe*, 543 U.S. 77, 82 (2004) (*per curiam*)). Public employee speech "made pursuant to official duties" has a different character, the *Garcetti* Court explained. First, restrictions on such speech "do not infringe any liberties the employee might have enjoyed as a private citizen." *Id*. at 422. Someone hired to be the governor's spokesperson is paid to articulate and disseminate the governor's views, not to offer her own opinions on the topics of the day. Second, restrictions on such speech in no way undermine "the potential societal value of employee speech," since employees "retain the prospect of constitutional protection for their contributions to the civic discourse." *Id*. Finally, a contrary approach to such speech would "commit state and federal courts to a new, permanent, and intrusive role, mandating oversight of communications between and among government employees and their superiors in the course of official business," and would "displace[ ] . . . managerial discretion." *Id*. at 423.

This reasoning is not applicable to situations in which a public employee – prosecutor, police officer, or anyone else – is compelled to give testimony pursuant to a subpoena. First, the individual person has a

strong interest in complying with the demands of a subpoena: apart from whatever desire a public employee might have to assist in the administration of justice, failure to comply with a subpoena can result in lengthy incarceration. *See, e.g.*, Kim Murphy, *Two Freed in Anarchist Case*, L.A. TIMES, Mar. 1, 2013, at A8 ("[t]wo activists . . . held for more than five months, mostly in solitary confinement[,] to pressure them to testify about suspected anarchists"); Jesse McKinley, *8-Month Jail Term Ends as Maker of Video Turns Over a Copy*, N.Y. TIMES, Apr. 4, 2007, at A9 (freelance journalist held for 224 days for "refusing to turn over a videotape" of demonstration). It would be strange to have a constitutional rule that prohibits the State from conditioning public employment on a basis that restricts an employee's right to speak freely, *Connick*, 461 U.S. at 142, yet allows the State to condition public employment on an employee's willingness to impede the judicial process by remaining mute. Indeed, as we held in *Fairley III*, a government has no right to tell its employees what to say in court. 578 F.3d at 525.

The public also has a substantial interest in hearing such speech. Indeed, the extraordinary power to jail those who refuse to cooperate with grand juries is rooted in the "longstanding principle that 'the public . . . has a right to every man's evidence.'" *Branzburg*, 408 U.S. at 688 (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)). Public-employee speech often provides society with information that is essential for democratic self-governance:

> [A]s the state grows more layered and impacts lives more profoundly, it seems inimical to First Amendment principles to treat too summarily those who bring, often at some personal risk, its operations into public view. It is vital to the health of our polity that the functioning of the ever more complex and powerful machinery of government not become democracy's dark lagoon.

Andrew v. Clark, 561 F.3d 261, 273 (4th Cir. 2009) (Wilkinson, J., concurring). Unlike restrictions on speech "made pursuant to official duties," threats or punishment for subpoenaed testimony undoubtedly chill valuable "contributions to the civic discourse" in significant and pernicious ways.

Finally, it cannot be said that affording Chrzanowski's speech some level of constitutional protection would commit the courts to an "intrusive role, mandating oversight of communications between and among government employees and their superiors in the course of official business." *Id*. at 423. As *Garcetti* explained, "sound principles of federalism and the separation of powers" caution against judicial intervention when an employee's expressive activity is truly "commissioned or created" by a public employer. *Id*. at 423, 422. But if the defendants here had some legitimate managerial interest in dissuading Chrzanowski from testifying truthfully pursuant to a subpoena, we cannot imagine what it might be. In short, none of the rationales justifying the rule announced in *Garcetti* applies here.

V

The district court went on to hold that "even if the conclusion that there was no constitutional violation is incorrect, it cannot be said that the right was so clearly established that defendants cannot avail themselves of qualified immunity." To qualify as "clearly established," the right must be "particularized" in the sense that "[t]he contours of the right [were] sufficiently clear that a reasonable official would understand that what he [was] doing violate[d] that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Given our rationale in the *Fairley* line of cases, we have little trouble concluding that reasonable officials in the defendants' shoes would understand that retaliating against Chrzanowski for giving truthful grand jury and trial testimony would violate the First Amendment.

The defendants maintain that this court's decision in *Tamayo v. Blagojevich*, 526 F.3d 1074 (7th Cir. 2008), cast some doubt on whether official testimony could be entitled to First Amendment protection, but this argument misapprehends the reasoning and scope of that opinion. In *Tamayo*, the former Interim Administrator of the Illinois Gaming Board (IGB) alleged (among other things) that she was retaliated against in response to her public testimony before the Illinois House Gaming Committee. *Id*. at 1078-80, 1091. As we explained, this particular form of testimony did not qualify for First Amendment protections:

> An employee with significant and comprehensive responsibility for policy formation and implementation certainly has greater responsibility to speak to a wider audience on behalf of the governmental unit. When, as here, a complaint states that the senior administrator of an agency testified before a committee of the legislature charged with oversight of the agency about allegedly improper political influence over that agency, the natural reading of such an allegation is that the official, in so informing the legislators, was discharging the responsibilities of her office, not appearing as "Jane Q. Public."

Id. at 1091-92 (citations omitted). Although we also noted that Tamayo "had a duty to see that the law was administered properly" and "a duty to bring alleged wrongdoing within her agency to the attention of the relevant public authorities," *id*. at 1091, our holding did not rest on these broad and general characterizations of Tamayo's "official responsibilities." Rather, we explained that Tamayo's testimony did not receive First Amendment protection because, as a practical matter, she was expected to engage in such speech in the regular course of her employment. Testifying before the House Gaming Committee was an important part of the job of a high-ranking official like Tamayo; the same was not true for Chrzanowski.

Our opinion in *Morales v. Jones*, 494 F.3d 590 (7th Cir. 2007), has much greater bearing on this case. There, a Milwaukee police officer alleged that he was transferred to night-shift patrol duty after being deposed pursuant to a subpoena in a civil suit

brought by a fellow officer against the Chief of Police. *Id*. at 598. We concluded that "being deposed in a civil suit pursuant to a subpoena was unquestionably not one of Morales' job duties because it was not part of what he was employed to do." *Id*.; accord *Karl v. City of Mountlake Terrace*, 378 F.3d 1062 (9th Cir. 2012); *Reilly v. City of Atlantic City*, 532 F.3d 216, 220 (3d Cir. 2008). But *see Huppert*, 574 F.3d at 707. Like Chrzanowski, Morales undoubtedly had a professional obligation (not to mention a personal obligation) to comply with the subpoena, but this did not somehow convert his deposition testimony into speech "made pursuant to official duties." Defendants point out that *Morales* involved testimony in the civil context, whereas this case involves testimony in criminal proceedings, but this is a distinction without a difference: providing eyewitness testimony regarding potential wrongdoing, civil or criminal, was never "part of what [Chrzanowski] was employed to do." Chrzanowski's rights were clearly established at all relevant times.

VI

We conclude by emphasizing that we express no opinion on the merits of Chrzanowski's claims. We hold only that at this preliminary stage, he has stated a valid First Amendment claim. We REVERSE the district court's judgment and REMAND for further proceedings consistent with this opinion.

APPENDIX B

United States District Court,
Northern District of Illinois
Western Division

Name of Assigned Judge or Magistrate Judge	Philip G. Reinhard	**Sitting Judge if Other than Assigned Judge**	
CASE NUMBER	12 C 50020	**DATE**	7/6/2012
CASE TITLE	Chrzanowski vs. Bianchi et al		

DOCKET ENTRY TEXT:

For the reasons stated below, the court grants defendants' motion to dismiss Counts I and II of the amended complaint, grants plaintiff's request to voluntarily dismiss Counts III-VI, denies defendants' motion to dismiss Counts III-VI as moot, and dismisses this cause in its entirety.

/s/ Philip G. Reinhard

STATEMENT – OPINION

Plaintiff, Kirk Chrzanowski, filed, pursuant to 42 U.S.C. § 1983 and Illinois law, a six-count amended complaint against defendants, Louis Bianchi, individually and in his official capacity as the State's Attorney for McHenry County, Illinois, Michael

Combs, individually and in his official capacity as an assistant state's attorney for McHenry County, the McHenry County State's Attorney's Office, and McHenry County. The amended complaint alleges the following claims: (1) that plaintiff was terminated from his position as an assistant state's attorney in violation of the First Amendment to the United States Constitution (Count I against Bianchi individually); (2) that plaintiff was interrogated in violation of the First Amendment (Count II against Combs individually); (3) that plaintiff was retaliatorily discharged in violation of Illinois law (Count III against the McHenry County State's Attorney's Office); (4) that plaintiff was discharged in violation of the Illinois Whistleblower Act, 740 ILCS 174/1 et seq. (Count IV against the McHenry County State's Attorney's Office); (5) that plaintiff was discharged in violation of the Illinois State Officials and Employees Ethics Act, 5 ILCS 430/15 (Count V against Bianchi individually and the McHenry County State's Attorney's Office); and (6) an indemnification claim under Illinois law, 745 ILCS 10/9-102 (Count VI against McHenry County). Defendants have moved to dismiss all claims, contending as to Counts I and II respectively that Bianchi and Combs are qualifiedly immune because plaintiff's speech was related to his official duties as an assistant prosecutor, as to Counts III-V that there is no jurisdiction over those claims, and as to Count VI that a claim for indemnification cannot stand on its own. Plaintiff responds that as to Counts I and II that he spoke as a private citizen on a matter of public concern and therefore he may maintain a First Amendment claim against Bianchi and Combs. As to

the state-law claims in Counts III-VI, plaintiff requests leave to voluntarily dismiss those claims.

Background

The following facts are taken from the amended complaint. Plaintiff was employed as an assistant state's attorney in McHenry County from January 23, 2006, until he was terminated on December 2, 2011. On or about February 10, 2011, plaintiff testified, pursuant to a subpoena, before a McHenry County grand jury. His testimony concerned allegations that Bianchi had improperly influenced or arranged a negotiated guilty plea in a criminal case for which plaintiff was the primary prosecutor. The grand jury returned an indictment, and plaintiff subsequently testified, again pursuant to a subpoena, at Bianchi's criminal trial.

According to the amended complaint, plaintiff had received good performance evaluations and salary increases prior to him testifying. After the disclosure of plaintiff as a witness, Bianchi retaliated against him by placing negative information in plaintiff's personnel file, including a memorandum, handwritten notes, and email. Further, plaintiff was interrogated by Bianchi and Combs about his grand jury and trial testimony. Bainchi [sic] subsequently asked plaintiff to resign, and when he refused, Bianchi terminated him. Plaintiff alleges he was terminated in retaliation for him truthfully testifying against Bianchi.

Applicable Law

A dismissal for failure to state a claim under Fed. R. Civ. P. 12(b)(6) is proper when allegations in a complaint, however true, would not raise a claim of entitlement to relief. *Virnich v. Vorwold*, 664 F. 3d 206, 212 (7th Cir. 2012). The complaint must contain allegations that state a claim to relief that is plausible on its face. *Virnich*, 664 F. 3d at 212. This standard is the same where qualified immunity is raised as an affirmative defense. *Tamayo v. Blagojevich*, 526 F. 3d 1074, 1090 (7th Cir. 2008).

Government actors performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Tamayo*, 526 F. 3d at 1090. The applicable two-part test for determining whether an actor is entitled to qualified immunity is: (1) do the facts alleged, taken in the light most favorable to the plaintiff, show the defendant's conduct violated a constitutional right; and (2) was the constitutional right allegedly violated clearly established. *Tamayo*, 526 F. 3d at 1090. If either prong is not satisfied, then the defendant is entitled to qualified immunity. *Tamayo*, 526 F. 3d at 1090.

For a government employee's speech to qualify for First Amendment protection, he must have been speaking as a private citizen on a matter of public concern. *Tamayo*, 526 F. 3d at 1091 (citing *Garcetti v.*

Ceballos, 547 U.S. 410, 418 (2006)). Public employees who speak pursuant to their official duties speak as employees rather than citizens, and thus their speech is not protected by the First Amendment regardless of its content. *Tamayo*, 526 F. 3d at 1091.

In this case, the issue is whether plaintiff's testimony was as a private citizen or as part of his official duties and responsibilities as an assistant state's attorney.[1] To answer this question, an understanding of the duties and responsibilities of an assistant state's attorney such as plaintiff is necessary.

As an assistant state's attorney plaintiff was obligated to pursue all criminal offenses, even those allegedly perpetrated by his supervisors, including Bianchi himself. See 55 ILCS 5/3-9005(a)(1) (West 2010). It was also part of his job to serve the people of McHenry County in the proper administration of justice. Thus, it was part of those duties as a prosecutor that obligated plaintiff to cooperate in the pursuit of any criminal charges involving his supervisors, including testifying as a material witness if necessary.

Plaintiff also had a duty as an employee of the McHenry County State's Attorney's Office to report claims of official misconduct by an elected official such as Bianchi. It was part of his responsibilities to see that the actions of his fellow prosecutors, including

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[1] Defendants rightly do not contend that the content of the speech did not regard a matter of public concern.

Bianchi, were consistent with applicable ethics rules and the appropriate administration of justice. This separate duty included cooperating with any investigation into improper conduct by anyone in the office.

The duties of plaintiff in this case are very similar to those of the plaintiff in *Tamayo.* There the plaintiff was called on to testify before a legislative committee investigating alleged improprieties by the then Governor of Illinois. Her testimony pertained to the alleged wrongdoing. *Tamayo*, 526 F. 3d at 1091.

In holding that the plaintiff's testimony was not protected under the First Amendment, the Court of Appeals emphasized that she "had a duty to see that the law was administered properly." *Tamayo*, 526 F. 3d at 1091. Further, the Court of Appeals stated this responsibility "encompassed a duty to bring alleged wrongdoing within her agency to the attention of the relevant public authorities." *Tamayo*, 526 F. 3d at 1091. Thus, this court finds *Tamayo* to provide strong support for its conclusion that plaintiff's testimony here regarding the allegations of criminal wrongdoing by Bianchi was clearly part of his duties and obligations as a prosecutor and employee of the McHenry County State's Attorney's office.

This conclusion is further bolstered by the *Garcetti* decision itself. There, the plaintiff, as assistant prosecutor, investigated a claim that a search warrant affidavit contained serious misrepresentations. *Garcetti*, 547 U.S. at 414. The plaintiff further submitted an internal memorandum regarding his investigation

and also testified for the defense at the suppression hearing as to his observations regarding the challenged affidavit. *Garcetti*, 547 U.S. at 414. He claimed he was subsequently disciplined for his speech.

The Supreme Court, in holding that the plaintiff's speech was not protected by the First Amendment, focused on the "controlling" fact that his expressions were made "pursuant to his duties." *Garcetti*, 547 U.S. at 421. The fact that the plaintiff spoke as "a prosecutor fulfilling a responsibility . . . about how best to proceed with a pending case" distinguished the plaintiff's situation from those in which the First Amendment provides protection. *Garcetti*, 547 U.S. at 421. Restricting such speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have as a private citizen. *Garcetti*, 547 U.S. at 421-22. The plaintiff did not act as a citizen when he investigated potential criminal charges and did not speak as a citizen by addressing the proper disposition of a pending criminal case. *Garcetti*, 547 U.S. at 422.

That is exactly the case here. Pursuant to his duties as a prosecutor, plaintiff questioned the actions of Bianchi as it related to a pending case over which plaintiff had primary responsibility. That questioning led to further investigation by outside authorities which in turn resulted in a criminal prosecution requiring plaintiff's testimony. There can be no question here, after *Gacretti* [sic], that plaintiff was acting and speaking in his role as prosecutor as opposed to a

private citizen when he testified. Accordingly, his speech was not protected by the First Amendment.

This is so notwithstanding that he testified pursuant to a subpoena. His duty to participate in the investigation, including testifying, emanated from a duty completely independent of any compulsion via the subpoena. The subpoena was merely a procedural mechanism to obtain his presence at the grand jury and trial and did not detract from his overarching duty to cooperate in the criminal prosecution as an assistant state's attorney and employee of the McHenry County State's Attorney's Office.

Because plaintiff's testimony was not protected by the First Amendment he has not set forth a valid constitutional claim against either Bainchi [sic] or Combs. That alone supports application of the qualified immunity defense. The court therefore need not reach the second prong of the qualified immunity defense.

Having so concluded, the court notes that even if the conclusion that there was no constitutional violation is incorrect, it cannot be said that the right was so clearly established that defendants cannot avail themselves of qualified immunity. At most in plaintiff's favor there is some question as to whether or not he spoke as a private citizen as opposed to a prosecutor and employee. An answer favorable to plaintiff, however, would be far from based on clearly established law. Thus, even if defendants violated the First Amendment under the unique facts of this case,

they would still be qualifiedly immune under the second prong of the doctrine.

For the foregoing reasons, the court grants defendants' motion to dismiss Counts I and II of the amended complaint, grants plaintiff's request to voluntarily dismiss Counts III-VI,[2] denies defendants' motion to dismiss Counts III-VI as moot, and dismisses this cause in its entirety.

[2] Even if plaintiff had not sought voluntary dismissal of these state-law claims, the court would have dismissed them without prejudice pursuant to 28 U.S.C. § 1367(c).

APPENDIX C

Illinois Rules of Professional Conduct

RULE 8.3: Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of Rule 8.4(b) or Rule 8.4(c) shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by the attorney-client privilege or by law or information gained by a lawyer or judge while participating in an approved lawyers' assistance program or an intermediary program approved by a circuit court in which nondisciplinary complaints against judges or lawyers can be referred.

(d) A lawyer who has been disciplined as a result of a lawyer disciplinary action brought before any body other than the Illinois Attorney Registration and Disciplinary Commission shall report that fact to the Commission.

Adopted July 1, 2009, effective January 1, 2010.

RULE 8.4: Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(d) engage in conduct that is prejudicial to the administration of justice.

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law. Nor shall a lawyer give or lend anything of value to a judge, official, or employee of a tribunal, except those gifts or loans that a judge or a member of the judge's family may receive under Rule 65(C)(4) of the Illinois Code of Judicial Conduct. Permissible campaign contributions to a judge or candidate for judicial office may be made only by check, draft, or other instrument payable to or to the order of an entity that the lawyer reasonably believes to be a political committee supporting such

judge or candidate. Provision of volunteer services by a lawyer to a political committee shall not be deemed to violate this paragraph.

(g) present, participate in presenting, or threaten to present criminal or professional disciplinary charges to obtain an advantage in a civil matter.

(h) enter into an agreement with a client or former client limiting or purporting to limit the right of the client or former client to file or pursue any complaint before the Illinois Attorney Registration and Disciplinary Commission.

(i) avoid in bad faith the repayment of an education loan guaranteed by the Illinois Student Assistance Commission or other governmental entity. The lawful discharge of an education loan in a bankruptcy proceeding shall not constitute bad faith under this paragraph, but the discharge shall not preclude a review of the lawyer's conduct to determine if it constitutes bad faith.

(j) violate a federal, state or local statute or ordinance that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: the seriousness of the act; whether the lawyer knew that the act was prohibited by statute or ordinance; whether the act was part of a pattern of prohibited

conduct; and whether the act was committed in connection with the lawyer's professional activities. No charge of professional misconduct may be brought pursuant to this paragraph until a court or administrative agency of competent jurisdiction has found that the lawyer has engaged in an unlawful discriminatory act, and the finding of the court or administrative agency has become final and enforceable and any right of judicial review has been exhausted.

(k) if the lawyer holds public office:

(1) use that office to obtain, or attempt to obtain, a special advantage in a legislative matter for a client under circumstances where the lawyer knows or reasonably should know that such action is not in the public interest;

(2) use that office to influence, or attempt to influence, a tribunal to act in favor of a client; or

(3) represent any client, including a municipal corporation or other public body, in the promotion or defeat of legislative or other proposals pending before the public body of which such lawyer is a member or by which such lawyer is employed.

Adopted July 1, 2009, effective January 1, 2010.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
WESTERN DIVISION

KIRK CHRZANOWSKI, *Plaintiff,* vs. LOUIS A. BIANCHI, individually and in his official capacity as McHenry County State's Attorney, MICHAEL P. COMBS, individually, and in his official capacity as McHenry County Assistant State's Attorney, COUNTY OF McHENRY, & McHENRY COUNTY STATE'S ATTORNEY'S OFFICE, *Defendants.*	No. 12 CV 50020 Judge Philip G. Reinhard Magistrate Judge P. Michael Mahoney **JURY DEMAND**

FIRST AMENDED COMPLAINT

(Filed April 4, 2012)

Now comes, the Plaintiff, KIRK CHRZANOWSKI, by and through his attorneys GUMMERSON RAUSCH WAND LEE WOMBACHER, LLC and complaining of the Defendants, LOUIS A. BIANCHI, MICHAEL P. COMBS, and COUNTY OF McHENRY, states as follows:

JURISDICTION & VENUE

1. The jurisdiction of the court is invoked pursuant to 42 U.S.C. §1983 in that the Plaintiff has been deprived of his rights secured by the Constitution of the United States of America, the Constitution of the United States of America, and the Court's supplementary jurisdiction powers pursuant to 28 U.S.C. § 1367(a).

2. Venue lies in the Western Division of the Northern District of Illinois pursuant to 28 U.S.C. § 1391, because the relevant acts occurred within this District and the individual and corporate defendants are residents of the Western District.

PARTIES

3. Plaintiff, KIRK CHRZANOWSKI, is an individual residing in Palatine, Cook County, Illinois and is a citizen of the United States.

4. At all relevant times hereto Plaintiff had the right to freedom of speech and freedom of association as guaranteed by the Constitution of the United States of America.

5. Defendant LOUIS A. BIANCHI is and at all times relevant was the elected State's Attorney of McHenry County, Illinois. At all relevant times hereto BIANCHI was acting under color of state law and in the capacity of elected State's Attorney of McHenry County, Illinois. Defendant BIANCHI is sued in his individual and official capacity.

6. Upon information and belief, Defendant LOUIS A. BIANCHI, is a resident of Crystal Lake, County of McHenry, State of Illinois.

7. Defendant MICHAEL P. COMBS is and at all times relevant was an Assistant McHenry County State's Attorney. At all relevant times COMBS was acting under color of state law. He is sued in his official and individual capacity.

8. Upon information and belief, Defendant, MICHAEL P. COMBS, is a resident of Rockford, County of Winnebago, State of Illinois.

FACTS COMMON TO ALL COUNTS

9. Plaintiff was employed as an Assistant State's Attorney with the McHENRY COUNTY STATE'S ATTORNEY'S OFFICE from January 23, 2006 to his wrongful termination on December 2, 2011.

10. On or about February 10, 2011, Plaintiff testified before the McHenry County grand jury pursuant to a subpoena served upon him by the special prosecutor in the matter, In re the Investigation of Louis A. Bianchi.

11. Plaintiff gave sworn testimony before the grand jury concerning the allegation that McHenry County State's Attorney Louis A. Bianchi had improperly influenced and/or arranged a negotiated plea in a case for which Plaintiff was principally responsible.

12. Prior to giving his testimony, Plaintiff received a telephone call from Ron Salgado, Chief Investigator in the McHENRY COUNTY STATE'S

ATTORNEY'S OFFICE, and a friend and political ally of Louis A. Bianchi.

13. Ron Salgado left Plaintiff a message indicating that he wanted to speak to Plaintiff about the grand jury subpoena.

14. Plaintiff did not return Salgado's call nor otherwise respond to the message.

15. On or about February 24, 2011 the grand jury before which Plaintiff testified returned an indictment against Louis A. Bianchi on charges of official misconduct in violation of 720 ILCS 5/33-3(b).

16. On or about April 6, 2011, the Special Prosecutor listed Plaintiff as a potential trial witness in the matter of People of the State of Illinois versus Louis A. Bianchi, 11 CF 169.

17. On or about July 13, 2011, Plaintiff was served with a subpoena to testify in the matter of People of the State of Illinois versus Louis A. Bianchi.

18. On August 1, 2011 Plaintiff testified in the prosecution's case-in-chief in the matter of People v. Louis A. Bianchi, 11 CF 169 concerning the allegation that Louis A. Bianchi had improperly influenced and/or arranged a negotiated plea in a case for which Plaintiff was principally responsible. Attached hereto and incorporated herein, by reference, as Exhibit A is a true and correct copy of the transcript of Plaintiff's testimony.

19. Prior to his testifying at trial, Plaintiff received several email messages at his McHenry County State's Attorney's Office-issued email address, from Terry Ekl, the attorney who represented Louis A. Bianchi in People v. Bianchi, 11 CF 169.

20. Plaintiff did not return those emails nor otherwise respond to the messages.

21. Prior to his testifying at trial, Plaintiff received several voicemail messages, via his desk telephone at the McHenry County State's Attorney's Office from Thomas Popovich, the attorney who represented Ron Salgado, Chief Investigator for the McHenry County State's Attorney's Office, in another matter filed by the Special Prosecutor, People v. Salgado.

22. Plaintiff did not return those phone calls nor otherwise respond to the messages.

23. On cross-examination of the Plaintiff by Attorney Ekl the following exchange occurred:

    Q. And you didn't feel that you owed your boss any obligation to talk to his lawyer before this trial, right?

    A. My only obligation is to tell the truth here, sir.

24. The Plaintiff received good performance reviews accompanied by salary increases in 2006, 2007, 2008 (twice), 2009 and 2010.

25. Prior to the disclosure of the Plaintiff as a potential witness against Defendant BIANCHI,

the Plaintiff's personnel file contained positive feedback and commendations.

26. After the disclosure of the Plaintiff as a potential witness, Defendant BIANCHI began to retaliate against the Plaintiff by placing purportedly negative information in the Plaintiffs personnel file.

27. On June 6, 2011, Defendant Bianchi placed a memorandum in the Plaintiff's personnel file that was negative and unrelated to his performance as an Assistant McHenry County State's Attorney. The memorandum stated:

> This morning when I was passing through the office at approximately 8:20, Kirk was passing through with two college females who are spending their internship here at the office. He passed me by without introducing me. I then went around the office and intentionally came and circled around and stopped him and asked him to introduce me to them. He never would have thought of introducing me to them had I not stopped him and made a point of it.

The Plaintiff was not made aware that the memorandum was placed in his personnel file, nor was he given an opportunity to respond to the memorandum.

28. On or about July 27, 2011, Defendant BIANCHI, placed his handwritten notes regarding a telephone conference with a member of the public, that do not identify Plaintiff in any way,

in Plaintiffs personnel file. The Plaintiff was not made aware that the notes were placed in his personnel file, nor was he given an opportunity to respond to them.

29. On or about September 8, 2011, Defendant COMBS e-mailed Defendant BIANCHI regarding the Plaintiff, and that e-mail was placed in Plaintiff's personnel file. The Plaintiff was not made aware that the e-mail was placed in his personnel file, nor was he given an opportunity to respond to the e-mail.

30. Defendant COMBS was never in a supervisory role over the Plaintiff.

31. On December 2, 2011, Plaintiff was summoned from his regular courtroom duties by James Kelch, an investigator of the McHenry County State's Attorney's Office, to Defendant BIANCHI's office.

32. Once present in Defendant BIANCHI's office, Plaintiff was confronted and interrogated by Defendants BIANCHI and COMBS. State's Attorney Investigator James Kelch was also present, but did not participate in the interrogation.

33. Defendant COMBS presented Plaintiff with a transcript of his grand jury and trial testimony from the matter People v. Louis A. Bianchi, 11 CF 169 and interrogated Plaintiff about his testimony.

34. Defendant COMBS presented Plaintiff with purported phone records and interrogated Plaintiff about same.

35. Defendant BIANCHI asked Plaintiff for his resignation and when Plaintiff refused, Louis A. Bianchi told Plaintiff, "You're terminated. Get out." Plaintiff's firing was in retaliation for his truthful testimony against Defendant BIANCHI.

36. Plaintiff was immediately escorted to retrieve certain of his belongings from his office where another investigator of the McHenry County State's Attorney's Office was waiting for Plaintiff.

37. As a result of the wrongful termination, Plaintiff lost approximately 300 hours of accumulated sick pay and paid personal time.

38. As a direct and proximate result of the actions taken by the defendants, the Plaintiff has suffered lost wages and other economic losses. He has suffered emotional distress, embarrassment, and mental anguish.

39. Following the Plaintiff's termination, Defendant COMBS placed a lengthy memorandum in Plaintiffs personnel file. The Plaintiff was not made aware that the memorandum was placed in his personnel file, nor was he given an opportunity to respond to the memorandum.

40. Following the termination of the Plaintiff, Defendant COMBS was promoted to the Chief of the Criminal Division of the McHenry County State's Attorney's Office.

41. Defendant BIANCHI has engaged in a pattern of conduct in which he has retaliated against employees of the McHenry County State's Attorney's Office that have testified against him.

42. Defendant BIANCHI and the McHENRY COUNTY STATE'S ATTORNEY'S OFFICE has a custom, practice, policy and/or pattern, either implicit or explicit of retaliating against employees who exercise their constitutional right to freedom of speech by speaking against BIANCHI's conduct, speaking to individuals investigating and/or prosecuting BIANCHI, being listed as witnesses for the prosecution in criminal cases pending against BIANCHI, or testifying against BIANCHI.

43. Defendant BIANCHI has a custom and practice of giving preferential treatment to employees that are political allies.

44. Defendant BIANCHI is the final policy-maker for the McHENRY COUNTY STATE'S ATTORNEY'S OFFICE.

45. At or about the time of the investigation and prosecution of BIANCHI by a special prosecutor, Thomas Carroll was employed by the McHenry County State's Attorney's Office as an Assistant McHenry County State's Attorney.

46. Upon information and belief, Thomas Carroll testified before the McHenry County Grand Jury, and the Circuit Court of McHenry County regarding the allegations contained in the Bill of Indictment against Defendant BIANCHI.

47. Upon information and belief, Thomas Carroll was subpoenaed by the Special Prosecutor to testify in the trial of the matter of People of the State of Illinois versus Louis A. Bianchi, 10 CF 933.

48. Upon information and belief, Thomas Carroll was also directed to resign or told he would be terminated.

49. Upon information and belief, Defendant BIANCHI, constructively discharged Thomas Carroll, following his truthful courtroom testimony.

50. Prior to the time of the investigation and prosecution of BIANCHI by a special prosecutor, Jeffrey Bora was employed by the McHenry County State's Attorney's Office as an Assistant McHenry County State's Attorney.

51. Upon information and belief, Jeffrey Bora was principally responsible for the prosecution of a defendant BIANCHI identified to Bora as a relative of BIANCHI.

52. Upon information and belief, in the course of his work on that case, Jeffrey Bora was approached by BIANCHI and asked to give the defendant a recognizance bond in the pending felony matter.

53. Upon information and belief, Jeffrey Bora refused to grant the recognizance bond.

54. Upon information and belief, thereafter, BIANCHI on several occasions attempted to influence Jeffrey Bora' s prosecution, pursuant to his official duties, of said Defendant.

55. Upon information and belief, Jeffrey Bora spoke out against BIANCHI's actions.

56. Upon information and belief, in retaliation for Jeffrey Bora's protected speech, Jeffrey Bora's employment was terminated by BIANCHI.

COUNT I – 42 U.S.C. § 1983 – VERSUS LOUIS A. BIANCHI IN HIS INDIVIDUAL CAPACITY

57. Plaintiff hereby incorporates paragraphs 1 through 56 as if fully set forth herein.

58. At all times relevant to the complaint there was in effect § 1983 of United States Code, Title 42, Chapter 21, Subchapter I which provides, in relevant part,:

> Every person who, under color of any . . . ordinance . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. §1983.

59. Defendant BIANCHI is a state actor by means of his employment as the elected State's Attorney for the County of McHenry.

60. As described above, Plaintiff exercised his right to freedom of speech.

61. Plaintiff's actions constitute speech on matters of public concern and, therefore, Plaintiff's speech is protected by the First Amendment to the United States Constitution.

62. At the time of Plaintiff's protected speech, he was speaking as a private citizen on a matter of public concern misconduct of the elected State's Attorney.

63. As a result of Plaintiff's protected speech, Defendant retaliated against Plaintiff by terminating his employment.

64. As a direct and proximate result of the actions taken by defendants as described herein, the Plaintiff has suffered a chilling effect upon the exercise of his constitutional right of freedom of speech and has suffered harm and injury.

65. As a direct and proximate result of the actions taken by defendants as described herein, the Plaintiff has incurred attorneys fees and costs.

66. At all relevant times, Defendant BIANCHI's actions were willful, wanton, intentional and malicious. Punitive damages should be awarded in order to punish and deter such conduct.

WHEREFORE, Plaintiff prays that this Court will enter judgment against the Defendant LOUIS A. BIANCHI and in favor of Plaintiff for compensatory damages in excess of Fifty Thousand Dollars ($50,000.00), for punitive damages in an amount to be determined, for reasonable attorney's fees and costs as authorized by 42 U.S.C. §1988, and for such other relief as this Court deems appropriate.

COUNT II – 42 U.S.C. § 1983 – VERSUS MICHAEL P. COMBS IN HIS INDIVIDUAL CAPACITY

67. Plaintiff hereby incorporates paragraphs 1 through 56 as if fully set forth herein.

68. At all times relevant to the complaint there was in effect § 1983 of United States Code, Title 42,

Chapter 21, Subchapter I which provides, in relevant part,:

> Every person who, under color of any . . . ordinance . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. §1983.

69. Defendant COMBS acted in his capacity as Assistant McHenry County State's Attorney, and is therefore a state actor.

70. As described above, Plaintiff exercised his right to freedom of speech.

71. Plaintiff's actions constitute speech on matters of public concern and, therefore, Plaintiff's speech is protected by the First Amendment to the United States Constitution.

72. At the time of Plaintiff's protected speech, he was speaking as a private citizen on a matter of public concern.

73. As a result of Plaintiff's protected speech, Defendant COMBS retaliated against Plaintiff by interrogating him regarding his testimony in the matter of People v. Bianchi.

74. Defendant COMBS also interfered with the Plaintiff's constitutional right to remain silent,

in that he continued to interrogate him despite Plaintiff's assertion of his right to counsel.

75. As a direct and proximate result of the actions taken by defendants as described herein, the Plaintiff has suffered a chilling effect upon the exercise of his constitutional right of freedom of speech and has suffered harm and injury.

76. As a direct and proximate result of the actions taken by defendants as described herein, the Plaintiff has incurred attorney's fees and costs.

77. At all relevant times, Defendant COMBS' actions were willful, wanton, intentional and malicious. Punitive damages should be awarded in order to punish and deter such conduct.

WHEREFORE, Plaintiff prays that this Court will enter judgment against the Defendant MICHAEL P. COMBS and in favor of Plaintiff for compensatory damages in excess of Fifty Thousand Dollars ($50,000.00), for punitive damages in an amount to be determined, for reasonable attorney's fees and costs as authorized by 42 U.S.C. §1988, and for such other relief as this Court deems appropriate.

COUNT III – RETALIATORY DISCHARGE (STATE LAW CLAIM) – VERSUS MCHENRY COUNTY STATE'S ATTORNEY'S OFFICE

78. Plaintiff hereby incorporates paragraphs 1 through 56 as if fully set forth here.

79. Plaintiff was discharged.

80. Plaintiff's discharge was in retaliation for his activities as described above.

81. Plaintiff's discharge violates a clear mandate of public policy.

82. At all relevant times, Defendant's actions were willful, wanton, intentional and malicious. Punitive damages are necessary and appropriate to punish and deter such conduct.

WHEREFORE, Plaintiff prays that this Court will enter judgment against the Defendant McHENRY COUNTY STATE'S ATTORNEY'S OFFICE and in favor of Plaintiff for compensatory damages in excess of Fifty Thousand Dollars ($50,000.00), for punitive damages in an amount to be determined, and for such other relief as this Court deems appropriate.

COUNT IV – VIOLATION OF WHISTLEBLOWER ACT (STATE LAW CLAIM) – VERSUS MCHENRY COUNTY STATE'S ATTORNEY'S OFFICE

83. Plaintiff hereby incorporates paragraphs 1 through 56 as if fully set forth here.

84. At all times relevant to the complaint there was in effect the Illinois Whistleblower Act, 740 ILCS 174/1, et. seq. which provides in relevant part:

> An employer may not retaliate against an employee who discloses information in a court . . . or in any other proceeding, where the employee has reasonable cause to believe that the information

> discloses a violation of a State or federal law, rule, or regulation.
>
> 740 ILCS 174/15.

85. Plaintiff's testimony before the McHenry County Grand Jury and before the trial court concerned the possible violation of the law of the State of Illinois regarding official misconduct.

86. At all relevant times hereto, Plaintiff reasonably believed that the conduct of Defendant BIANCHI was a violation of the laws of the State of Illinois.

87. Plaintiff was discharged following his testimony before a tribunal.

88. Plaintiff's discharge was in retaliation for his activities as described above in paragraphs 12-23 and 31-36.

WHEREFORE, Plaintiff prays that this Court will enter judgment against the Defendant, McHENRY COUNTY STATE'S ATTORNEY'S OFFICE, and in favor of Plaintiff for all relief necessary to make Plaintiff whole, including but not limited to the following:

A. reinstatement, with the same seniority status that Plaintiff would have had;

B. back pay, with interest; and

C. any and all other damages sustained as a result of Plaintiff's termination including but not limited to attorney's fees and costs.

COUNT V – VIOLATION OF WHISTLEBLOWER PROVISIONS OF THE STATE OFFICIALS AND EMPLOYEES ETHICS ACT (STATE LAW CLAIM) – VERSUS MCHENRY COUNTY STATE'S ATTORNEY'S OFFICE AND LOUIS A. BIANCHI IN HIS INDIVIDUAL CAPACITY

89. Plaintiff hereby incorporates paragraphs 1 through 77 as if fully set forth here.

90. At all times relevant to the complaint there was in effect the State Officials and Employees Ethic Act. 5 ILCS 430/15 et. seq.

91. The McHENRY COUNTY STATE'S ATTORNEY'S OFFICE is a public body as defined by the Act.

92. Article 15 of the Act is entitled "Whistle Blower Protection" and provides in relevant part:

> An officer, a member, a State employee, or a State agency shall not take any retaliatory action against a State employee because the state employee does any of the following:
>
> (2) Provides information to or testifies before any public body conducting an investigation, hearing, or inquiry into any violation of a law, rule, or regulation by any officer, member, State agency, or other State employee.

5 ILCS 430/15-10.

93. Plaintiff's testimony before the Grand Jury and the trial court is a protected whistle blower activity.

94. Plaintiff had a legal and ethical obligation to testify before the Grand Jury and the trial court.

95. The Defendant, the McHENRY COUNTY STATE'S ATTORNEY'S OFFICE, by and through its agents, apparent agents, and/or employees, State's Attorney LOUIS A. BIANCHI and Assistant State's Attorney MICHAEL P. COMBS, retaliated against Plaintiff by terminating his employment on December 2, 2011, and by placing negative memorandums, notes, and documents in his personnel file.

96. The discharge of Plaintiff from his position as an Assistant State's Attorney constitutes retaliatory action under the State Employees and Ethics Act.

97. As a direct and proximate result of the retaliatory action, the Plaintiff has been terminated from his employment, has lost fringe benefits and seniority status, and has incurred costs and attorney's fees.

WHEREFORE, KIRK CHRZANOWSKI prays for judgment against the McHENRY COUNTY STATE'S ATTORNEY'S OFFICE and LOUIS A. BIANCHI, granting all of the remedies available to him as allowed under the State Employees and Ethics Act, including, but not limited to, reinstatement, two times the amount of back pay due and owing, interest,

reinstatement of fringe benefits and seniority rights, and payment of reasonable costs and attorney's fees.

COUNT VI – 745 ILCS 10/9-102
INDEMNIFICATION CLAIM AGAINST
COUNTY OF MCHENRY (STATE LAW CLAIM)

98. Plaintiff hereby incorporates paragraphs 1 through 97 as if fully set forth here.

99. Defendant COUNTY OF McHENRY is the employer of the individual defendants named herein.

100. The individual defendants, as previously alleged, committed the acts under color of law and in the scope of their employment with the COUNTY OF McHENRY.

101. At all relevant times there was in effect the Illinois Tort Immunity Act, 745 ILCS 10/9-102, which states:

> A local public entity is empowered and directed to pay any tort judgment or settlement for compensatory damages (and may pay any associated attorney's fees and costs) for which it or an employee while acting within the scope of his employment is liable in the manner provided in this Article.

102. The Defendant COUNTY OF McHENRY is required by Illinois law to pay any judgment against any of the defendants.

WHEREFORE, Plaintiff prays that this Court will enter judgment against the Defendant COUNTY OF McHENRY and in favor of Plaintiff for an amount equal to the judgment entered herein against the Defendant employees of COUNTY OF [sic] and for such other relief as this Court deems appropriate.

RULE 38 JURY DEMAND

Pursuant to Federal Rule of Civil Procedure, the Plaintiff demands trial by jury for all claims.

Respectfully submitted,

s/ Jamie R. Wombacher
Attorney for Plaintiff

Rebecca M. Lee
Jamie R. Wombacher
R. Mark Gummerson
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EXHIBIT A

STATE OF ILLINOIS)
) SS:
COUNTY OF MCHENRY)

IN THE TWENTY-SECOND JUDICIAL CIRCUIT
MCHENRY COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
vs.	)	No. 11 CF 169
LOUIS A. BIANCHI,	)	
Defendant.	)	

EXCERPT OF REPORT OF PROCEEDINGS had in the above-entitled cause before The Honorable Joseph G. McGraw, Judge of said Court, on the 1st day of August, 2011, in the afternoon session, at the McHenry County Government Center, Woodstock, Illinois.

APPEARANCES:

MR. THOMAS K. MCQUEEN,
Special Prosecutor,

on behalf of the People of the
State of Illinois;

EKL WILLIAMS & PROVENZALE LLC,
by: MR. TERRY A. EKL,
MS. TRACY STANKER,

on behalf of the Defendant.

[2] (Whereupon, prior proceedings were had which are not herein transcribed.)

THE COURT: You may call your next witness.

(Enter witness.)

THE COURT: Raise your right hand. Do you solemnly swear the testimony you're about to give shall be the truth, the whole truth and nothing but the truth, so help you god?

THE WITNESS: Yes, your Honor.

THE COURT: Please be seated.

Proceed.

MR. MCQUEEN: Sir, would you state your name in full and spell your last for the record, please.

THE WITNESS: My last name – or my name is Kirk Robert Chrzanowski. Last name is spelled C-h-r-z-a-n-o-w-s-k-i.

KIRK R. CHRZANOWSKI,

called as a witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MCQUEEN:

Q And where do you reside, sir?

A I live in Palatine, Illinois.

Q Are you an attorney?

[3] A Yes, sir.

Q And when did you become an attorney?

A I was licensed to practice law in November of 2005.

Q And by whom are you employed?

A I'm employed by the McHenry County State's Attorney's Office.

Q And for how long have you been so employed?

A I was hired as an assistant state's attorney at the end of January of 2006.

Q And would you tell us briefly about your career in the State's Attorney's Office, which divisions you've been in.

A January of 2006 when I was hired, I was assigned to the misdemeanor division. I worked in misdemeanors until February of 2008. February of 2008, I was assigned to the felony review division. I worked in that division until June of 2008. And then I was assigned to narcotics prosecution and review and I worked in that division from June of 2008 to October of 2009 I believe.

Q Was William Stanton your supervisor in felony review?

A Yes, he was.

[4] Q Now, you're now assigned to a felony trial courtroom?

A Yes, sir.

Q Let me direct your attention to the early part of 2010 and ask if you were assigned a case where the defendant was Jeremy Reid, R-e-i-d.

A Yes, that was my case.

Q All right. You presented that case to the grand jury, did you?

A I may have. I don't recall if I was the one who presented that.

Q But after its indictment, it was assigned to the trial court where you were assigned; is that correct?

A Yes, sir.

Q Now, would you describe the charges to the Court, please.

A Mr. Reid was charged with four counts in a bill of indictment, two counts were unlawful delivery of a controlled substance, 1 to 15 grams of cocaine. Each was a Class X felony because it was within 1,000 feet of a school. The other two charges were unlawful possession of a controlled substance less than 15 grams of cocaine, both were Class 4 felonies.

[5] Q And those – the two transactions that made up those four counts had occurred in December of 2009; is that correct?

A That's correct, there were two separate transactions.

Q And was Mr. Reid held in custody, if you recall?

A He was.

Q And you mentioned that these transactions occurred allegedly within a thousand yards of a school. What school was that, sir?

A Crystal Lake Central High School.

Q All right. Who is Ronald Salgado?

A He's the chief investigator for the McHenry County State's Attorney's Office.

Q All right. Now, did there come a time after the Reid case was indicted that you had a conversation with Mr. Salgado, sir?

A Yes.

Q And do you recall about when that occurred?

A It was mid to end of March of – two thousand and – 2010 I believe or 2011 – 2011, it was the early part of this year. I believe.

Q Early part of 2010.

[6] A Yes, early part of 2010.

Q All right. And where did this conversation take place?

A It took place in my office.

Q Did he come to your office or did you ask him to come to your office?

A He came to my office.

Q And had you been in court on the Reid case?

A I believe I had been in court on the case that day.

Q All right. And was it your responsibility as the assistant handling the case for the State's Attorney's Office to communicate with the defense lawyer representing the defendant?

A Yes, I was responsible for completing discovery, I was responsible for tendering any offers and I was responsible for communicating with defense counsel.

Q All right. Now, tell us what happened when Mr. Salgado came to your office, sir.

A He came to my office – I was seated at my desk. I was working. I had just come back from the morning court call and he came into my office and he closed the door behind him.

[7] Q Had he ever done that before, sir?

A On one prior occasion.

Q Did you have a conversation with Mr. Salgado?

A At that point I did.

Q And what did he say to you and what did you say to him?

MR. EKL: Objection to what Mr. Salgado said, hearsay.

MR. MCQUEEN: Your Honor, I'm going to make the same argument that I made earlier about 801(d)(2)C or D, these are statements by employees of the defendant in the course of their positions at the State's Attorney's Office and, therefore, are not hearsay.

THE COURT: That objection is sustained.

BY MR. MCQUEEN:

Q After your conver- – after your conversation with Mr. Salgado, sir, did you have a conversation with your supervisor, Philip Hiscock?

A I did.

Q And what is Mr. Hiscock's position?

A He – he is the chief of the criminal division of the McHenry County State's Attorney's Office.

Q And did you meet with him in his office, sir?

A I did.

[8] Q And did you discuss with him the meeting that you had had with Mr. Salgado?

A Briefly, yes.

Q All right. What did you say to Mr. Hiscock and what did he say to you?

MR. EKL: Objection, hearsay.

THE COURT: Your response.

MR. MCQUEEN: Same response as before, Judge, these are all agents of the defendant in the course of doing the office – the State's Attorney's Office work, working on the Reid case and, therefore, they are the statements of his agents.

THE COURT: Objection sustained.

BY MR. MCQUEEN:

Q Thereafter, did you enter into plea negotiations with Public Defender Christopher Harmon?

A I did.

Q And as a result of those negotiations, did you meet with your supervisor, Mr. Hiscock, to discuss what the offer would be to Mr. Harmon?

A I did.

Q Let me show you what I've marked as People's Exhibit 12, a May 10 letter. I'll ask if that's your signature.

[9] A It is.

Q And is this the formal offer of the State's Attorney's Office on May 10 of 2010 to Mr. Harmon in respect to the Jeremy Reid case?

A This was not the original that was mailed out to Mr. Harmon.

Q You have later, on August 9 of 2010, amended this document; is that correct?

A I did.

Q The original document provided for how many years incarceration in the Illinois Department of Corrections?

A The original offer communicated five years.

Q All right. After presenting that offer to the public defender, Mr. Chrzanowski, did you have a series of conversations with officers of the narcotics task force that had arrested Mr. Reid?

A My conversations with the arresting agency started in mid – mid-March and went up and through the point that that offer was tendered.

Q All right. And after the offer, was there a request by Mr. Harmon to reduce the offer which caused you to have further conversations with law enforcement personnel?

[10] A Yes, sir.

Q But as of the 9th of August, the offer which you've identified in People's Exhibit 12 was the office position with respect to a disposition; is that correct?

A As of August 9 of 2010, the only offer that had been extended in writing was five years in the Illinois Department of Corrections.

Q All right. And when you arrived at your office on August 9, sir, did you have a telephone message on your answering machine?

A I did.

Q And was that message from Ronald Salgado?

A It was.

MR. EKL: Objection. It would be hearsay, your Honor.

THE COURT: Overruled. Did you have a message?

BY THE WITNESS:

A Yes.

BY MR. MCQUEEN:

Q After that message – and were you to appear in court the following day, August 10, 2010, for a resolution of the Reid case?

A Mr. Reid's case was scheduled for a status on [11] August 10th of 2010.

Q Could it have been on the call on August 10 for a negotiated plea?

A It may have been, but –

Q Let me show you what I've marked as People's Exhibit 15 which I'll represent to you is the file of the Reid case produced by the clerk's office to us, and specifically I'm looking at page 37 which is an order dated July 28th. Do you recognize that order, sir?

A I do.

Q And what does it indicate the parties agreed to on July 28 with respect to the appearance in court on August 10, 2010?

THE COURT: What date is the – what page are you on, Mr. McQueen?

MR. MCQUEEN: 37, Judge, COC 37.

THE COURT: Thank you.

BY THE WITNESS:

A The court order indicates that on motion of defendant, the case was set for negotiated plea on August 10, 2010.

BY MR. MCQUEEN:

Q All right. Now, on the morning of August 10, [12] did you receive a call from the state's attorney, Mr. Bianchi?

A I don't recall if I received a phone call from Mr. Bianchi.

Q Did you have a meeting with him in his office?

A I did.

Q And who was present for that meeting?

A It was myself, Mr. Bianchi, and Assistant State's Attorney Phil Hiscock.

Q And what is Mr. Hiscock's position, sir?

A He's the chief of the criminal division.

Q All right. Was anybody else present to your knowledge?

A No, sir.

Q What did you say to Mr. Hiscock and Mr. Bianchi, and what did they say to you, sir?

MR. EKL: Objection as to the term "what they said," if we could note what each person said.

BY MR. MCQUEEN:

Q I certainly understand that, and Mr. Chrzanowski, I want you to identify each speaker individually, please.

A As far as Mr. Bianchi goes, I sat down in his [13] office and to the best of my recollection, he asked me about Jeremy Reid's case.

Q And do you recall what you reported to him about Mr. Reid's case, sir?

A I believe that I indicated to him the facts of the case and kind of where we were in negotiations on it.

Q And at that time, where did you believe you were in negotiations?

MR. EKL: Objection as to what he believed.

THE COURT: Sustained as to the form. Just have him respond what were –

BY MR. MCQUEEN:

Q Did you indicate to Mr. Bianchi the status of negotiations during that meeting, sir?

A I don't recall if I had indicated specifically where we were.

Q All right. What's the next thing that you remember either Mr. Bianchi or Mr. Hiscock saying to you, sir?

A I don't believe Mr. Hiscock said much of anything during that meeting. I believe that Mr. Bianchi had indicated to me that four years in the Illinois Department of Corrections was an acceptable [14] resolution to the case.

Q And is that what you went off to court that morning to do?

A That was the – my understanding, that the plea that was to be offered was four years in the Illinois Department of Corrections.

Q And that understanding came after your meeting with Mr. Bianchi; is that correct?

A Yes, sir.

Q All right. Did you go to court that morning?

A I did.

Q Did you see Mr. Harmon in the courtroom?

A I did. He approached me right as I passed the bar.

Q And what did you say to Mr. Harmon about the plea that was going to take place that morning?

A Mr. Harmon was walking towards me and I walked past the bar and directly towards him and we met in front of defense counsel's table and I told him that his client would receive four years in the Illinois Department of Corrections for a plea.

Q And did he respond?

A I don't remember him saying much. His eyes just got wide and he kind of had a – he kind of looked [15] startled or shocked.

MR. EKL: Objection, your Honor.

THE COURT: Sustained as to the characterization.

BY MR. MCQUEEN:

Q And that plea then was undertaken that morning?

A Yes, sir.

Q Did you see Mr. Bianchi in the courtroom that morning, sir?

A He was present.

Q Did you – were you able to identify members of the Reid family in the courtroom?

A Yes.

Q And did you observe Mr. Bianchi do anything with the family members, the Reid family members?

A As I entered the courtroom that morning, the judge had not taken the bench yet and as I approached the bar, Mr. Bianchi was standing to the right, almost along the jury box by a plexiglas kind of divider and I passed Mr. Bianchi and I looked to my left and I saw Mr. Reid's family sitting in the first couple rows and I looked back to Mr. Bianchi and it appeared that he was looking in their direction and made a gesture, some type of head gesture, like a nod.

[16] Q And did you see any reaction from the family?

A No, not at that point because I had been walking towards Mr. Harmon.

Q All right. Did you observe the family leave the courtroom with Mr. Bianchi for a period of time?

A No, sir.

Q All right. When the plea was – Judge Condon sits in that courtroom, sir?

A Yes, sir.

Q And did he sit on the day of the plea, if you recall?

A Yes.

Q Was Judge Condon told that the defendant was related to Chief Investigator Ron Salgado during the course of the plea?

A No, sir.

MR. EKL: Objection, assumes a fact that's not in the record.

THE COURT: Sustained.

MR. MCQUEEN: I have no further questions of the witness, Judge.

THE COURT: Cross.

MR. EKL: I have a question.

[17] CROSS EXAMINATION

BY MR. EKL:

Q Mr. Chrzanowski, it would be a fair statement that you are a trial lawyer, correct?

A That's my assignment, yes, sir.

Q And you understand the importance of lawyers interviewing witnesses prior to the trial's beginning, don't you?

A Yes, sir.

Q It's what lawyers do, right?

A It's one of their functions.

Q You wouldn't speak to me about this case, would you?

A That's correct, sir.

Q Okay. In fact, you went so far as to send me a certified letter telling me that you would not take a few minutes to talk to me about this case. Isn't that true, Mr. Chrzanowski?

A I sent you a letter indicating I had a vacation and that I didn't wish to discuss the case with you.

Q But you would not make any time to talk to me about this case and your involvement in the Reid case, would you?

A That's correct.

[18] Q How many times did you talk to the special prosecutor about this case?

A Once before grand jury and once before trial.

Q When did you talk to him last?

A Thursday.

Q You made time for him on Thursday, but you wouldn't make time for me, right?

A That's correct, sir.

Q That's your choice, right?

A Yes, it is.

Q And you didn't feel that you owed your boss any obligation to talk to his lawyer before this trial, right?

A My only obligation is to tell the truth here, sir.

Q Well, you did not make the time to talk to Lou Bianchi's attorney, but you made the time to talk to the special prosecutor, didn't you?

A Again my answer is yes, sir.

Q And you also talked to the special prosecutor's investigators too, didn't you?

A Yes.

Q And you made time for them, didn't you?

A Yes, sir.

[19] Q Okay. And when you testified before the grand jury, you met with Mr. McQueen before that too, didn't you?

A Yes.

Q Okay. But you testified truthfully before the grand jury, didn't you?

A Yes, sir.

Q And your recollection of the events surrounding the Reid case, Mr. Chrzanowski, they're not better today than they were when you testified before the grand jury, are they?

A No, sir.

Q Now, you prepared what is called a Blue Back form in connection with this case, didn't you?

A Yes, sir.

Q Would I be correct, sir, that it is your procedure to prepare that Blue Back accurately?

A Yes.

Q In other words, when you had conversations with Mr. Harmon about plea bargaining, plea negotiations, in this case, you would put those conversations accurate on – accurately on your Blue Back form, wouldn't you?

A As best as I could recall them, yes.

[20] Q In other words, you were making essentially contemporaneous notes of what was taking place, right?

A Yes.

Q And likewise when you talked to Phil Hiscock about this case, you made a notation on your Blue Back form as well, didn't you?

A I believe so.

Q And you accurately related your conversation with Mr. Hiscock about what his feelings were on the negotiated plea in this case, didn't you, sir?

A Yes.

Q Now, I'm going to ask you some questions about your negotiations with Mr. Harmon, and if at any point you want to see your Blue Back, you let me know and I'll let you take a look at it. Fair enough?

A Yes, sir.

Q Would I also be correct, sir, that you would make the entries on the Blue Back in chronological order? Would that be a fair statement?

A Yes, the notes were as the case was ongoing.

Q So on the first page, for example, on the Blue Back, you start with the date of 3/18/10, correct?

A If that's what it indicates, yes.

[21] Q And then after this first page of the Blue Back is complete – May I approach the witness, please, Judge.

THE COURT: All right. Is that marked?

MR. EKL: Yes, it is.

THE COURT: Which exhibit is it?

MR. EKL: I'm sorry, it's Defendant's Exhibit No. 3. May I proceed.

THE COURT: Yes.

BY MR. EKL:

Q And you made entries on the first page of the Blue Back and when you got down to 3/30/10, then you went on to the second page and began making entries all the way to 8/10 on the second page, right?

A Yes.

Q Now, in – on March the 23rd, 2010, you told Mr. Harmon that a plea to a Class 1 for boot camp was possible, but it was not a firm offer at that time, correct?

A Yes, sir.

Q So would it be a fair statement that Mr. Harmon was looking for boot camp kind of right out of the blocks on the case, right?

A Yes.

[22] Q Now, on May the 6th you had occasion to speak with Mr. Hiscock about a disposition in the case, didn't you?

A I'm sorry, what date was that, sir?

Q That would be May the 6th.

A I believe so, yes.

Q Take a look at Exhibit No. 3. Does that refresh your recollection that on May the 6th, you had a conversation with Phil Hiscock?

A Yes, sir.

Q Okay. And that followed a conversation you had had with Chris Harmon, correct?

A Yes, sir.

Q Mr. Harmon told you at that time that he was looking for an offer of five years DOC on a Class 1, with an option play for eight years DOC for boot camp, right?

A Yes.

Q And you recorded that accurately on your Blue Back form, didn't you?

A Yes, sir.

Q Then you went and talked to Phil Hiscock and you told him about the facts of the case, right?

A He was already familiar with the facts of the [23] case, sir.

Q And he told you he was torn between four years on a Class 1 or eight years boot camp. He told you that, didn't he?

A He did.

Q And he told you he wanted you to get some input from the arresting agency, right?

A Yes.

Q And as a good state's attorney, you went ahead and did that, didn't you?

A I did contact –

Q Okay. And you then called Sergeant Triplett (phonetic) of the narcotics task force about a disposition in the case, didn't you?

A It was Sergeant Timothy Tippett.

Q Tippett? T-i-p-p-e-t-t?

A Yes.

Q And you talked to him on 5/7, didn't you?

A I either talked to him or left him a voicemail.

Q Okay. And what Sergeant Tippett told you is they wouldn't agree to boot camp, but they were okay with four years on a Class 1, correct?

A If that's what my notes indicate, that was his message.

[24] Q Why don't you take a look at it, 5/7/10. Isn't that what you put on your Blue Back?

A Yes, sir.

Q Okay. So as of 5/7/10, you knew that the arresting agency was okay with four years and you knew that Phil Hiscock was torn between four years and eight years boot camp, right?

A Yes, sir.

Q Fair statement that four years DOC is a harsher sentence than eight years boot camp?

A In terms of actual time in custody, yes, sir.

Q Okay. All right. Now, Harmon kept working on you, didn't he, trying to get boot camp, boot camp offer, didn't he?

A Yes, sir.

Q And did you ever ultimately offer Harmon boot camp?

A No, sir.

Q Well, then there was another time that you talked to Harmon and that was on 7/21, Harmon came to you and told you that for four years on a Class 1, we could close the file. Isn't that true?

A Yes.

Q So as of 7/21, Harmon wanted four years, the [25] arresting agency was okay with four years, and

Phil Hiscock had told you that he was torn between four years and eight years boot camp with four years boot camp being the harsher sentence. Is that true?

A With four years IDOC no boot camp being the harsher sentence, –

Q Right.

A – yes, that's correct.

Q So then we get to the day the case is up, August the 10th, and is it a fair statement that you don't know how it was that you ended up in Lou Bianchi's office that morning?

A That's a fair statement, sir.

Q Okay. And would it also be a fair statement that what you put on your Blue Back form that day was, discussed four year – years on amended Class 4 with Lou and Phil –

THE COURT: Class 1.

MR. EKL: I'm sorry, Judge.

THE COURT: You said four, it's amended Class 1.

MR. EKL: Yes. Let me start over.

BY MR. EKL:

Q Discussed four years on amended Class 1 felony with Lou and Phil and they agreed with [26]

negotiated plea. That's what you put on your Blue Back, wasn't it?

A Yes.

Q Okay. So when you went into the office that day, you told Phil and Lou what the negotiated plea was going to be, didn't you?

A I told them that the public defender was requesting four years.

Q Okay. And Phil and Lou told you that four years on a Class 1 was acceptable to them, didn't they?

A Mr. Bianchi told me it was acceptable and Mr. Hiscock I think made a head nod and gesture.

Q Well, do you remember testifying before the grand jury?

A Yes, sir.

Q Okay. Do you remember making this statement: –

THE COURT: Give Mr. McQueen a page.

MR. EKL: Yes. We are at page of 57 Mr. Chrzanowski's grand jury which is Bate's stamped 0303 at the bottom.

BY MR. EKL:

Q – "And I don't recall if on the 10th I [27] had sought Mr. Bianchi and Mr. Hiscock out or if I was called into Mr. Bianchi's

> office, but I do recall the conversation taking place in Mr. Bianchi's office and Mr. Hiscock was present and myself and I remember Mr. Bianchi asking me my impressions of the case and I remember that there was some discussion and being told that four years on a Class 1 felony was acceptable as far as they were concerned."

Do you remember testifying that before the grand jury?

A Yes, sir.

Q So Mr. Bianchi and Mr. Hiscock told you that four years DOC was acceptable to them and that was the negotiated plea that you had discussed with Mr. Harmon; isn't that true?

A Mr. Bianchi verbally communicated to me that four years was acceptable and Mr. Hiscock nodded as Mr. Bianchi made that statement.

Q So it was the nod of Mr. Hiscock's head which indicated to you that it was acceptable to him?

A And the fact that Mr. Bianchi had stated that [28] that was considered acceptable to them.

Q When you went up to court that morning, you told Mr. Harmon that he got the four-year recommendation that he was – had requested. You made that statement, didn't ya – didn't you?

A I don't recall that statement.

Q Well, do you remember Mr. Harmon telling you, "that's fine" when you told him he got his four years?

A I don't recall Mr. Harmon making that statement.

Q Page 59 of the transcript, Bate's 05 – 0305:

"And what did you say to Mr. Harmon and what did he say to you?

"I walked into the courtroom that morning and I – this was after my conversation with Mr. Hiscock and Mr. Bianchi, and Mr. Harmon was walking toward me and I approached him with my cases to discuss and he's the public defender, we have a lot of cases up each morning. We tried and discuss the cases before the judge takes the bench so that we can resolve things quick and I approach him and I say his client would be getting the four years on a Class 1.

"And what did he say, if you recall?

[29] "And he said that's fine."

Do you remember him – do you remember making those statements in front of the grand jury?

A Yes, sir.

MR. EKL: Just one moment please, Judge.

THE COURT: All right.

MR. EKL: A couple final questions.

BY MR. EKL:

Q Do you remember a case Marco Baez, B-a-e-z?

A Marco Baez, yes.

Q Yeah. And Mr. Baez was in his mid-20s and he was charged with two deliveries as Mr. Reid was and the negotiated disposition on that case was four years in the DOC; isn't that true?

A That's a correct disposition, yes.

MR. EKL: If I could just have one moment, please, Judge.

THE COURT: All right.

MR. EKL: That's all, Judge. Thank you.

THE COURT: Redirect.

REDIRECT EXAMINATION

BY MR. MCQUEEN:

Q During the meeting on the morning of August 10 with Mr. Bianchi, sir, did you relate to him the [30] phone message which you had received from Ronald Salgado?

MR. EKL: Objection, beyond the scope.

THE COURT: It is beyond the scope.

MR. MCQUEEN: No, I don't believe it is, Judge, because he was asked about his communications

with Bianchi and Hiscock during cross examination, so –

THE COURT: All right. Did you have – Go ahead.

BY MR. MCQUEEN:

Q Did you relate to Mr. Bianchi and Mr. Hiscock the phone message that you had received the previous day from Ronald Salgado?

A To the best of my recollection, I don't believe I mentioned it to either one of them.

MR. MCQUEEN: All right. Nothing further.

THE COURT: Anything else?

MR. EKL: No, your Honor.

THE COURT: You may step down, sir.

(Witness excused.)

END OF EXCERPT.

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[31] STATE OF ILLINOIS)
) SS:
COUNTY OF MCHENRY)

I, Stacey A. Collins, an Official Court Reporter for the Circuit Court of McHenry County, State of Illinois, do hereby certify that I reported in shorthand the proceedings had in the above entitled cause and

that the foregoing is a true and correct transcript of all the proceedings heard.

/s/ Stacey A. Collins
Stacey A. Collins, CSR
Official Court Reporter
License No. 084-002377
Date: 9-22-11