No. 3-13-0696

IN THE ILLINOIS APPELLATE COURT
THIRD JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff, v. BETHANY MCKEE, Defendant-Appellee, and JOSEPH HOSEY, Respondent-Appellant.	Appeal from the Circuit Court of Will County, Illinois; Twelfth Judicial Circuit; Trial Judge Gerald R. Kinney; Notice of Appeal: Sept. 20, 2013; Date of Appealable Order: Sept. 20, 2013; Jurisdiction Conferred Upon Illinois Appellate Court Pursuant to Sup. Ct. R. 304(b)(5).

REPLY BRIEF OF RESPONDENT-APPELLANT JOSEPH HOSEY

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ORAL ARGUMENT REQUESTED

ARGUMENT

In Respondent-Appellant Joseph Hosey's Opening Brief, Hosey argued that the Circuit Court's order divesting him of his statutory privilege and compelling him to disclose the identity of his confidential source misapplied Illinois law in a number of ways, each of which on its own is fatal: because disclosure is irrelevant to the criminal case against McKee; because it is not essential to protect any claimed public interest such as her right to a fair trial; and because it was ordered by the Circuit Court without other sources of information having been exhausted.

Defendant-Appellee McKee's opposition brief concedes that the identity of Hosey's source is irrelevant to any element of, or defense to, the charges against her, and fails to identify a single court in any jurisdiction that ordered disclosure of a reporter's confidential source where that information was not directly relevant to the substantive elements of the underlying proceeding. She also is unable to identify any specific impact on her right to a fair trial that would be remedied by disclosure of the identity of the source, since the claimed effects of pretrial publicity obviously would not be undone if the source's identity is disclosed. It is not surprising therefore that McKee also fails to cite a single case in any jurisdiction that held that adverse publicity for a criminal defendant should be addressed – not by methods that actually ameliorate its potential effects such as jury instructions, venue change, and peremptory challenges – but by forcing a reporter to identify his confidential source. Regarding exhaustion of alternative sources, even McKee's brief concedes that "the trial court denied a chance to conduct a hearing into the leak [and] did not order an investigation." (McKee Br. 23)

The Illinois Special Witness Doctrine provides an additional basis to reverse the Circuit Court. McKee incorrectly describes the elements of that doctrine as being the

same as the statutory privilege in order to justify the Circuit Court's failure to even address it.

McKee tops it off by suggesting that this Court does not have the power to correct the Circuit Court's unprecedented misapplication of the law under a more deferential standard of review that clearly does not apply here – although the Circuit Court's decision would be reversible under any standard.

It is also noteworthy that McKee's insistence that the forced disclosure of Hosey's confidential source information is "critical," (McKee Br. 13), "essential" to protect a public interest, (*id.* at 15), and "necessary" to her defense, (*id.* at 26), is belied by her recent actions. McKee filed two requests seeking months of additional time to file her brief in this appeal, but then demanded a more expedited trial date from the Circuit Court, resulting in a schedule that would complete the trial before this appeal was concluded – a strategy that moots her fair trial concerns and refutes even more strongly her alleged need to secure Hosey's confidential source information in order to prepare for trial.

McKee does not come close to demonstrating that divesting a reporter's statutory privilege, which a court is supposed to order only as a "last resort," *In re Arya*, 226 Ill. App. 3d 848, 862 (4th Dist. 1992), was justified here, or that the requirements of the Special Witness Doctrine have been met. For the reasons set forth in Hosey's Opening Brief, and further below, the Circuit Court misapplied the law in ordering Hosey to either violate his promise of confidentiality to his source or be fined and imprisoned. The Circuit Court's order should be reversed by this Court.

I. This Court should apply a de novo standard of review.

McKee fails to distinguish the Illinois Supreme Court authorities demonstrating that a de novo standard of review applies where the circuit court draws legal conclusions

from undisputed facts or where the trial court received only documentary evidence. Instead, she cites cases involving evidentiary hearings with live witness testimony – which did not occur here – in which, not surprisingly, courts applied a manifest weight of the evidence standard to the resulting factual findings. *See People v. Pawlaczyk*, 189 Ill.2d 177, 184-85 (2000) (hearing with testimony from two witnesses); *Best v. Best*, 223 Ill.2d 342, 345-47, 350-51 (2006) (following hearing with cross-examination, trial court given deference "because it is in the best position to observe the conduct and demeanor of the parties and witnesses."); *In re Arya*, 226 Ill. App. 3d at 854 ("[W]e cannot reverse the trial court's *factual findings* on appeal unless they are against the manifest weight of the evidence.") (emphasis added). However, even where courts apply a manifest weight of the evidence standard on contested factual issues, the trial court's ruling "on the legal effect of its factual findings" is still reviewed de novo. *E.g.*, *Corral v. Mervis Indus., Inc.*, 217 Ill.2d 144, 153-54 (2005).

McKee also claims that the holding in *In re Special Grand Jury Investigation of Alleged Violation of the Juvenile Court Act*, 104 Ill.2d 419 (1984), suggests deferential review. (McKee Br. 2) In fact, the holding in that case demonstrates just the opposite: the Illinois Supreme Court, rather than defer to the trial court's findings, reversed simply because it did not "agree with" the circuit court's conclusions. *In re Special Grand Jury*, 104 Ill.2d at 428-29.

Moreover, the only potentially disputed fact identified by McKee – whether Assistant State's Attorney Ken Grey told McKee's counsel that he had heard the disclosure came from the police department, (McKee Br. 3) – was never introduced into evidence. It was only suggested through the unattributed, double-hearsay comments

made by her attorney and then refuted by a sworn statement. (*Compare* R. C264 *with* R. IC92-93) Regardless, such a "finding," even if there had been evidence, would not come close to supporting the Circuit Court's order, as explained below.[1]

II. The identity of Hosey's source is not relevant to the merits of the criminal case against McKee.

McKee argues for a very broad construction of "relevance," claiming it should include relevance to hypothetical matters collateral to the merits of the underlying proceeding. She wants relevance to include the possibility that a lawyer may have violated a discovery rule or that the grand jury secrecy rules may have been violated. (McKee Br. 10-11) The Illinois Reporter's Privilege Act, however, ties "relevance" to "the proceedings," 735 ILCS 5/8-904, 906, which, in this case, is the criminal case against McKee. Indeed, the "relevancy of the source" requirement of Section 906 follows the requirement in the same section that courts consider "the merits of the claim or defense." *Id.* The identity of Hosey's source plainly is not relevant to the merits of the claim or defense in the criminal proceedings against McKee, and McKee does not even attempt to argue that it is.

Other Circuit Court cases that considered this issue refused to compel confidential reporter's source testimony where, as here, it was sought for matters collateral to the elements or merits of the claim at issue in the proceedings. In *People v. McCullough*, 40 Med. L. Rptr. 1316 (DeKalb Cnty. Cir. Ct. Nov. 8, 2011), the court held that "the question is whether [the information sought by the subpoena] is material to prove an element of the offense or to prove a defense asserted by defendant." *Id.* at 1318 (denying

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[1] The Circuit Court's references to "the facts and circumstances of this case" does not mean, as McKee suggests, (McKee Br. 2 n.2), that the Circuit Court did anything more than draw legal conclusions from uncontested facts, an exercise that requires de novo review.

petition to divest because "the potential relevance of the protected interest is speculative"). Likewise, in *Illinois v. Fort*, 15 Med. L. Rptr. 2251 (Cook Cnty. Cir. Ct. Sept. 19, 1988), the court denied the petition to divest noting that the movants seeking to quash did not possess information "relevant to the ultimate issues in this case." *Id.* at 2253 (refusing to force disclosure where the requested information was "not relevant and material to the issue of guilt or innocence" of murder defendant) (citing *State v. St. Peter,* 315 A.2d 254 (Vt. 1974), and *Brown v. Commonwealth,* 204 S.E.2d 429 (Va. 1974)).

While McKee correctly notes that lower court holdings do not bind this Court, (McKee Br. 34), the fact that all other courts that have considered this issue reached a contrary result can at least inform this Court of how far the Circuit Court stretched in ordering divestiture against Hosey. Indeed, in *every* case we are aware of in which the reporter's testimony was sought for collateral matters, such as to test witness credibility, the court rejected the request. (Hosey Br. 14-15) McKee fails to cite a contrary holding.

In the cases McKee relies on, the source's identity or communication to the reporter was directly relevant to the merits of the underlying proceeding. In *In re Special Grand Jury Investigation of Alleged Violation of the Juvenile Court Act*, 104 Ill.2d 419 (1984), the disclosure to the reporter *was* the crime being investigated by a grand jury, so the identity of the reporter's source was the critical substantive issue. In *In re Arya*, 226 Ill. App. 3d 848 (4th Dist. 1992), the reporter's requested testimony involved hearing a defendant's confession to a crime and was thus directly relevant to guilt or innocence.[2] In *People v. Pawlaczyk*, 189 Ill.2d 177, 193 (2000), (McKee Br. 9), the underlying

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[2] Despite the clear relevance of the reporter's testimony to the merits of the proceedings, the courts in both *In re Special Grand Jury* and *In re Arya* still refused disclosure so the applicants could pursue additional attempts to find alternative sources of the information.

proceeding was a grand jury investigation to determine if two public officials perjured themselves at deposition in a civil trial by denying that they were the source of allegedly defamatory statements. As the Supreme Court explained, "the identity of [the reporter's] source or sources is directly relevant to an element of the perjury charge." *Id.* at 194. Thus, the identity of the source was "relevant to the proceedings" because it would "make . . . one of the elements of perjury more or less probable." *Id.* Here, by contrast, the identity of Hosey's confidential source has no bearing on whether McKee is guilty of the charges against her.

Last, McKee cites a 1971 California state court case, *Farr v. Superior Court*, 22 Cal. App. 3d 60, 64-65 (Cal. Ct. App. 1971) ("*Farr*"). (McKee Br. 12) Putting aside the fact that the case is not applying Illinois law, McKee's counsel also knew, (*see* R. C260) – but failed to advise this Court – that the *Farr* case is not even applying current law in California. The California Court of Appeals in a later case, *In re Willon*, 47 Cal. App. 4th 1080 (Cal. Ct. App. 1996), imposed more rigorous standards that must be met before compelling reporters to breach their pledge of confidentiality – standards which McKee would not meet here – and criticized the ruling in *Farr* for its "conclusory reasoning" that incorrectly "presumed there was an 'undeniable need for disclosure.'" The facts of *Farr* are also clearly distinguishable, in part because the court in that case was investigating a violation of a gag order (which is not the case here). Tellingly, even the Circuit Court, after asking about the *Farr* during oral argument, (*see* R. ROP 256-57), did not cite to that case in its ruling, presumably recognizing that *Farr* is not good law and does not support McKee's petition.

In short, neither the Illinois Reporters Privilege Act nor a single case supports the broad, speculative, collateral-issue definition of "relevance" that McKee urges. The Circuit Court order should be reversed because the compelled disclosure is not relevant to the criminal proceedings against McKee.

III. Disclosure of Hosey's source is not essential to protect a public interest.

The Circuit Court order also should be reversed because McKee failed to demonstrate, as she must, that disclosure of Hosey's confidential source is "essential" to protect a public interest. 735 ILCS 5/8-907(2). McKee identifies several purported interests that have little to do with this case. For example, she identifies the court's "interest in ensuring that its orders were complied with." (McKee Br. 10, 24) However, no gag order was violated or even in place prior to the disclosure to Hosey. Indeed, McKee attached Hosey's stories as exhibits for her motion to secure a gag order. (R. C50-51) McKee also asserts an interest in "effective law enforcement," (McKee Br. 17), without explaining how divesting Hosey of his statutory privilege would aid in the fight against crime.[3] McKee then returns to the Circuit Court's speculation about collateral issues, such as "if" the Illinois Supreme Court Rules regarding discovery were violated, (*id.* at 19-20), or "if" grand jury secrecy rules were violated. (*Id.* at 24)

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[3] McKee, (McKee Br. 16-17, 33-34), cites cases implicating law enforcement interests only where the reporters witnessed the crime being investigated or where the transmission of information to the reporter *was* the crime being investigated. *E.g.*, *Branzburg v. Hayes*, 408 U.S. 665 (1972); *U.S. v. Sterling*, 724 F.3d 482 (4th Cir. 2013); *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141 (D.C. Cir. 2006); *In re Special Grand Jury Investigation of Alleged Violation of the Juvenile Court Act*, 104 Ill.2d 419 (1984). Indeed, in *Branzburg*, a case followed by the more recent cases McKee cites, the Supreme Court stated that "harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news source would have no justification." 408 U.S. at 707-08.

McKee fails to cite a case in which a court held that the public interest required an order stripping a reporter of his privilege protections based on matters collateral to the substance of the merits of the proceeding. Again, other Illinois circuit courts have rejected similar efforts. *E.g.*, *Fort*, 15 Med. L. Rptr. at 2253-54 (holding that where information sought was not material to the defendant's guilt or innocence and defendant was not denied cross examination rights, defendant "failed to establish that . . . disclosure of what [media movants] possess is essential to protect the public interest."); *McCullough*, 40 Med. L. Rptr. at 1318 (holding that where party seeking divestiture could only "speculate as to . . . how th[e] information may impact" the underlying case, the "public interest asserted . . . does not outweigh the public's interest in the news media's First Amendment protections or right to freely gather and disseminate information").

McKee's primary argument is that the Freedom of Information Act, 5 ILCS 14/1 *et seq.* ("FOIA"), required police reports to be kept confidential, (McKee Br. 28-30, 32, 36), and that disclosure could impact her right to a fair trial, particularly to not have jurors biased by pretrial publicity. (*Id.* at 16, 18, 20, 30)

At the outset, FOIA does not require police reports to be kept confidential. Rather, it provides that "[a]ll records in the custody or possession of a public body are presumed to be open to inspection or copying." 5 ILCS 140/1.2. The exemptions McKee cites do not "prohibit dissemination of such information, but rather are simply cases where disclosure is not required." *Roerhorborn v. Lambert,* 277 Ill. App. 3d 181, 186 (1st Dist. 1995); *see also* Illinois Attorney General, A Guide to the Illinois Freedom of Information Act, at 13 (2004) ("The exemptions do not . . . prohibit the dissemination of

information; rather, they merely authorize the withholding of information.") (Hosey Br. App'x 28-29). Even McKee admits that FOIA exemptions grant the "right" rather than the duty to withhold, (McKee Br. 32), and public bodies asserting that right face a stringent "clear and convincing evidence" burden. 5 ILCS 140/1.2.

As to McKee's right to be tried by jurors not biased by pretrial news reports, she concedes that "voir dire, changing venue, peremptory challenges, and the like can help protect fair trial rights," but then argues that "they are not the exclusive remedies." (McKee Br. 18) Yet she cannot explain how forcing a reporter to disclose confidential source testimony could help protect against juror bias. Nor can she cite a case in which a court ordered disclosure of a reporter's confidential source based on such a concern. Further, even if compelling a reporter's disclosure could somehow protect against juror bias, it again raises the question why – if there are other means to address pretrial publicity concerns – the Circuit Court should jump straight to divesting a reporter of his privilege, rather than considering that as a "last resort" as Illinois law requires. *In re Arya,* 226 Ill. App. 3d at 862.[4]

The Circuit Court order should be reversed because divesting Hosey of his reporter's privilege was not essential to protect any public interest.

IV. McKee also failed to demonstrate that all other available sources of information have been exhausted.

McKee admits that there were at least two additional potential sources of information beyond the affidavits she relies on – an evidentiary hearing and a court-ordered investigation – that she requested but that the Circuit Court denied. (McKee Br.

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[4] McKee's citations to cases citing to a defendants' right to a fair trial, such as *Irvin v. Dowd*, 366 U.S. 717 (1961), and *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984), are irrelevant because they did not consider any attempt to compel information from a reporter.

21) Such a hearing would have allowed McKee's counsel to question appropriate personnel to ascertain who may have secured access to or disclosed the reports. Since the information about the source is not even relevant to the underlying proceeding, it may not be surprising that the Circuit Court refused to go to the trouble of conducting a hearing on the issue. Regardless, ordering divestiture of Hosey's privilege before undertaking such an investigation again reveals the Circuit Court's preference for making divestiture a first resort, rather than a "last resort." *In re Arya*, 226 Ill. App. 3d at 862.

McKee tries to distinguish *In re Special Grand Jury Investigation of Alleged Violation of the Juvenile Court Act*, 104 Ill.2d 419, 428-29 (1984), in which the Illinois Supreme Court reversed an order divesting a reporter of his privilege for failure to exhaust alternative sources, as being different because – as McKee notes – "there were at least four identified individuals who could have had access to the disclosed material who were not questioned." (McKee Br. 22). But that is the point: McKee has not questioned *any* of the individuals who could reasonably be expected to have information about access to police records in this case. All that matters is that there was a "possibility" that an alternative source was available. 735 ILCS 5/8-906 (The court must consider, *inter alia,* "the possibility of establishing by other means that which it is alleged the source requested will tend to prove."); *In re Special Grand Jury*, 104 Ill.2d at 428 ("[T]he possibility" that certain witnesses "might have provided relevant information . . . is apparent.").

The Circuit Court's refusal to allow McKee to pursue these alternative sources does not relieve McKee, or the Circuit Court, of the statutory burden. This burden is meant to be a stringent one, requiring "more than a showing of inconvenience to the

investigator before a reporter can be compelled to disclose his sources." *Id.* at 428-29. "It is not sufficient investigation . . . to merely assert that [the] investigation has not revealed the information sought." *Arya*, 226 Ill. App. 3d at 861; *see also In re Special Grand Jury*, 104 Ill.2d at 427-29 (reversing divestiture order for failing to exhaust other potential sources because the people with access to the improperly disclosed transcripts were never questioned).

Accordingly, the Circuit Court also should be reversed because it ordered divestiture even though all other available sources of the information had not been exhausted.

V. The Special Witness Doctrine provides an independent basis for reversal.

The Circuit Court failed to address the elements of the Special Witness Doctrine. "First, the party subpoenaing the reporter must specifically state the testimony the party expects to elicit from the reporter. Second, that party must specifically state why that testimony is not only relevant, but *necessary* to the party's case. Finally, that party must specifically state the efforts that party has made to secure the same evidence through alternative means." *People v. Palacio*, 240 Ill. App. 3d 1078, 1102 (4th Dist. 1993) (emphasis in original).

Even if the identity of Hosey's source were relevant (and it is not) and even if the "alternative means" to secure the evidence were sufficiently pursued (and they were not), the Circuit Court did not consider whether Hosey's testimony was "*necessary*" to McKee's case. The record and case law firmly demonstrate that it is not necessary. McKee believes the "necessary" conclusion is "implicit", claiming that the requirements to satisfy the Special Witness Doctrine and the Reporter's Privilege Act "overlap."

(McKee Br. 26-27) However, the language of the Appellate Court in *Palacio* – "not only relevant but *necessary*" – makes clear that something more than relevance is required.

The Circuit Court order circumvents the protections of the Special Witness Doctrine without any consideration given to its requirements. The doctrine was not satisfied here. For that independent reason, the Circuit Court should be reversed.

VI. McKee's trial strategy demonstrates that Hosey's confidential source information is unnecessary and irrelevant to McKee's defense or her right to a fair trial.[5]

McKee maintains that the forced disclosure of Hosey's confidential source information is necessary to her defense and essential to protect her right to receive a fair trial. (McKee Br. 13, 16-20) Her strategy is antithetical to her claims. On June 16, 2014, shortly after requesting two extensions of time to file her brief – including one for a 90-day extension – McKee demanded a quick trial date, originally agreeing to have trial begin July 14, 2014, before Hosey's Reply Brief in this appeal was due. (Hearing Tr. June 16, 2014).[6] McKee has since requested a short continuance to have time to consider evidence disclosed by the State, agreeing to start trial on August 4. (Hearing Tr. July 14, 2014; Hearing Tr. July 23, 2014). In addition, McKee requested a bench trial, (Hearing Tr. July 23, 2014), undermining further any suggestion that divestiture is essential to

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5 The support for this section comes from certified transcripts of proceedings below dated June 16, June 19, July 14, and July 23, 2014. Hosey filed a motion to supplement the record with these materials, though this Court also may take judicial notice of "public documents which are included in the records of other courts and administrative tribunals [because] [s]uch documents fall within the category of readily verifiable facts which are capable of 'instant and unquestionable demonstration.'" *May Dep't Stores Co. v. Teamsters Union Local No.* 743, 64 Ill.2d 153, 159 (1976) (quoting 9 Wigmore on Evidence § 2571, at 548 (3d ed. 1940)); *see also Metropolitan Life Ins. Co. v. Am. Nat'l Bank & Trust Co.*, 288 Ill. App. 3d 760, 764 (1st Dist. 1997) (same).

6 A few days later, the Circuit Court on its own motion moved the trial to July 21, 2014. (Hearing Tr. June 19, 2014)

guard against juror bias. McKee's trial strategy demonstrates that even she believes the disclosure ordered is entirely irrelevant to her case and unnecessary to protect her right to a fair trial.

VII. Hosey's good faith and the error of the Circuit Court both warrant a reversal of the Circuit Court's contempt order.

Hosey requests that this Court vacate the contempt order if it determines that the divestiture order was erroneous – and it was, as demonstrated above. Moreover, independent of the substantive outcome of this appeal, Illinois courts have the authority to vacate civil and criminal contempt orders issued to parties who disobey Circuit Court orders in good faith to test the validity of the order on appeal. *People v. Jaudon*, 307 Ill. App. 3d 427, 448 n.13 (1st Dist. 1999) (vacating criminal contempt order in part because contemnor disobeyed order in a "good-faith effort to test" the order); *Janousek v. Slotky*, 2012 IL App (1st) 113432, ¶¶ 36-37 (affirming circuit court order but vacating contempt order); *People v. Campobello*, 348 Ill. App. 3d 619, 637 (2d Dist. 2004) (same). Accordingly, an order vacating the Circuit Court contempt order is warranted here both because Hosey acted in good faith and because the Circuit Court order compelling disclosure of confidential source material should be reversed.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in his Opening Brief, Respondent-Appellant Joseph Hosey respectfully requests that this Court:

a. reverse the Circuit Court's order divesting Hosey of his reporter's privilege, compelling him to produce his files, and compelling him to identify his source,

b. vacate the Circuit Court's order holding Hosey in civil and criminal contempt,

c. vacate the fines imposed against Hosey, and

d. grant any other relief this Court considers just.

Dated: August 1, 2014

Respectfully submitted,

JOSEPH HOSEY

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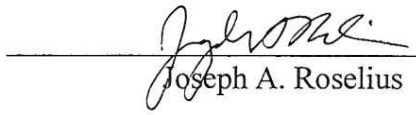
CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance, and the certificate of service, is 14 pages.



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NOTICE OF FILING AND CERTIFICATE OF SERVICE

I, Joseph A. Roselius, an attorney, certify that I caused nine paper copies of the **Reply Brief of Respondent-Appellant Joseph Hosey** to be filed with the Clerk of the Illinois Appellate Court, Third Judicial District, Illinois, along with five compact discs containing electronic copies of all the briefs filed in this matter, by hand delivery on August 1, 2014:

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I, Joseph A. Roselius, an attorney, certify that I caused three copies of the **Reply Brief of Respondent-Appellant Joseph Hosey** to be served upon the following counsel of record in this appeal by U.S. Mail on August 1, 2014:

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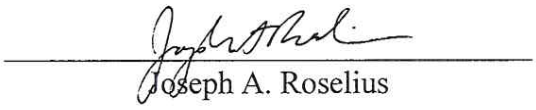

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