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Thomas D. Palella
Clerk of the Appellate Court
APPELLATE COURT 1ST DISTRICT

No. 1-22-0322

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff–Appellee, v. JUSSIE SMOLLETT, Defendant–Appellant.	Appeal from the Circuit Court of Cook County, Illinois Circuit Court No. 20 CR 03050-01 The Honorable James B. Linn, Judge Presiding.

THE STATE'S RESPONSE IN OPPOSITION TO THE DEFENDANT'S EMERGENCY MOTION TO STAY SENTENCE AND/OR GRANT BAIL PENDING APPEAL

The State of Illinois, by and through the Office of the Special Prosecutor ("OSP"), pursuant to this Court's March 11, 2022 Order, hereby submits its response in opposition to Defendant-Appellant Jussie Smollett's Emergency Motion to Stay Sentence and/or to Grant Bail Pending Appeal ("Emergency Motion").

INTRODUCTION

There is no emergency that warrants the extraordinary relief of staying Mr. Smollett's sentence pending appeal. Indeed, the Emergency Motion fails to offer a single justification for staying Mr. Smollett's sentence that is particularized to the facts or circumstances of this case. Rather than attempt to meet his burden of showing good cause for his immediate release, Mr. Smollett makes only cursory, woefully undeveloped arguments. Each fails to demonstrate good cause to stay his jail sentence. The Emergency Motion should be denied.

Mr. Smollett asserts that he is entitled a stay because he will most likely serve his short, 150-day jail sentence before his appeal on the merits is decided. Mot. ¶ 21. But, according to this logic, *every* defendant sentenced to a term of imprisonment less than a few years would automatically receive a stay pending appeal. That simply is not, and cannot be, the rule.

Mr. Smollett also claims his sentence should be stayed because his health and safety is allegedly at risk in jail for two reasons. First, Mr. Smollett suggests that due to his high-profile status, he is the target of "hatred" and will most likely be assigned to "solitary confinement," which will pose a "safety and health danger" to him. *Id.* ¶¶ 19–20. And second, in passing, Smollett hints that he faces a "serious health risk" due to the potential exposure to Covid-19 in jail. *Id.* ¶ 27. These "safety and health" bases are not only wholly unsupported in the motion but, importantly, are factually incorrect. In fact, amidst false claims that Mr. Smollett was being held in solitary confinement, the Cook County Sheriff's Office recently issued a statement pointing out that

solitary confinement has been abolished at the Cook County Jail since 2016 and specifically outlining the steps the jail was taking to ensure Mr. Smollett's safety and wellbeing. And the same goes for the apparent risk of contracting Covid-19, which—aside from being a generic concern applicable to any incarcerated defendant—current, real-time data reflects that the Cook County Jail has the spread of Covid-19 firmly under control.

Finally, Mr. Smollett contends that he has a meritorious appeal and thus would be "irreparably harmed if he serves a sentence based on convictions which may be reversed on appeal." *Id.* ¶¶ 15–18. Of course, almost every defendant believes he or she has a meritorious appeal. However, as set forth below, the "substantial appellate issues" that Mr. Smollett claims warrant a stay of his sentence have been exhaustively briefed and argued in the trial court which provided well-reasoned rulings based on Illinois law. Mr. Smollett's generalized legal disagreements with rulings in the trial court is not a basis to grant the Emergency Motion.

In the end, Mr. Smollett relies on half-truths and misleading statements, at best, to manufacture an alleged emergency to prompt the Court to overrule the trial court's sentence—without a transmitted record on appeal. All of Mr. Smollett's arguments presented in the Emergency Motion were made to the trial court either before trial, during trial, and/or during an almost seven-hour sentencing hearing in which the trial court handed down an exceedingly well-reasoned sentence—one the trial court made clear on the record had been considered at great length. The trial court also denied Mr. Smollett's motion to stay the sentence. Simply put, Mr. Smollett has had multiple opportunities to present these arguments to the trial court. And each time they failed. As such, there is no cause for this Court to revisit this matter on an exigent timetable.

ARGUMENT

Mr. Smollett fails to provide any justifiable reason that this Court should stay his sentence pending appeal,[1] let alone one that constitutes an emergency. Illinois Supreme Court Rule 609(a) permits, in an appeal from a judgment in which the defendant is sentenced to imprisonment, that "the defendant may be admitted to bail and the sentence or condition of imprisonment or periodic imprisonment stayed, with or without bond, by a judge of the trial or reviewing court." Ill. S. Ct. R. 609(a). The "decision to grant bond pending appeal is discretionary" and "the burden [is] on [the defendant] to show good cause for his release either on bond or his own recognizance." *People v. Hill*, 2020 IL App (1st) 162119, ¶ 58. This Court should exercise its discretion and deny the Emergency Motion. Moreover, Mr. Smollett fails to meet his burden of demonstrating good cause.

I. The short length of Mr. Smollett's sentence does not create an emergency

Mr. Smollett was convicted of five separate felony counts of falsely reporting a crime to a police officer in violation of 720 ILCS 5/26-1(a)(4), each a Class 4 felony. *Id.* § 26-1(b). He faced a sentence of imprisonment of "not less than one year and not more than 3 years." 730 ILCS 5/5-4.5-45(a). The trial court, showing leniency, instead sentenced Smollett to 30 months' probation with the first 150 days to be served in the custody of the Cook County Jail. The sentence of 150 days in jail is much less than the statutory minimum for his convictions. Mr. Smollett now tries to use that short sentence to his advantage, arguing that he will be irreparably harmed because he will "most likely" serve the entire 150-day term of imprisonment before his appeal is decided on the merits. Mot. ¶ 21. This argument misses the mark.

[1] Mr. Smollett also requests that that this Court waive an appeal bond, but cites to an Illinois Supreme Court Rule that governs civil appeals. Mot. at 5–6 (quoting Ill. S. Ct. R. 305(a)). Besides citing the wrong standard, for all of the reasons stated herein this Court need not and should his alternative argument for an appeal bond because Mr. Smollett fails to show good cause to stay his sentence.

According to Mr. Smollett, every defendant who is sentenced to a term of incarceration that *may* be served before an appeal runs its course would be entitled to an automatic stay of their sentence pending appeal. This certainly includes every misdemeanor conviction, for which incarceration terms are less than a year, but would also sweep in a large swath of felony incarcerations as well. Indeed, in the First Appellate District, almost one-third of criminal appeals take over 3 years from filing to disposition.[2] Well over half of criminal appeals (about 65%) take more than 2 years, and over 90% of criminal appeals take more than one 1 year.[3] A short sentence is not grounds for an emergency stay. Moreover, taken to its logical extreme, every single defendant who indicates he or she will appeal their conviction would be entitled to a stay of the sentence pending appeal.

The trial court acted well-within its discretion in denying a stay of Mr. Smollett's sentence pending appeal. Indeed, a trial court generally need not even explain why because "[t]he conviction and trial record in the absence of stated reasons may stand as the trial court's basis for denying bail." *People v. Brooks*, 251 Ill. App. 3d 927, 929 (1993). Here, however, the trial court made clear at the March 10, 2022 sentencing that it had "considered the sentence at great length."[4] Indeed, the trial court stated during the sentencing hearing that it had "never had a case that has been plead as exhaustively as this one, voluminous writings, hundreds and hundreds of pages, of

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[2] Illinois Courts Annual Report 2020 at 186, https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/de4253a6-147f-4643-a201-0e29ce403179/2020%20Annual%20Report%20Statistical%20Summary.pdf.

[3] *Id.*

[4] The official transcript from sentencing is forthcoming, but video from the entire March 10, 2022 hearing, including the posttrial motion arguments and ruling and sentencing, is publicly available at https://www.youtube.com/watch?v=81cLAL6plUo. *See id.* at 6:33:45–6:34:12.

filings, asking for [relief by the defendant]."[5] And taking that all into consideration, when Mr. Smollett moved to stay the sentence pending appeal, the trial court denied the request by noting that "[t]he wheels of justice turn slowly, but sometimes the hammer of justice has to fall. And it's falling right here, right now. I am not staying this."[6] In response, Mr. Smollett provides no justifiable reason to revisit the trial court's ruling, and certainly no reason that otherwise sets him apart from numerous other convicted felons sentenced to a term of incarceration.

II. Mr. Smollett's claims of health and safety risks are unsupported

In an attempt to manufacture a basis for emergency relief, Mr. Smollett cites alleged risks to his "safety and health" supposedly based on his placement in "solitary confinement" and the general risk of Covid-19. Mot. ¶¶ 20, 27. But those claims are based solely on his say-so and entirely unsupported with any facts. But more importantly, the claims are demonstrably untrue.

A. Mr. Smollett is not in solitary confinement

Mr. Smollett vaguely asserts that he "has become a target of vicious threats in the social media forums," and therefore he may experience "physical harm" while incarcerated. Mot. ¶ 19. Due to this, "he will most likely be assigned to segregated incarceration or protective custody, both euphemisms for solitary confinement." *Id.* ¶ 20. This assertion is wholly without merit as it was Mr. Smollett who requested to be placed in protective custody after sentencing. Moreover, contrary to Mr. Smollett's unsupported conjecture, he will not be held in solitary confinement because solitary confinement has been abolished at the Cook County Jail.

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5 *See id.* at 3:00:15–3:00:45.

6 *Id.* at 6:35:20–6:35:35.

Specifically, after rumors regarding Mr. Smollett's housing conditions began swirling in the media immediately after his sentence, the Cook County Sheriff's Office released the following statement:

> Mr. Smollett is not being held in solitary confinement. The use of solitary confinement was abolished at the Cook County Jail in 2016, and any claims that he is being held in this manner is false. Mr. Smollett is being housed in his own cell, which is monitored by security cameras in the cell and by an officer wearing a body worn camera who is stationed at the entrance of the cell to ensure that Mr. Smollett is under direct observation at all times. As with all detained persons, Mr. Smollett is entitled to have substantial time out of his cell in the common areas on the tier where he is housed, where he is able to use the telephone, watch television, and interact with staff. During such times out of cell, other detainees will not be present in the common areas. These protocols are routinely used for individuals ordered into protective custody who may potentially be at risk of harm due to the nature of their charges, their profession, or their noteworthy status. The safety and security of all detained individuals, including Mr. Smollett, is the Sheriff's Office's highest priority.[7]

Not only is Smollett not being held in solitary confinement, but the Cook County Sheriff's Office have made public the specific measures that are being taken to ensure the health, safety, and wellbeing of Mr. Smollett while he serves his jail term.

B. Covid-19 is not good cause to stay Mr. Smollett's jail sentence

Mr. Smollett also suggests in passing that the potential exposure to Covid-19 while in jail poses a "serious health risk" due to Mr. Smollett's "compromised immune system." Mot. ¶ 27. There is absolutely no support for this claimed risk.

Mr. Smollett submits a purported "affidavit" from an Oregon doctor, Dr. Michael Freeman, in support of his argument, but the affidavit is conclusory, overly generic, and wholly inadequate to support any requested relief. *See* Mot. at Ex. 5. The affidavit states generically that Covid-19 is "an ongoing global pandemic," and that prisons and jails all around the United States have been

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[7] *See ABC7Chicago*, "Jussie Smollett begins serving 150-day jail sentence as attorneys request release during appeal," March 11, 2022, https://abc7chicago.com/jussie-smollett-sentencing-verdict-cook-county-jail-sentence-outburst/11641911.

"particularly hit with the Covid pandemic at every wave of the pandemic." *Id.* ¶¶ 3–5. In one vaguely worded and perfunctory conclusion, Dr. Freeman then concludes that jail poses a "heightened danger" to Mr. Smollett "when taking his current health status, including compromised immunity, into account." *Id.* ¶ 6. The basis for Dr. Freeman's opinion is left entirely unknown. There is no information at all regarding how Mr. Smollett's immunity is compromised, to what extent it is compromised, or to what degree Covid-19 may pose a risk to that condition. In fact, Dr. Freeman does not even state that examined the Mr. Smollett or reviewed any of his medical records or medical history.

Further, the Cook County Jail has taken significant measures to mitigate the risk of the spread of Covid-19 within the jail.[8] Indeed, after the Cook County Jail initially suffered a large outbreak at the onset of the pandemic, the CDC found that the Cook County Jail implemented "[a]ggressive intervention strategies" that limited the introduction and mitigated transmission of Covid-19 in the jail.[9] As of March 15, 2022, the most up-to-date information as of this filing, there are only 13 detainees in custody at Cook County Jail that are currently positive for Covid-19.[10] In short, Mr. Smollett offers no supported, particularized reason as to why he—as opposed to any other convicted defendant sentenced to imprisonment—should avoid serving his sentence pending appeal due to Covid-19.

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[8] *See Cook County Sheriff's Office*, "COVID-19 Cases at CCDOC," updated March 15, 2022, https://www.cookcountysheriff.org/coronavirus/covid-19-cases-at-ccdoc/#:~:text=12%20detainees%20in%20custody%20at,receiving%20treatment%20at%20local%20hospitals.

[9] *See medRxiv* "Outbreach of COVID-19 and Interventions in One of the Largest Jails in the United States – Cook County, IL, 2020," https://www.medrxiv.org/content/10.1101/2020.07.12.20148494v1.

[10] *Supra* n.8, https://www.cookcountysheriff.org/coronavirus/covid-19-cases-at-ccdoc/#:~:text=12%20detainees%20in%20custody%20at,receiving%20treatment%20at%20local%20hospitals.

III. The alleged legal issues were exhaustively briefed at multiple stages in front of multiple courts, including the Illinois Supreme Court and the trial court, and Mr. Smollett offers no specific reason for calling any rulings into question while he serves his sentence

In proclaiming this is a "meritorious appeal" with "substantial appellate issues," the Emergency Motion cites to and attaches certain pre-trial motions, as well as his post-trial motion, (*see* Mot. at ¶¶ 15–18, Exs. 3–4), but does not offer any specifics as to how any of the trial court's rulings are in error or would warrant a stay of Mr. Smollett's sentence. Worse, the Emergency Motion omits both the full-briefing (including responses by the OSP) and the trial court's rulings on those motions—even though Mr. Smollett had the full briefing and rulings when the Emergency Motion was filed. For this Court's benefit in ruling on the Emergency Motion, the OSP briefly supplements the record with the procedural history outlined below and provides the Court with the full briefing and the trial court's rulings on these issues in the Supporting Record.

The special grand jury returned a true bill and the OSP filed an indictment on February 11, 2020, charging Mr. Smollett with six counts of disorderly conduct, namely making false police reports in violation of 720 ILCS 5/26-1(a)(4).

On February 24, 2020—the day of Mr. Smollett's arraignment—Mr. Smollett filed two emergency motions before the Illinois Supreme Court: (1) "Emergency Motion to Stay Proceedings;" and (2) "Emergency Motion for Supervisory Order Pursuant to Rule 383 and Movant's Explanatory Suggestions in Support of the Motion." SR0001–SR0038. In the latter emergency motion, Mr. Smollett challenged the OSP's appointment and asked the Illinois Supreme Court to both (1) vacate Judge Michael B. Toomin's June 21, 2019 order in Case No. 19 MR 00014 granting the appointment of a special prosecutor, and (2) vacate Judge Toomin's August 23, 2019 order appointing Dan. K. Webb as Special Prosecutor. *See* SR0012. The OSP filed responses in opposition to Mr. Smollett's emergency requests for relief before the Illinois

Supreme Court. SR0039–SR0070. On March 6, 2020, in two one-page orders, the Illinois Supreme Court denied both of Mr. Smollett's emergency motions. SR0071, SR0072.

Also on February 24, 2020, before the trial court, Mr. Smollett filed a "Motion to Dismiss Indictment for Violation of Defendant's Right Against Double Jeopardy." *See* Mot. at Ex. 3. The OSP submitted a response in opposition, and also filed a sur-reply in light of Mr. Smollett's 34-page reply brief. SR0073–SR0239. The trial court heard oral argument on June 12, 2020 and denied the motion in a lengthy ruling from the bench. SR0241–SR0295. Notably, Mr. Smollett did not file an interlocutory appeal under Illinois Supreme Court Rule 604(f) from the denial of the motion to dismiss on double jeopardy grounds.

On July 17, 2020, Mr. Smollett filed a lengthy second motion to dismiss challenging the appointment of the Special Prosecutor. SR0307–SR0331. The OSP filed a response in opposition on August 28, 2020. SR0332–0355. The trial court heard oral argument on that motion to dismiss and denied it on September 10, 2020. SR0363–SR0389.

Meanwhile, on September 9, 2020, Mr. Smollett filed a third motion to dismiss for alleged violations of Mr. Smollett's Fifth Amendment Due Process rights relating to the special grand jury. SR0407–SR0423. The OSP submitted another written response in opposition on October 1, 2020. SR0424–SR0445. In light of the motion to dismiss, the trial court reviewed the entirety of the grand jury transcripts *in camera*, and during a status hearing on October 30, 2020, found no basis to grant any relief for alleged errors relating to the special grand jury. SR0447–SR0454.

On October 13, 2021, Mr. Smollett filed a fourth motion to dismiss, arguing that he was protected from further prosecution because he had entered into a "non-prosecution immunity agreement" with the Cook County State's Attorney's Office in No. 19 CR 0310401. *See* Mot. at

Ex. 3b. The trial court heard oral argument on October 15, 2021, and denied the motion to dismiss during the hearing. SR0472–SR0487.

After a two-week jury trial, the jury returned a verdict of guilty on five of six counts of disorderly conduct charged in the indictment. On February 25, 2022, Mr. Smollett filed an 83-page post-trial motion seeking both judgment notwithstanding the verdict, or in the alternative, a new trial. *See* Mot. at Ex. 4. The post-trial motion incorporated all prior motions and rulings, including those mentioned above, and further alleged thirteen evidentiary and procedural errors pretrial and post-trial supposedly warranting relief. *Id.* The OSP submitted a written response in opposition on March 7, 2022. SR0490–SR0502. The trial court conducted a lengthy hearing on the post-trial motion on March 10, 2022, and after hearing argument from both the defense and the OSP, denied the post-trial motion.[11]

As is clear from the above, the alleged "substantial appellate issues" raised by Mr. Smollett were thoroughly litigated in the trial court and/or the Illinois Supreme Court, and both courts provided rulings based on extensive briefing by the parties. Simply because Mr. Smollett disagrees with both court's prior rulings is not a basis to stay his sentence or grant bail.

[11] *Supra* n.4, https://www.youtube.com/watch?v=81cLAL6plUo, at 1:27:20–3:07:05.

CONCLUSION

For the foregoing reasons, the OSP respectfully requests that this Court deny Mr. Smollett's Emergency Motion to Stay Sentence and/or to Grant Bail Pending Appeal.

Dated: March 16, 2022

Respectfully Submitted,

/s/ *Sean G. Wieber*

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No. 1-22-0322

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff–Appellee, v. JUSSIE SMOLLETT, Defendant–Appellant.	)	Appeal from the Circuit Court of Cook County, Illinois Circuit Court No. 20 CR 03050-01 The Honorable James B. Linn, Judge Presiding.

NOTICE OF FILING

Please take notice that on March 16, 2022, I, Sean G. Wieber, the undersigned attorney, caused The State's Response in Opposition to Defendant Jussie Smollett's Emergency Motion to Stay Sentence and/or to Grant Bail Pending Appeal to be electronically filed with the Clerk of the Appellate Court of Illinois for the First Judicial District.

Dated: March 16, 2022

Respectfully submitted,

/s/ Sean G. Wieber
Deputy Special Prosecutor

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PROOF OF FILING AND SERVICE

Under the penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and correct. On March 16, 2022, the foregoing State's Response in Opposition to Defendant Jussie Smollett's Emergency Motion to Stay Sentence and/or to Grant Bail Pending Appeal, was electronically filed with the Clerk, Illinois Appellate Court for the First Judicial District, and served upon the following by email:

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No. 1-22-0322

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff–Appellee, v. JUSSIE SMOLLETT, Defendant–Appellant.	)	Appeal from the Circuit Court of Cook County, Illinois Circuit Court No. 20 CR 03050-01 The Honorable James B. Linn, Judge Presiding.

SUPPORTING RECORD

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October 1, 2020	OSP's Response in Opposition to Defendant's Motion to Dismiss Indictment for Alleged Violation of Fifth Amendment Due Process Rights, Case No. 20 CR 03050-01	SR0424-SR0445
October 30, 2020	Report of Proceedings of the October 30, 2020 Hearing before Judge James B. Linn Circuit Court of Cook County, Criminal Division, Case No. 20 CR 03050-01	SR0446-SR0469
October 15, 2021	Report of Proceedings of the October 15, 2021 Hearing before Judge James B. Linn Circuit Court of Cook County, Criminal Division, Case No. 20 CR 03050-01	SR0470-SR0489
March 7, 2022	OSP's Opposition to Defendant's Motion for Judgment Notwithstanding the Verdict and Motion for New Trial, Case No. 20 CR 03050-01	SR0490-SR0502

No. 1-22-0322

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff–Appellee, v. JUSSIE SMOLLETT, Defendant–Appellant.	)	Appeal from the Circuit Court of Cook County, Illinois Circuit Court No. 20 CR 03050-01 The Honorable James B. Linn, Judge Presiding.

AFFIDAVIT OF SEAN G. WIEBER

I, Sean G. Wieber, having personal knowledge of the following facts, state as follows under penalty of perjury pursuant to 735 ILCS 5/1-109.

1. My name is Sean G. Wieber. I am an attorney licensed to practice law before the Courts of Illinois. I served as Deputy Special Prosecutor in *People of the State of Illinois v. Smollett*, Case No 20 CR 03050-01, before the Honorable Judge James B. Linn, and continue to serve as Deputy Special Prosecution in this case. I assist Dan K. Webb who was appointed Special Prosecutor in the instant action on August 23, 2019.

2. I submit this Affidavit in Support of The State's Response in Opposition to Defendant's Emergency Motion to Stay Sentence and/or Grant Bail Pending Appeal. This Affidavit is submitted to authenticate documents in the Supplemental Supporting Record in accordance with Supreme Court Rules 328 and 610.

3. In compiling this Supporting Record, I have reviewed the pleadings and transcripts of proceedings in this matter and selected those that bear on the merits of Defendant's Emergency

Motion to Stay Sentence and/or Grant Bail Pending Appeal but were not included as part of that filing.

4. Included in the Supporting Record at SR0001-SR0038 is a true and correct copy of Emergency Motion to Stay Proceedings and Emergency Motion for Supervisory Order Pursuant to Rule 383 and Movant's Explanatory Suggestions in Support of the Motion, filed on February 24, 2020 in Case No. 125790 (Illinois Supreme Court).

5. Included in the Supporting Record at SR0039-SR0070 is a true and correct copy of OSP's Response in Opposition to Emergency Motion to Stay Proceedings and Emergency Motion for Supervisory Order Pursuant to Rule 383, filed on February 24, 2020 in Case No. 125790 (Illinois Supreme Court).

6. Included in the Supporting Record at SR0071-SR0072 is a true and correct copy of the Orders from Illinois Supreme Court denying Emergency Motion to Stay Proceedings and Emergency Motion for Supervisory Order Pursuant to Rule 383, filed on February 24, 2020 in Case No. 125790 (Illinois Supreme Court).

7. Included in the Supporting Record at SR0073-SR0239 is a true and correct copy of the OSP's Response in Opposition to Motion to Dismiss Indictment for Alleged Violation of Defendant's Right Against Double Jeopardy filed on March 24, 2020; Defendant's Reply filed on May 20, 2020; and the OSP's Sur-Reply in Opposition filed on June 5, 2020 in Case No. 20 CR 03050-01.

8. Included in the Supporting Record at SR0240-SR0306 is a true and correct copy of the Report of Proceedings of the June 12, 2020 Hearing before Judge James B. Linn Circuit Court of Cook County, Criminal Division, Case No. 20 CR 03050-01.

9. Included in the Supporting Record at SR0307-SR0331 is a true and correct copy of Defendant's Motion to Dismiss Indictment and Memorandum of Law in Support filed on July 17, 2020 in Case No. 20 CR 03050-01.

10. Included in the Supporting Record at SR0332-SR0355 is a true and correct copy of the OSP's Response in Opposition to Defendant's Motion to Dismiss Indictment filed on August 28, 2020 in Case No. 20 CR 03050-01.

11. Included in the Supporting Record at SR0356-SR0406 is a true and correct copy of the Report of Proceedings of the September 10, 2020 Hearing before Judge James B. Linn Circuit Court of Cook County, Criminal Division, Case No. 20 CR 03050-01.

12. Included in the Supporting Record at SR0407-SR0423 is a true and correct copy of Defendant's Motion to Quash and Dismiss Indictment for Violation of Defendant's Fifth Amendment Due Process Rights filed on September 9, 2020 in Case No. 20 CR 03050-01.

13. Included in the Supporting Record at SR0424-SR0445 is a true and correct copy of the OSP's Response in Opposition to Defendant's Motion to Dismiss Indictment for Alleged Violation of Fifth Amendment Due Process Rights filed on October 1, 2020 in Case No. 20 CR 03050-01.

14. Included in the Supporting Record at SR0446-SR0469 is a true and correct copy of Report of Proceedings of the October 30, 2020 Hearing before Judge James B. Linn Circuit Court of Cook County, Criminal Division, Case No. 20 CR 03050-01.

15. Included in the Supporting Record at SR0470-SR0489 is a true and correct copy of Report of Proceedings of the October 15, 2021 Hearing before Judge James B. Linn Circuit Court of Cook County, Criminal Division, Case No. 20 CR 03050-01.

16. Included in the Supporting Record at SR0490-SR0502 is a true and correct copy of the OSP's Opposition to Defendant's Motion for Judgment Notwithstanding the Verdict and Motion for New Trial filed on March 7, 2022 in Case No. 20 CR 03050-01.

Dated: March 16, 2022 */s/ Sean G. Wieber*

By: Sean G. Wieber
Deputy Special Prosecutor

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Carolyn Taft Grosboll
SUPREME COURT CLERK

No. _____

IN THE
SUPREME COURT OF ILLINOIS

JUSSIE SMOLLETT,	)	Appeal from the Circuit Court of Cook
	)	County, Illinois, County Department
Movant,	)	Criminal Division
	)	
	)	Circuit Court No.
v.	)	No. 19 MR 00014
	)	
	)	
THE HON. MICHAEL P. TOOMIN,	)	The Honorable
	)	Michael P. Toomin,
Respondent.	)	Judge Presiding.

EMERGENCY MOTION TO STAY PROCEEDINGS

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Movant Jussie Smollett, by his attorneys, respectfully requests that the Court enter a stay of the proceedings against Movant in the matter 20 CR 03050-01, until its disposition of Movant's Motion for Supervisory Order. In further support of the Emergency Motion for Stay, Plaintiffs state as follows:

INTRODUCTION

Movant has sought a Supervisory Order from the Court to vacate the Orders of June 21, 2019 and Order of August 23, 2019, entered by Respondent, Honorable Michael Toomin, that appointed a special prosecutor and subsequently appointed Daniel Webb as the special prosecutor with an overly broad delegation of authority and contrary to the requirements of Illinois law. *See* 55 ILCS 5/3-9008. The Orders that are subject of the Motion for Supervisory Order have led to the second indictment of Movant and the filing of additional charges against him in the matter, 20 CR 03050-01. Mr. Smollett faces an arraignment on February 24, 2019.

As set forth in the Motion for Supervisory Order and Suggestions in Support, the law is clear that Respondent exceeded its authority by appointing a special prosecutor so that the resulting indictment of Mr. Smollett, on the same charges that were dismissed by the State's Attorney, are improper. Thus, any and all actions resulting from the improper appointment of a special prosecutor are void so that the charges in matter No. are also improper. A stay is necessary to prevent the unlawful, second prosecution of Movant, based on the improper appointment of a special prosecutor, while the Court considers Movant's Motion for Supervisory Order.

PROCEDURAL HISTORY

On January 29, 2019, Mr. Smollett was the victim of a racist and homophobic attack by two masked men. Although Mr. Smollett was initially treated as the victim of a hate crime, the Chicago Police Department later accused Mr. Smollett of staging the hate crime and filing a false police report and on March 7, 2019, a felony indictment was filed against Mr. Smollett in the Circuit Court of Cook County, case number 19 CR 3104, alleging 16 counts of disorderly conduct,

namely filing a false police report in violation of Chapter 720, Act 5, Section 26-1(a)(4) of the Illinois Compiled Statutes Act of 1992, as amended.

Subsequently, on March 26, 2019, the State's Attorney's Office moved to *nolle pros* all 16 counts. The Honorable Steven G. Watkins granted the motion and dismissed the case against Movant. The $10,000.00 bond Movant had posted was forfeited, as agreed by the parties.

On April 5, 2019, Sheila M. O'Brien, in *pro se*,[1] filed a Petition to Appoint a Special Prosecutor to preside over all further proceedings in the matter of the *People of the State of Illinois v. Jussie Smollett* (hereafter "Petition"). SR1[2]. On May 10, 2019, Judge Martin "transferred" the matter to Judge Michael Toomin of the Juvenile Justice Division.[3]

On June 21, 2019, Respondent issued a written order granting the appointment of a special prosecutor "to conduct an independent investigation of any person or office involved in all aspects of the case entitled the *People of the State of Illinois v. Jussie Smollett*, No. 19 CR 0310401, and if reasonable grounds exist to further prosecute Smollett, in the interest of justice the special prosecutor may take such action as may be appropriate to effectuate that result. Additionally, in the event the investigation establishes reasonable grounds to believe that any other criminal offense was committed in the course of the Smollett matter, the special prosecutor may commence the prosecution of any crime as may be suspected." SR51. On July 19, 2019, Movant Jussie Smollett filed four motions: (1) Motion for the Substitution for Cause of the Honorable Michael P. Toomin,

[1] Ms. O'Brien had no relation to the case; rather, she asserted standing based on her status as a resident of Cook County who was unsatisfied with the unexplained dismissal of charges against Mr. Smollett..

[2] Citations here are to the Supporting Record filed herewith.

[3] On May 2, 2019, the parties appeared before Judge LeRoy Martin, Jr. on the various motions that had been filed. During the hearing, Ms. O'Brien filed a suggestion of recusal based on recent media reports that Judge Martin's son works for the Cook County State's Attorney's Office as an Assistant State's Attorney. After argument by Ms. O'Brien and counsel, the court adjourned the hearing until May 10, 2019 so Judge Martin could read and consider Ms. O'Brien's suggestion of recusal and any response the State's Attorney's Office chose to file. The court subsequently found that recusal was unnecessary, but transferred the matter "in the interest of justice."

Judge Presiding, and for Appointment of Another Cook County Judge to Hear Concurrently Filed Motions; (2) Motion to Intervene Instanter; (3) Motion for Reconsideration of the June 21, 2019 Order Granting the Appointment of a Special Prosecutor; and (4) Motion to Disclose Transcripts of Grand Jury Testimony. SR74, SR83, SR93, SR246. The four motions were opposed by Petitioner Sheila O'Brien, SR265-SR309, and replied to by Mr. Smollett. SR315. On July 31, among other matters, Respondent denied Movant for leave to intervene. In its denial of the motion to intervene, Respondent stated:

> Post-judgment intervention is limited to situations where it is the only way of protecting the rights of the intervenor.'
>
> That is not applicable here for the reasons I earlier expressed, that it's not the -- has no direct effect upon the rights of the intervenor. ***These issues could be raised at any time if, in fact, Mr. Smollett was prosecuted.***

SR364 (emphasis added).

On August 23, 2019, over Movant's objection, Respondent appointed Dan K. Webb, a private attorney as the special prosecutor to preside over further proceedings in this matter. On February 11, 2020, pursuant to an investigation led by Mr. Webb, a special grand jury indicted Movant of six counts of disorderly conduct, namely filing a false police report in violation of Chapter 720, Act 5, Section 26-1(a)(4) of the Illinois Compiled Statutes Act of 1992, as amended. Movant's arraignment on the new indictment is scheduled on February 24, 2020.

ARGUMENT

Movants respectfully request that this Court stay proceedings in matter No. 20 CR 03050-01 pending the Court's consideration of the Motion for Supervisory Order. Subjecting Movant to a criminal prosecution that stems from an unlawful appointment of the special prosecutor will clearly create undue harm to Movant.

Typically, the issue of a stay arises when a stay is sought pending an appeal. In such cases, there is no exhaustive list of factors for a court to consider because "[t]here are numerous different factors which may be relevant when the court makes its determination and, by necessity, these factors will vary depending on the facts of the case." *Stacke v. Bates*, 138 Ill. 2d 295, 305 (1990). There is no "ritualistic formula" for a court to determine whether to grant a stay because "the court, of necessity, is engaged in a balancing process as to the rights of the parties, in which all elements bearing on the equitable nature of the relief sought should be considered." *Id.* at 308-09. "Factors to be considered in reaching a decision on a motion to stay include the orderly administration of justice and judicial economy." *Cullinan v. Fehrenbacher*, 2012 IL App (3d) 120005, ¶ 10.

Here, subjecting Movant to a second criminal prosecution creates a clear harm that, although not a controlling factor, "should be considered in light of the other factors." *Stacke*, 138 Ill. 2d at 307. Moreover, "the most persuasive factor … to which other courts often look, is the movant's likelihood of success on the merits." *Stacke*, 138 Ill. 3d at 306.

Respondent clearly exceeded its authority by appointing a special prosecutor so that the resulting charges against Movant are improper and the Court should enter a stay of the criminal proceedings pending resolution of the Motion for Supervisory Order. As set forth in the Motion for Supervisory Order, and incorporated herein by reference, Movant is likely to succeed on the merits of his Motion for a Supervisory Order. Respondent exceeded its authority by appointing a special prosecutor in violation of 55 ILCS 5/3-9008(a-15) because despite the clear requirements of subsection (a-15), the State's Attorney did not file a petition to recuse herself from the initial prosecution of Movant so that a special prosecutor could not lawfully be appointed on that basis. For this reason alone, the appointment of a special prosecutor was improper. In addition, Respondent ruled that the entire initial prosecution of Mr. Smollett was conducted without proper authority and therefore void. Such a ruling was without basis in fact or law. Movant is likely to succeed on the merits of its Motion for Supervisory Order.

Further, a stay will promote the administration of justice and judicial economy. In the event the Court grants the Motion for Supervisory Order, any resources expended in the criminal matter will be unnecessary. Thus, a stay would promote judicial economy.

CONCLUSION

WHEREFORE, for the foregoing reasons, Movant respectfully requests that the Court enter a stay of the proceedings in matter No 20 CR03050-01 pending its disposition of the Motion for Supervisory Order and enter any other relief the Court deems fair and just.

Dated: February 24, 2020

Respectfully submitted,

/s/ William J. Quinlan

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Attorneys for Jussie Smollett

No. _____

IN THE
SUPREME COURT OF ILLINOIS

JUSSIE SMOLLETT,	)	Appeal from the Circuit Court of Cook
	)	County, Illinois, County Department,
Movant,	)	Criminal Division
	)	
	)	Circuit Court No.
v.	)	No. 19 MR 00014
	)	
	)	
THE HON. MICHAEL P. TOOMIN,	)	The Honorable
	)	Michael P. Toomin,
Respondent.	)	Judge Presiding.

NOTICE OF FILING

To: See Certificate of Service

PLEASE TAKE NOTICE that on February 24, 2020, I caused the foregoing **Motion to Stay Proceedings; Supporting Record; and [Proposed] Order** to be electronically submitted with the Clerk of the Supreme Court of Illinois by using the Odyssey eFileIL system.

Dated: February 24, 2020

THE QUINLAN LAW FIRM

/s/ William J. Quinlan

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No. _____

IN THE
SUPREME COURT OF ILLINOIS

JUSSIE SMOLLETT,	)	Appeal from the Circuit Court of Cook
	)	County, Illinois, County Department,
Movant,	)	Criminal Division
	)	
	)	Circuit Court No.
v.	)	No. 19 MR 00014
	)	
	)	
THE HON. MICHAEL P. TOOMIN,	)	The Honorable
	)	Michael P. Toomin,
Respondent.	)	Judge Presiding.

CERTIFICATE OF SERVICE

William J. Quinlan, an attorney, certifies that on February 24, 2020, he caused the **Motion to Stay Proceedings; Supporting Record; and [Proposed] Order** to be electronically submitted to the Clerk of the Supreme Court of Illinois, by using the Odyssey eFileIL system.

He further certifies that on February 24, 2020, he caused the above-named filings to be served on the following parties as indicated below.

The Hon. Michael P. Toomin
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Chicago, Illinois 60608
(service via hand delivery)

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Court Appointed Special Prosecutor
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risa.lanier@cookcountyil.gov
(service via electronic mail)

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ William J. Quinlan
William J. Quinlan

No. _____

IN THE
SUPREME COURT OF ILLINOIS

JUSSIE SMOLLETT, Movant, v. THE HON. MICHAEL P. TOOMIN, Respondent.	)	Appeal from the Circuit Court of Cook County, Illinois, County Department, Criminal Division Circuit Court No. No. 19 MR 00014 The Honorable Michael P. Toomin, Judge Presiding.

ORDER

This matter coming to be heard on Movant's Emergency Motion to Stay Proceedings, and the Court having been fully advised in the premises, IT IS HEREBY ORDERED that further proceedings in matter No 20 CR03050-01 are immediately stayed pending disposition of the Motion for Supervisory Order.

Hereby entered the _____ day of February, 2020:

_____
JUSTICE

_____
JUSTICE

_____
JUSTICE

_____
JUSTICE

_____
JUSTICE

_____
JUSTICE

_____
JUSTICE

Prepared By:
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01

E-FILED
2/24/2020 12:34 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

No. _____

IN THE
SUPREME COURT OF ILLINOIS

JUSSIE SMOLLETT,	)	Appeal from the Circuit Court of Cook
	)	County, Illinois, County Department
Movant,	)	Criminal Division
	)	
	)	Circuit Court No.
v.	)	No. 19 MR 00014
	)	
	)	
THE HON. MICHAEL P. TOOMIN,	)	The Honorable
	)	Michael P. Toomin,
Respondent.	)	Judge Presiding.

EMERGENCY MOTION FOR SUPERVISORY ORDER PURSUANT TO RULE 383 AND MOVANT'S EXPLANATORY SUGGESTIONS IN SUPPORT OF THE MOTION

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EMERGENCY MOTION FOR SUPERVISORY ORDER

Pursuant to Supreme Court Rule 383, Movant Jussie Smollett ("Movant") respectfully requests that the Court issue a Supervisory Order compelling the Honorable Michael P. Toomin ("Respondent") to vacate the Order entered on June 21, 2019 granting the appointment of a special prosecutor and the Order entered on August 23, 2019 appointing Dan K. Webb as the special prosecutor. In further support of this Motion, Movant states as follows:

INTRODUCTION

1. Movant Jussie Smollett requests a Supervisory Order from the Court to vacate Respondent's Orders that appointed a special prosecutor contrary to the requirements of Illinois law and, in addition, vested the special prosecutor with overly broad duties that have now resulted in a second prosecution of Mr. Smollett, on identical charges that were previously *nolle prossed* by the duly-elected State's Attorney. Despite Mr. Smollett's clear interest in the underlying matter, Respondent denied Mr. Smollett's Petition for Intervention on the grounds that Mr. Smollett's interest was purely hypothetical. Mr. Smollett, now facing an arraignment on the second round of charges, has an actual and clear interest and seeks the Court's intervention.

2. Mr. Smollett is unable to obtain relief via typical appellate avenues so that a Supervisory Order from the Court is warranted. Indeed, on July 31, 2019, Respondent denied Mr. Smollett's request to intervene and reconsider the appointment of a special prosecutor, rulings that were not immediately appealable under Rule 301. The Special Prosecutor has now filed charges against Mr. Smollett. To the extent the second indictment of Mr. Smollett has terminated the proceedings in the underlying matter, an appeal would not afford Mr. Smollett adequate relief. Specifically, if a reviewing court were to reverse the denial of the Petition to Intervene, such an action would not specifically address the appointment of the Special Prosecutor which Mr. Smollett contends was improper and contrary to Illinois law. Thus, the extraordinary remedy of supervisory order is necessary.

REVLEVANT BACKGROUND

3. The renewed criminal prosecution giving rise to this Motion stems from a racist and homophobic attack on Movant Jussie Smollett on January 29, 2019 by two masked men. Although Mr. Smollett was initially treated as the victim of a hate crime, the Chicago Police Department later accused Mr. Smollett of staging the hate crime and filing a false police report.

4. On March 7, 2019, a felony indictment was filed against Mr. Smollett in the Circuit Court of Cook County, case number 19 CR 3104, alleging 16 counts of disorderly conduct, namely filing a false police report in violation of Chapter 720, Act 5, Section 26-1(a)(4) of the Illinois Compiled Statutes Act of 1992, as amended.

5. On March 26, 2019, the State's Attorney's Office moved to *nolle pros* all 16 counts. The Honorable Steven G. Watkins granted the motion and dismissed the case against Mr. Smollett. The $10,000.00 bond Mr. Smollett had posted was forfeited, as agreed by the parties. Judge Watkins also ordered the records in this matter sealed.[1]

6. At the time, this matter had drawn national attention and the sudden dismissal of all charges without proper explanation caused public confusion.

7. On April 5, 2019, Sheila M. O'Brien, in *pro se*,[2] filed a Petition to Appoint a Special Prosecutor to preside over all further proceedings in the matter of the *People of the State of Illinois v. Jussie Smollett* (hereafter "Petition"). SR1.

8. Movant and Cook County State's Attorney Kim Foxx both filed separate oppositions to the Petition. SR29 & SR37.

9. On May 10, 2019, Judge Martin transferred the matter to Respondent, the

[1] On May 23, 2019, Judge Watkins granted the Media Intervenors' "Emergency Motion to Intervene for Purposes of Objecting to and Vacating the Sealing Order," which had been filed on April 1, 2019. Mr. Smollett's records were unsealed on a rolling basis following the Court's May 23, 2019 Order.

[2] Ms. O'Brien had no relation to the case; rather, she asserted standing based on her status as a resident of Cook County who was unsatisfied with the unexplained dismissal of charges against Mr. Smollett.

Honorable Michael Toomin of the Juvenile Justice Division.[3]

10. On June 21, 2019, Respondent issued a written order granting the appointment of a special prosecutor. Specifically, Respondent appointed a prosecutor authorized as follows:

> "to conduct an independent investigation of any person or office involved in all aspects of the case entitled the People of the State of Illinois v. Jussie Smollett, No. 19 CR 0310401, and if reasonable grounds exist to further prosecute Smollett, in the interest of justice the special prosecutor may take such action as may be appropriate to effectuate that result. Additionally, in the event the investigation establishes reasonable grounds to believe that any other criminal offense was committed in the course of the Smollett matter, the special prosecutor may commence the prosecution of any crime as may be suspected."

SR51.

11. On July 19, 2019, Movant Jussie Smollett filed four motions: (1) Motion for the Substitution for Cause of the Honorable Michael P. Toomin, Judge Presiding, and for Appointment of Another Cook County Judge to Hear Concurrently Filed Motions; (2) Motion to Intervene Instanter; (3) Motion for Reconsideration of the June 21, 2019 Order Granting the Appointment of a Special Prosecutor; and (4) Motion to Disclose Transcripts of Grand Jury Testimony. SR74, SR83, SR93, SR246. Petitioner O'Brien opposed the motions and Mr. Smollett filed replies in support of his motions. SR315.

12. On July 31, 2019, the parties appeared before Respondent for a hearing on Mr. Smollett's motions. Respondent denied the motion for substitution of judge for cause. In doing so, Respondent stated:

> And for these reasons -- both of them, the lack of a valid affidavit and the fact that the bias and prejudice are shown by matters occurring within this proceeding -- I will deny the motion to transfer this case, and the motion for substitution of Judges

[3] On May 2, 2019, the parties appeared before Judge LeRoy Martin, Jr. on the various motions that had been filed. During the hearing, Ms. O'Brien filed a suggestion of recusal based on recent media reports that Judge Martin's son worked for the Cook County State's Attorney's Office as an Assistant State's Attorney. After argument by Ms. O'Brien and counsel, the court adjourned the hearing until May 10, 2019 so Judge Martin could read and consider Ms. O'Brien's suggestion of recusal and any response the State's Attorney's Office chose to file. The court subsequently found that recusal was unnecessary, but transferred the matter "in the interest of justice."

shall be and is hereby denied.[4]

SR349. (Tr. at 13)

13. As to the motion to intervene, Mr. Smollett, through counsel, argued that Mr. Smollett "should be entitled to intervene in a case that directly impacts him, in which [h]is interests are not represented, and in which constitutional concerns are raised." SR83. Respondent ruled that the appointment of counsel would not necessarily directly impact Mr. Smollett:

> THE COURT: You say directly impact him?
>
> MS. GLANDIAN: Correct.
>
> THE COURT: Seems to me, by recalling the granting of the prayer for relief, I indicated that the Special Prosecutor saw fit, if there was a reasonable ground to re-prosecute Mr. Smollett, and if it was in the interest of justice, that was within the purview of his grant of authority.
>
> I don't consider that to be a direct -- direct cause or effect upon Mr. Smollett. It is conditional. It could happen; it could not happen. But it's not a direct consequence of the authority to further prosecute him, if these contingencies are met.
>
> MS. GLANDIAN: And your Honor, I believe the law is -- may or will be bound. It's not will be bound, but it's may, may be bound. And so as your Honor just conceded, he may be bound if the Special Prosecutor determines that they believe it's appropriate to further prosecute him.
>
> THE COURT: Okay.
>
> MS. GLANDIAN: And so I think it's fundamentally unfair for him not to have an opportunity to raise these issues, and to actually visit the grounds upon which the Court even appointed the Special Prosecutor, which we believe is flawed, and again, I think it's in everyone's interest to actually address that motion on its merits and for the Court to look at that order again, and the basis on which it was granted.

SR356-SR357. (Tr. at 20-21)

[4] Mr. Smollett maintains that his motion for substitution of judge for cause was improperly denied because (1) an affidavit was not required where actual bias and prejudice could be established from the assertions in the Court's June 21, 2019 Order itself; (2) the affidavit by Mr. Smollett's counsel affirming the basis for the substitution of Judge Toomin for cause was adequate; and (3) despite his finding that no extrajudicial source was involved, the June 21, 2019 Order indicated that fair judgment was impossible.

14. Respondent later added: "One further issue I would like to address, and that is under the intervention statute, while the party need not have a direct interest in the pending suit to intervene, he must stand to gain or lose by direct legal operation and effect of the judgment in that suit. If his interest is speculative or hypothetical, this does not constitute sufficient evidence or sufficient interest to warrant intervention." SR367 (Tr. at 31).

15. In denying the motion to intervene, Respondent stated:

> Post-judgment intervention is limited to situations where it is the only way of protecting the rights of the intervenor.
>
> That is not applicable here for the reasons I earlier expressed, that it's not the – has no direct effect upon the rights of the intervenor. ***These issues could be raised at any time if, in fact, Mr. Smollett was prosecuted.***

SR364 (Tr. at 28) (emphasis added).

16. Accordingly, Respondent ruled: "The Court will deny the motion to intervene. Based upon that ruling, there is no basis to proceed with the motion for reconsideration, the Court having ruled that there is no right to intervene as is requested, and the -- also the motion to publish the Grand Jury transcript that was referred to in Counsel's pleadings." SR368 (Tr. at 32).

17. On August 23, 2019, over Mr. Smollett's objection, Respondent appointed Dan K. Webb, a private attorney as the special prosecutor to preside over further proceedings in this matter. SR370.

18. On February 11, 2020, pursuant to an investigation led by Mr. Webb, a special grand jury indicted Mr. Smollett of six counts of disorderly conduct, namely filing a false police report in violation of Chapter 720, Act 5, Section 26-1(a)(4) of the Illinois Compiled Statutes Act of 1992, as amended. The charges arise from the same January 29, 2019, attack on Mr. Smollett, which was previously the subject of a 16-count indictment against him in the Circuit Court of Cook County, case number 19 CR 3104 (filed on March 7, 2019 and dismissed on March 26, 2019). SR373

19. Movant's arraignment on the new indictment is scheduled on February 24, 2020.[5]

ARGUMENT

20. By appointing a special prosecutor, Respondent exceeded its jurisdiction because the circuit court lacked authority to essentially horizontally reverse the circuit court's dismissal of the case and to appoint a special prosecutor to "further prosecute" Mr. Smollett. As discussed herein and in the Suggestions filed in Support, the appointment of the special prosecutor failed to comply with applicable law, as established by section 3-9008 of the Counties Code. 55 ILCS 5/3-9008.

21. The appointment was contrary to Illinois law for numerous reasons. Section 3-9008 provides the legal framework within which a court may appoint a special prosecutor. Subsections (a-5) and (a-10) authorize the appointment of a special prosecutor on a petition by an interested person or on the court's motion in two discreet situations -- when the State's Attorney has a conflict of interest or when the State's Attorney is unable to fulfill his or her duties. Respondent ruled that neither of these circumstances existed.

22. Subsection (a-15) provides that a court shall appoint a special prosecutor when a State's Attorney files a petition for recusal. Despite the clear requirements of the statute and the undisputed fact that the State's Attorney did *not* file a petition, Respondent appointed a special prosecutor.

23. In addition, Respondent determined that all prior proceedings against Mr. Smollett were null and void. Such a ruling was without basis in fact or law and wholly undermines the appointment of a special prosecutor here.

24. Section 3-9008 of the Counties Code provides that before appointing a private attorney, the court shall first contact public agencies "to determine a public prosecutor's availability to serve as a special prosecutor at no cost to the county and shall appoint a public agency if they are able and willing to accept the appointment." 55 ILCS 5/3-9008 (a-20). Here,

[5] Concurrent with the filing of this Motion, Mr. Smollett is filing a Motion to Stay the criminal proceedings related to the second prosecution.

Respondent indicated that it had contacted numerous public agencies but that only three public prosecutors had advised him of their willingness to serve as the special prosecutor in this case. When counsel for Mr. Smollett objected to the appointment of Mr. Webb based on the fact that three public prosecutors were available for the appointment, Respondent stated that although the three public officials were willing to serve as the special prosecutor, it was his opinion that they were willing but not "able." Respondent failed to provide any explanation for his conclusion. Such action was in excess of the authority provided under the law.

25. The Court may issue a supervisory order "when the normal appellate process will not afford adequate relief and the dispute involves a matter important to the administration of justice." Ill. Sup. Ct. R. 383; *Burnette v. Terrell*, 232 Ill. 2d 522, 545 (2009) (citations omitted). Here, the Court's intervention under Rule 383 is necessary because the typical appellate process is unable to afford Movant meaningful relief. Mr. Smollett is facing imminent criminal prosecution, including an arraignment on February 24, 2020, based on invalid court orders and proceedings that resulted in an improper indictment. Moreover, as discussed above, Respondent denied Mr. Smollett leave to intervene in the proceedings so that relief under the typical appellate process would be limited to reversing the denial of Mr. Smollett's petition to intervene. A reversal of that Order would not necessarily vacate the appointment of the special prosecutor and additional proceedings would likely exist concurrently with the criminal prosecution of Mr. Smollett.

26. This unprecedented matter is important to the administration of justice. Due to the high profile of this case, by exceeding its jurisdiction and improperly appointing a special prosecutor with overly broad authority, Mr. Smollett has been harmed, but also the public interest and confidence in the integrity of the judiciary is implicated.

WHEREFORE, Movant respectfully requests that the Honorable Court grant his Motion for Supervisory Order and the following relief:

(1) the June 21, 2019 Order granting the appointment of a special prosecutor is vacated;

(2) the August 23, 2019 Order appointing Dan K. Webb as the special prosecutor is vacated;

(3) the indictment filed on February 11, 2020 against Mr. Smollett is vacated; and

(4) any further prosecution of Mr. Smollett for disorderly conduct arising from the January 29, 2019 attack based on the appointment of the Special Prosecutor is barred.

MOVANT'S EXPLANATORY SUGGESTIONS IN SUPPORT OF HIS MOTION FOR SUPERVISORY ORDER

The renewed prosecution of Mr. Smollett is truly unprecedented and stems from the improper appointment of a special prosecutor. Illinois law sets forth a clear framework that applies to the appointment of a special prosecutor, section 3-9008 of the Counties Code. 55 ILCS 5/3-9008Despite the fact that the statutory requirements set forth in section 3-9008(a-15) were not met, Respondent appointed a special prosecutor vested with overly broad authority. Tellingly, the Petition and the Order appointing the prosecutor concede that the appointment is based almost entirely on media reports and not on facts or evidence. [6]

Respondent exceeded its authority by appointing a special prosecutor under section 5/3-9008 (a-15) for several reasons. Although Respondent indicated that the appointment was premised on section 5/3-9008 (a-15), the statutory prerequisite for the appointment, namely the filing of a petition for recusal by the State's Attorney, was not met. The record is undisputed that

[6] Importantly, in ruling on the petition for the appointment of a special prosecutor, the court was not called upon to make a determination as to Mr. Smollett's guilt or innocence of the prior charges. Rather, the court was required to determine whether the evidence in support of the petition established the statutory criteria for the appointment of a special prosecutor in accordance with section 3-9008. The Petition wholly lacked factual evidence to support any findings as to Mr. Smollett's guilt. Rather, Petitioner O'Brien admitted that "[t]he evidence for this petition is what is reported in the press, not traditional evidence under oath." SR16. And the court essentially agreed that it relied heavily on media reports as support for the factual allegations in the petition. *See* SR52. ("Petitioner's factual allegations stem from a number of articles published in the Chicago Tribune, the Chicago Sun-Times and other newspapers as well as local broadcasts, together with Chicago Police Department reports and materials recently released by the State's Attorney's Office. Although the court recognizes that portions of these sources may contain hearsay rather than 'facts' within the semblance of a trial record, the materials provide a backdrop for consideration of the legal issues raised by the petition.").

the State's Attorney did not file a petition for recusal and therefore, on this basis alone, the appointment does not meet the criteria established in section 3-9008 (a-15). Respondent also improperly ruled that the State's Attorney lacked the power to delegate her authority to one individual, her first assistant, to be exercised in a particular, individual, criminal prosecution. It is well settled that the duly elected State's Attorney, Kim Foxx, was well within her rights to do so and such a delegation has previously been sanctioned by Illinois courts.

Respondent further exceeded its authority when it ruled that Ms. Foxx's informal "recusal" rendered the entirety of the proceedings--from Mr. Smollett's arrest to the dismissal of the charges against him--null and void. Indeed, even if there was no valid authority to prosecute Mr. Smollett, this would not nullify the prior proceedings because the right to be prosecuted by someone with proper prosecutorial authority is a personal privilege held here by Mr. Smollett who has not challenged that prosecution. On the contrary, the People of the State of Illinois were properly represented by an Assistant State's Attorney acting with the permission and authority of the State's Attorney at all times during the proceedings. By ruling that such proceedings were void, Respondent well exceeded its authority.

Finally, Respondent appointed a special prosecutor vested with impermissibly vague and overbroad authority. The Order failed to limit the investigation in any way or specify a date or event that would terminate the special prosecutor's appointment. Moreover, the broad prescription of authority to the special prosecutor, namely that the special prosecutor may "further prosecute" Mr. Smollett if reasonable grounds exist, is vague and overbroad.

Mr. Smollett respectfully submits that the Court should invoke its supervisory authority and enter an Order that requires the circuit court to vacate the June 21, 2019 and August 23, 2019 Orders entered in excess of its authority and to prevent the renewed prosecution of Mr. Smollett based on a misapplication of the law.

ARGUMENT

I. The Court Should Exercise Its Supervisory Authority to Vacate the Circuit Court Orders of June 21, 2019 and August 23, 2019 That Exceeded the Circuit Court's Authority.

Illinois Supreme Court Rule 383 authorizes the Court to exercise its broad supervisory authority over a lower court. *See* Ill. Sup. Ct. R. 383. In *People ex rel. Daley v. Suria*, the Supreme Court affirmed the breadth of its supervisory authority, stating that "[w]e may, under our supervisory authority, require a trial court to vacate orders entered in excess of its authority or as an abuse of discretionary authority." 112 Ill. 2d 26, 38 (1986) (citing *People ex rel. Ward v. Moran*, 54 Ill. 2d 552 (1973); *Doherty v. Caisley*, 104 Ill. 2d 72 (1984)). The Court may also exercise its supervisory authority when, as here, the normal appellate process will not afford adequate relief or where the dispute involves a matter important to the administration of justice. *See Burnette v. Terrell,* 232 Ill. 2d 522, 545 (2009) (citations omitted).

Here, all of these factors warrant that the Court exercise its supervisory authority. *First*, Respondent clearly exceeded its authority when it entered the June 21, 2019, and August 23, 2019, Orders. As set forth herein, although the statutory prerequisite for the appointment of a special prosecutor was not established, Respondent not only appointed a special prosecutor but in so doing, provided an overbroad and vague delegation of authority to the special prosecutor. By doing so, Respondent effectively rewrote the special prosecutor statute (55 ILCS 5/3-9008 (a-15)) and deprived the State's Attorney the discretion which the statute expressly grants the office. *Second*, the normal appellate process will not afford Mr. Smollett adequate relief because he is facing imminent criminal prosecution including an arraignment on February 24, 2020, that stems from the improper appointment of a special prosecutor. Respondent declined to allow Mr. Smollett to intervene and in so doing, did not consider the Motion for Reconsideration of the underlying appointment of a special prosecutor submitted by Mr. Smollett. Although Respondent indicated that Mr. Smollett's interest was merely a hypothetical interest, it cannot be disputed that Mr. Smollett now has a real interest. Nonetheless, review of the denial of the intervention would not provide relief at this time because the appointment of the special prosecutor has led to new charges against Mr. Smollett. *Third*, the unprecedented and unique manner in which the special prosecutor

was appointed impacts the administration of justice. The issues in this case implicate core constitutional values, including the presumption of innocence, right to a fair trial, and separation of powers. Due to the high profile of this case, by exceeding its authority, Respondent has harmed not only Mr. Smollett, but also threatens to undermine public confidence in the integrity of the judiciary and improperly divest the duly elected State's Attorney of the authority granted to the office. Mr. Smollett respectfully submits that the Court's intervention is thus critical.

A. Respondent Exceeded Its Authority by Finding that the State's Attorney Formally Recused Herself Under Section 3-9008(a-15) in Order to Appoint a Special Prosecutor.

Section 3-9008 (a-5), (a-10) and (a-15) provide three bases in which a court may exercise its discretion to appoint a special prosecutor. Respondent properly rejected the Petition to the extent it sought the appointment based on subsections (a-5) and (a-10) and exclusively relied on subsection (a-15) in its ruling. Specifically, in the June 21, 2019, Order, Respondent first rejected Petitioner's argument that State's Attorney Kim Foxx was unable to fulfill her duties stemming from her "familiarity with potential witnesses in the case." *See* SR62-SR63 Respondent also recognized that "Petitioner has failed to show the existence of an actual conflict of interest in the Smollett proceeding." SR64. Nonetheless, based on public statements and an internal memorandum by the Chief Ethics Officer stating that State's Attorney Foxx had "recused" herself from this matter, the court found that "a reasonable assumption exists" that State's Attorney Foxx had invoked a permissive recusal under 55 ILCS 5/3-9008 (a-15) which can be done for "any other reason he or she deems appropriate." *Id.* In so ruling, Respondent misapplied the law and exceeded its authority.

Although section 3-9008(a-15) provides that the court shall appoint a prosecutor when a State's Attorney files "a petition to recuse himself or herself from a cause or proceeding for any other reason he or she deems appropriate," Respondent specifically noted in its Order that State's Attorney Foxx never filed a petition for recusal or otherwise alerted the court of her recusal. *Id.* Importantly, and in opposition to the Petition, State's Attorney Foxx unambiguously stated that she did not intend to formally or legally recuse herself. Notwithstanding the State's Attorney's

position, Respondent nonetheless concluded that "[a] review of the record confirms our understanding that what was intended by Ms. Foxx, and what indeed occurred, was an unconditional legal recusal. Her voluntary act evinced a relinquishment of any future standing or authority over the Smollett proceeding. Essentially, she announced that she was giving up all of the authority or power she possessed as the duly elected chief prosecutor; she was no longer involved." SR65-SR66. Respondent failed to cite any authority to support its ruling that the informal use of the term "recusal" in a public statement and internal memorandum constituted an unconditional legal recusal under Illinois law to essentially strip the State's Attorney of any future standing or authority in the matter. The court's analysis is also deficient for the reasons outlined below.

1. The statutory prerequisite for the appointment of a special prosecutor was not met

Section 3-9008 (a-15), provides:

> Notwithstanding subsections (a-5) and (a-10) of this Section, ***the State's Attorney may file a*** petition ***to recuse himself or herself from a cause or proceeding*** for any other reason he or she deems appropriate and the court shall appoint a special prosecutor as provided in this Section.

55 ILCS 5/3-9008 (a-15) (emphasis added). It is undisputed that State's Attorney Foxx never filed any such petition for recusal in this case.

In interpreting a statute, the primary rule of statutory construction to which all other rules are subordinate is to ascertain and give effect to the true intent and meaning of the legislature. *Village of Cary v. Trout Valley Ass'n,* 282 Ill. App. 3d 165, 169 (2d Dist. 1996). In order to determine the legislative intent, courts must read the statute as a whole, all relevant parts must be considered, and each section should be construed in connection with every other section. *Id*. Courts should look to the language of the statute as the best indication of legislative intent, giving the terms of the statute their ordinary meaning. *Id.* A statute is to be interpreted and applied in the manner in which it is written, when it is permissible to do so under the Constitution, and is not to be rewritten by a court in an effort to render it consistent with the court's view of sound public policy. *Kozak v. Retirement Board of the Firemen's Annuity & Benefit Fund,* 95 Ill. 2d 211, 220

(1983) (citations omitted).

Section 3-9008 (a-15) provides that the State's Attorney ***may*** file a petition for recusal "for any other reason" he or she deems appropriate. The plain and unambiguous language of the statute indicates that the State's Attorney is not required to file such a petition but may do so in his or her discretion. In other words, the filing of such a petition is permissive, not mandatory. *See In re Estate of Ahmed,* 322 Ill. App. 3d 741, 746 (1st Dist. 2001) ("As a rule of statutory construction, the word 'may' is permissive, as opposed to mandatory.").

Here, not only did State's Attorney Foxx not file such a petition, but expressly stated that she did not intend to formally and legally recuse herself. Respondent's conclusion that notwithstanding her stated intent and the fact that a petition for recusal was not filed, "a reasonable assumption exists" that State's Attorney Foxx invoked a permissive recusal under section 3-9008 (a-15), SR64, ignores the permissive language of the statute and violates principles of statutory construction. By deeming the use of the word "recusal" in a public statement and internal memorandum as the equivalent of filing a petition for recusal under section 3-9008 (a-15), Respondent effectively rewrote the statute and deprived State's Attorney Foxx the discretion which the statute expressly grants her. And contrary to its ruling, any such informal statements did not effectuate a legal recusal by State's Attorney Foxx. *See, e.g., People v. Massarella,* 72 Ill. 2d 531, 538 (1978) ("At two separate arraignments, assistant State's Attorneys made noncommittal statements that the Attorney General was in charge of the case. These comments do not express, as the defendant urges, exclusion of or objection by the State's Attorney.").

Importantly, in the absence of a petition for recusal, Respondent should have ended its inquiry when it found that subsections (a-5) and (a-10) of the Section did not require the appointment of a special prosecutor. Unlike these two subsections which begin with the phrase, "The court on its own motion, or an interested person in a cause or proceeding, civil or criminal, may file a petition alleging . . .," subsection (a-15) contains no such clause. Thus, it is clear that the circuit court cannot appoint a special prosecutor pursuant to subsection (a-15) on its own motion or on the petition of an interested person. The only time subsection (a-15) is applicable is

when it is invoked by the State's Attorney—which was not done in this case.

The filing of a petition for recusal is a statutory prerequisite to the appointment of a special prosecutor under 55 ILCS 5/3-9008 (a-15). Because the statutory prerequisite was not met here, the trial court exceeded its authority in granting the appointment of a special prosecutor.

2. State's Attorney Foxx had the power to delegate her authority to her first assistant.

Respondent incorrectly asserted that by recusing herself and appointing Joe Magats as "the Acting State's Attorney for this matter," State's Attorney Foxx attempted to create an office which she did not have the authority to create. SR66. But Ms. Foxx did not attempt to create a new office nor did she appoint Joe Magats as a special prosecutor in this case. Rather, Ms. Foxx delegated her authority to one individual, her first assistant, to be exercised in a particular, individual, criminal prosecution. Such a delegation has been sanctioned by Illinois courts. *See, e.g., People v. Marlow,* 39 Ill. App. 3d 177, 180 (1st Dist. 1976) ("As illustrated by the evidence, the request procedure used in this case fully observed the 'strict scrutiny' admonition set forth in Porcelli. The State's Attorney of Cook County delegated his authority to one individual, his first assistant, to be used only when he himself was not available. This delegated power was exercised with discretion and care."); *see also Scott v. Ass'n for Childbirth at Home, Int'l,* 88 Ill. 2d 279, 299 (1981) ("Where a statute vests power in a single executive head, but is silent on the question of subdelegation, the clear majority view is that the legislature, 'understanding the impossibility of personal performance, impliedly authorized the delegation of authority to subordinates.'") (quoting 1 A. Sutherland, Statutory Construction § 4.14 (4th ed. 1972)).

None of the cases that Respondent relied on support the contention that State's Attorney Foxx could not delegate her authority to her first assistant. *People v. Munson*, 319 Ill. 596 (1925), and *People v. Dunson*, 316 Ill. App. 3d 760 (2d Dist. 2000), are inapplicable, as they involve the delegation of authority to ***unlicensed*** prosecutors. Here, State's Attorney Foxx turned the Smollett case over to her first assistant, Joe Magats, whom Judge Toomin describes as "an experienced and capable prosecutor." SR66.

Respondent also cites to *People v. Jennings*, 343 Ill. App. 3d 717 (5th Dist. 2003), *People*

v. Ward, 326 Ill. App. 3d 897 (5th Dist. 2002), and *People v. Woodall,* 333 Ill. App. 3d 1146 (5th Dist. 2002) as support for its position; however, those cases are readily distinguishable. All of those cases involved the delegation of power to attorneys from the State's Attorneys Appellate Prosecutor's office—not the first assistant, as was the case here. Unlike assistant state attorneys, "[a]ttorneys hired by the [State Attorney's Appellate Prosecutor's Office] are not constitutional officers. Their powers are derived from the statute that created them, and those powers are strictly limited by the authority conferred upon the Agency by our state legislators." *Woodall,* 333 Ill. App. 3d at 1149 (citing *Siddens v. Industrial Comm'n,* 304 Ill. App. 3d 506, 510-11 (4th Dist. 1999)). As one court explained, "the State's Attorneys Appellate Prosecutor's Act (Act) (725 ILCS 210/4.01 (West 1998)) provides specific instances in which attorneys employed by the State's Attorneys Appellate Prosecutor's office may represent the State, with the most obvious instance being when a case is on appeal." *Ward*, 326 Ill. App. 3d at 901. In each of these cases, attorneys from the appellate prosecutor's office exceeded their authority to prosecute **as prescribed by statute**. *See, e.g., id.* at 902 (because "[t]he Cannabis Control Act, under which defendant was prosecuted, is not expressly listed, . . . prosecution under this Act [was not] allowed by attorneys from the State's Attorneys Appellate Prosecutor's office"); *Jennings,* 343 Ill. App. 3d at 725 ("Section 4.01 of the Act does not specifically include a murder prosecution as an instance in which an employee of the appellate prosecutor's office may assist a county State's Attorney in the discharge of his or her duties."); *Woodall*, 333 Ill. App. 3d at 1149 (noting that the Act limits the types of cases in which attorneys from the State's Attorneys Appellate Prosecutor's office may assist local prosecutors in the discharge of their constitutionally based duties and concluding that the appointment process relied on by the State was flawed).

In contrast to the State Attorney's Appellate Prosecutor's office, the Court has explained that Assistant State's Attorneys are "officers for the performance of the general duties of the offices of state's attorney." *People ex rel. Landers v. Toledo, St. L. & W.R. Co.,* 267 Ill. 142, 146 (1915). Accordingly, "[a]n Assistant State's Attorney is generally clothed with all the powers and privileges of the State's Attorney; and all acts done by him in that capacity must be regarded as if

done by the state's attorney himself." *People v. Nahas,* 9 Ill. App. 3d 570, 575-76 (3d Dist. 1973) (citing 27 C.J.S. District and Pros. Attys. Sec. 30(1).) Indeed, "the legislative purpose in creating the office of Assistant State's Attorney (Sec. 18, c. 53, Ill.Rev.Stat.) was to provide an official who should have full power to act in the case of the absence or sickness of the State's Attorney, or in the case of his being otherwise engaged in the discharge of the duties of office, in the same manner and to the same extent that the State's Attorney could act, and we also believe that the General Assembly in using the term, 'a State's Attorney' did intend that an assistant could act." *Nahas,* 9 Ill. App. 3d at 576.

In *Office of the Cook County State's Attorney v. Ill. Local Labor Relations Bd.,* 166 Ill. 2d 296 (1995), the Court specifically discussed the statutory powers and duties of the Cook County State's Attorney and Assistant Cook County State's Attorneys. The Court held that the assistants were vested with the authority to exercise the power of the State's Attorney, played a substantial part in discharging the statutory mission of the State's Attorney's office, and acted as "surrogates for the State's Attorney" in performing the statutory duties of the State's Attorney. *Id.* at 303.

The General Assembly intended, and the cases have long held, that an Assistant State's Attorney legally has the same power to act on behalf of the State's Attorney either by virtue of the office of Assistant State's Attorney, or as specifically authorized by the State's Attorney, pertaining to (1) initiating criminal prosecutions against a person; (2) intercepting private communications; and (3) procedures that may result in a person being deprived of his or her liberty for life. *See, e.g., People v. Audi,* 73 Ill. App. 3d 568, 569 (5th Dist. 1979) (holding that an information signed by an Assistant State's Attorney rather than the State's Attorney himself was not defective); *People v. White,* 24 Ill. App. 2d 324, 328 (2d Dist. 1960), *aff'd*, 21 Ill. 2d 373 (1961) (rejecting defendant's argument that an Assistant State's Attorney does not have the power or authority to prosecute by information in his own name in the county court); *Nahas,* 9 Ill. App. 3d at 575-76 (holding that the authorization of an eavesdropping device by a First Assistant, rather than the State's Attorney, was proper because "[a]n Assistant State's Attorney is generally clothed with all the powers and privileges of the State's Attorney; and all acts done by him in that capacity

must be regarded as if done by the State's Attorney himself"); *Marlow,* 39 Ill. App. 3d at 180 (holding that the State's Attorney can delegate his authority to give eavesdropping consent to a specifically indicated individual); *People v. Tobias*, 125 Ill. App. 3d 234, 242 (1st Dist. 1984) (holding that an Assistant State's Attorney has the authority to sign a petition to qualify the defendant for a life sentence under the habitual criminal statute, which provides that such petition be "signed by the state's attorney").

Accordingly, Respondent mistakenly ruled that State's Attorney Foxx did not have the power to delegate authority in the Smollett matter to her first assistant, Joe Magats, and that by doing so, she invoked a permissive recusal under 55 ILCS 5/3-9008 (a-15), authorizing the appointment of a special prosecutor.

B. Even if There Was No Valid Commission to Prosecute Mr. Smollett, This Would Not Render the Prior Proceedings Null and Void Because Mr. Smollett Has Not Challenged the Allegedly Defective Commission to Prosecute.

Respondent exceeded its authority when it ruled that State's Attorney Foxx's informal "recusal" rendered the entirety of the proceedings—from Mr. Smollett's arrest to the dismissal of the charges against him—null and void. In the Order, Respondent concluded that because State's Attorney Foxx could not delegate her authority to her first assistant:

- There was no duly elected State's Attorney when Jussie Smollett was arrested;
- There was no State's Attorney when Smollett was initially charged;
- There was no State's Attorney when Smollett's case was presented to the grand jury, nor when he was indicted;
- There was no State's Attorney when Smollett was arraigned and entered his plea of not guilty; and
- There was no State's Attorney in the courtroom when the proceedings were *nolle prossed.*

SR70.

In an effort to somehow nullify the arrest, prosecution, and dismissal of charges against Mr. Smollett, Respondent relied on five cases: *People v. Jennings*, 343 Ill. App. 3d 717 (5th Dist. 2003), *People v. Ward,* 326 Ill. App. 3d 897 (5th Dist. 2002), *People v. Woodall,* 333 Ill. App. 3d 1146 (5th Dist. 2002), *People v. Munson*, 319 Ill. 596 (1925), and *People v. Dunson*, 316 Ill. App. 3d 760 (2d Dist. 2000). Significantly, none of these cases support the conclusion that the prior proceedings against Mr. Smollett are null and void. In the Order, Respondent quoted the following passage from *Ward*:

> If a case is not prosecuted by an attorney properly acting as an assistant State's Attorney, the prosecution is void and the cause should be remanded so that it can be brought by a proper prosecutor.

Ward, 326 Ill. App. 3d at 902. However, the court in *Woodall*—also relied upon by Respondent—actually distinguished *Ward* and *Dunson* and held that the defective appointment of special assistant prosecutors **did not nullify** the defendant's judgment of conviction in that case. *Woodall,* 333 Ill. App. 3d at 1161.

The court in *Woodall* began its analysis by explaining that "[t]here are only two things that render a judgment null and void. A judgment is void, and hence, subject to attack at any time, only when a court either exceeds its jurisdiction or has simply not acquired jurisdiction." *Id.* at 1156 (citing *People v. Johnson,* 327 Ill. App. 3d 252, 256 (4th Dist. 2002)). The court also noted that it failed "to comprehend how the prosecutors' flawed station in this case could serve to deprive the court of jurisdiction and thus void the defendant's convictions, when the prosecutorial pursuit of people actually placed twice in jeopardy could not." *Woodall,* 333 Ill. App. 3d at 1157. The court then went on to explain why neither *Ward* nor *Dunson* supports the proposition that a prosecution by attorneys who lacked the legal authority to act on the State's behalf would render the proceedings null and void. *Id.*

First, *Woodall* noted that *Ward* does not, in fact, stand for such a proposition: "The author of the *Ward* opinion cited the aged decision in a manner that warned that it did not exactly stand for the proposition stated. . . . [T]he term 'void' was not used in conjunction with a jurisdictional analysis, and a question over whether or not the trial court acquired jurisdiction was not

raised." *Woodall*, 333 Ill. App. 3d at 1157. The court further noted:

> *Ward* should not be read as the source of a novel jurisdictional rule that would void all convictions procured by licensed attorneys who, for whatever reason, mistakenly believe that they are authorized to act on the State's behalf and who are permitted to do so by those being prosecuted. Any defect in an attorney's appointment process or in his or her authority to represent the State's interests on a given matter is not fatal to the circuit court's power to render a judgment. The right to be prosecuted by someone with proper prosecutorial authority is a personal privilege that may be waived if not timely asserted in the circuit court.

Id. at 1159.

Second, *Woodall* distinguished *Dunson,* in which the court held that a prosecution by a prosecutor who did not hold an Illinois law license rendered the convictions void as a matter of common law. *Id.* at 1160. The *Woodall* court explained: "Our case is not one where the assistance rendered, even though it was beyond the statutory charter to assist, inflicted any fraud upon the court or the public. The State was represented competently by attorneys who earned the right to practice law in this state. There was no deception about their license to appear and represent someone else's interests in an Illinois courtroom." *Id.* at 1160-61.[7]

As noted above, *Woodall* held that "the right to be prosecuted by someone with proper prosecutorial authority is ***a personal privilege*** that may be waived if not timely asserted in the circuit court." *Woodall*, 333 Ill. App. 3d at 1159 (emphasis added). Thus, if there, in fact, had been a defect in the authority to prosecute Mr. Smollett, the only person who could properly challenge the validity of the proceedings would be Mr. Smollett--and he has not done so.

Although *Woodall* held that the State's Attorney did not have the authority to unilaterally create a special assistant office by appointing attorneys employed by State's Attorney's Appellate Prosecutor's office to conduct trial on his behalf without county board approval, it nonetheless found that the defective appointment of the special assistant prosecutors did not nullify the defendant's judgment of conviction. *Woodall,* 333 Ill. App. 3d at 1161. The court explained:

[7] *Dunson* relied heavily on *Munson*, an older case from 1925. Although *Woodall* did not separately address *Munson*, that case also involved the unauthorized practice of law and is distinguishable for the same reasons as *Dunson*.

> The defendant has not attempted to demonstrate the harm visited upon him by his prosecutors' defective commission to prosecute. For that matter, he does not even claim that anything evil or wrong occurred in the process to verdict other than that defect. To the extent that the Agency attorneys' lack of proper authority to prosecute somehow inflicted injury, it was a wound that the defendant invited by allowing their presence to go unchallenged. We find no reason to overturn the defendant's convictions.

Id. Here, like in *Woodall*, because any such defect has gone unchallenged by Mr. Smollett, there is no basis on which the court can void the proceedings in this case.

Similarly, in *Jennings*, relied on by Respondent, the court held that although the attorney who tried the case for the State did not have the authority to prosecute the defendant, the defendant waived his right to challenge the defective commission of the attorney. *People v. Jennings,* 343 Ill. App. 3d 717, 727 (5th Dist. 2003). *Jennings* explained: "The defendant does not argue and the record does not indicate that he was harmed by Lolie's prosecution. At no time in the proceedings did the defendant object to the trial court's recognition of Lolie as a prosecutor. The defendant, therefore, waived his right to challenge Lolie's defective commission to prosecute." *Id.*

An analysis of the cases which Respondent relied on illustrates that Respondent erroneously ruled that that the entirety of the proceedings--from Mr. Smollett's arrest to the dismissal of the charges against him--are null and void. On the contrary, the record supports the conclusion that the People of the State of Illinois were properly represented by an Assistant State's Attorney acting with the permission and authority of the State's Attorney at all times during the proceedings.

C. The Appointment Was Vague and Overbroad.

The Order's broad prescription of authority to the special prosecutor, namely that the special prosecutor may "further prosecute" Mr. Smollett if reasonable grounds exist, is unquestionably vague and overbroad. SR71. If it was intended that such further prosecution could only be the result of some potential new discovery of wrongdoing by Mr. Smollett during the pendency of the case (which does not exist), this should have been clarified in the Order. But if the court intended to authorize the special prosecutor to further prosecute Mr. Smollett for filing a

false police report on January 29, 2019 (as alleged in the indictment that was thereafter dismissed), then the Order is overbroad and vague as to this critical issue.

Furthermore, the Order does not limit the investigation in any way or specify a date or event that would terminate the special prosecutor's appointment. Illinois courts have held that such a deficiency renders the appointment vague and overbroad. *See, e.g., In re Appointment of Special Prosecutor,* 388 Ill. App. 3d 220, 233 (3d Dist. 2009) ("The order's definition of the scope of the subject matter and the duration of Poncin's appointment is vague in that it does not specify an event for terminating the appointment or the injunction. The circuit court should not have issued the appointment without a specific factual basis, and the court should have more clearly limited the appointment to specific matters. Under the circumstances, we view the circuit court's prescription of Poncin's authority to be overbroad and, therefore, an abuse of discretion.").

II. The Harm to Movant Cannot Be Remedied Through the Normal Appellate Process.

The Court should issue a supervisory order '"when the normal appellate process will not afford adequate relief and the dispute involves a matter important to the administration of justice."' *Burnette*, 232 Ill. 2d at 545 (citation omitted); *see e.g. Delgado v. Bd. of Election Comm'rs of City of Chicago*, 224 Ill. 2d 481, 481, 488-89 (2007) (finding that "direct and immediate action [was] necessary" to remove a candidate from a ballot where there was an impending election).

Here, Mr. Smollett sought leave to intervene and filed a motion to reconsider the appointment of a special prosecutor. Respondent denied Mr. Smollett leave to intervene and such a ruling was not immediately appealable. Pursuant to Respondent's overly broad appointment, the special prosecutor convened a special grand jury which returned a six-count indictment against Mr. Smollett on February 11, 2020. An appeal of the denial of intervention would not provide Mr. Smollett adequate relief because a reversal of that order does not necessarily implicate the appointment of the special prosecutor and the resulting charges against Mr. Smollett that result from the improper appointment. Mr. Smollett submits that Respondent appointed the Special Prosecutor in a manner that exceeded its authority and was contrary to Illinois law so that review of such orders via supervisory order is warranted. Further, because Mr. Smollett is facing imminent

criminal prosecution, with an arraignment on February 24, 2020, the normal appellate process will not afford adequate relief to Mr. Smollett. The only adequate remedy will be the immediate intervention of this Court through the exercise of its unique supervisory powers.

CONCLUSION

For the foregoing reasons, Movant Jussie Smollett respectfully requests that his Emergency Motion for Supervisory Order be granted and that this Court order Respondent to vacate the June 21, 2019 Order appointing a special prosecutor, to vacate the August 23, 2019 Order appointing Dan K. Webb as the special prosecutor, to dismiss the indictment filed against Mr. Smollett on February 11, 2010, and to vacate all further proceedings in that matter.

Dated: February 24, 2020.

Respectfully submitted,

/s/ William J. Quinlan

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No. _____

IN THE
SUPREME COURT OF ILLINOIS

JUSSIE SMOLLETT,	)	Appeal from the Circuit Court of Cook
	)	County, Illinois, County Department,
Movant,	)	Criminal Division
	)	
	)	Circuit Court No.
v.	)	No. 19 MR 00014
	)	
	)	
THE HON. MICHAEL P. TOOMIN,	)	The Honorable
	)	Michael P. Toomin,
Respondent.	)	Judge Presiding.

NOTICE OF FILING

To: See Certificate of Service

PLEASE TAKE NOTICE that on February 24, 2020, I caused the foregoing **Emergency Motion for Supervisory Order and Movant's Explanatory Suggestions in Support of His Motion for Supervisory Order, Supporting Record and [Proposed] Supervisory Order** to be electronically submitted with the Clerk of the Supreme Court of Illinois by using the Odyssey eFileIL system.

Dated: February 24, 2020

THE QUINLAN LAW FIRM, LLC

/s/ William J. Quinlan

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No. _____

IN THE
SUPREME COURT OF ILLINOIS

JUSSIE SMOLLETT,	)	Appeal from the Circuit Court of Cook
	)	County, Illinois, County Department,
Movant,	)	Criminal Division
	)	
	)	Circuit Court No.
v.	)	No. 19 MR 00014
	)	
	)	
THE HON. MICHAEL P. TOOMIN,	)	The Honorable
	)	Michael P. Toomin,
Respondent.	)	Judge Presiding.

CERTIFICATE OF SERVICE

William J. Quinlan, an attorney, certifies that on February 24, 2020, he caused the **Notice of Filing, Emergency Motion for Supervisory Order and Movant's Explanatory Suggestions in Support of His Motion for Supervisory Order, Supporting Record and [Proposed] Supervisory Order** to be electronically submitted to the Clerk of the Supreme Court of Illinois, by using the Odyssey eFileIL system.

The Hon. Michael P. Toomin
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He further certifies that on February 24, 2020, he caused the above-named filings to be served on the following parties as indicated above.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ William J. Quinlan

No. _____

IN THE
SUPREME COURT OF ILLINOIS

JUSSIE SMOLLETT,	)	Appeal from the Circuit Court of Cook
	)	County, Illinois, County Department,
Movant,	)	Criminal Division
	)	
	)	Circuit Court No.
v.	)	No. 19 MR 00014
	)	
	)	
THE HON. MICHAEL P. TOOMIN,	)	The Honorable
	)	Michael P. Toomin,
Respondent.	)	Judge Presiding.
	)	

SUPERVISORY ORDER

This matter coming to be heard on Movant's Emergency Motion for Supervisory Order, and the Court having been fully advised in the premises, IT IS HEREBY ORDERED that:

1. the June 21, 2019 Order granting the appointment of a special prosecutor is vacated;
2. the August 23, 2019 Order appointing Dan K. Webb as the special prosecutor is vacated;
3. the indictment filed on February 11, 2020 against Mr. Smollett is vacated; and
4. any further prosecution of Mr. Smollett for disorderly conduct arising from the January 29, 2019 attack is barred.

Hereby entered the _____ day of February, 2020:

_____ JUSTICE

_____ JUSTICE

_____ JUSTICE

_____ JUSTICE

_____ JUSTICE

_____ JUSTICE

_____ JUSTICE

Prepared By:

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No. 125790

IN THE SUPREME COURT OF ILLINOIS

JUSSIE SMOLLET, Movant, THE HON. MICHAEL P. TOOMIN, Respondent,	))))))))))	Appeal from the Circuit Court of Cook County, Illinois, County Department Criminal Division No. 19 MR 00014-01 The Honorable Michael P. Toomin, Presiding

THE OFFICE OF THE SPECIAL PROSECUTOR'S RESPONSE IN OPPOSITION TO MOVANT'S EMERGENCY MOTION TO STAY PROCEEDINGS

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The Office of the Special Prosecutor ("OSP") respectfully requests that the Court deny Movant Jussie Smollett's Emergency Motion to Stay Proceedings ("Motion to Stay"), filed in this Court on February 24, 2020. In support of this response, the OSP states as follows:[1]

1. Mr. Smollett asks this Court to stay the ongoing criminal proceedings in Case No. 20 CR 03050-01 pending this Court's disposition of his Emergency Motion for a Supervisory Order ("Motion for Supervisory Order"). The OSP opposes Mr. Smollett's Emergency Motion for a Supervisory Order, and has filed a response in opposition to that Motion simultaneously with this response, which it fully incorporates herein.

2. Illinois Supreme Court Rule 609 is the only criminal rule relating to stays in criminal proceedings. Rule 609(b) states, in relevant part:

> On appeals ***in other cases*** [besides those where the defendant is sentenced to imprisonment or probation] the judgment or ***order*** may be stayed by a judge of the trial or reviewing court, with or without bond.

Ill. S. Ct. R. 609(b) (emphasis added).

3. Mr. Smollett's Motion to Stay did not cite to Rule 609. Instead, Mr. Smollett notes that "the issue of a stay arises when a stay is sought pending an appeal" (Motion to Stay at 4), and cites two cases discussing relevant considerations of a motion to stay in ***civil cases pursuant to Supreme Court Rule 305***. *Id.* (citing and quoting *Stacke v. Bates*, 138 Ill. 2d 295, 305 (1990) and *Cullinan v. Fehrenbacher*, 2012 IL App (3d) 120005, ¶ 10). Those cases are inapplicable here, as Mr. Smollett seeks to stay separate ongoing criminal proceedings—not a civil judgment—albeit via filing within the confines of a civil matter captioned above.

[1] Citations to "SR" are to the Supporting Record filed with both of Movant's Emergency Motions. Citations to "Sup SR" are to the Supplemental Supporting Record filed concurrently herewith.

4. While the OSP has been unable to find any authority articulating a standard that should govern the review of Mr. Smollett's Motion to Stay ongoing criminal proceedings under Rule 609(b),[2] this Court has said that it "has not restricted the authority granted by the rule" and that appellate courts do have the power to issue such stays. *People ex rel. Rice v. Appellate Court, Fifth Dist.*, 48 Ill. 2d 195, 197 (1971).

5. However, most importantly for present purposes, regardless of whether Rule 305 or 609(b) applies, Mr. Smollett has not identified a sufficient basis to stay his pending criminal case.

6. In fact, beyond stating in a conclusory fashion that a stay would promote the administration of justice and judicial economy, Mr. Smollett proffers no reason to stay his ongoing criminal prosecution other than his assertion that he "is likely to succeed on the merits of [his] Emergency Motion for Supervisory Order." Motion to Stay at 4. While likelihood of success is a standard often invoked in evaluating motions to stay proceedings in the civil context, *see Stacke*, 138 Ill. 2d at 306, Mr. Smollett's perceived likelihood of success does not warrant this Court's invention in ongoing criminal proceedings that have different considerations, including constitutional concerns like the Speedy Trial Act (725 ILCS 5/103-5).[3] Furthermore, even if the civil standard applied here, likelihood of success on its own is not necessarily sufficient to grant a stay but rather is, as Mr. Smollett notes, one of the factors a court would consider. Motion to Stay at 4.

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[2] The OSP's review of the case law under Rule 609 deals almost exclusively with stays pending a conviction and the imposition of a sentence, which are governed by Rule 609(a).

[3] Notably, Mr. Smollett's counsel indicated to the trial judge at arraignment that Mr. Smollett may assert his right to a speedy trial and, in fact, initially asserted a trial demand—though, moments later, he opted to take that request back for the time being. Sup SR 053-054.

7. Moreover, Mr. Smollett's mere assertion that he is likely to prevail on the merits does not make it so. And, in fact, his Motion for a Supervisory Order is procedurally and legally deficient and should be denied, as fully articulated in the OSP's concurrently filed Response in Opposition to the Motion for Supervisory Order (incorporated herein by reference). Among other things, as detailed in that filing, this Court should not allow Mr. Smollett to circumvent the normal appellate process or Judge Toomin's ongoing jurisdiction by utilizing a disfavored authority reserved for exceptional circumstances, particularly when Mr. Smollett's Motion for a Supervisory Order is merely an attempt to have this Court second-guess Judge Toomin's reasoned and legally sound decision.

8. Importantly, Mr. Smollett's attempt to challenge the appointment of the special prosecutor through his Motion for Supervisory Order (which has prompted this Motion to Stay) is incredibly tardy. Judge Toomin granted the petition to appoint a special prosecutor on June 21, 2019 (SR51–SR73), and appointed Dan K. Webb as special prosecutor on August 23, 2019. SR370–SR372. Mr. Smollett strategically chose to not to move to intervene in those proceedings until nearly a month ***after*** Judge Toomin granted the petition to appoint the special prosecutor, which Judge Toomin found was untimely. SR 366. Moreover, Mr. Smollett chose ***not*** to appeal: (1) Judge Toomin's decision granting the petition; (2) Judge Toomin's decision appointing Dan K. Webb as the special prosecutor; or (3) Judge Toomin's ruling denying his motion to intervene. Instead, Mr. Smollett knowingly waited until ***eight months*** after Judge Toomin decided it was necessary to appoint a special prosecutor to challenge Judge Toomin's orders in this Court—and, as explained in detail in the OSP's concurrently filed Response in Opposition to the Motion for Supervisory Order, elected to do so by improperly invoking a disfavored and extraordinary

mechanism (a supervisory order). In sum, Mr. Smollett's strategic choices and repeated delay undermine any purported need for an "emergency" stay of the ongoing criminal prosecution.

9. Mr. Smollett also fails to identify any reason why this Motion to Stay is an "emergency" motion or why a stay is necessary to protect any of his rights or interests.

10. On the flipside, it is important, in the interests of justice, that the criminal proceeding be allowed to continue. Indeed, as time passes, evidence becomes stale and witnesses' memories can fade. This risk is heightened here, given the unique procedural posture of this case, whereby Mr. Webb was appointed special prosecutor ***eight months*** after the incident at issue and, thus, the current indictment was returned approximately ***one year*** after the conduct at issue. Furthermore, this prosecution is part of a broader mandate that Judge Toomin gave to Mr. Webb with the goal of, among other things, "restor[ing] the public's confidence in the integrity of our criminal justice system." SR71. Therefore, to ensure justice is served, the prosecution of Mr. Smollett must be allowed to continue without unnecessary delay.

CONCLUSION

For the foregoing reasons, the OSP respectfully requests that this Court deny Movant Jussie Smollett's Emergency Motion to Stay Proceedings.

Dated: March 2, 2020

Respectfully Submitted,

/s/ Dan K. Webb

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No. 125790

IN THE SUPREME COURT OF ILLINOIS

JUSSIE SMOLLET,	)	Appeal from the Circuit Court of Cook County,
	)	Illinois, County Department
Movant,	)	Criminal Division
	)	
	)	No. 19 MR 00014-01
	)	
THE HON. MICHAEL P. TOOMIN,	)	The Honorable
	)	Michael P. Toomin, Presiding
Respondent.	)	
	)	

NOTICE OF FILING

Please take notice that on March 2, 2020, I, Dan K. Webb, the undersigned attorney, caused The Office of the Special Prosecutor's Response in Opposition to Movant's Emergency Motion to Stay Proceedings to be electronically filed with the Clerk of the Supreme Court of Illinois.

Dated: March 2, 2020

Respectfully submitted,

/s/ Dan K. Webb
Special Prosecutor

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PROOF OF FILING AND SERVICE

Under the penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and correct. On March 2, 2020, the foregoing Office of the Special Prosecutor's Response in Opposition to Movant's Emergency Motion to Stay Proceedings, was electronically filed with the Clerk, Illinois Supreme Court, and served upon the following by email:

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Dan K. Webb

No. 125790

IN THE SUPREME COURT OF ILLINOIS

JUSSIE SMOLLET,	)	Appeal from the Circuit Court of Cook County,
	)	Illinois, County Department
Movant,	)	Criminal Division
	)	
	)	No. 19 MR 00014-01
	)	
THE HON. MICHAEL P. TOOMIN,	)	The Honorable
	)	Michael P. Toomin, Presiding
Respondent.	)	
	)	

THE OFFICE OF THE SPECIAL PROSECUTOR'S RESPONSE IN OPPOSITION TO MOVANT'S EMERGENCY MOTION FOR SUPERVISORY ORDER PURSUANT TO RULE 383 AND MOVANT'S EXPLANATORY SUGGESTIONS IN SUPPORT OF THE MOTION

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The Office of the Special Prosecutor ("OSP") respectfully requests that the Court deny Movant's Emergency Motion for a Supervisory Order Pursuant to Rule 383, filed on February 24, 2020 (the "Motion"). In support of its opposition, the OSP states as follows:[1]

INTRODUCTION

Eight months after Judge Toomin ordered the appointment of a special prosecutor, and now—facing prosecution—regretting strategic choices his legal team made relating to that appointment, Movant Jussie Smollett seeks extraordinary relief before this Court.[2] Specifically, Mr. Smollett wants this Court to ***wholly invalidate*** proper and reasoned rulings, void a diligent six-month investigation conducted by the OSP in conjunction with a special grand jury, and halt an ongoing investigation into other entities. This Court should not hesitate to deny Mr. Smollett's incredible request for relief.

Mr. Smollett's Motion is simply a last-ditch (and improper) attempt to avoid prosecution and bypass Judge Toomin's ongoing jurisdiction over the underlying case. In fact, over the last 10 months since Petitioner Sheila O'Brien initiated the chain of events that led to the appointment of the special prosecutor, Mr. Smollett has made a number of procedural choices that severely undermine his ability to seek this Court's intervention, including his untimely intervention before Judge Toomin nearly 30 days after the June 21, 2019 order appointing the special prosecutor (and failure to appeal that ruling); his failure to appeal Judge Toomin's June 21, 2019 order deciding to appoint a special prosecutor; and, his failure to appeal Judge Toomin's August 23, 2019 order

[1] Citations to "SR" are to the Supporting Record filed with both of Movant's Emergency Motions. Citations to "Sup SR" are to the Supplemental Supporting Record filed concurrently herewith.

[2] Despite his delay in seeking relief through the proper channels discussed herein, Mr. Smollett has captioned this motion as an "emergency" without identifying any legal standard or circumstances to explain why this motion is an "emergency."

appointing Dan K. Webb as special prosecutor. Indeed, besides properly seeking to intervene in front of Judge Toomin, the appropriate venue for Mr. Smollett to challenge Judge Toomin's rulings was in the appellate court. Because he (now regrettably) failed to seek any appeal, Mr. Smollett's Motion is merely a method of "circumventing the normal appellate process," which this Court has said is an impermissible use of the Court's supervisory powers. *People ex rel. Foreman v. Nash*, 118 Ill. 2d 90, 97 (1987).

Furthermore, supervisory orders are limited to circumstances where a court exceeded its authority, which did not occur here. Judge Toomin utilized his discretion and jurisdictional authority to appoint a special prosecutor, and his detailed order is legally supported and reasoned. This Court should not exercise a disfavored authority reserved for exceptional circumstances merely because Mr. Smollett believes Judge Toomin's ruling should be reconsidered—a challenge he could have made through other legal mechanisms.

Therefore, the Court should deny Mr. Smollett's Motion so that his criminal prosecution and the special prosecutor's ongoing investigation may proceed to, as Judge Toomin aptly stated, "restore the public's confidence in the integrity of our criminal justice system." SR71.

PROCEDURAL HISTORY

Mr. Smollett's "relevant background" section captures some of the procedural history that is critical to resolving the instant motion, but overlooks significant details that must be addressed.

Following the Cook County State's Attorney's Office's ("CCSAO") decision to dismiss the original 16-count indictment against Mr. Smollett on March 26, 2019 (via a motion for *nolle prosequi*), retired appellate justice Sheila O'Brien filed a *pro se* Petition to Appoint a Special Prosecutor in the matter of *People of the State of Illinois v. Jussie Smollett* (hereinafter, the "Petition"). SR1–SR28. The case was initially assigned to the Honorable Judge Leroy K. Martin,

Jr. Without moving to intervene, Mr. Smollett specially appeared (via counsel) to oppose Ms. O'Brien's petition on April 18, 2019 (SR29–SR36), and he continued to have counsel present at all appearances in these proceedings.

On April 26, 2019, Ms. O'Brien filed a Notice to Appear and Produce Pursuant to Illinois Supreme Court Rule 237 directed to Mr. Smollett. Sup. SR 001-002. In response, Mr. Smollett filed an Objection and Motion to Quash the Notice to Appear and Produce, and argued that he could not be compelled to appear in the proceedings because "Mr. Smollett is not a party to this case." Sup SR 005. Mr. Smollett did not file a motion to intervene at that time.

Judge Martin transferred the matter to Judge Toomin on May 10, 2019. Judge Toomin took the Petition for the Appointment of a Special Prosecutor under advisement on June 3, 2019. Sup. SR 011.

On June 21, 2019, Judge Toomin issued a 21-page written order directing the appointment of a special prosecutor "to conduct an independent investigation of the actions of any person or office involved in all aspects of the case entitled *People of the State of Illinois v. Jussie Smollett*, No. 19 CR 0310401, and if reasonable grounds exist to further prosecute Smollett, in the interest of justice the special prosecutor may take such action as may be appropriate to effectuate that result. Additionally, in the event the investigation establishes reasonable grounds to believe that any other criminal offense was committed in the course of the Smollett matter, the special prosecutor may commence the prosecution of any crime as may be suspected." SR71.

Twenty-eight (28) days after Judge Toomin's order, on July 19, 2019, Mr. Smollett filed four motions, including a Motion for Reconsideration of the June 21, 2019 Order Granting the Appointment of a Special Prosecutor (SR93–SR245) and a Motion to Intervene Instanter. SR83–SR92. In Mr. Smollett's Motion to Intervene Instanter, he argued that his motion was timely under

735 ILCS 5/2-408(a)(2) because it had been filed within 30 days of Judge Toomin's order appointing the special prosecutor. SR86. Ms. O'Brien's response in opposition to Mr. Smollett's Motion to Intervene argued that his intervention was untimely, and aptly noted that Mr. Smollett had been served with all the pleadings in the proceedings since April 2019, had communicated with counsel, had appeared at each status hearing, had filed pleadings despite not being a party, and had actually fought the notice to appear before the court. SR269–SR271.

Judge Toomin denied Mr. Smollett's motion to intervene on July 31, 2019, finding that the motion "was far from timely." SR366. Judge Toomin also found that Mr. Smollett lacked a direct interest in the order appointing the special prosecutor because he only ordered an independent investigation, not the re-prosecution of Mr. Smollett. SR367. Moreover, Judge Toomin reiterated on the record that although there seemed to be a question "that because [the order] called for the appointment of a Special Prosecutor, it did not have finality to it" (SR365), the order appointing the special prosecutor "was not an interim order. It didn't – it didn't pretend to be, it didn't purport to be." SR366.

On August 23, 2019, Judge Toomin issued another written order appointing Dan K. Webb as Special Prosecutor in No. 19 MR 00014. SR370. That order contained the same investigatory mandate that Judge Toomin had issued in his June 21, 2019 order. In addition, Judge Toomin ordered that "the Special Prosecutor shall be vested with the same powers and authority of the elected State's Attorney of Cook County, limited only by the subject matter of this investigation, including the power to discover and gather relevant evidence, to compel the appearance of witnesses before a Special Grand Jury of the Circuit Court of Cook County, to confer immunity as may be deemed necessary, to consider the bar of limitations where applicable, and to institute

criminal proceedings by indictment, information, or complaint, where supported by probable cause, upon his taking the proper oath required by law." SR371.

The OSP was promptly formed and began conducting an investigation pursuant to Judge Toomin's mandate, including convening a special grand jury. Subsequently, on February 11, 2020, the special grand jury returned an indictment against Mr. Smollett charging him with six counts of disorderly conduct, namely making false police reports in violation of 720 ILCS 5/26-1(a)(4). [3] *See* Case No. 20 CR 03050-01. The OSP's investigation into whether any person or office involved in the Smollett matter engaged in wrongdoing is still ongoing.

Importantly, Judge Toomin continued to maintain jurisdiction over and preside over proceedings in the underlying matter despite the appointment of the special prosecutor and the formation of the OSP. Notably, on January 16, 2020, Petitioner O'Brien filed a Petition for Mandamus in an effort to stop the CCSAO from using outside counsel in connection with the OSP's investigation. One issue that arose during the briefing of that petition was whether Judge Toomin retained jurisdiction to even decide the petition. On February 14, 2020, Judge Toomin reiterated that his court had retained jurisdiction over, and would continue to retain jurisdiction over, the matter. Sup SR 037-039.

At no point did Mr. Smollett ever appeal any of Judge Toomin's orders.

[3] While the indictment in case No. 20 CR 03050-01 alleges false reports relating to an incident occurring on January 29, 2019, like the original indictment Mr. Smollett faced, the two indictments are not identical and contain different allegations. In fact, among other things, the recent indictment alleges Mr. Smollett made false reports to police on two occasions not referenced in the prior indictment.

LEGAL STANDARD

Both the Illinois Constitution and the Illinois Supreme Court Rules grant this Court with supervisory authority over all courts vested under the Illinois Supreme Court. *See* Ill. Const. art. VI, § 16; Ill. Sup. Ct. R. 383. Despite this grant of power, this Court grants supervisory authority "only in limited circumstances." *People ex rel. Birkett v. Bakalis*, 196 Ill. 2d 510, 512 (2001). Outside of the petition for leave to appeal docket, "supervisory orders are ***disfavored***." *Id.* (emphasis added). In fact, this Court has repeatedly stated that the issuance of supervisory authority "should be reserved for ***exceptional circumstances***." *Carmichael v. Union Pac. R.R. Co.*, 2019 IL 123853, ¶ 37 (emphasis added); *see also Vasquez Gonzalez v. Union Health Serv., Inc.*, 2018 IL 123025, ¶ 17 ("We exercise our supervisory authority only under exceptional circumstances."); *Statland v. Freeman*, 112 Ill. 2d 494, 497 (1986) ("Similarly, this court will not exercise its supervisory authority save under exceptional circumstances.").

Generally, this Court "will not issue a supervisory order unless the normal appellate process will not afford adequate relief and the dispute involves a matter important to the administration of justice or intervention is necessary to keep an inferior tribunal from acting beyond the scope of its authority." *Bakalis*, 196 Ill. 2d at 513 (internal citations omitted). The normal appellate process must truly be inadequate, as this Court has stated that "supervisory orders may not be used to circumvent the normal appellate process." *Nash*, 118 Ill. 2d at 97.

ARGUMENT

I. This Motion is an improper attempt to bypass Judge Toomin and circumvent the normal appellate process.

Seeking a supervisory order from this Court is not the proper venue for Mr. Smollett to obtain relief. As detailed below, Mr. Smollett should have sought to challenge the appointment of

the special prosecutor by properly intervening in the matter in front of Judge Toomin, who still retains jurisdiction in this matter. Additionally, Mr. Smollett also had the option of filing a timely appeal from multiple rulings made by Judge Toomin. Yet, perhaps hoping the OSP would not ultimately seek a new indictment, he did not avail himself of that appellate opportunity. This Court should not grant Mr. Smollett an extraordinary remedy so that he can bypass Judge Toomin and completely avoid the traditional appellate process.

A. Judge Toomin's court is the proper venue for Mr. Smollett's opposition to the appointment of a special prosecutor.

The proper venue for Mr. Smollett's challenge to the appointment of a special prosecutor was before Judge Toomin—not this Court.

First, Mr. Smollett had an opportunity to file a proper and timely motion to intervene in the underlying matter, but failed to do so. As detailed above, because Mr. Smollett failed to timely file a motion to intervene that demonstrated he had a direct interest, Judge Toomin did not consider Mr. Smollett's motion for reconsideration of his June 21, 2019 order. Specifically, Mr. Smollett chose to sit on the sidelines as a "non-party" for more than 100 days after the Petition was filed and nearly a month after the issuance of Judge Toomin's June 21, 2019 order granting the Petition before moving to intervene. In fact, as discussed above, his counsel repeatedly appeared at court hearings and submitted papers on his behalf as a non-party.[4] As a result, on July 31, 2019, Judge Toomin correctly held that Mr. Smollett's petition to intervene was not timely:

> Here, the petition ***was far from timely*** as it was in *Ramsey Emergency Services vs. Interstate Commerce Commission*, 367 [Ill.] App. 3d 351. There, the petition was filed after the proceedings were well under way, as they were here. The evidence

[4] For example, on April 30, 2019, Mr. Smollett filed an Objection and Motion to Quash Notice to Appear and Produce Pursuant to Supreme Court Rule 237 Directed to Jussie Smollett. Sup SR 003-009. In that filing, Mr. Smollett acknowledged that he "is not a party to this case." *Id*. ¶ 6.

> was closed, as it was here. And, in that case, the Administrative Law Judge had already issued a proposed final order. So all of those requisites were met in *Ramsey*; they were met here as well.

SR366-367 (emphasis added); *see Ramsey Emergency Servs., Inc. v. Illinois Commerce Comm'n*, 367 Ill. App. 3d 351, 365 (1st Dist. 2006) ("INENA filed a petition to intervene after Ramsey's application proceedings were already well underway, evidence had been closed, and the ALJ assigned to the case had already issued a proposed final order. The petition to intervene was far from timely."). Judge Toomin also held that the June 21, 2019 order did not directly affect Mr. Smollett because he only ordered the special prosecutor to "conduct an independent investigation and re-prosecution is not ordered, but may occur if additional considerations are met, i.e., reasonable grounds exist to re-prosecute Mr. Smollett, and it's in the interest of justice." SR367. Therefore, Mr. Smollett's first available avenue was to file a legally sufficient and timely motion to intervene, which he did not do.

Second, now that Mr. Smollett is being prosecuted by the OSP, Mr. Smollett arguably may have a direct interest in the existence of the OSP and could move to intervene before Judge Toomin (the court with continuing jurisdiction) to challenge the appointment of the special prosecutor. If granted that opportunity, he could then assert the same arguments he makes before this Court in what is essentially a motion to reconsider Judge Toomin's ruling. In fact, as detailed by Mr. Smollett in the Motion (¶¶ 13-15), when denying his prior motion to intervene, Judge Toomin previously stated that: "these issues [i.e., motion to intervene] ***could be raised at any time if, in fact, Mr. Smollett was prosecuted.***" SR364 (emphasis added).[5] Therefore, Judge Toomin gave

[5] The OSP is not conceding that any attempt to file a motion to intervene (or seek any other relief) in front of Judge Toomin would ultimately be accepted (particularly if it is not timely) or meritorious. The OSP

Mr. Smollett a specific roadmap regarding the procedure for asserting a potential challenge to the appointment of the special prosecutor (if it proved necessary, though without guaranteeing such a challenge would prove successful). However, Mr. Smollett has intentionally chosen to ignore that procedural mechanism and instead seek extraordinary and disfavored relief from this Court.

Importantly, the option of filing a motion before Judge Toomin is still procedurally viable because Judge Toomin reiterated as recently as February 14, 2020, that he retains jurisdiction over the underlying matter and will "continue to exercise its jurisdiction." Sup. SR 022. As a result, while Mr. Smollett claims "an appeal would not afford Mr. Smollett adequate relief" (Mot. at 1), Judge Toomin could consider a ***timely*** motion to intervene in light of Mr. Smollett's changed circumstances if Mr. Smollett opted to utilize that mechanism rather than forum shop by filing with this Court.

This Court should not now reward Mr. Smollett's initial failure to file a timely motion to intervene nor allow him to bypass the proper procedural vehicle of a motion for intervention before Judge Toomin.

B. Mr. Smollett has refused to use the normal appellate process and altogether failed to appeal adverse rulings before Judge Toomin.

Mr. Smollett cannot be allowed to seek extraordinary relief from this Court because he now regrets not appealing Judge Toomin's prior rulings. Indeed, by filing the Motion before this Court, Mr. Smollett clearly seeks to "circumvent the normal appellate process," which this Court has said is improper use of its supervisory authority. *Nash*, 118 Ill. 2d at 97.

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also does not waive any potential objection or argument relating to any such future motion or other challenge to Judge Toomin's prior decisions in this matter.

Mr. Smollett elected to not appeal Judge Toomin's June 21, 2019 order appointing a special prosecutor. This was a final order that was immediately appealable. *See* SR366 (The Court: "This was not an interim order. It didn't – it didn't pretend to be, it didn't purport to be."); *see also In re Appointment of Special Prosecutor*, 388 Ill. App. 3d 220, 226 (3d Dist. 2009) (noting that this Court assigned an appeal of the modification of an order appointing a special prosecutor to the Third District). Rather than directly filing a timely appeal of the June 21, 2019 order granting the Petition, Mr. Smollett made the strategic choice to instead return to Judge Toomin on July 19, 2019, with both a motion to intervene and a motion to reconsider. Notably, although Mr. Smollett was (and remains) a non-party in this matter, he could have appealed Judge Toomin's ruling appointing the special prosecutor. *See In re Appointment of Special Prosecutor*, 388 Ill. App. 3d at 230 (noting that Illinois Supreme Court Rule 301 "has been construed to allow even a nonparty to appeal" so long as they have a "direct, immediate, and substantial interest in the subject matter, which would be prejudiced by the judgment or benefitted by its reversal.") (internal quotation marks omitted).[6] Thus, he made an intentional decision not to appeal and must live with the consequences of that decision.

Additionally, after Judge Toomin denied Mr. Smollett's motion to intervene as untimely, Mr. Smollett also chose not to seek an appeal. Although Mr. Smollett claims without any legal support that the July 31, 2019 denial of his motion to intervene and the motion to reconsider were

[6] Mr. Smollett cannot contend he did not have standing to appeal Judge Toomin's order considering he argued below in his motion to intervene that he maintained a direct interest in the subject matter of the appointment of a special prosecutor and, therefore, he could have asserted such a position to support an appeal. SR86–SR89. Moreover, Mr. Smollett remains a non-party in these proceedings and would certainly argue he has standing before this Court on the Motion and his Emergency Motion to Stay Proceedings despite his status as a non-party.

not "immediately appealable," one of Mr. Smollett's counsel of record for this Motion was certainly considering an appeal on July 31, 2019. *See* Marlea Baldacci, Eliot C. McLaughlin and Jen Goelz, *Judge Stands By Decision to Appoint Prosecutor in Jussie Smollett Case*, CNN (July 31, 2019) https://www.cnn.com/2019/07/31/us/jussie-smollett-judge-prosecutor-motions-denied/index.html (last visited Feb. 28, 2020) ("Smollett's lawyer, Tina Glandian, said at a media briefing following Wednesday's hearing that the actor's legal team would be appealing Toomin's Wednesday decisions."). Mr. Smollett, however, did not appeal the July 31, 2019 rulings despite his current lawyers' statements, and must also live with the consequences of that decision.[7]

Finally, Judge Toomin delivered one more final appealable order when he appointed Dan K. Webb as special prosecutor on August 23, 2019. SR 370. However, Mr. Smollett again did not file a timely appeal.

In sum, Mr. Smollett had numerous opportunities to seek recourse through the proper appellate channels, yet chose not to do so. This Court cannot permit Mr. Smollett to circumvent

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[7] The denial of Mr. Smollett's motion to intervene and the motion to reconsider were also arguably appealable orders as well, and while Illinois courts are split on the issue, some have permitted an appeal of the denial of a motion to intervene. *See Koester v. Yellow Cab Co*., 18 Ill. App. 3d 56, 61 (1st Dist. 1974) ("The order denying the petition to intervene completely adjudicated the only immediate claim brought before the court by Illinois Bell, and in our view it is a 'final judgment' within the meaning of Supreme Court Rule 301."); *Mendelson v. Lillard*, 83 Ill. App. 3d 1088, 1092 (1st Dist. 1980) ("We note that an order denying a party the right to intervene has been held to be final and appealable under Supreme Court Rule 301."); *but see People ex rel. Collins v. Burton*, 276 Ill. App. 3d 95, 97 (4th Dist. 1995) ("We conclude that the doctrine has been firmly established that a Rule 304(a) finding is necessary to give immediate appealability to the denial of leave to intervene."). Given the denial of the motion to intervene and Judge Toomin's decision not to proceed on the motion for reconsideration, the only matter left to determine on July 31, 2019 was who would be appointed as special prosecutor. *See* SR368 (The Court: "We will reconvene when the Court has had the opportunity to select a Special Prosecutor in accordance with the order on June 21st."). In fact, Judge Toomin reiterated that the June 21, 2019 order "was not an interim order" for purposes of appeal, reinforcing that the proceedings before Judge Toomin were final and that the only remedy available to Mr. Smollett was through the proper appellate procedures. SR366. For all intents and purposes, the denial of Mr. Smollett's motion to intervene should be treated as a final appealable order in light of these circumstances.

the normal appellate process because he now regrets his strategic choices not to file notices of appeal from appealable orders.

II. Judge Toomin did not exceed his authority in ordering the appointment of the special prosecutor.

Should this Court even need to address the merits of the Motion, this Court should find that Judge Toomin did not exceed his authority by appointing the special prosecutor. Specifically, Mr. Smollett offers only contradictory and legally baseless arguments in an attempt to have this Court question Judge Toomin's use of his discretion. Furthermore, Judge Toomin's 21-page detailed opinion appointing the special prosecutor is well-reasoned and Judge Toomin did not exceed his authority in determining that an independent investigation (and, if deemed necessary and in the interests of justice, a new prosecution) was warranted.

A. Mr. Smollett incorrectly asks this Court to apply an abuse of discretion standard.

After repeatedly framing the question before this Court as whether Judge Toomin "exceeded his authority," Mr. Smollett asks this Court to overturn Judge Toomin's prior rulings based on arguments applying a lower and different standard—that Judge Toomin improperly utilized his discretion or misinterpreted the law. *See Bakalis*, 196 Ill. 2d at 513 (noting that a supervisory order is only appropriate to "keep an inferior tribunal from acting beyond the scope of its authority."). However, a motion for a supervisory order is ***not*** a motion for reconsideration—as discussed above, any such reconsideration must occur before Judge Toomin. Furthermore, when ruling on the Petition and determining whether to appoint a special prosecutor, Judge Toomin was vested with broad discretion. *See In re Appointment of Special Prosecutor*, 388 Ill. App. 3d at 232; *In re Harris*, 335 Ill. App. 3d 517, 520 (1st Dist. 2002). Therefore, as a threshold matter,

Mr. Smollett's attempt to have this Court second guess Judge Toomin's discretionary decisions—which he made with valid authority and jurisdiction to make—is improper.

B. Judge Toomin correctly ruled that State's Attorney Kim Foxx made an invalid recusal and appointment of an "Acting State's Attorney," which voided the prior proceedings.

Although the purpose of a supervisory authority is not to merely question the discretion applied by a circuit judge, contrary to Mr. Smollett's contentions, Judge Toomin's ruling was grounded in law and properly reasoned.

Judge Toomin first took note of State's Attorney Kim Foxx's public statements that she recused herself "to address potential questions of impropriety based upon familiarity with potential witnesses" (SR57), as well as the CCSAO's internal statements that Foxx "is recused from the investigation involving Jussie Smollett." SR56. In light of those statements using the word "recuse"—a term with legal import—Judge Toomin found that a "reasonable assumption exists" that State's Attorney Foxx's decision to recuse herself was based on 55 ILCS 5/3-9008(a-15), which states that a State's Attorney "may file a petition to recuse himself or herself from a cause or proceeding for any other reason he or she deems appropriate and the court shall appoint a special prosecutor as provided in this Section." *See* SR64. Since State's Attorney Foxx failed to file a petition for recusal, Judge Toomin noted that she "depriv[ed] the court of notice that appointment of a special prosecutor was mandated." *Id.* Instead, she (improperly) turned the prosecution of Mr. Smollett over to "Acting State's Attorney" Joseph Magats. SR 64-66. .

Judge Toomin found that, despite the absence of a formal petition or motion recusing State's Attorney Foxx from Mr. Smollett's prosecution, there was no other way to construe the actions of State's Attorney Foxx than an "unconditional legal recusal":

> A review of the record confirms our understanding that what was intended by Ms. Foxx, and what indeed occurred, was an unconditional legal recusal. Her voluntary act evinced a relinquishment of any future standing or authority over the Smollett proceeding. Essentially, she announced she was giving up all of the authority or power she possessed as the duly elected chief prosecutor; she was no longer involved.

SR65–SR66.

Moreover, Judge Toomin found that State's Attorney Foxx deviated from section 3-9008(a-15) when, instead of allowing the court to appoint a special prosecutor, she created the role of "Acting State's Attorney" in the matter. SR66. Indeed, Judge Toomin correctly noted that State's Attorney Foxx "possessed no authority, constitutionally or statutorily, to create that office." *Id.*; *see also* 55 ILCS 5/3-9005(a) (listing the 13 enumerated powers of each State's Attorney, which does not include the power to create subordinate offices or appoint prosecutors following recusal).

Judge Toomin noted that Illinois courts have routinely disapproved of similar arrangements where State's Attorneys make invalid recusals under the law and appoint an individual to serve in its place. *See People v. Jennings*, 343 Ill. App. 3d 717, 724 (5th Dist. 2003) ("This type of appointment cannot be condoned. State's Attorneys are clearly not meant to have such unbridled authority in the appointment of special prosecutors."). As a consequence, courts have found prosecutions pursuant to these invalid arrangements where a State's Attorney acts beyond its authority to be void. *See* SR68–SR70 (collecting cases).

In light of the "reasonable assumption" that State's Attorney Foxx recused herself pursuant to section 3-9008(a-15) and her deviation from that statute in appointing Acting State's Attorney Joseph Magats, Judge Toomin correctly ruled that all of the proceedings under the Acting State's Attorney were void:

> There was no duly elected State's Attorney when Jussie Smollett was arrested;
> There was no State's Attorney when Smollett was initially charged;
> There was no State's Attorney when Smollett's case was presented to the grand jury, nor when he was indicted;
> There was no State's Attorney when Smollett was arraigned and entered his plea of not guilty; and
> There was no State's Attorney in the courtroom when the proceedings were *nolle prossed*.

SR70.

Thus, at each step of the way, Judge Toomin's 21-page order was reasoned and supported by valid case law as he applied the authority and discretion vested in him by 725 ILCS 5/3-9008 to determine whether a special prosecutor should be appointed. Accordingly, Judge Toomin did not act "beyond the scope of [his] authority." *Bakalis*, 196 Ill. 2d at 513. Instead, Mr. Smollett's current motion merely seeks to re-litigate this issue (which already had its day in court, with the CCSAO actively opposing the Petition, thereby allowing Judge Toomin to consider counter arguments like those Mr. Smollett raises now). As a result, Mr. Smollett has not provided any basis for concluding that Judge Toomin's prior order was improper or that it requires any remedy by this Court.

C. Mr. Smollett's arguments are contradictory and not supported by law.

Mr. Smollett's specific arguments that Judge Toomin exceeded his authority also each fail.

First, Mr. Smollett takes a confusing, legally unsupported position and makes contradictory statements with respect to the necessity of a recusal petition by the State's Attorney to trigger Judge Toomin's authority to make a ruling under Section 3-9008(a-15). Section 3-9008(a-15) states that the "State's Attorney ***may*** file a petition to recuse himself or herself from a cause or proceeding for any other reason he or she deems appropriate and the court shall appoint a special prosecutor…" 55 ILCS 5/3-9008(a-15) (emphasis added). While Mr. Smollett admits

this language is "***permissive***" and that "the State's Attorney is ***not required*** to file such a petition," he also labels the filing of such a petition a "statutory prerequisite." Mot. at 12–14 (emphasis added). It cannot be both. Per the plain language of the statute, the filing of such a petition is permissive and not required. *In re Estate of Ahmed*, 322 Ill. App. 3d 741, 746 (2001) ("As a rule of statutory construction, the word 'may' is permissive, as opposed to mandatory.").

Judge Toomin also found that State's Attorney Foxx effectively recused herself pursuant to 725 ILCS 5/3-9008(a-15) even though she did not file a formal petition. SR64–SR66. Therefore, the absence of a formal petition by State's Attorney Foxx—which is permissive and not mandatory—does not preclude the appointment of a special prosecutor. In fact, it would belie common sense to read Section 5/3-9008(a-15) as ***only*** allowing a court to appoint a special prosecutor when a State's Attorney filed a petition thereby giving the State's Attorney the ability to prevent such an appointment which may be necessary due to improper conduct by the State's Attorney (as Judge Toomin concluded occurred here).

Second, Mr. Smollett's contention that, contrary to Judge Toomin's reasoned conclusion, State's Attorney Foxx could delegate her authority to other Assistant State's Attorneys misses the mark. Of course, Assistant State's Attorneys "are in essence surrogates for the State's Attorney." *Office of Cook Cty. State's Attorney v. Illinois Local Labor Relations Bd.*, 166 Ill. 2d 296, 303 (1995). However, none of the cases Mr. Smollett cites involve such delegation of authority in the context of either the recusal of the State's Attorney or the creation of a subordinate office (i.e., Acting State's Attorney). As Judge Toomin correctly held (based on legal reasoning and citation to case law), State's Attorney Foxx did not possess the power under Illinois law to both recuse herself (without recusing the entire Cook County State's Attorney's Office) and create the role of

Acting State's Attorney to act in her stead. SR66–SR68. Therefore, State's Attorney Foxx's actions were an improper delegation of her authority under the law.

Third, Judge Toomin correctly held that the prior proceedings following State's Attorney Foxx's recusal were null and void. Under Section 3-9008(a-15), as Judge Toomin detailed, State's Attorney Foxx's recusal required the court to appoint a special prosecutor. *See* 55 ILCS 5/3-9008(a-15). Once Judge Toomin determined (as discussed above) that State's Attorney Foxx's delegation of authority to Joe Magats as the "Acting State's Attorney" was invalid under Illinois law, SR66–SR68, the necessary remedy was to vacate the prior proceedings and deem them void. *See People v. Munson*, 319 Ill. 596, 604 (1925) (quashing indictment where elected State's Attorney was not licensed to practice law); *People v. Ward*, 326 Ill. App. 3d 897, 902 (5th Dist. 2002) (vacating conviction and stating that "[i]f a case is not prosecuted by an attorney properly acting as an assistant State's Attorney, the prosecution is void and the cause should be remanded so that it can be brought by a proper prosecutor."); *People v. Dunson*, 316 Ill. App. 3d 760, 770 (2d Dist. 2000) (finding that participation of assistant State's Attorney not licensed to practice law in Illinois rendered trial "null and void *ab initio* and that the resulting final judgment is also void."). While Mr. Smollett tries to avoid this legal (and common sense) outcome by arguing that the proceedings need not be invalidated because he, as the defendant, did not challenge their propriety, there is no legal basis for such a position. Mot. at 19–20. Furthermore, as Judge Toomin noted in his opinion, the issues implicated by an improper recusal and delegation of authority extend well beyond Mr. Smollett and relate to the "integrity of our criminal justice system." SR71. Indeed, Mr. Smollett cannot simply acquiesce to a legal proceeding that had no authority to occur merely because he is pleased with the outcome (which the "Acting State's Attorney" had no authority to negotiate).

Finally, contrary to Movant's contention, Judge Toomin's June 21, 2019 order appointing the special prosecutor was not vague or overbroad. *See In re Appointment of Special Prosecutor*, 388 Ill. App. 3d at 234 (noting that the trial court is vested with discretion to craft the "scope of the special prosecutor's authority."). The order specifically delineates two discrete avenues of investigation to the OSP: (1) "to conduct an independent investigation of the actions of any person or office involved in all aspects of the case entitled *People of the State of Illinois v. Jussie Smollett*, No 19 CR 0310401, and if reasonable grounds exists to further prosecute Smollett, in the interest of justice the special prosecutor may take such action as may be appropriate to effectuate that result"; and, (2) "in the event the investigation establishes reasonable grounds to believe that any other criminal offense was committed in the course of the Smollett matter," to "commence the prosecution of any crime as may be suspected." SR71. This order was tied to and stemmed from the specific conduct and issues in the underlying matter. Furthermore, given that Judge Toomin cannot know or anticipate precisely what potential misconduct a special prosecutor might find, it would belie common sense to handcuff the special prosecutor with a narrower order. As a result, Judge Toomin's tailored, limited, and rational order does not require any further narrowing or specificity.

III. Even assuming Judge Toomin did exceed his authority (which he did not), this case is not an "exceptional circumstance" warranting this Court's intervention in an ongoing prosecution and investigation.

Even if this Court finds that Judge Toomin exceeded his authority (which he did not), this is not an "exceptional case" which warrants this Court's use of its supervisory authority. Indeed, this is not a case, for example, where a court impermissibly exercised powers belonging to the State's Attorney's Office, *see People ex rel. Daley v. Suria*, 112 Ill. 2d 26, 36–38 (1986), or where

a court deviated from Illinois law in declaring a statute unconstitutional. *Vasquez Gonzalez*, 2018 IL 123025, ¶¶ 20–32.

Here, as discussed above, Mr. Smollett had numerous opportunities to utilize the traditional mechanisms provided by the justice system to challenge Judge Toomin's rulings (*e.g.*, filing a timely and sufficient motion to intervene in front of Judge Toomin or seeking an appeal). Further, Mr. Smollett offers no reason why overturning Judge Toomin's reasoned rulings is a "matter important to the administration of justice." Rather, he merely notes that his case implicates "constitutional values" like the presumption of innocence and right to a fair trial—values that are implicated in ***every criminal case***. Mot. at 11. Moreover, the interests of justice actually support ***upholding*** Judge Toomin's orders, allowing the special prosecutor to continue his investigation, and—for the first time—proceeding with a legally authorized prosecution of Mr. Smollett for his alleged criminal conduct. In fact, as Judge Toomin aptly noted, "the unprecedented irregularities identified in this case warrants the appointment of independent counsel to ***restore the public's confidence in the integrity of our criminal justice system***." SR71 (emphasis added). This Court should not exercise a disfavored power reserved for exceptional cases to interrupt the ongoing criminal proceeding and investigation that are permitted within the scope of Judge Toomin's order, which was grounded in established Illinois law.

IV. If the Court grants the Motion, it should not order the relief sought.

The relief Mr. Smollett seeks is overbroad and extends well beyond his direct interests. He sweepingly seeks to (1) vacate Judge Toomin's June 21, 2019 order appointing a special prosecutor; (2) vacate Judge Toomin's August 23, 2019 order appointing Dan K. Webb as special prosecutor; (3) dismiss the February 11, 2020 indictment returned by the special grand jury against Mr. Smollett; and (4) vacate all further proceedings in Case No. 20 CR 03050-01. In other words,

in an attempt to avoid personally facing prosecution (which includes new charges), he seeks the overbroad remedy of stripping the special prosecutor of all of its authority, unwinding the events of the past six months (when resources have been expended by the special prosecutor, the court, the CCSAO, and other entities who have obtained legal counsel or responded to requests from the special prosecutor as part of its investigation), and preventing the special prosecutor from completing its investigation, including into ***other entities*** beyond Mr. Smollett. Such a far-reaching result would, as outlined above, run contrary to the interests of justice.[8]

Therefore, if this Court determines that it is proper to assert its supervisory authority in this case, OSP respectfully submits that the proper remedy would be, at most, to vacate Judge Toomin's ruling on July 31, 2019 denying Mr. Smollett's motion to intervene, thereby allowing Judge Toomin to reconsider that ruling, or, alternatively, directing Mr. Smollett to file a new motion to intervene based on his current direct interest stemming from his recent indictment (which Judge Toomin could, of course, deny if it is legally insufficient). Then, if Mr. Smollett is allowed to intervene, Mr. Smollett would be able to seek Judge Toomin's reconsideration of Judge Toomin's appointment of a special prosecutor.

CONCLUSION

For the foregoing reasons, the OSP respectfully requests that this Court deny Movant Jussie Smollett's Emergency Motion for a Supervisory Order.

[8] It should also be noted that Mr. Smollett has filed a motion to dismiss the indictment in the criminal trial court, which is currently pending, thus seeking a more tailored remedy in that court.

Dated: March 2, 2020

Respectfully submitted,

/s/ Dan K. Webb

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No. 125790

IN THE SUPREME COURT OF ILLINOIS

JUSSIE SMOLLET, Movant, THE HON. MICHAEL P. TOOMIN, Respondent.	)	Appeal from the Circuit Court of Cook County, Illinois, County Department Criminal Division No. 19 MR 00014-01 The Honorable Michael P. Toomin, Presiding

NOTICE OF FILING

Please take notice that on March 2, 2020, I, Dan K. Webb, the undersigned attorney, caused The Office of the Special Prosecutor's Response in Opposition to Movant's Emergency Motion for Supervisory Order Pursuant to Rule 383 and Movant's Explanatory Suggestions In Support of The Motion to be electronically filed with the Clerk of the Supreme Court of Illinois.

Dated: March 2, 2020

Respectfully submitted,

/s/ Dan K. Webb
Special Prosecutor

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PROOF OF FILING AND SERVICE

Under the penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and correct. On March 2, 2020, the foregoing Office of the Special Prosecutor's Response in Opposition to Movant's Emergency Motion for a Supervisory Order Pursuant to Rule 383 and Movant's Explanatory Suggestions in Support of the Motion was electronically filed with the Clerk, Illinois Supreme Court, and served upon the following as indicated:

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Office of the Special Prosecutor

SUPREME COURT OF ILLINOIS

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CAROLYN TAFT GROSBOLL
Clerk of the Court

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March 06, 2020

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William John Quinlan
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In re: Smollet v. Toomin
125790

Today the following order was entered in the captioned case:

Emergency motion by Movant to stay proceedings in the Circuit Court of Cook County, in case No. 20 CR 3050, pending disposition of motion for a supervisory order. Denied.

Order entered by the Court.

Theis, J., took no part.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

cc: Attorney General of Illinois - Criminal Division
Cathy McNeil Stein
Dan K. Webb
David Edward Hutchinson
Lisa Hegedus Quinlan
Hon. Michael P. Toomin
Risa Renee Lanier
State's Attorney Cook County
Tina Glandian
Valerie Lynn Hletko

SUPREME COURT OF ILLINOIS

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March 06, 2020

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In re: Smollet v. Toomin
125790

Today the following order was entered in the captioned case:

Emergency motion by Movant for a supervisory order. Denied.

Order entered by the Court.

Theis, J., took no part.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

cc: Attorney General of Illinois - Criminal Division
Cathy McNeil Stein
Dan K. Webb
David Edward Hutchinson
Lisa Hegedus Quinlan
Hon. Michael P. Toomin
Risa Renee Lanier
State's Attorney Cook County
Tina Glandian
Valerie Lynn Hletko

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

People of the State of Illinois,	)	
	)	
	)	
	)	
	)	
	)	No. 20 CR 03050-01
Jussie Smollett,	)	
	)	
Defendant.	)	
	)	

RESPONSE TO MOTION TO DISMISS INDICTMENT FOR ALLEGED VIOLATION OF DEFENDANT'S RIGHT AGAINST DOUBLE JEOPARDY

Mr. Smollett's motion to dismiss is meritless. In March 2019, Mr. Smollett ***voluntarily*** gave $10,000 (through release of his bond) to the City of Chicago, and as a result, he obtained a very valuable benefit: the Cook County State's Attorney's Office dismissed his pending criminal case. Now, facing prosecution for new (and, importantly, different) charges, he wants to strategically and improperly characterize his prior ***voluntary*** release of his bond as some sort of "punishment"—and does so contrary to controlling law for the sole purpose of attempting to avoid prosecution by the Office of the Special Prosecutor.

Mr. Smollett's motion fails in three critical ways:

- *First*, Mr. Smollett's motion ignores that the protections of his right against double jeopardy **do not apply to this proceeding because jeopardy never attached in the prior criminal proceeding**. Rather, a mere 12 days after he was arraigned, long before any jury was empaneled and sworn (jury trial) or the first witness was sworn and evidence heard

(bench trial), his case was dismissed via a motion for *nolle prosequi.* Indeed, the fact that the case was *nolle prossed* should end the inquiry, as Mr. Smollett was never put in jeopardy in prior proceedings, so the instant action is not and cannot constitute double jeopardy. *People v. Hughes*, 2012 IL 112817, ¶ 23 ("[I]f a *nolle prosequi* is entered before jeopardy attaches, the State may reprosecute the defendant") (collecting cases).

- *Second*, Mr. Smollett's voluntary release of his bond was not a legal "punishment." No court ordered Mr. Smollett to forfeit his bond nor was the release of his bond in conjunction with any finding or admission of guilt or any sentence.
- *Third,* double jeopardy does not apply because, as Judge Michael P. Toomin outlined in his June 21, 2019, Order, the Prior Charges and resolution were ***void*** because there was no duly appointed State's Attorney serving in Mr. Smollett's prior case. (Ex. 1 at 20).

For all of these reasons, Mr. Smollett's motion fails as a matter of law. Therefore, while Mr. Smollett has technically been charged a second time for the offense of disorderly conduct, **the current prosecution does not implicate the Double Jeopardy Clause in any way**. Thus, as detailed below, the Court should deny Mr. Smollett's motion to dismiss the indictment and allow this prosecution to proceed.

BACKGROUND

The disorderly conduct charges at issue stem from Mr. Smollett's reporting of an alleged attack against him in the early morning hours of January 29, 2019.[1] After an investigation of the incident, Mr. Smollett was indicted on 16 counts of felony disorderly conduct (the "Prior Charges"). (Ex. 2). The Prior Charges refer to statements made by Mr. Smollett to Chicago Police

[1] Of note, Mr. Smollett's motion incorrectly conflates the underlying incident on January 29, 2019 with the charged conduct, which is making false reports to police relating to that incident.

Department Officer Muhammed Baig and Detective Kimberly Murray on January 29, 2019. (*Id.*) Mr. Smollett was arraigned on the Prior Charges on March 14, 2019. (Ex. 2 at 1, Ex. 8 at 2).

On March 26, 2019, the Prior Charges were dismissed following the State's motion for *nolle prosequi*. (Ex. 3 at 2–3.) During the relevant hearing, Assistant State's Attorney Risa Lanier stated:

> After reviewing the circumstances of this case, including Mr. Smollett's volunteer service in the community and agreement to forfeit his bond to the City of Chicago, the State's motion in regards to the indictment is to nolle pros. We believe this outcome is a just disposition and appropriate resolution to this case.

Id. With respect to Mr. Smollett's bond, Ms. Lanier stated:

> I do have an order directing the Clerk of the Circuit Court to Release Bond No. 1375606 payable to the City of Chicago, to be sent directly to the City of Chicago, Department of Law.

Id. at 3. That same day, Judge Steve G. Watkins entered an order to "release Bond No. D1375606, payable to the City of Chicago, to be sent directly to: City of Chicago Department of Law." (Ex. 4.) Neither the transcript of the March 26, 2019 court proceeding nor the Court's order mentioned the assessment of a fine.

Judge Toomin entered an order granting the appointment of a special prosecutor on June 21, 2019 relating to the prior proceedings against Mr. Smollett. (Ex. 1.) Judge Toomin concluded that due to State's Attorney Kim Foxx's recusal in conjunction with an improper delegation of her authority to First Assistant State's Attorney Joe Magats, the prior criminal proceedings against Mr. Smollett were void. (*Id*. at 20–21.)

On August 23, 2019, Judge Toomin appointed Dan K. Webb as Special Prosecutor to conduct an "independent investigation" and if "reasonable grounds exist to further prosecute Smollett, in the interest of justice" to "take such action as may be appropriate." (Ex. 5 at 1.) Following investigation by the Special Prosecutor in conjunction with a special grand jury, the

special grand jury indicted Mr. Smollett on six counts of felony disorderly conduct on February 11, 2020 (the "New Charges"). (Ex. 6.) The New Charges cover conduct alleged to have occurred on January 29, 2019 and February 14, 2019 involving three different police officers and four separate conversations. (*Id*.)

Notably, the New Charges differ significantly from the Prior Charges. Among other things, the New Charges assert that Mr. Smollett committed the crime of disorderly conduct (i.e., making a false report to police) on ***four*** separate occasions, some of which were ***not included in the Prior Charges at all***. (*Compare* Ex. 2 *with* Ex. 6.) For example, the Prior Charges only alleged that Mr. Smollett made false statements on January 29, 2019 to two different peace officers—Officer Muhammed Baig and Detective Kimberly Murray (Ex. 2)—while the New Charges allege additional and distinct false reports made to Detective Robert Graves on February 14, 2019. (Ex. 6, Count 6.) In fact, Mr. Smollett himself acknowledged the uniqueness of the New Charges in a pending civil action just two weeks ago, stating that "the new charges are distinguishable" from the prior charges. *See City of Chicago v. Smollett,* 19 cv. 04547, Dkt. 78 at p. 11–12, fn. 2.[2]

Mr. Smollett now challenges his indictment on the New Charges.

ARGUMENT

Mr. Smollett asserts a single, narrow challenge to the New Charges: that he risks receiving multiple punishments for the same offense, which he contends violates the Double Jeopardy Clause.[3] (*See* MTD at 7) (stating that while the Double Jeopardy Clause "protects against three

[2] Mr. Smollett is represented by Mr. Quinlan and Mr. Hutchinson from The Quinlan Law Firm, LLC, in that civil lawsuit as well as in this pending criminal case. Statements made by Mr. Smollett and his counsel in his civil proceedings are evidentiary admissions and can be considered by this Court. *See Nat'l Union Fire Ins. Co. of Pittsburgh v. DiMucci,* 2015 IL App (1st) 122725, ¶ 56.

[3] The Fifth Amendment of the United States provides that "No person shall … be subject for the same offense to be twice put in jeopardy of life or limb. Article 1, § 10 of the Illinois Constitution similarly states, "no person shall be twice put in jeopardy for the same offense." Illinois has also adopted a specific

distinct abuses" the only "one at issue here" is "multiple punishments for the same offense"). As detailed below, because (1) jeopardy never attached; (2) Mr. Smollett received no legal "punishment" relating to the Prior Charges; and (3) the Prior Charges were part of a proceeding that is void, the Double Jeopardy Clause is not implicated here and **his motion fails as a matter of law**.[4]

I. Double Jeopardy Is Not at Issue Because Jeopardy Never Attached

In an effort to put the cart before the horse, Mr. Smollett claims that the "only question is whether the $10,000 bond forfeiture constitutes 'punishment' for purposes of the Double Jeopardy Clause." (MTD at 8.) In doing so, however, he ignores a fundamental threshold question—did jeopardy attach regarding the Prior Charges? *See People v. Bellmyer,* 199 Ill. 2d 529, 538 (2002) (explaining "[t]he starting point in any double jeopardy analysis, of course, is determining whether or not jeopardy has attached.") (internal quotation marks and citations omitted); *see also People v. Cabrera*, 402 Ill. App. 3d 440, 447 (1st Dist. 2010) ("To determine whether a subsequent prosecution would violate a defendant's right to avoid being placed in double jeopardy, a reviewing court must initially determine whether jeopardy 'attached' in the first proceeding."). Jeopardy attaching is prerequisite even in situations where a defendant asserts a challenge based on a fear of multiple punishments for the same offense.[5] *See People v. Delatorre,* 279 Ill. App. 3d

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statute outlining the effects of a former prosecution, 720 ILCS 5/3-4. Because double jeopardy protections are similarly guaranteed by the U.S. and Illinois constitutions, (*see People v. Levin,* 157 Ill. 2d 138, 143–44 (1993)), and Illinois law, and for consistency with Mr. Smollett's motion, this brief will refer to the Double Jeopardy Clause to encompass both state and federal protections.

[4] Because Mr. Smollett's motion fails as a matter of law, no evidentiary hearing is necessary to determine the outcome of Mr. Smollett's motion.

[5] The very cases cited by Mr. Smollett confirm this—jeopardy had attached in all those cases. *See Helvering v. Mitchell*, 303 U.S. 391, 396 (1938) (describing that the defendant was indicted, tried, and acquitted on the criminal counts before the tax deficiency assessment at issue arose); *U.S. v. Halper*, 490 U.S. 435, 437 (1989) (defendant was indicted and convicted before the government brought the False Claims Act action resulting in civil penalties which were considered a "punishment"); *Austin v. United States,* 509 U.S. 602,

1014, 1019 (2d Dist. 1996) ("We determine that the general proposition in *Serfass* that there can be no double jeopardy without a former jeopardy is as appropriate to multiple punishments for the same offense when sought in separate proceedings as it is to successive prosecutions for the same offense.") (internal citation omitted).

The answer to the question "did jeopardy attach?"—which is dispositive here—is: jeopardy did ***not*** attach, and, therefore, the Double Jeopardy Clause does not apply.

According to well-established and controlling legal standards, jeopardy attaches at a: "(1) jury trial when the jury is empaneled and sworn; (2) bench trial when the first witness is sworn and the court begins to hear evidence; and (3) guilty plea hearing when the guilty plea is accepted by the trial court." *Cabrera*, 402 Ill. App. 3d at 447 (internal quotation marks omitted); *see also Bellmyer,* 199 Ill. 3d at 538 (outlining the legal standard); 720 ILCS 5/3-4 (identifying criteria for barring prosecution based on double jeopardy). Here, Mr. Smollett's case was dismissed via a motion for *nolle prosequi* 12 days after Mr. Smollett was arraigned—before discovery had even been completed, let alone before a jury was empaneled or any witness was sworn. *See People v. Shields*, 76 Ill. 2d 543, 547 (1979) ("Proceedings preliminary to a trial do not constitute jeopardy."). Mr. Smollett also did not enter a guilty plea to any of the 16 disorderly conduct counts previously charged. **Thus, per well-established jurisprudence, jeopardy did not attach to the Prior Charges**.

In fact, Illinois law is crystal clear that a "*nolle prosequi* is not a final disposition of the case, and will not bar another prosecution for the same offense." *People v. Milka*, 211 Ill. 2d 150, 172 (2004) (internal quotation marks and citations omitted); *see also People v. Norris*, 214 Ill. 2d 92, 104 (2005) ("[W]hen a *nolle prosequi* is entered before jeopardy attaches, the State is entitled

604 (1993) (defendant was indicted, pleaded guilty and was sentenced prior to the second alleged "punishment" of a forfeiture action).

to refile the charges against the defendant."); *Hughes*, 2012 IL 112817 at ¶ 23 ("[W]e have previously held that if a *nolle prosequi* is entered before jeopardy attaches, the State may reprosecute the defendant") (collecting cases).

Because jeopardy did not attach regarding the Prior Charges, Mr. Smollett's double jeopardy argument fails on its face. For this reason alone, Mr. Smollett's motion must be denied.

II. Mr. Smollett Received No Legal "Punishment" in the Prior Proceeding

Even if jeopardy had attached and the Double Jeopardy Clause was implicated here—which it is not—Mr. Smollett's motion still fails as there is no risk of multiple punishments because Mr. Smollett was never "punished" relating to the Prior Charges. As explained in detail below, Mr. Smollett's decision to pay $10,000 to the City of Chicago was not a legal punishment because: (1) Mr. Smollett voluntarily chose to release the funds; (2) the release of the bond to the City of Chicago was not a "fine" under the law because he was not sentenced or given a disposition by a court; and (3) the release of the bond was not in conjunction with a finding or admission of guilt. In short, Mr. Smollett cannot now recast his voluntary choice to release his bond as a legal "punishment" simply because it is advantageous for him to do so.

a. Mr. Smollett's Release of His Bond Was Voluntary as a Condition of the Dismissal of His Charges

As a threshold matter, the framework of Mr. Smollett's argument, that the $10,000 bond he released to the City of Chicago "can ***only*** constitute a fine or victim restitution," has no basis in law and belies common sense. (MTD at 10 (emphasis added).) And, contrary to this false dichotomy Mr. Smollett created, the $10,000 voluntary payment was something else entirely—consideration as part of an agreement between two willing parties: Mr. Smollett and the Cook County State's Attorney's Office. Specifically, as Mr. Smollett admits, the $10,000 was

"***voluntarily*** forfeited as a ***condition of the dismissal of charges***." (*Id*. (emphasis added).)[6] Thus, it is clear that the voluntary release of the bond to the City of Chicago was not an imposed sanction, but was a choice Mr. Smollett made (and agreed to) to try to avoid the risk of proceeding to trial on the Prior Charges.[7] As discussed further below, such a choice cannot—either under the law or based on common sense—constitute a punishment.

b. Mr. Smollett's Payment of $10,000 to the City of Chicago Was Not a "Fine"

Contrary to Mr. Smollett's contention, the $10,000 bond that he ***voluntarily*** relinquished in conjunction with his case being dismissed was not—and legally could not constitute—a "fine." Under the Illinois Criminal Code, a "fine" is one of a number of "appropriate dispositions" for a felony, yet the court did not enter ***any*** "disposition" for the Prior Charges and instead, on a motion by the State, dismissed the case. *See* 730 ILCS 5/5-4.5-15(a) (listing the "dispositions" as probation, periodic imprisonment, conditional discharge, imprisonment, fine, restitution, impact incarceration). Additionally, the Code states that a fine (or restitution[8]) cannot be the only disposition of a felony case; a court must impose such a disposition along with another appropriate disposition. *See* 730 ILCS 5/5-4.5-15(b). Here, because Mr. Smollett did not plead guilty and was not otherwise convicted of any of the Prior Charges, he was not given a sentence of ***any*** disposition

[6] Notably, Mr. Smollett's characterization of his relinquishment of his bond as a condition for dismissal is consistent with how the Cook County State's Attorney's Office described the release in its press statement after the dismissal. Specifically: "The charges were dropped in return for Mr. Smollett's agreement to do community service and forfeit his $10,000 bond to the City of Chicago. Without the completion of these terms, the charges would not have been dropped." (Ex. 7, March 26, 2019, Press Statement).

[7] Of note, even if a defendant and prosecutor reached a plea agreement, the terms would need to be accepted by a judge and sentence imposed by a judge. The negotiated dismissal in this case, therefore, is significantly and meaningfully different.

[8] Mr. Smollett concedes that the $10,000 was not restitution. MTD at 10. However, even if the $10,000 was deemed restitution, it would not change the instant analysis because, like a fine, restitution is something ordered and imposed by a court as part of a disposition or under a program, like the Felony Deferred Prosecution Program. Here, **no court required or sentenced Mr. Smollett to pay the $10,000**.

that would have allowed for a fine to be entered as a disposition. *See* 730 ILCS 5/5-1-19 ("'Sentence' is the disposition imposed by the court on a convicted defendant."); *see also People v. Graves,* 235 Ill. 2d 244, 250 (2009) ("A fine, however, is punitive in nature and is a pecuniary punishment imposed as part of a sentence *on a person convicted of a criminal offense.*") (emphasis added) (internal quotation marks omitted).[9]

As clear evidence of the fact that the $10,000 did not constitute a "fine," the Certified Statement of Conviction/Disposition merely states that the case was *nolle prosequi* and does not list any fine (Ex. 8), as would be noted if a fine was a disposition in the case. With respect to the release of Mr. Smollett's bond, the Certified Statement of Conviction/Disposition states "Cash Bond ***Refund*** Processed Forwarded Accounting Department," with again no mention of a fine. (*Id.* at 4.) (emphasis added). Furthermore, Mr. Smollett's bond relinquishment was processed as a "Refund," with the money being sent to the City of Chicago, rather than as "Money to satisfy . . . Fines . . ." (Ex. 9.) Mr. Smollett provides no documentation indicating that the $10,000 was a fine or processed akin to a fine, such as being released to the clerk or Sheriff, rather than being refunded (per his voluntary choice) and then sent to the City of Chicago.

Importantly, Mr. Smollett's argument wholly misses the mark by making the true—but irrelevant—point that "fines may be imposed" under the disorderly conduct statute. (MTD at 9.) The mere fact that a court could ***sentence*** a defendant ***convicted*** under the statute to pay a fine has no bearing on the nature of Mr. Smollett's ***voluntary*** release of the $10,000 bond in the prior

[9] Tellingly, even the case law Mr. Smollett quotes to support of his "multiple punishments" argument (*United States v. Halper*) refers specifically to a defendant being "sentenced" twice for the same crime (MTD at 7). However, it is clear that Mr. Smollett was never sentenced in the prior proceeding, and thus the $10,000 bond relinquishment was not a fine (or any other type of punishment). Moreover, the Supreme Court has abrogated *Halper*, finding its test for determining whether a particular sanction was punitive "unworkable." *Hudson v. United States*, 522 U.S. 93, 102 (1997).

proceeding.[10] Similarly, the mere fact that a defendant ***could*** choose to use his bond to pay a fine he was ordered to pay as part of his sentence (MTD at 9–10) in no way means that Mr. Smollett's ***voluntary*** decision to allow the bond funds to be transferred to the City of Chicago was in fact payment for a fine (which, as noted above, ***he was never ordered or sentenced to pay***).

Moreover, at most, the Cook County State's Attorney's Office negotiated that Mr. Smollett relinquish the $10,000 bond, but that Office does not have the authority to impose a "fine."[11] Indeed, the State's Attorney's Office is vested with certain investigatory and prosecutorial powers—***not*** the power to unilaterally impose or order sanctions, like a fine. *See* 55 ILCS 5/3-9005 (delineating the powers and duties of State's Attorneys). Rather, the "imposition of fine is a judicial act." *People v. Higgins*, 2014 IL App (2d) 120888, ¶ 24; *see also People v. Chester*, 2014 IL App (4th) 120564, ¶ 33 ("[F]ines, which as a matter of law must be imposed by the trial court as part of the sentence ordered."); 730 ILCS 5/4-4-1(b) (stating that sentences are "imposed by [a] judge").[12]

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[10] Confusingly, Mr. Smollett also cites to the fact that a particular provision of the disorderly conduct statute, which was not a provision under which Mr. Smollett was charged, (725 ILCS 5/26-1(b)), requires that a defendant convicted under that provision pay a fine. (MTD at 9.) Because that provision is not at issue, and Mr. Smollett was not convicted, this is wholly irrelevant.

[11] The judge presiding over the prior case did enter an order to release the bond to the City of Chicago, per the agreement between the parties (see MTD at 2) and at the request of the Cook County State's Attorney's Office, but the judge did not decide that the bond would need to be forfeited or in any way sentence Mr. Smollett. Rather, the judge entered an administrative order to allow the clerk to release the bond and direct it to where the parties wanted it to go.

[12] Rather than recognizing the State's Attorney's Office's lack of authority to issue a fine, Mr. Smollett contends that the Office demonstrated an "expressed intent to punish" (MTD at 15) though he provides ***no*** citation or legal basis for why or how such an intent (even if it could be shown) would be relevant to the double jeopardy analysis. Further, to attempt to demonstrate this purported "intent" he merely cites public statements made by State's Attorney Kim Foxx, who the Cook County State's Attorney's Office stated publicly was not the decision-maker or attorney handling Mr. Smollett's case and which have no legal relevance. Similarly, Mr. Smollett's reference (in the "Background" section) to the Special Prosecutor's press release referring to the prior resolution of the case as "punishment" (MTD at 5–6) has no legal relevance.

Therefore, in sum, Mr. Smollett's ***voluntary*** relinquishment of the $10,000 did not and could not constitute a "fine."

c. Mr. Smollett's Guilt Has Not Been Admitted or Determined; Therefore No Legal "Punishment" Could Have Occurred

Even putting aside whether the voluntary relinquishment constituted a "fine" (one of only two possibilities, according to Mr. Smollett), Mr. Smollett's current position that the $10,000 payment to the City of Chicago constitutes a "punishment" is wholly inconsistent with his repeated contention publicly and in ongoing civil litigation (where he is represented by counsel also representing him in this case) that the dismissal of the Prior Charges was "due to his innocence" and "indicative of his innocence." (*City of Chicago v. Smollett,* 19-CV-04547, Dkt. 47, Resp. to City MTD at 3 (Jan. 15, 2020); *City of Chicago v. Smollett,* 19-CV-04547, Dkt. 78, Resp. to Motion to Dismiss for Failure to State a Claim at 4, (March 2, 2020.))[13] Notably, Black's Law Dictionary defines punishment as: "A sanction … assessed against a person who has violated the law." Black's Law Dictionary (11th ed. 2019). As discussed above, not only does Mr. Smollett's voluntary release of his bond not meet this definition because it was not "assessed" upon him (rather, it was something he agreed to), but there has been no finding or admission that he "violated the law." In fact, Mr. Smollett's contention that the dismissal was "due to his innocence" **is the opposite of any determination or admission of guilt**. Thus, the prerequisite for "punishment" (i.e., a finding of a violation) did not exist.[14] Therefore, as discussed above, the release of the bond

[13] Of course, the Office of the Special Prosecutor recognizes that Mr. Smollett is presumed innocent until proven guilty.

[14] Mr. Smollett's argument that the release of the $10,000 bond must have been "intended to serve retributive or deterrent purposes" (MTD at 14) similarly fails because there cannot be retribution or deterrence without underlying wrongdoing. Thus, if—as he contends—he is innocent and the dismissal was "due to his innocence," the $10,000 payment could not serve retributive or deterrent purposes. Rather, it was an agreed and negotiated condition to the charges being dismissed.

was merely a "condition" to obtain a dismissal (as admitted by Mr. Smollett)—not a legal "punishment."

Tellingly, given the lack of legal basis for his position that he can have been punished without having been convicted or admitted guilt, Mr. Smollett relies solely upon a case from ***1880***, *United States v. Chouteau,* to claim the fact that he was not convicted (and thus was not sentenced to any disposition, including to pay a fine) is of no import. (MTD at 16.) However, that extremely dated case does not support—let alone save—his motion, as it relates to wholly inapplicable circumstances. In *Chouteau*, the Supreme Court answered the question of whether a distiller's settlement with the government—which constituted a "full and complete" resolution—precluded the government from seeking the "same penalty" via a new proceeding based largely on the same conduct. *See United States v. Chouteau,* 102 U.S. 603, 610–11 (1880). ("The question, therefore, is presented whether sureties on a distiller's bond shall be subjected to the penalty attached to the commission of an offence, when the principal has effected a full and complete compromise with the government, under the sanction of an act of Congress, of prosecutions based upon the same offence and designed to secure the same penalty."). Importantly, in *Chouteau,* the penalty paid to the government was "in full satisfaction, compromise, and settlement of said indictments and prosecutions," and the agreement "covered the causes or grounds of the prosecutions, and consequently released the party from liability for the offences charged and any further punishment for them." *Id.* By comparison, here, Mr. Smollett merely negotiated to obtain ***a dismissal*** via a motion for *nolle prosequi*—no full release of liability—**which expressly left the door open for another prosecution**. *See Hughes*, 2012 IL 112817, ¶ 23 (explaining that a *nolle prosequi* "leaves the matter in the same condition as before the prosecution commenced" and the "State may reprosecute the defendant"). Therefore, Mr. Smollett's reliance on the *Chouteau* case—and ***only***

that dated case—to try to undercut the dispositive fact that he was not convicted or sentenced (or acquitted) on the Prior Charges (and, therefore, legally could not have been "punished") is misplaced.

In sum, Mr. Smollett (through his counsel) negotiated a resolution to the Prior Charges to avoid having to risk proceeding to trial. It seems that he may now have "buyer's remorse" about the terms of his negotiated resolution because he did not anticipate the events that would follow—namely that a special prosecutor would be appointed and would assess whether he should be further prosecuted. As a result, Mr. Smollett is grasping at straws by attempting to recast his prior agreement—and ***voluntary*** choice to give the City of Chicago $10,000—as some sort of "punishment." However, given that the $10,000 was not ordered or imposed by a court (and he has gone so far as to claim that the dismissal was "due to his innocence"), this ***voluntary agreement*** to give up $10,000 cannot be deemed a legal "punishment" for purposes of the Double Jeopardy Clause.

III. Double Jeopardy Cannot Apply Because the Prior Proceedings Are Void

The particular circumstances of Mr. Smollett's case also undermine any possible challenge under the Double Jeopardy Clause. Specifically, when Judge Toomin granted the motion to appoint a special prosecutor relating to Mr. Smollett's case, he concluded that the actions by the Cook County State's Attorney's Office relating to the Prior Charges were void. (Ex. 1 at 20.) Among other things, Judge Toomin noted that there was no duly appointed State's Attorney at the time Mr. Smollett was charged, indicted, arraigned, or when the proceedings were *nolle prossed* (at which time Mr. Smollett voluntarily relinquished his $10,000 bond). (*Id.*) Therefore, even if a dismissal 12 days after arraignment and a voluntary release of a $10,000 bond as a condition of a dismissal ***could*** be deemed to implicate the Double Jeopardy Clause (which would run contrary

to established law), ***in this particular case***, there still would be no Double Jeopardy violation because, based on Judge Toomin's order, the New Charges are being brought on a clean slate. In other words, because the Prior Charges, and their resolution, were void, the New Charges cannot be deemed a second bite at the proverbial apple because it is as if the first bite never occurred. Thus, as a matter of law, the Double Jeopardy Clause cannot apply to the New Charges.

CONCLUSION

For the foregoing reasons, the Office of the Special Prosecutor respectfully requests that this Court deny Mr. Smollett's Motion to Dismiss Indictment.

Dated: March 24, 2020

Respectfully Submitted,

/s/ Dan K. Webb

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

People of the State of Illinois,	)	
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	)	
	)	No. 20 CR 03050-01
Jussie Smollett,	)	
	)	
Defendant.	)	
	)	

NOTICE OF FILING

TO:

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YOU ARE HEREBY NOTIFIED that on March 24, 2020, before 5:00 p.m., the undersigned filed the attached Response to Motion to Dismiss Indictment for Alleged Violation of Defendant's Right Against Double Jeopardy with the Clerk of the Circuit Court at the George N. Leighton Criminal Courthouse, 2600 South California Avenue, Chicago, Illinois 60608, with a courtesy copy provided to Judge Linn through his clerk via email at Amber.Hunt@cookcountyil.gov.

/s/ Sean G. Wieber
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PROOF OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing to be emailed to the following attorneys of record on March 24, 2020:

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

People of the State of Illinois,	)	
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	)	
	)	No. 20 CR 03050-01
Jussie Smollett,	)	
	)	
Defendant.	)	
	)	

EXHIBITS IN RESPONSE TO MOTION TO DISMISS INDICTMENT FOR ALLEGED VIOLATION OF DEFENDANT'S RIGHT AGAINST DOUBLE JEOPARDY

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

People of the State of Illinois,	)	
	)	
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	)	No. 20 CR 03050-01
Jussie Smollett,	)	
	)	
Defendant.	)	
	)	

AFFIDAVIT OF SEAN G. WIEBER

I, Sean G. Wieber, having personal knowledge of the following facts, state as follows under penalty of perjury pursuant to 735 ILCS 5/1-109.

1. My name is Sean G. Wieber. I am an attorney licensed to practice law before the Courts of Illinois. I serve as Deputy Special Prosecutor in *People of the State of Illinois v. Smollett*, Case No 20 CR 03050-01, pending in the Circuit Court of Cook County, Illinois, Criminal Division. I assist Dan K. Webb who was appointed Special Prosecutor on August 23, 2019.

2. I submit this Affidavit in Support of The Office of the Special Prosecutor's Response to Motion to Dismiss Indictment for Alleged Violation of Defendant's Right Against Double Jeopardy. This Affidavit is submitted to authenticate documents attached as exhibits to the response.

3. Exhibit 1 is a true and correct copy of the June 21, 2019 Order of Judge Michael P. Toomin in Circuit Court of Cook County, Criminal Division Case No. 19 MR 00014.

4. Exhibit 2 is a true and correct copy of the March 7, 2019 True Bill and Indictment for Disorderly Conduct in People of the State of Illinois v. Jussie Smollett, Circuit Court of Cook County, Criminal Division Case No. 19 CR 3104-01.

5. Exhibit 3 is a true and correct copy of the Report of Proceedings of the March 26, 2019 hearing before Judge Steven G. Watkins in Circuit Court of Cook County, Criminal Division, Case No. 19 CR 3104-01.

6. Exhibit 4 is a true and correct copy of the March 26, 2019 Order by Judge Steven G. Watkins in Circuit Court of Cook County, Criminal Division, Case No. 19 CR 3104-01.

7. Exhibit 5 is a true and correct copy of the August 23, 2019 Order of Judge Michael P. Toomin in Circuit Court of Cook County, Criminal Division Case No. 19 MR 00014.

8. Exhibit 6 is a true and correct copy of the February 11, 2020 True Bill and Indictment for Disorderly Conduct in People of the State of Illinois v. Jussie Smollett, Circuit Court of Cook County, Criminal Division Case No. Case No. 19 CR 3104-01.

9. Exhibit 7 is a true and correct copy of the March 26, 2019 statement by the Cook County State's Attorney's Office on Dismissal of Charges for Jussie Smollett, available at: https://www.cookcountystatesattorney.org/news/statement-dismissal-charges-jussie-smollett (last accessed March 24, 2020).

10. Exhibit 8 is a true and correct copy of the Certified Statement of Conviction/Disposition for People of the State of Illinois vs. Jussie Smollett, Circuit Court of Cook County, Criminal Division Case No. 19 CR 3104-01.

11. Exhibit 9 is a true and correct copy of the March 26, 2019 Criminal Division Bond Audit Form for Circuit Court of Cook County, Criminal Division Case No. Case No. 19 CR 3104-01, Bond # D-1375606.

Dated: March 24, 2020

/s/ Sean G. Wieber

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Exhibit 1

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

IN RE APPOINTMENT OF SPECIAL PROSECUTOR	**No. 19 MR 00014** **Michael P. Toomin** **Judge Presiding**

ORDER

Petitioner, Sheila O'Brien, seeks the appointment of a special prosecutor to reinstate and further prosecute the case of the People of the State of Illinois v. Jussie Smollett, No. 19 CR 0310401, to investigate the actions of any person or office involved in the investigation, prosecution and dismissal of that matter, and to also investigate the procedures of the Cook County State's Attorney's Office regarding charging decisions, bonds, deferred prosecutions and recusals. Respondent, Kim Foxx, State's Attorney of Cook County, denies that that the Smollett prosecution was compromised, impeded or undermined by any illegal or improper action and further contends that petitioner cannot meet the standards for appointment of a special prosecutor. Accordingly, respondent maintains the petition should be denied.

The issues have been joined by the pleadings and exhibits and following oral argument the matter was taken under advisement. The court will now address the merits of the petition.

BACKGROUND

The instant petition has its genesis in a story unique to the anals of the Criminal Court. The principal character, Jussie Smollett, is an acclaimed actor known to the public from his performances in the television series, "Empire." But his talents were not destined to be confined to that production. Rather, in perhaps the most prominent display of his acting potential, Smollett conceived a fantasy that propelled him from the role of a sympathetic victim of a vicious homophobic attack to that of a charlatan who fomented a hoax the equal of any twisted television intrigue.

Petitioner's factual allegations stem from a number of articles published in the Chicago Tribune, the Chicago Sun-times and other newspapers as well as local broadcasts, together with redacted Chicago Police Department reports and materials recently released by the State's Attorney's Office. Although the court recognizes that portions of these sources may contain hearsay rather than "facts" within the semblance of a trial record, the materials provide a backdrop for consideration of the legal issues raised by the petition.[1]

The story begins on January 22, 2019, when Smollett first sought the aid of the Chicago Police Department. Smollett reported that he was the recipient of an envelope delivered to the "Empire" studio on Chicago's West Side. Inside, was an unsettling note with letters apparently cut out from an unidentifiable publication, forming what appeared to be a racial and homophobic message that Smollett perceived as a threat. His fear was further heightened by the stick figure

[1] Hearsay is an out-of-court statement offered for the truth of the matter asserted therein, its value depending upon the credibility of the declarant. *People v. Murphy*, 157 Ill. App. 3d 115, 118, (1987); see also Ill. R. Evid. 801 (a)-(c) (eff. Jan. 1, 2011). Yet, certain of such statements may be admissible for other purposes (*People v. Davis*, 130 Ill. App. 3d 41, 53, (1984), including to simply show that a statement was made, to characterize an act, to show its effect on the listener, or to explain the steps in an investigation. See M. Graham, Graham's Handbook of Illinois Evidence § 801.5, at 763-78 (10th ed. 2010); and Ill. R. Evid. 803 and 804. Admissions and prior inconsistent statements, which appear prominently in the parties' submissions, are likewise not considered hearsay. Graham, §§ 801.9 and 801.14; and Ill. R. Evid. 801(d)(1), (2).

displayed on the note, holding a gun pointed at the figure's head. Additionally, the envelope contained a white powder substance that the police later determined to be aspirin.

A week later, on January 29, 2019, Smollett's production manager called 911 to report that Jussie had been attacked by two men outside a local sandwich shop at two o'clock that morning. Smollett, who is black and gay, later told the police he was physically attacked as he returned home from an early morning stop at the nearby Subway store. Smollett claimed that two masked men shouted homophobic and racial slurs, and as they beat him yelled "This is MAGA country." After looping a rope around his neck, the offenders who reportedly were white, poured "an unknown substance" on him before running away.

When news of the attack was released to the public, members of the United Sates Congress, television talk show hosts and other public figures expressed outrage. This included even the President of the United States who after viewing this story declared, "It doesn't get worse, as far as I'm concerned."

Acting on the belief that what had transpired was potentially a hate crime, the response of law enforcement was swift and certain. On the day following the attack, at least a dozen detectives combed hundreds of hours of surveillance camera footage in the area Smollett designated as the scene of the attack. None of the footage revealed anything resembling the attack. However, detectives did observe images of two people in the area, but their faces were indistinguishable.

As the investigation progressed the police began to focus on two brothers who soon came to be viewed as suspects. On February 13, 2019, as they returned from Nigeria, the brothers were taken into custody and questioned. The following day their apartment was searched.

Smollett's story then began to unravel. Detectives eventually concluded that he had lied about the attack. The investigation shifted to whether Smollett orchestrated the scenario, paying the Nigerians to stage the event. The police learned that both brothers had actually worked with Smollett at his television studio. Smollett had now become a suspect, well on his way to becoming an accused.

On February 21, 2019, in the early morning, Smollett turned himself in to custody at Chicago Police Headquarters where he was arrested and charged with filing a false police report, a form of disorderly conduct. The offense is a Class 4 felony, carrying a potential sentence of up to three years imprisonment. That same day, Police Superintendent, Eddie Johnson, held a press conference where he essentially confirmed what anonymous sources had been leaking to the media; that Smollett had staged the attack because he was dissatisfied with his "Empire" salary and that he had sent the threatening letter to himself.

On March 8, 2019, a Cook County grand jury indicted Smollett on 16 felony counts of disorderly conduct. A plea of not guilty was entered at his arraignment and the cause was continued to April 17, 2019. However, that date never materialized; rather, at an emergency court appearance on March 26, 2019, the case was *nolle prossed*, a disposition that shocked officialdom as well as the community. The State's Attorney's Office then issued the following statement:

> "After reviewing all the facts and circumstances of the case including Mr. Smollett's volunteer service in the community and his agreement to forfeit his bond to the City of Chicago, we believe the outcome is a just disposition and appropriate resolution of this case"

The State's Attorney's revelation was widely condemned. The secrecy shrouding the disposition prompted a backlash from both Superintendent Johnson as well as Mayor Rahm Emanuel, who derided the decision as a "whitewash of justice." President Trump again weighed in, announcing that the F.B.I and the Department of Justice would review the case, which he called "an embarrassment to our nation."

Internal documents recently released by the State's Attorney's Office and the Chicago Police Department contradict the impression that the sudden disposition was only recently conceived. In reality, negotiations extended back to February 26, 2019, a date close to the initial charges when First Assistant Magats wrote:

> "We can offer the diversion program and restitution. If we can't work something out, then we can indict him and go from there."

On February 28, 2019, the Chief of the Criminal Division, Risa Lanier, told detectives that they could no longer investigate the crime; she felt the case would be settled with Smollett paying $10,000 in restitution and doing community service. Although the detectives assumed the disposition would include a guilty plea, there was no admission of guilt or plea when the agreement was consummated. The public also found unsettling that the prosecutors had left open the question of Smollett's wrongdoing.

As with many unwinding plots, this case has a back story offering further insight into the workings behind the scenes. The details of that story became public over the course of the prosecution and was supplemented on May 31, 2019 through the release of reports, text messages and other internal documents released by the State's Attorney's Office and the Chicago Police Department and reported by the media.

On February 1, 2019, two days after Jussie Smollett reported his staged hate crime, State's Attorney Kim Foxx was contacted by Tina Tchen, a local attorney who previously served

as Michelle Obama's Chief of Staff. Tchen, a Smollett family friend, informed Foxx of the family's concern over the investigation and particularly, leaks from the police department to the media.

In turn, Foxx reached out to Superintendent Johnson, seeking to have the investigation taken over by the F.B.I. She later exchanged text messages with a member of the Smollett family who was grateful for Foxx's efforts.

The same day, Ms. Foxx discussed the likelihood of the F.B.I. taking over the investigation with her Chief Ethics Officer, April Perry. On February 3, 2019, Foxx told Perry to "impress upon them [the FBI] this is good." Perry later responded that she had spent 45 minutes giving her "best sales pitch" to the F.B.I., but they would likely want to hear more from Superintendent Johnson.

In another text, Ms. Foxx wondered if it was worth the effort and the transfer never materialized:

> "I don't want to waste any capital on a celebrity case that doesn't involve us. I'm just trying to move this along, since it's a distraction and people keep calling me."

On February 13, 2019, Foxx quietly announced that she was leaving the case. April Perry sent an internal email informing staff:

> "Please note that State's Attorney Foxx is recused from the investigation involving Jussie Smollett. First Assistant State's Attorney, Joe Magats is serving as the Acting State's Attorney for this matter."

Six days later, the recusal was confirmed by Foxx's spokewoman, Tandra Simonton:

> "Out of an abundance of caution, the decision to recuse herself was made to address potential questions of impropriety based upon familiarity with potential witnesses in the case."

Additionally, an ABC 7-I-Team press release recounted that Alan Spellberg, supervisor of the State's Attorney's Appeals Division, had sent a four-page memo to office brass indicating that the appointment of Magats was against legal precedent:

> "My conclusion from all of these authorities is that while the State's Attorney has the complete discretion to recuse herself from the matter, she cannot simply direct someone (even the First Assistant) to act in her stead"

Mounting questions over Foxx's withdrawal prompted various responses from her office. Foxx, they explained, did not legally recuse herself from the Smollett case; she did so only "colloquially." According to Foxx's spokewoman, Keira Ellis:

> "Foxx did not formally recuse herself or the [State's Attorney] Office based on any actual conflict of interest. As a result she did not have to seek the appointment of a special prosecutor"

The confusion continued, as well as the widespread doubt. On May 31, 2019, the State's Attorney added yet another explanation for her recusal:

> "False rumors circulated that I was related or somehow connected to the Smollett family, so I removed myself from all aspects of the investigation and prosecution…so as to avoid even the perception of a conflict."

ANALYSIS

Petitioner, Sheila O'Brien, seeks the appointment of a special prosecutor to reinstate and further prosecute the charges in the matter entitled the People of the State of Illinois v. Jussie Smollett, dismissed by the Cook County State's Attorney on March 26, 2019, and *inter alia,* to investigate the actions of any person or office involved in the investigation, prosecution and dismissal of that matter. Petitioner asserts that appointment of a special prosecutor is appropriate where, as here, the State's Attorney is unable to fulfill her duties, has an actual conflict of interest or has recused herself in the proceedings.

State's Attorney, Kim Foxx, denies that petitioner has the requisite standing to bring this action, Ms. Foxx further maintains that petitioner cannot meet the standard for the appointment of a special prosecutor as she had no actual in conflict in this case, and at no time filed a formal recusal motion as the law requires. Additionally, the State's Attorney posits that appointment of a special prosecutor would be duplicative of the inquiry she requested into her handling of the matter, currently being conducted by the Cook County Inspector General.

Any analysis must be prefaced by reference to governing legal principles. As a threshold matter it is generally recognized that section 3-9005 of the Counties Code, 55 ILCS 5/3-9005 (West 2018), cloaks the State's Attorney with the duty to commence and prosecute all actions, civil or criminal, in the circuit court for the county in which the people of the State or county may be concerned. *People v. Pankey*, 94 Ill. 2d 12, 16 (1983). As a member of the executive branch of government, the public prosecutor is vested with exclusive discretion in the initiation and management of a criminal prosecution. *People v. Novak,* 163 Ill. 2d 93, 113 (1994). Essentially, it is the responsibility of the State's Attorney to evaluate the evidence and other pertinent factors to determine what offenses, if any, can and should properly be charged. *People*

ex rel. Daley v. Moran, 94 Ill. 2d 41, 51 (1983).

It is well-settled that prosecutorial discretion is an essential component of our criminal justice system. As noted, the State's Attorney is cloaked with broad prosecutorial power in decisions to bring charges or decline prosecution. *Novak,* 163 Ill. 2d at 113. Control of criminal investigations is the prerogative of the executive branch, subject only to judicial intervention to protect rights. *Dellwood Farms, Inc. v. Cargill, Inc.,* 128 F. 3d 1122, 1125 (1997).

In derogation of these long-standing principles, our legislature has codified certain limitations on the powers and duties of our elected State's Attorneys. Thus, the current iteration of Section 3-9008 of the Counties Code, 55 ILCS 5/3-9008 (West 2018) provides in relevant parts:

> (a- 5) The court on its own motion, or an interested person in a cause or proceeding,...may file a petition alleging that the State's Attorney is sick, absent, or unable to fulfill his or her duties. The court shall consider the petition, any documents filed in response, and ... If the court finds that the State's Attorney is sick, absent, or otherwise unable to fulfill his or her duties, the court may appoint some competent attorney to prosecute or defend the cause or proceeding.
>
> (a-10) The court on its own motion, or an interested person in a cause or proceeding,...may file a petition alleging that the State's Attorney has an actual conflict of interest in the cause or proceeding. The court shall consider the petition, any documents filed in response, and... If the court finds that the petitioner has proven by sufficient facts and evidence that the State's Attorney has an actual conflict of interest in a specific case, the court may appoint some competent attorney to prosecute or defend the cause or proceeding.
>
> (a-15) Notwithstanding subsections (a-5) and (a-10) of this Section, the State's Attorney may file a petition to recuse himself or herself from a cause or proceeding for any other reason he or she deems appropriate and the court shall appoint a special prosecutor as provided in this Section.

This limitation upon the public prosecutor's statutory powers has endured for more than 170 years, providing the sole standards for determining when a State's Attorney should be disqualified from a particular cause or proceeding. See Laws 1847, §1, p. 18; *People v. Lang*, 346 Ill. App. 3d 677, 680 (2004). The abiding purpose of the enactment is to "prevent any influence upon the discharge of the duties of the State's Attorney by reason of personal interest." *In re Harris*, 335 Ill. App. 3d 517, 520 (2002), quoting *People v. Morley*, 287 Ill. App. 3d 499, 503-04 (1997). The term "interested" as used in the former statute was interpreted by our supreme court to mean that the State's Attorney must be interested as: (1) a private individual; or (2) an actual party to the action. *Environmental Protection Agency v. Pollution Control Board*, 69 Ill. 2d 394, 400-01 (1977).

Over time, the reach of Section 3-9008 was expanded to include situations in which the State's Attorney has a *per se* conflict of interest in the case. Guidance as to what may constitute a *per se* conflict may be found in an unbroken line of precedent. In *People v. Doss*, 382 Ill. 307 (1943) and *People v. Moretti*, 415 Ill. 398 (1953), where the State's Attorneys were potential witnesses before the grand jury, appointment of a special prosecutor was the regular and proper procedure to be followed. Likewise, in *Sommer v. Goetze*, 102 Ill. App. 3d 117 (1981), a special prosecutor was mandated in a civil proceeding where an assistant State's Attorney was both the complainant and key witness. See also *People v. Lanigan*, 353 Ill. App. 3d 422 (2004) (State's Attorney's representation of deputy sheriffs on their fee petitions contemporaneously with their prosecution created a *per se* conflict of interest).

Prevailing precedent dictates that the decision to appoint a special prosecutor under section 3-9008 is not mandatory, but rather within the sound discretion of the circuit court. *In re Appointment of Special Prosecutor*, 388 Ill. App. 3d 220, 232, (2009); *Harris*, 335 Ill. App. 3d at

520 and *People v. Arrington*, 297 Ill. App. 3d 1, 3 (1998). Even where a disqualifying ground is found, "the appointment of a special state's attorney is not mandatory, the statute only requiring that such an appointment may be made." *Lanigan*, 353 Ill. App. 3d at 429-30, quoting *Sommer*, 102 Ill. App. 3d at 120.

Moreover, the authority of a special state's attorney is strictly limited to the special matter for which he was appointed. *Franzen v. Birkett* (*In re Special State's Attorney*, 305 Ill. App. 3d 749, 761 (1999). His powers are restricted to those causes or proceedings in which the State's Attorney is disqualified. ("As to all other matters the State's Attorney continues to exercise all of the duties and enjoys all of the emoluments of his office.") *Aiken v. County of Will*, 321 Ill. App. 171, 178 (1943). Additionally, the appointment of a special prosecutor is appropriate only where the petitioner pleads and proves specific facts showing that the State's Attorney would not zealously represent the People in a given case. *Harris*, 335 Ill. App. 3d at 522, citing *Baxter v. Peterlin*, 156 Ill. App. 3d 564, 566 (1987).

Standing to seek appointment of a special prosecutor may also be at issue. Under two provisions of the current statute, commencement of actions to disqualify the State's Attorney are limited to motions brought by the court or by an interested person in a cause or proceeding. Section 3-9008 (a-5) and (a-10).

The issue was earlier addressed by our supreme court in *People v. Howarth*, 415 Ill. 499, 513 (1953), where the court concluded that citizens associated with the Good Government Council could properly invoke the court's jurisdiction. See also, *Lavin v. Board of Commissioners of Cook County*, 245 Ill. 496, 502 (1910), where the court recognized that "the filing of a petition by the State's attorney setting up facts... to appoint a special State's attorney gave the court jurisdiction of the subject matter...." Similarly, in *People ex rel. Baughman v. Eaton*, 24 Ill. App. 3d 833, 834 (1974), the Fourth District found it was appropriate for a private

citizen to seek a special prosecutor to call the court's attention to circumstances that may warrant that appointment. Nor is it necessary that a private citizen petitioning to invoke the disqualification statute be a party to the action. *In re Appointment of Special Prosecutor*, 388 Ill. App. 3d 220, 229 (2009); *Franzen*, 305 Ill. App. 3d at 758.

With these principles in mind, consideration will be given to the merits of the case at hand. Petitioner first asserts that she is an "interested person" within the purview of Section 3-9008 by reason of her professional background and personal attributes. As a member of the judiciary from 1985 to 2011, petitioner alleges that she has sustained personal harm from the derogatory manner in which the Smollett case was handled; that she and all residents of the community have been subjected to ridicule and disparaging media commentary to the extent that her ability to live peacefully has been diminished.

The State's Attorney denies that petitioner's status as a taxpayer and active member of her community is sufficient to confer standing. Rather, petitioner is merely a casual observer who should not be allowed to invoke the jurisdiction of Section 3-9008 absent some showing of particular pecuniary interest to intervene.

Although the State's Attorney's argument has a degree of merit, the authorities previously discussed do not foreclose the application of petitioner's personal attributes and feelings in determining her status as an interested person. There is no requirement that she be a party to the action nor need she have any financial interest in this cause. Her assertion of standing will be sustained.

Petitioner next contends that State's Attorney Foxx was unable to fulfill her duties in the Smollett case because Foxx's recusal indicated her acknowledgement of a potential conflict of interest stemming from her "familiarity with potential witnesses in the case." Petitioner's argument appears to be grounded on the first basis for appointment of a special prosecutor

providing that an interested person in a cause or proceeding may file a petition where the State's Attorney is sick, absent or unable to fulfill his or her duties. 55 ILCS 5/3-9008 (a-5).

An identical argument was recently rejected in In re Appointment of Special Prosecutor (Emmett Farmer), 2019 IL. App. (1st) 173173, where the First District determined that subsection (a-5) is limited to situations where the State's Attorney is physically unable to perform due to sickness, absence or similar circumstances beyond her control:

> "By grouping 'sick, absent or unable to fulfill his or her duties' together in subsection (a-5), the legislature indicated that the inability to fulfill one's duties is of a kind with sickness and absence" ¶28

Accordingly, petitioner's argument on subsection (a-5) must fail.

In her second ground of disqualification, petitioner submits that Ms. Foxx's use of the word "recuse" reflects her subjective belief that "she had a conflict with prosecuting Jussie Smollett and thus was unable to perform her duties as defined." Although the existence of an actual conflict of interest is indeed a recognized ground of disqualification under subsection (a-10), petitioner essentially fails to plead and prove specific facts identifying the interest or the conflict.

In petitioner's "Fact Timeline" one might perhaps discern that the conflicting interest of which petitioner speaks was a manifest desire to aid and assist Mr. Smollett. If so, adherence to that motive would certainly intersect with and be in derogation of the State's Attorney's statutory duties and responsibilities. Petitioner's Timeline, together with other facts established during the course of the proceedings, might offer some support for a claim of interest. First, Ms. Foxx's receipt of text messages requesting her assistance when Smollett was a purported victim in the early stages of the case, coupled with the series of conversations with Smollett's family could be indicative of a desire to help. Likewise, Foxx's request that Police Superintendent, Eddie

Johnson facilitate the transfer of the case to the F.B.I. could manifest a desire to aid. Again, after Smollett had been indicted, Foxx's approval of the dismissal on an unscheduled court date in return for the favorable disposition Smollett received might also be indicative of bias. Finally, Foxx's public statements, first upholding the strength of the State's case, then justifying the agreement because the evidence turned out to be weaker than was initially presented were additional factors showing favor.

Although petitioner's allegations raise some disquieting concerns they do not rise to a clear showing of interest. To be sure, other facts such as the initial charging of Smollett, the engagement of the grand jury, the return of the indictment, the arraignment and ongoing prosecution of Smollett are opposing facts that tend to undermine a claim of interest. Petitioner has failed to show the existence of an actual conflict of interest in the Smollett proceeding.

Finally, petitioner posits that this court must appoint a special prosecutor because Kim Foxx recused herself in the Smollett case. Petitioner grounds this assertion on staff's public statement on February 19, 2019 that Foxx had decided to recuse herself "out of an abundance of caution" because of her "familiarity with potential witnesses in the case." The announcement mirrored the internal acknowledgement, of February 13, 2019 that Foxx "is recused" from the Smollett investigations.

Although the statutory authority relied upon by Ms. Foxx was not articulated, a reasonable assumption exists that it was bottomed on subsection 3-9003 (a-15), authority for the proposition that permissive recusals can be invoked by the State's Attorney for "any other reason he or she deems appropriate." However, Foxx did not file a petition for recusal, nor did she alert the court of her recusal, thereby depriving the court of notice that appointment of a special prosecutor was mandated. Instead, she simply turned the Smollett case over to her First Assistant, Joseph Magats. As will be shown, her ability to bypass the mandate of the statute was

in opposition to well-established authority.

Curiously, public announcements that flowed from the State's Attorney's Office offered the rather novel view that the recusal was not actually a recusal. Rather, in an exercise of creative lawyering, staff opined that Foxx did not formally recuse herself *in a legal sense*; that the recusal was only in a *colloquial sense*. Under that rubric, Foxx could carry on as public prosecutor, unhampered by her contradictory statements. However, discerning members of the public have come to realize that the "recusal that really wasn't" was purely an exercise in sophistry. In this regard, the court takes judicial notice of the recently released memo penned by Chief Ethics Officer, April Perry, under the title, State's Attorney Recusal, dated February 13, 2019:

> "Please note that State's Attorney Kim Foxx is recused from the investigation involving victim Jussie Smollett. First Assistant Joe Magats is serving as the Acting State's Attorney for this matter.

Experience confirms that the term "recusal" is most often used to signify a voluntary action to remove oneself as a judge. Black's Law Dictionary, 4th Ed. p.1442 (1951). However, recusals are not the sole province of the judiciary, but may be invoked by most public officials. Thus, recusals are a species of the disqualification process courts typically encounter in processing motions for substitution of judges or change of venue. In *Brzowski v. Brzowski*, 2014 IL. App. 3d 130404, the Third District held that the same rules should apply when a judge is disqualified from a case, either by recusal or through a petition for substitution:

> "...it is a generally accepted rule in both state and federal courts that once a judge recuses, that judge should have no further involvement in the case outside of certain ministerial acts." ¶19.

A review of the record confirms our understanding that what was intended by Ms. Foxx,

and what indeed occurred, was an unconditional legal recusal. Her voluntary act evinced a relinquishment of any future standing or authority over the Smollett proceeding. Essentially, she announced that she was giving up all of the authority or power she possessed as the duly elected chief prosecutor; she was no longer involved.

The procedure invoked by the State's Attorney necessarily raises problematic concerns. Particularly so, as they relate to the prosecution of Jussie Smollett and the ultimate disposition of his case. Under subsection 3-9008 (a-15), there is no doubt Ms. Foxx was vested with the authority to recuse herself from any cause or proceeding for "any other reason" than those enumerated in subsection (a-5) and (a-10). Notably, this statutory grant appearing as it does in the Counties Code, is the sole legislative authority that enables a duly elected State's Attorney to voluntarily step down from a particular case for any reason.

Given Ms. Foxx's earlier involvement with the Smollett family when Jussie occupied the status of victim, her decision to recuse was understandable. But once that decision became a reality, section 3-9008 was the only road she could traverse and that statute unequivocally requires that a special prosecutor be appointed by the court. Yet, for reasons undisclosed even to this day, Foxx instead chose to detour from that mandated course, instead appointing Mr. Magats as "the Acting State's Attorney for this matter."

The State's Attorney's decision not only had far reaching consequences but also, quite likely, unintended results. Not because of her choice of Joe Magats, an experienced and capable prosecutor, but rather because his appointment was to an entity that did not exist. There was and is no legally cognizable office of Acting State's Attorney known to our statutes or to the common law. Its existence was only in the eye or imagination of its creator, Kim Foxx. But, she was possessed of no authority, constitutionally or statutorily, to create that office. That authority reposes solely in the Cook County Board pursuant to section 4-2003 of the Counties Code, 55

ILCS 5/4-2003 (2018), *People v. Jennings*, 343 Ill. App. 3d 717, 724 (2003), *People ex rel. Livers v. Hanson*, 290 Ill. 370, 373 (1919).

The State's Attorney is a constitutional officer, (Ill. Const. 1970, Art. 6, §19). Although reposing in the judicial article, the office is a part of the executive branch of State Government and the powers exercised by that office are executive powers. *People v. Vaughn*, 49 Ill. App. 3d 37, 39 (1977);

It is axiomatic that the State's Attorney is endowed with considerable authority under the Counties Code, 55 ILCS 5/3-9005 (a) (West 2018), yet none of the 13 enumerated powers and duties vests her with the power to create subordinate offices or to appoint prosecutors following disqualification or recusal. Pursuant to the statute, in addition to those enumerated duties, the State's Attorney has the power:

> 1) To appoint special investigators to serve subpoenas, make returns… and conduct and make investigations which assist the State's Attorney. 55 ILCS 5/3-9005(b);
>
> 2) To secure information concerning putative fathers and non-custodial parents for the purpose of establishing…paternity or modifying support obligation; 55 ILCS 5/3-9005 (c);
>
> 3) To seek appropriations…. for the purpose of providing assistance in the prosecution of capital cases…in post-conviction proceedings and in …petitions filed under section 2-1401 of the Code of Civil Procedure. 55 ILCS 5/3-9005(d); and,
>
> 4) To enter into …agreements with the Department of Revenue for pursuit of civil liabilities under the Illinois Criminal Code. 55 ILCS 5/3-9005 (e).

Nor do decisions of our reviewing courts offer any hint of approval for the unprecedented exercise of power witnessed in the Smollett prosecution. Rather, attention is directed to a series

of cases arising from the practice in downstate counties whereby agency attorneys appeared to assist county prosecutors in specific cases pursuant to section 4-01 of the State's Attorneys Appellate Prosecutors Act, 725 ILCS 210/4.01 (West 2018). Indeed, this was a common practice in counties containing less than 3,000,000 inhabitants. In each instance, the common thread connecting the cases involved appearances on crimes not specifically enumerated in the enabling Act, coupled with the absence of court orders authorizing the appointments mandated under 55 ILCS 5/3-9008.

In *People v. Jennings*, 343 Ill. App. 3d 717 (2003), the record showed that appointed counsel actually displaced the elected State's Attorney, with total responsibility for the prosecution. Counsel acted pursuant to the State's Attorney's order naming him as a special assistant State's Attorney and an oath of office was taken. Yet, no order was entered by the trial court appointing him as a duly authorized prosecutor in the case. In disapproving this procedure, the *Jennings* court stated: "This type of appointment cannot be condoned. State's Attorneys are clearly not meant to have such unbridled authority in the appointment of special prosecutors." *Jennings*, 343 Ill. App. 3d at 724.

Similarly, in *People v. Woodall*, 333 Ill. App. 3d 1146 (2002), the court having found no legitimate basis for any of the agency attorneys to conduct the prosecution on the State's behalf cautioned:

> "The use of special assistants is limited by statute. They can be appointed by circuit court order only after a judicial determination that the elected State's Attorney is 'sick or absent, or [is] unable to attend, or is interested in any cause or proceeding' 55 ILCS 5/3-9008 (West 1998)." *Woodall*, 333 Ill. App. 3d at 1154

The *Woodall* court was also troubled by the State's Attorneys effrontery in professing they were at liberty to create the assistant State's Attorney positions in derogation of the

authority of the County Board:

> The position of "special assistant State's Attorney" is a position unknown to our laws. The State asks us to recognize an appointment process that would create a new hybrid office, an assistant State's Attorney who is special in several ways, but not in the way that the adjective 'special' normally defines the office of special prosecutor...the assistant would hold a special position never authorized by the county board." See 55 ILCS 5/4-2003 (West 1998)." *Woodall*, 333 Ill. App. 3d at 1153-54.

Earlier, in *People v. Ward*, 326 Ill. App. 3d 897 (2002), the Fifth District sounded the death knell for prosecutions conducted by attorneys who lacked legitimacy:

> "If a case is not prosecuted by an attorney properly acting as an assistant State's Attorney, the prosecution is void and the cause should be remanded so that it can be brought by a proper prosecutor. *Ward*, 326 Ill. App. 3d at 902

The specter of a void prosecution is surely not confined to *Ward*. Our jurisprudence speaks to many cases, civil and criminal, where the nullity or voidness rule has caused judgements to be vacated on collateral review. Most prominent perhaps are challenges directed to the standing of unlicensed attorneys to attend or conduct the proceedings. For example, In *People v. Munson*, 319 Ill. 596 (1925), the supreme court considered the effect of participation in the securing of an indictment by one elected as State's Attorney but not licensed to practice law. In quashing the indictment, the court reasoned:

> "If one unauthorized to practice law or appear in courts of record may assist the grand jury in returning an indictment merely because he has been elected to the office of State's Attorney, no reason is seen why one not so elected and not otherwise qualified may not do the same. *Munson*, 319 Ill. App. 3d at 605."

An identical result obtained in *People v Dunson*, 316 Ill. App. 3d 760 (2000), where the defendant, who was prosecuted by an unlicensed attorney, sought post-conviction relief from two disorderly conduct convictions. Although the court recognized the prejudice that inured to the

defendant, it likewise condemned the deception practiced upon the court and upon the public. Relying on *Munson*, the court held that "the participation in the trial by a prosecuting assistant State's Attorney who was not licensed to practice law under the laws of Illinois requires that the trial be deemed null and void *ab initio* and that the resulting final judgment is also void" *Dunson*, 316 Ill. App. 3d at 770.

CONCLUSION

In summary, Jussie Smollett's case is truly unique among the countless prosecutions heard in this building. A case that purported to have been brought and supervised by a prosecutor serving in the stead of our duty elected State's Attorney, who in fact was appointed to a fictitious office having no legal existence. It is also a case that deviated from the statutory mandate requiring the appointment of a special prosecutor in cases where the State's Attorney is recused. And finally, it is a case where based upon similar factual scenarios, resulting dispositions and judgments have been deemed void and held for naught.

Here, the ship of the State ventured from its protected harbor without the guiding hand of its captain. There was no master on the bridge to guide the ship as it floundered through unchartered waters. And it ultimately lost its bearings. As with that ship, in the case at hand:

> There was no duly elected State's Attorney when Jussie Smollett was arrested;
>
> There was no State's Attorney when Smollett was initially charged;
>
> There was no State's Attorney when Smollett's case was presented to the grand jury, nor when he was indicted;
>
> There was no State's Attorney when Smollett was arraigned and entered his plea of not guilty; and
>
> There was no State's Attorney in the courtroom when the proceedings were *nolle prossed.*

Adherence to the long-standing principles discussed herein mandates that a special prosecutor be appointed to conduct an independent investigation of the actions of any person or office involved in all aspects of the case entitled the People of the State of Illinois v. Jussie Smollett, No. 19 CR 0310401, and if reasonable grounds exist to further prosecute Smollett, in the interest of justice the special prosecutor may take such action as may be appropriate to effectuate that result. Additionally, in the event the investigation establishes reasonable grounds to believe that any other criminal offense was committed in the course of the Smollett matter, the special prosecutor may commence the prosecution of any crime as may be suspected.

Although disqualification of the duly elected State's Attorney necessarily impacts constitutional concerns, the unprecedented irregularities identified in this case warrants the appointment of independent counsel to restore the public's confidence in the integrity of our criminal justice system.

ENTERED: _____
Michael P. Toomin,
Judge of the
Circuit Court of Cook County

DATE: June 21, 2019

Exhibit 2

01 3-7-19

** INFORMATION INDICTMENT RETURN SHEET**

CASE NO.	IR	DEFENDANT	NO.	ARRAIGNMENT DATE
19CR-3104	2397168	Jussie Smollett	001	03/14/2019

GJ- 604

FBI-679854TC5 SEX:Male RACE:Black DOB:06/21/1982

ISB-37521501 Add:340 E. North Water St Unit 3900, Chicago, IL 60611

Municipal-19-1103271

CB-19771648 Arrest Agy:CHICAGO POLICE DEPARTMENT

RD/AR-JC133190 Arrest Unit:UNIT 610 - DETECTIVE SECTION - CENTRAL

Arrest Date:02/21/2019

DL State: *** DL#: ***

Hgt:511 Wgt:175

Hair:Black Eyes:Brown

True Bill 02/28/2019
ASA: Mary Devereux

001 FALSE REPORT OF OFFENSE
720 ILCS 5/26-1(a)(4)
0011489 Class: 4
002 FALSE REPORT OF OFFENSE
720 ILCS 5/26-1(a)(4)
0011489 Class: 4
003 FALSE REPORT OF OFFENSE
720 ILCS 5/26-1(a)(4)
0011489 Class: 4
004 FALSE REPORT OF OFFENSE
720 ILCS 5/26-1(a)(4)
0011489 Class: 4
005 FALSE REPORT OF OFFENSE
720 ILCS 5/26-1(a)(4)
0011489 Class: 4
006 FALSE REPORT OF OFFENSE
720 ILCS 5/26-1(a)(4)
0011489 Class: 4
007 FALSE REPORT OF OFFENSE
720 ILCS 5/26-1(a)(4)
0011489 Class: 4
008 FALSE REPORT OF OFFENSE
720 ILCS 5/26-1(a)(4)
0011489 Class: 4
009 FALSE REPORT OF OFFENSE
720 ILCS 5/26-1(a)(4)
0011489 Class: 4
0010 FALSE REPORT OF OFFENSE
720 ILCS 5/26-1(a)(4)
0011489 Class: 4

FILED
2019 MAR -7 PM 1:14
CLERK OF CIRCUIT COURT
CRIMINAL DIVISION
DOROTHY BROWN
CLERK

0011 FALSE REPORT OF OFFENSE
720 ILCS 5/26-1(a)(4)
0011489 Class: 4
0012 FALSE REPORT OF OFFENSE
720 ILCS 5/26-1(a)(4)
0011489 Class: 4
0013 FALSE REPORT OF OFFENSE
720 ILCS 5/26-1(a)(4)
0011489 Class: 4
0014 FALSE REPORT OF OFFENSE
720 ILCS 5/26-1(a)(4)
0011489 Class: 4
0015 FALSE REPORT OF OFFENSE
720 ILCS 5/26-1(a)(4)
0011489 Class: 4
0016 FALSE REPORT OF OFFENSE
720 ILCS 5/26-1(a)(4)
0011489 Class: 4

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AM

FILED
2019 MAR -7 PM 1:14
CLERK OF CIRCUIT COURT
CRIMINAL DIVISION
DOROTHY BROWN
CLERK

G.J. NO. 604
GENERAL NO. 19CR-3104

CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT
CRIMINAL DIVISION
FEBRUARY 2019

The People of the State of
Illinois
v.

Jussie Smollett

INDICTMENT FOR

DISORDERLY CONDUCT

A TRUE BILL
Bernice C. Edwards

Foreman of the Grand Jury

WITNESS
Detective: Michael Theis, Star#21217

Filed March 7, 2019
Dorothy Brown, Clerk

Bail $ NO BAIL

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

The FEBRUARY 2019 Grand Jury of the
Circuit Court of Cook County,

The Grand Jurors chosen, selected and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths present that on or about January 29, 2019 at and within the County of Cook

Jussie Smollett

committed the offense of DISORDERLY CONDUCT

in that HE, KNOWINGLY TRANSMITTED OR CAUSED TO BE TRANSMITTED, IN ANY MANNER, TO ANY PEACE OFFICER, PUBLIC OFFICER OR PUBLIC EMPLOYEE, TO WIT: CHICAGO POLICE OFFICER MUHAMMED BAIG, A REPORT TO THE EFFECT THAT AN OFFENSE HAD BEEN COMMITTED, TO WIT: JUSSIE SMOLLETT REPORTED, IN PERSON, THAT HE WAS THE VICTIM OF A BATTERY, A HATE CRIME AND AN AGGRAVATED BATTERY, REPORTING THAT ON JANUARY 29, 2019, AT APPROXIMATELY 2:00 AM, ON THE PUBLIC WAY NEAR 341 EAST LOWER NORTH WATER STREET, IN CHICAGO, COOK COUNTY, ILLINOIS, TWO UNKNOWN MALES, DRESSED IN BLACK AND ONE OF WHOM WORE A BLACK MASK, APPROACHED JUSSIE SMOLLETT, CALLED JUSSIE SMOLLETT RACIAL AND HOMOPHOBIC SLURS, AND STRUCK JUSSIE SMOLLETT ABOUT THE FACE WITH THEIR HANDS, CAUSING BODILY HARM TO JUSSIE SMOLLETT, AND THE TWO UNKNOWN MALES MADE PHYSICAL CONTACT OF AN INSULTING OR PROVOKING NATURE WITH JUSSIE SMOLLETT, POURING AN UNKNOWN CHEMICAL SUBSTANCE ONTO JUSSIE SMOLLETT, AND JUSSIE SMOLLETT KNEW THAT AT THE TIME OF THIS TRANSMISSION THERE WAS NO REASONABLE GROUND FOR BELIEVING THAT SUCH OFFENSES HAD BEEN COMMITTED,

IN VIOLATION OF CHAPTER 720 ACT 5 SECTION 26-1(a)(4) OF ILLINOIS COMPILED STATUTES ACT 1992 AS AMENDED AND

contrary to the Statute and against the peace and dignity of the same People of the State of Illinois.

COUNT NUMBER 1
CASE NUMBER 19CR-3104
CHARGE ID CODE: 0011489

The Grand Jurors chosen, selected and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths present that on or about January 29, 2019 at and within the County of Cook

Jussie Smollett

committed the offense of DISORDERLY CONDUCT

in that HE, KNOWINGLY TRANSMITTED OR CAUSED TO BE TRANSMITTED, IN ANY MANNER, TO ANY PEACE OFFICER, PUBLIC OFFICER OR PUBLIC EMPLOYEE, TO WIT: CHICAGO POLICE OFFICER MUHAMMED BAIG, A REPORT TO THE EFFECT THAT AN OFFENSE HAD BEEN COMMITTED, TO WIT: JUSSIE SMOLLETT REPORTED, IN PERSON, THAT HE WAS THE VICTIM OF A BATTERY, A VIOLATION OF CHAPTER 720 ACT 5 SECTION 12-3(a)(1) OF THE ILLINOIS COMPILED STATUTES, REPORTING THAT ON JANUARY 29, 2019, AT APPROXIMATELY 2:00 AM, ON THE PUBLIC WAY NEAR 341 EAST LOWER NORTH WATER STREET, IN CHICAGO, COOK COUNTY, ILLINOIS, TWO UNKNOWN MALES, DRESSED IN BLACK AND ONE OF WHOM WORE A BLACK MASK, APPROACHED JUSSIE SMOLLETT, CALLED JUSSIE SMOLLETT RACIAL AND HOMOPHOBIC SLURS, AND STRUCK JUSSIE SMOLLETT ABOUT THE FACE WITH THEIR HANDS, CAUSING BODILY HARM TO JUSSIE SMOLLETT, AND JUSSIE SMOLLETT KNEW THAT AT THE TIME OF THIS TRANSMISSION THERE WAS NO REASONABLE GROUND FOR BELIEVING THAT SUCH AN OFFENSE HAD BEEN COMMITTED,

IN VIOLATION OF CHAPTER 720 ACT 5 SECTION 26-1(a)(4)/(12-3(a)(1)) OF ILLINOIS COMPILED STATUTES ACT 1992 AS AMENDED AND

contrary to the Statute and against the peace and dignity of the same People of the State of Illinois.

COUNT NUMBER 2
CASE NUMBER 19CR-3104
CHARGE ID CODE: 0011489

The Grand Jurors chosen, selected and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths present that on or about January 29, 2019 at and within the County of Cook

Jussie Smollett

committed the offense of DISORDERLY CONDUCT

in that HE, KNOWINGLY TRANSMITTED OR CAUSED TO BE TRANSMITTED, IN ANY MANNER, TO ANY PEACE OFFICER, PUBLIC OFFICER OR PUBLIC EMPLOYEE, TO WIT: CHICAGO POLICE OFFICER MUHAMMED BAIG, A REPORT TO THE EFFECT THAT AN OFFENSE HAD BEEN COMMITTED, TO WIT: JUSSIE SMOLLETT REPORTED, IN PERSON, THAT HE WAS THE VICTIM OF A BATTERY, A VIOLATION OF CHAPTER 720 ACT 5 SECTION 12-3(a)(2) OF THE ILLINOIS COMPILED STATUTES, REPORTING THAT ON JANUARY 29, 2019, AT APPROXIMATELY 2:00 AM, ON THE PUBLIC WAY NEAR 341 EAST LOWER NORTH WATER STREET, IN CHICAGO, COOK COUNTY, ILLINOIS, TWO UNKNOWN MALES, DRESSED IN BLACK AND ONE OF WHOM WORE A BLACK MASK, APPROACHED JUSSIE SMOLLETT, CALLED JUSSIE SMOLLETT RACIAL AND HOMOPHOBIC SLURS, AND STRUCK JUSSIE SMOLLETT ABOUT THE FACE WITH THEIR HANDS, AND THE TWO UNKNOWN MALES MADE PHYSICAL CONTACT OF AN INSULTING OR PROVOKING NATURE WITH JUSSIE SMOLLETT, POURING AN UNKNOWN CHEMICAL SUBSTANCE ONTO JUSSIE SMOLLETT, AND JUSSIE SMOLLETT KNEW THAT AT THE TIME OF THIS TRANSMISSION THERE WAS NO REASONABLE GROUND FOR BELIEVING THAT SUCH AN OFFENSE HAD BEEN COMMITTED,

IN VIOLATION OF CHAPTER 720 ACT 5 SECTION 26-1(a)(4) OF ILLINOIS COMPILED STATUTES ACT 1992 AS AMENDED AND

contrary to the Statute and against the peace and dignity of the same People of the State of Illinois.

COUNT NUMBER 3
CASE NUMBER 19CR-3104
CHARGE ID CODE: 0011489

The Grand Jurors chosen, selected and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths present that on or about January 29, 2019 at and within the County of Cook

Jussie Smollett

committed the offense of DISORDERLY CONDUCT

in that HE, KNOWINGLY TRANSMITTED OR CAUSED TO BE TRANSMITTED, IN ANY MANNER, TO ANY PEACE OFFICER, PUBLIC OFFICER OR PUBLIC EMPLOYEE, TO WIT: CHICAGO POLICE OFFICER MUHAMMED BAIG, A REPORT TO THE EFFECT THAT AN OFFENSE HAD BEEN COMMITTED, TO WIT: JUSSIE SMOLLETT REPORTED, IN PERSON, THAT HE WAS THE VICTIM OF AN AGGRAVATED BATTERY, A VIOLATION OF CHAPTER 720 ACT 5 SECTION 12-3.05(c) OF THE ILLINOIS COMPILED STATUTES, REPORTING THAT ON JANUARY 29, 2019, AT APPROXIMATELY 2:00 AM, ON THE PUBLIC WAY NEAR 341 EAST LOWER NORTH WATER STREET, IN CHICAGO, COOK COUNTY, ILLINOIS, TWO UNKNOWN MALES, DRESSED IN BLACK AND ONE OF WHOM WORE A BLACK MASK, APPROACHED JUSSIE SMOLLETT, CALLED JUSSIE SMOLLETT RACIAL AND HOMOPHOBIC SLURS, AND STRUCK JUSSIE SMOLLETT ABOUT THE FACE WITH THEIR HANDS, CAUSING BODILY HARM TO JUSSIE SMOLLETT, AND JUSSIE SMOLLETT KNEW THAT AT THE TIME OF THIS TRANSMISSION THERE WAS NO REASONABLE GROUND FOR BELIEVING THAT SUCH AN OFFENSE HAD BEEN COMMITTED,

IN VIOLATION OF CHAPTER 720 ACT 5 SECTION 26-1(a)(4)/(12-3.05(c)) OF ILLINOIS COMPILED STATUTES ACT 1992 AS AMENDED AND

contrary to the Statute and against the peace and dignity of the same People of the State of Illinois.

COUNT NUMBER 4
CASE NUMBER 19CR-3104
CHARGE ID CODE: 0011489

The Grand Jurors chosen, selected and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths present that on or about January 29, 2019 at and within the County of Cook

Jussie Smollett

committed the offense of DISORDERLY CONDUCT

in that HE, KNOWINGLY TRANSMITTED OR CAUSED TO BE TRANSMITTED, IN ANY MANNER, TO ANY PEACE OFFICER, PUBLIC OFFICER OR PUBLIC EMPLOYEE, TO WIT: CHICAGO POLICE OFFICER MUHAMMED BAIG, A REPORT TO THE EFFECT THAT AN OFFENSE HAD BEEN COMMITTED, TO WIT: JUSSIE SMOLLETT REPORTED, IN PERSON, THAT HE WAS THE VICTIM OF AN AGGRAVATED BATTERY, A VIOLATION OF CHAPTER 720 ACT 5 SECTION 12-3.05(c) OF THE ILLINOIS COMPILED STATUTES, REPORTING THAT ON JANUARY 29, 2019, AT APPROXIMATELY 2:00 AM, ON THE PUBLIC WAY NEAR 341 EAST LOWER NORTH WATER STREET, IN CHICAGO, COOK COUNTY, ILLINOIS, TWO UNKNOWN MALES, DRESSED IN BLACK AND ONE OF WHOM WORE A BLACK MASK, APPROACHED JUSSIE SMOLLETT, CALLED JUSSIE SMOLLETT RACIAL AND HOMOPHOBIC SLURS, AND STRUCK JUSSIE SMOLLETT ABOUT THE FACE WITH THEIR HANDS, AND THE TWO UNKNOWN MALES MADE PHYSICAL CONTACT OF AN INSULTING OR PROVOKING NATURE WITH JUSSIE SMOLLETT, POURING AN UNKNOWN CHEMICAL SUBSTANCE ONTO JUSSIE SMOLLETT, AND JUSSIE SMOLLETT KNEW THAT AT THE TIME OF THIS TRANSMISSION THERE WAS NO REASONABLE GROUND FOR BELIEVING THAT SUCH AN OFFENSE HAD BEEN COMMITTED,

IN VIOLATION OF CHAPTER 720 ACT 5 SECTION 26-1(a)(4)/(12-3.05(c)) OF ILLINOIS COMPILED STATUTES ACT 1992 AS AMENDED AND

contrary to the Statute and against the peace and dignity of the same People of the State of Illinois.

COUNT NUMBER 5
CASE NUMBER 19CR-3104
CHARGE ID CODE: 0011489

The Grand Jurors chosen, selected and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths present that on or about January 29, 2019 at and within the County of Cook

Jussie Smollett

committed the offense of DISORDERLY CONDUCT

in that HE, KNOWINGLY TRANSMITTED OR CAUSED TO BE TRANSMITTED, IN ANY MANNER, TO ANY PEACE OFFICER, PUBLIC OFFICER OR PUBLIC EMPLOYEE, TO WIT: CHICAGO POLICE OFFICER MUHAMMED BAIG, A REPORT TO THE EFFECT THAT AN OFFENSE HAD BEEN COMMITTED, TO WIT: JUSSIE SMOLLETT REPORTED, IN PERSON, THAT HE WAS THE VICTIM OF AN AGGRAVATED BATTERY, A VIOLATION OF CHAPTER 720 ACT 5 SECTION 12-3.05(f)(2) OF THE ILLINOIS COMPILED STATUTES, REPORTING THAT ON JANUARY 29, 2019, AT APPROXIMATELY 2:00 AM, ON THE PUBLIC WAY NEAR 341 EAST LOWER NORTH WATER STREET, IN CHICAGO, COOK COUNTY, ILLINOIS, TWO UNKNOWN MALES, DRESSED IN BLACK AND ONE OF WHOM WORE A BLACK MASK TO CONCEAL HIS IDENTITY, APPROACHED JUSSIE SMOLLETT, CALLED JUSSIE SMOLLETT RACIAL AND HOMOPHOBIC SLURS, AND STRUCK JUSSIE SMOLLETT ABOUT THE FACE WITH THEIR HANDS, CAUSING BODILY HARM TO JUSSIE SMOLLETT, AND JUSSIE SMOLLETT KNEW THAT AT THE TIME OF THIS TRANSMISSION THERE WAS NO REASONABLE GROUND FOR BELIEVING THAT SUCH AN OFFENSE HAD BEEN COMMITTED,

IN VIOLATION OF CHAPTER 720 ACT 5 SECTION 26-1(a)(4)/(12-3.05(f)(2)) OF ILLINOIS COMPILED STATUTES ACT 1992 AS AMENDED AND

contrary to the Statute and against the peace and dignity of the same People of the State of Illinois.

COUNT NUMBER 6
CASE NUMBER 19CR-3104
CHARGE ID CODE: 0011489

The Grand Jurors chosen, selected and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths present that on or about January 29, 2019 at and within the County of Cook

Jussie Smollett

committed the offense of DISORDERLY CONDUCT

in that HE, KNOWINGLY TRANSMITTED OR CAUSED TO BE TRANSMITTED, IN ANY MANNER, TO ANY PEACE OFFICER, PUBLIC OFFICER OR PUBLIC EMPLOYEE, TO WIT: CHICAGO POLICE OFFICER MUHAMMED BAIG, A REPORT TO THE EFFECT THAT AN OFFENSE HAD BEEN COMMITTED, TO WIT: JUSSIE SMOLLETT REPORTED, IN PERSON, THAT HE WAS THE VICTIM OF AN AGGRAVATED BATTERY, A VIOLATION OF CHAPTER 720 ACT 5 SECTION 12-3.05(f)(2) OF THE ILLINOIS COMPILED STATUTES, REPORTING THAT ON JANUARY 29, 2019, AT APPROXIMATELY 2:00 AM, ON THE PUBLIC WAY NEAR 341 EAST LOWER NORTH WATER STREET, IN CHICAGO, COOK COUNTY, ILLINOIS, TWO UNKNOWN MALES, DRESSED IN BLACK AND ONE OF WHOM WORE A BLACK MASK TO CONCEAL HIS IDENTITY, APPROACHED JUSSIE SMOLLETT, CALLED JUSSIE SMOLLETT RACIAL AND HOMOPHOBIC SLURS, AND STRUCK JUSSIE SMOLLETT ABOUT THE FACE, AND THE TWO UNKNOWN MALES MADE PHYSICAL CONTACT OF AN INSULTING OR PROVOKING NATURE WITH JUSSIE SMOLLETT, POURING AN UNKNOWN CHEMICAL SUBSTANCE ONTO JUSSIE SMOLLETT, AND JUSSIE SMOLLETT KNEW THAT AT THE TIME OF THIS TRANSMISSION THERE WAS NO REASONABLE GROUND FOR BELIEVING THAT SUCH AN OFFENSE HAD BEEN COMMITTED,

IN VIOLATION OF CHAPTER 720 ACT 5 SECTION 26-1(a)(4)/(12-3.05(f)(2)) OF ILLINOIS COMPILED STATUTES ACT 1992 AS AMENDED AND

contrary to the Statute and against the peace and dignity of the same People of the State of Illinois.

COUNT NUMBER 7
CASE NUMBER 19CR-3104
CHARGE ID CODE: 0011489

The Grand Jurors chosen, selected and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths present that on or about January 29, 2019 at and within the County of Cook

Jussie Smollett

committed the offense of DISORDERLY CONDUCT

in that HE, KNOWINGLY TRANSMITTED OR CAUSED TO BE TRANSMITTED, IN ANY MANNER, TO ANY PEACE OFFICER, PUBLIC OFFICER OR PUBLIC EMPLOYEE, TO WIT: CHICAGO POLICE OFFICER MUHAMMED BAIG, A REPORT TO THE EFFECT THAT AN OFFENSE HAD BEEN COMMITTED, TO WIT: JUSSIE SMOLLETT REPORTED, IN PERSON, THAT HE WAS THE VICTIM OF A HATE CRIME, A VIOLATION OF CHAPTER 720 ACT 5 SECTION 12-7.1(a) OF THE ILLINOIS COMPILED STATUTES, REPORTING THAT ON JANUARY 29, 2019, AT APPROXIMATELY 2:00 AM, ON THE PUBLIC WAY NEAR 341 EAST LOWER NORTH WATER STREET, IN CHICAGO, COOK COUNTY, ILLINOIS, TWO UNKNOWN MALES, APPROACHED JUSSIE SMOLLETT, CALLED JUSSIE SMOLLETT RACIAL AND HOMOPHOBIC SLURS, AND STRUCK JUSSIE SMOLLETT ABOUT THE FACE, CAUSING BODILY HARM TO JUSSIE SMOLLETT, AND THE TWO UNKNOWN MALES MADE PHYSICAL CONTACT OF AN INSULTING OR PROVOKING NATURE WITH JUSSIE SMOLLETT, POURING AN UNKNOWN CHEMICAL SUBSTANCE ONTO JUSSIE SMOLLETT, AND JUSSIE SMOLLETT KNEW THAT AT THE TIME OF THIS TRANSMISSION THERE WAS NO REASONABLE GROUND FOR BELIEVING THAT SUCH AN OFFENSE HAD BEEN COMMITTED,

IN VIOLATION OF CHAPTER 720 ACT 5 SECTION 26-1(a)(4)/(12-7.1(a)) OF ILLINOIS COMPILED STATUTES ACT 1992 AS AMENDED AND

contrary to the Statute and against the peace and dignity of the same People of the State of Illinois.

COUNT NUMBER 8
CASE NUMBER 19CR-3104
CHARGE ID CODE: 0011489

The Grand Jurors chosen, selected and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths present that on or about January 29, 2019 at and within the County of Cook

Jussie Smollett

committed the offense of DISORDERLY CONDUCT

in that HE, KNOWINGLY TRANSMITTED OR CAUSED TO BE TRANSMITTED, IN ANY MANNER, TO ANY PEACE OFFICER, PUBLIC OFFICER OR PUBLIC EMPLOYEE, TO WIT: CHICAGO POLICE DETECTIVE KIM MURRAY, A REPORT TO THE EFFECT THAT AN OFFENSE HAD BEEN COMMITTED, TO WIT: JUSSIE SMOLLETT REPORTED, IN PERSON, THAT HE WAS THE VICTIM OF A BATTERY, A HATE CRIME AND AN AGGRAVATED BATTERY, REPORTING THAT ON JANUARY 29, 2019, AT APPROXIMATELY 2:00 AM, ON THE PUBLIC WAY IN THE MIDDLE OF THE INTERSECTION OF NEW STREET AND LOWER NORTH WATER STREET, IN CHICAGO, COOK COUNTY, ILLINOIS, JUSSIE SMOLLETT HEARD RACIAL AND HOMOPHOBIC SLURS, AND TWO UNKNOWN OFFENDERS APPROACHED JUSSIE SMOLLETT FROM BEHIND, PUNCHED JUSSIE SMOLLETT IN THE FACE, AND THAT JUSSIE SMOLLETT FOUGHT BACK, AND HE AND THE TWO UNKNOWN OFFENDERS FELL TO THE GROUND WHERE JUSSIE SMOLLETT WAS KICKED IN THE BACK, FELT PULLING AT HIS NECK, AND A LIQUID WAS POURED ONTO HIM, AND JUSSIE SMOLLETT REPORTED THAT ONE OF HIS ATTACKERS WAS A MALE WHITE, IN DARK CLOTHING, WEARING A BLACK MASK WITH AN OPEN EYE AREA SHOWING THE SKIN AROUND HIS EYES, AND THAT THE UNKNOWN OFFFENDERS CAUSED BODILY HARM TO JUSSIE SMOLLETT, AND THAT THE TWO UNKNOWN MALES MADE PHYSICAL CONTACT OF AN INSULTING OR PROVOKING NATURE WITH JUSSIE SMOLLETT BY POURING A LIQUID ONTO JUSSIE SMOLLETT, AND PUTTING A ROPE AROUND HIS NECK, AND JUSSIE SMOLLETT KNEW THAT AT THE TIME OF THIS TRANSMISSION THERE WAS NO REASONABLE GROUND FOR BELIEVING THAT SUCH OFFENSES HAD BEEN COMMITTED,

IN VIOLATION OF CHAPTER 720 ACT 5 SECTION 26-1(a)(4) OF ILLINOIS COMPILED STATUTES ACT 1992 AS AMENDED AND

contrary to the Statute and against the peace and dignity of the same People of the State of Illinois.

COUNT NUMBER 9
CASE NUMBER 19CR-3104
CHARGE ID CODE: 0011489

The Grand Jurors chosen, selected and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths present that on or about January 29, 2019 at and within the County of Cook

Jussie Smollett

committed the offense of DISORDERLY CONDUCT

in that HE, KNOWINGLY TRANSMITTED OR CAUSED TO BE TRANSMITTED, IN ANY MANNER, TO ANY PEACE OFFICER, PUBLIC OFFICER OR PUBLIC EMPLOYEE, TO WIT: CHICAGO POLICE DETECTIVE KIM MURRAY, A REPORT TO THE EFFECT THAT AN OFFENSE HAD BEEN COMMITTED, TO WIT: JUSSIE SMOLLETT REPORTED, IN PERSON, THAT HE WAS THE VICTIM OF A BATTERY, A VIOLATION OF CHAPTER 720 ACT 5 SECTION 12-3(a)(1) OF THE ILLINOIS COMPILED STATUTES, REPORTING THAT ON JANUARY 29, 2019, AT APPROXIMATELY 2:00 AM, ON THE PUBLIC WAY IN THE MIDDLE OF THE INTERSECTION OF NEW STREET AND LOWER NORTH WATER STREET, IN CHICAGO, COOK COUNTY, ILLINOIS, JUSSIE SMOLLETT HEARD RACIAL AND HOMOPHOBIC SLURS, AND TWO OFFENDERS APPROACHED JUSSIE SMOLLETT FROM BEHIND, PUNCHED JUSSIE SMOLLETT IN THE FACE, AND THAT JUSSIE SMOLLETT FOUGHT BACK, AND THAT HE AND THE TWO OFFENDERS FELL TO THE GROUND WHERE JUSSIE SMOLLETT WAS KICKED IN THE BACK, FELT PULLING AT HIS NECK, AND A LIQUID WAS POURED ONTO HIM, JUSSIE SMOLLETT REPORTED THAT ONE OF HIS ATTACKERS WAS A MALE WHITE, IN DARK CLOTHING, WEARING A BLACK MASK WITH AN OPEN EYE AREA SHOWING THE SKIN AROUND HIS EYES, AND THAT THE OFFFENDERS CAUSED BODILY HARM TO JUSSIE SMOLLETT, AND JUSSIE SMOLLETT KNEW THAT AT THE TIME OF THIS TRANSMISSION THERE WAS NO REASONABLE GROUND FOR BELIEVING THAT SUCH AN OFFENSE HAD BEEN COMMITTED,

IN VIOLATION OF CHAPTER 720 ACT 5 SECTION 26-1(a)(4)/(12-3(a)(1)) OF ILLINOIS COMPILED STATUTES ACT 1992 AS AMENDED AND

contrary to the Statute and against the peace and dignity of the same People of the State of Illinois.

COUNT NUMBER 10
CASE NUMBER 19CR-3104
CHARGE ID CODE: 0011489

The Grand Jurors chosen, selected and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths present that on or about January 29, 2019 at and within the County of Cook

Jussie Smollett

committed the offense of DISORDERLY CONDUCT

in that HE, KNOWINGLY TRANSMITTED OR CAUSED TO BE TRANSMITTED, IN ANY MANNER, TO ANY PEACE OFFICER, PUBLIC OFFICER OR PUBLIC EMPLOYEE, TO WIT: CHICAGO POLICE DETECTIVE KIM MURRAY, A REPORT TO THE EFFECT THAT AN OFFENSE HAD BEEN COMMITTED, TO WIT: JUSSIE SMOLLETT REPORTED, IN PERSON, THAT HE WAS THE VICTIM OF A BATTERY, A VIOLATION OF CHAPTER 720 ACT 5 SECTION 12-3(a)(2) OF THE ILLINOIS COMPILED STATUTES, REPORTING THAT ON JANUARY 29, 2019, AT APPROXIMATELY 2:00 AM, ON THE PUBLIC WAY IN THE MIDDLE OF THE INTERSECTION OF NEW STREET AND LOWER NORTH WATER STREET, IN CHICAGO, COOK COUNTY, ILLINOIS, JUSSIE SMOLLETT HEARD RACIAL AND HOMOPHOBIC SLURS, AND TWO UNKNOWN OFFENDERS APPROACHED JUSSIE SMOLLETT FROM BEHIND, PUNCHED JUSSIE SMOLLETT IN THE FACE, AND THAT JUSSIE SMOLLETT FOUGHT BACK, AND THAT HE AND THE TWO OFFENDERS FELL TO THE GROUND WHERE JUSSIE SMOLLETT WAS KICKED IN THE BACK, AND THAT THE TWO UNKNOWN MALES MADE PHYSICAL CONTACT OF AN INSULTING OR PROVOKING NATURE WITH JUSSIE SMOLLETT BY POURING A LIQUID ONTO JUSSIE SMOLLETT, AND JUSSIE SMOLLETT FELT PULLING AT HIS NECK AND THE UNKNOWN OFFENDERS PUT A ROPE AROUND HIS NECK, AND JUSSIE SMOLLETT REPORTED THAT ONE OF HIS ATTACKERS WAS A MALE WHITE, WEARING A BLACK MASK WITH AN OPEN EYE AREA SHOWING THE SKIN AROUND HIS EYES, AND JUSSIE SMOLLETT KNEW THAT AT THE TIME OF THIS TRANSMISSION THERE WAS NO REASONABLE GROUND FOR BELIEVING THAT SUCH AN OFFENSE HAD BEEN COMMITTED,

IN VIOLATION OF CHAPTER 720 ACT 5 SECTION 26-1(a)(4)/(12-3(a)(2)) OF ILLINOIS COMPILED STATUTES ACT 1992 AS AMENDED AND

contrary to the Statute and against the peace and dignity of the same People of the State of Illinois.

COUNT NUMBER 11
CASE NUMBER 19CR-3104
CHARGE ID CODE: 0011489

The Grand Jurors chosen, selected and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths present that on or about January 29, 2019 at and within the County of Cook

Jussie Smollett

committed the offense of DISORDERLY CONDUCT

in that HE, KNOWINGLY TRANSMITTED OR CAUSED TO BE TRANSMITTED, IN ANY MANNER, TO ANY PEACE OFFICER, PUBLIC OFFICER OR PUBLIC EMPLOYEE, TO WIT: CHICAGO POLICE DETECTIVE KIM MURRAY, A REPORT TO THE EFFECT THAT AN OFFENSE HAD BEEN COMMITTED, TO WIT: JUSSIE SMOLLETT REPORTED, IN PERSON, THAT HE WAS THE VICTIM OF AN AGGRAVATED BATTERY, A VIOLATION OF CHAPTER 720 ACT 5 SECTION 12-3.05(c) OF THE ILLINOIS COMPILED STATUTES, REPORTING THAT ON JANUARY 29, 2019, AT APPROXIMATELY 2:00 AM, ON THE PUBLIC WAY IN THE MIDDLE OF THE INTERSECTION OF NEW STREET AND LOWER NORTH WATER STREET, IN CHICAGO, COOK COUNTY, ILLINOIS, JUSSIE SMOLLETT HEARD RACIAL AND HOMOPHOBIC SLURS, AND TWO OFFENDERS APPROACHED JUSSIE SMOLLETT FROM BEHIND, PUNCHED JUSSIE SMOLLETT IN THE FACE, AND THAT JUSSIE SMOLLETT FOUGHT BACK, AND THAT HE AND THE TWO OFFENDERS FELL TO THE GROUND WHERE JUSSIE SMOLLETT WAS KICKED IN THE BACK, FELT PULLING AT HIS NECK, AND A LIQUID WAS POURED ONTO HIM, JUSSIE SMOLLETT REPORTED THAT ONE OF HIS ATTACKERS WAS A MALE WHITE OF UNKNOWN AGE, IN DARK CLOTHING, WEARING A BLACK MASK WITH AN OPEN EYE AREA SHOWING THE SKIN AROUND HIS EYES, AND THAT THE UNKNOWN OFFFENDERS CAUSED BODILY HARM TO JUSSIE SMOLLETT, AND JUSSIE SMOLLETT KNEW THAT AT THE TIME OF THIS TRANSMISSION THERE WAS NO REASONABLE GROUND FOR BELIEVING THAT SUCH AN OFFENSE HAD BEEN COMMITTED,

IN VIOLATION OF CHAPTER 720 ACT 5 SECTION 26-1(a)(4)/(12-3.05(c)) OF ILLINOIS COMPILED STATUTES ACT 1992 AS AMENDED AND

contrary to the Statute and against the peace and dignity of the same People of the State of Illinois.

COUNT NUMBER 12
CASE NUMBER 19CR-3104
CHARGE ID CODE: 0011489

The Grand Jurors chosen, selected and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths present that on or about January 29, 2019 at and within the County of Cook

Jussie Smollett

committed the offense of DISORDERLY CONDUCT

in that HE, KNOWINGLY TRANSMITTED OR CAUSED TO BE TRANSMITTED, IN ANY MANNER, TO ANY PEACE OFFICER, PUBLIC OFFICER OR PUBLIC EMPLOYEE, TO WIT: CHICAGO POLICE DETECTIVE KIM MURRAY, A REPORT TO THE EFFECT THAT AN OFFENSE HAD BEEN COMMITTED, TO WIT: JUSSIE SMOLLETT REPORTED, IN PERSON, THAT HE WAS THE VICTIM OF AN AGGRAVATED BATTERY, A VIOLATION OF CHAPTER 720 ACT 5 SECTION 12-3.05(c) OF THE ILLINOIS COMPILED STATUTES, REPORTING THAT ON JANUARY 29, 2019, AT APPROXIMATELY 2:00 AM, ON THE PUBLIC WAY IN THE MIDDLE OF THE INTERSECTION OF NEW STREET AND LOWER NORTH WATER STREET, IN CHICAGO, COOK COUNTY, ILLINOIS, JUSSIE SMOLLETT HEARD RACIAL AND HOMOPHOBIC SLURS, AND TWO OFFENDERS APPROACHED JUSSIE SMOLLETT FROM BEHIND, PUNCHED JUSSIE SMOLLETT IN THE FACE, AND THAT JUSSIE SMOLLETT FOUGHT BACK, AND THAT HE AND THE TWO OFFENDERS FELL TO THE GROUND WHERE JUSSIE SMOLLETT WAS KICKED IN THE BACK, AND THAT THE TWO UNKNOWN MALES MADE PHYSICAL CONTACT OF AN INSULTING OR PROVOKING NATURE WITH JUSSIE SMOLLETT BY POURING A LIQUID ONTO JUSSIE SMOLLETT, AND JUSSIE SMOLLETT FELT PULLING AT HIS NECK AND THE UNKNOWN OFFENDERS PUT A ROPE AROUND HIS NECK, AND JUSSIE SMOLLETT REPORTED THAT ONE OF HIS ATTACKERS WAS A MALE WHITE, WEARING A BLACK MASK WITH AN OPEN EYE AREA SHOWING THE SKIN AROUND HIS EYES, AND JUSSIE SMOLLETT KNEW THAT AT THE TIME OF THIS TRANSMISSION THERE WAS NO REASONABLE GROUND FOR BELIEVING THAT SUCH AN OFFENSE HAD BEEN COMMITTED,

IN VIOLATION OF CHAPTER 720 ACT 5 SECTION 26-1(a)(4)/(12-3.05(c)) OF ILLINOIS COMPILED STATUTES ACT 1992 AS AMENDED AND

contrary to the Statute and against the peace and dignity of the same People of the State of Illinois.

COUNT NUMBER 13
CASE NUMBER 19CR-3104
CHARGE ID CODE: 0011489

The Grand Jurors chosen, selected and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths present that on or about January 29, 2019 at and within the County of Cook

Jussie Smollett

committed the offense of DISORDERLY CONDUCT

in that HE, KNOWINGLY TRANSMITTED OR CAUSED TO BE TRANSMITTED, IN ANY MANNER, TO ANY PEACE OFFICER, PUBLIC OFFICER OR PUBLIC EMPLOYEE, TO WIT: CHICAGO POLICE DETECTIVE KIM MURRAY, A REPORT TO THE EFFECT THAT AN OFFENSE HAD BEEN COMMITTED, TO WIT: JUSSIE SMOLLETT REPORTED, IN PERSON, THAT HE WAS THE VICTIM OF AN AGGRAVATED BATTERY, A VIOLATION OF CHAPTER 720 ACT 5 SECTION 12-3.05(f)(2) OF THE ILLINOIS COMPILED STATUTES, REPORTING THAT ON JANUARY 29, 2019, AT APPROXIMATELY 2:00 AM, ON THE PUBLIC WAY IN THE MIDDLE OF THE INTERSECTION OF NEW STREET AND LOWER NORTH WATER STREET, IN CHICAGO, COOK COUNTY, ILLINOIS, JUSSIE SMOLLETT HEARD RACIAL AND HOMOPHOBIC SLURS, AND TWO OFFENDERS APPROACHED JUSSIE SMOLLETT FROM BEHIND, PUNCHED JUSSIE SMOLLETT IN THE FACE, AND THAT JUSSIE SMOLLETT FOUGHT BACK, AND THAT HE AND THE TWO OFFENDERS FELL TO THE GROUND WHERE JUSSIE SMOLLETT WAS KICKED IN THE BACK, FELT PULLING AT HIS NECK, AND A LIQUID WAS POURED ONTO HIM, JUSSIE SMOLLETT REPORTED THAT ONE OF HIS ATTACKERS WAS A MALE WHITE, IN DARK CLOTHING, WEARING A BLACK MASK TO CONCEAL HIS IDENTITY, WITH AN OPEN EYE AREA SHOWING THE SKIN AROUND HIS EYES, AND THAT THE UNKNOWN OFFFENDERS CAUSED BODILY HARM TO JUSSIE SMOLLETT, AND JUSSIE SMOLLETT KNEW THAT AT THE TIME OF THIS TRANSMISSION THERE WAS NO REASONABLE GROUND FOR BELIEVING THAT SUCH AN OFFENSE HAD BEEN COMMITTED,

IN VIOLATION OF CHAPTER 720 ACT 5 SECTION 26-1(a)(4)/(12-3.05(f)(2)) OF ILLINOIS COMPILED STATUTES ACT 1992 AS AMENDED AND

contrary to the Statute and against the peace and dignity of the same People of the State of Illinois.

COUNT NUMBER 14
CASE NUMBER 19CR-3104
CHARGE ID CODE: 0011489

The Grand Jurors chosen, selected and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths present that on or about January 29, 2019 at and within the County of Cook

Jussie Smollett

committed the offense of DISORDERLY CONDUCT

in that HE, KNOWINGLY TRANSMITTED OR CAUSED TO BE TRANSMITTED, IN ANY MANNER, TO ANY PEACE OFFICER, PUBLIC OFFICER OR PUBLIC EMPLOYEE, TO WIT: CHICAGO POLICE DETECTIVE KIM MURRAY, A REPORT TO THE EFFECT THAT AN OFFENSE HAD BEEN COMMITTED, TO WIT: JUSSIE SMOLLETT REPORTED, IN PERSON, THAT HE WAS THE VICTIM OF AN AGGRAVATED BATTERY, A VIOLATION OF CHAPTER 720 ACT 5 SECTION 12-3.05(f)(2) OF THE ILLINOIS COMPILED STATUTES, REPORTING THAT ON JANUARY 29, 2019, AT APPROXIMATELY 2:00 AM, ON THE PUBLIC WAY IN THE MIDDLE OF THE INTERSECTION OF NEW STREET AND LOWER NORTH WATER STREET, IN CHICAGO, COOK COUNTY, ILLINOIS, JUSSIE SMOLLETT HEARD RACIAL AND HOMOPHOBIC SLURS, AND TWO OFFENDERS APPROACHED JUSSIE SMOLLETT FROM BEHIND, PUNCHED JUSSIE SMOLLETT IN THE FACE, AND THAT JUSSIE SMOLLETT FOUGHT BACK, AND THAT HE AND THE TWO OFFENDERS FELL TO THE GROUND WHERE JUSSIE SMOLLETT WAS KICKED IN THE BACK, AND THAT THE TWO UNKNOWN MALES MADE PHYSICAL CONTACT OF AN INSULTING OR PROVOKING NATURE WITH JUSSIE SMOLLETT BY POURING A LIQUID ONTO JUSSIE SMOLLETT, AND JUSSIE SMOLLETT FELT PULLING AT HIS NECK AND THE UNKNOWN OFFENDERS PUT A ROPE AROUND HIS NECK, AND JUSSIE SMOLLETT REPORTED THAT ONE OF HIS ATTACKERS WAS A MALE WHITE, WEARING A BLACK MASK TO CONCEAL HIS IDENTITY, WITH AN OPEN EYE AREA SHOWING THE SKIN AROUND HIS EYES, AND JUSSIE SMOLLETT KNEW THAT AT THE TIME OF THIS TRANSMISSION THERE WAS NO REASONABLE GROUND FOR BELIEVING THAT SUCH AN OFFENSE HAD BEEN COMMITTED,

IN VIOLATION OF CHAPTER 720 ACT 5 SECTION 26-1(a)(4)/(12-3.05(f)(2)) OF ILLINOIS COMPILED STATUTES ACT 1992 AS AMENDED AND

contrary to the Statute and against the peace and dignity of the same People of the State of Illinois.

COUNT NUMBER 15
CASE NUMBER 19CR-3104
CHARGE ID CODE: 0011489

The Grand Jurors chosen, selected and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths present that on or about January 29, 2019 at and within the County of Cook

Jussie Smollett

committed the offense of DISORDERLY CONDUCT

in that HE, KNOWINGLY TRANSMITTED OR CAUSED TO BE TRANSMITTED, IN ANY MANNER, TO ANY PEACE OFFICER, PUBLIC OFFICER OR PUBLIC EMPLOYEE, TO WIT: CHICAGO POLICE DETECTIVE KIM MURRAY, A REPORT TO THE EFFECT THAT AN OFFENSE HAD BEEN COMMITTED, TO WIT: JUSSIE SMOLLETT REPORTED, IN PERSON, THAT HE WAS THE VICTIM OF A HATE CRIME, A VIOLATION OF CHAPTER 720 ACT 5 SECTION 12-7.1(a) OF THE ILLINOIS COMPILED STATUTES, REPORTING THAT ON JANUARY 29, 2019, AT APPROXIMATELY 2:00 AM, ON THE PUBLIC WAY IN THE MIDDLE OF THE INTERSECTION OF NEW STREET AND LOWER NORTH WATER STREET, IN CHICAGO, COOK COUNTY, ILLINOIS, JUSSIE SMOLLETT HAD RACIAL AND HOMOPHOBIC SLURS CALLED OUT TO HIM, AND TWO UNKNOWN OFFENDERS APPROACHED JUSSIE SMOLLETT FROM BEHIND, PUNCHED JUSSIE SMOLLETT IN THE FACE, AND THAT JUSSIE SMOLLETT FOUGHT BACK, AND THAT HE AND THE TWO UNKNOWN OFFENDERS FELL TO THE GROUND WHERE JUSSIE SMOLLETT WAS KICKED IN THE BACK, FELT PULLING AT HIS NECK, AND A LIQUID WAS POURED ONTO HIM, AND JUSSIE SMOLLETT REPORTED THAT ONE OF HIS ATTACKERS WAS A MALE WHITE, WEARING A BLACK MASK WITH AN OPEN EYE AREA SHOWING THE SKIN AROUND HIS EYES, AND THAT THE UNKNOWN OFFFENDERS CAUSED BODILY HARM TO JUSSIE SMOLLETT, AND THAT THE TWO UNKNOWN MALES HAD MADE PHYSICAL CONTACT OF AN INSULTING OR PROVOKING NATURE WITH JUSSIE SMOLLETT BY POURING A LIQUID ONTO JUSSIE SMOLLETT, AND PUTTING A ROPE AROUND HIS NECK, AND JUSSIE SMOLLETT KNEW THAT AT THE TIME OF THIS TRANSMISSION THERE WAS NO REASONABLE GROUND FOR BELIEVING THAT SUCH AN OFFENSE HAD BEEN COMMITTED,

IN VIOLATION OF CHAPTER 720 ACT 5 SECTION 26-1(a)(4)/(12-7.1(a)) OF ILLINOIS COMPILED STATUTES ACT 1992 AS AMENDED AND

contrary to the Statute and against the peace and dignity of the same People of the State of Illinois.

COUNT NUMBER 16
CASE NUMBER 19CR-3104
CHARGE ID CODE: 0011489

Exhibit 3

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

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff,	)	
vs.	)	No. 19 CR 03104-01
JUSSIE SMOLLETT, Defendant.	)	

REPORT OF PROCEEDINGS at the hearing of the above-entitled cause before the HONORABLE STEVEN G. WATKINS, Judge of said Court, on the 26th day of March, 2019.

APPEARANCES:

HON. KIMBERLY M. FOXX,
State's Attorney of Cook County,
By: MS. RISA LANIER,
Assistant State's Attorney,
on behalf of the People;

MS. PATRICIA BROWN HOLMES,
MS. TINA GLANDIAN and
MR. BRIAN WATSON,
on behalf of the Defendant.

Mary Ellen Kusibab
Official Court Reporter
CSR License No. 084-004348

THE CLERK: Jussie Smollett.

THE COURT: Good morning.

MS. BROWN HOLMES: Good morning, Judge. Patricia Brown Holmes, Tina Glandian and Brian Watson on behalf of Jussie Smollett.

MS. LANIER: Risa Lanier -- R-i-s-a, L-a-n-i-e-r -- for the People.

Your Honor, on today's date, the State did file a motion to advance this matter. It was originally set for April 17th, but we did file a motion to advance it to today's date.

THE COURT: The Court entered an order yesterday, setting the matter for April 2nd on the media coverage. So we can strike that date as well?

MS. LANIER: Yes.

THE COURT: All right. What are we doing?

MS. LANIER: Motion to advance sustained?

THE COURT: Granted.

MS. LANIER: Thank you.

Judge, on today's date, the State does have a motion in this case. After reviewing the facts and circumstances of the case, including Mr. Smollett's volunteer service in the community and agreement to forfeit his bond to the City of Chicago, the State's

motion in regards to the indictment is to nolle pros. We believe this outcome is a just disposition and appropriate resolution to this case.

I do have an order directing the Clerk of the Circuit Court to release Bond No. D 1375606, payable to the City of Chicago, to be sent directly to the City of Chicago, Department of Law. And there's an address and the person there who takes care of that on behalf of the City.

THE COURT: Thank you.

Defense?

MS. BROWN HOLMES: Judge, we would absolutely agree. And we would also ask that the Court immediately seal the records.

THE COURT: Do you have an order prepared for that?

MS. BROWN HOLMES: Yes, we do, Judge.

THE COURT: Motion, State, Nolle Pros, granted.

Motion, State, to release D-Bond 1375606 to the City of Chicago will be granted.

Motion, defendant, for immediate sealing of the criminal records will be granted as well.

MS. BROWN HOLMES: Thank you very much, Judge.

THE COURT: Sure. Anything else?

MS. LANIER: No, that's it.

THE COURT: All right. Good luck, Mr. Smollett.

THE DEFENDANT: Thank you very much.

THE COURT: You're welcome.

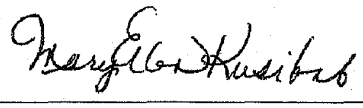
MS. BROWN HOLMES: We appreciate it.

THE COURT: You're welcome.

(Which were all the proceedings had in the above-entitled cause on this date.)

STATE OF ILLINOIS)
) SS.
COUNTY OF C O O K)

I, MARY ELLEN KUSIBAB, an Official Court Reporter for the Circuit Court of Cook County, Illinois, County Department, Criminal Division, do hereby certify that I reported in shorthand the proceedings had on the hearing in the above-entitled cause; that I, thereafter, caused the foregoing to be transcribed into typewriting, which I hereby certify to be a true and accurate transcript of the proceedings.



Mary Ellen Kusibab
C.S.R. No. 084-004348
Circuit Court of Cook County, IL
County Department - Criminal Division

Dated March 26, 2019.

Exhibit 4

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

PEOPLE OF THE STATE OF ILLINOIS	)	
	)	
	)	
VS.	)	Case No. 19CR-3104
	)	
Jussie Smollett	)	
Defendant(s)	)	

ORDER

IT IS HEREBY ORDERED that the Clerk of the Circuit Court of Cook County shall release Bond No. D13 7104, **payable to the City of Chicago**, to be sent directly to:

City of Chicago Department of Law
Attn: Natalie Frank
121 N. LaSalle Street, Suite 600
Chicago, Illinois 60602

E
N
T
E
R:

Judge of the Circuit Court of Cook County

DATED: 3/26/2019

ENTERED
JUDGE STEVE G. WATKINS-2117
MAR 26 2019
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Exhibit 5

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

IN RE APPOINTMENT OF SPECIAL PROSECUTOR	No. 19 MR 00014 Michael P. Toomin Judge Presiding

ORDER

This matter comes on for implementation of the order entered June 21, 2019, granting the Petition to Appoint a Special Prosecutor in the Matter of the People of the State of Illinois v. Jussie Smollett upon a finding of sufficient cause warranting disqualification of the State's Attorney of Cook County and appointment of a Special Prosecutor in her stead.

IT IS THEREFORE ORDERED that pursuant to Section 3-9008 (a-20), 55 ILCS 5/3-9008 (a-20) (West 2018), DAN K. WEBB, a member of the Bar of this State, be and is hereby appointed Special Prosecutor in the above-entitled matter to conduct an independent investigation of the actions of any person or office involved in all aspects of the case entitled the People of the State of Illinois v. Jussie Smollett, No. 19 CR 0310401, and if reasonable grounds exist to further prosecute Smollett, in the interest of justice the special prosecutor may take such action as may be appropriate to effectuate that result. Additionally, in the event the investigation establishes reasonable grounds to believe that any other criminal offenses were committed in the course of the Smollett matter, the special prosecutor may commence the prosecution of any crime as may be suspected.

Pursuant to section 3-9008 (a-20) of the Counties Code (55 ILCS 5/3-9008 (a-20) (West 2018), the Special Prosecutor shall be vested with the same powers and authority of the elected State's Attorney of Cook County, limited only by the subject matter of this investigation, including the power to discover and gather relevant evidence, to compel the appearance of witnesses before a Special Grand Jury of the Circuit Court of Cook County, to confer immunity as may be deemed necessary, to consider the bar of limitations where applicable, and to institute criminal proceedings by indictment, information, or complaint, where supported by probable cause, upon his taking the proper oath required by law.

IT IS FURTHER ORDERED that the Special Prosecutor shall be paid reasonable compensation commensurate with such time and effort actually expended in pursuit of this investigation. However, in no event shall such compensation exceed the statutory annual salary of the elected State's Attorney for any twelve (12) month period.

IT IS FURTHER ORDERED that the Special Prosecutor shall be empowered to hire and direct a staff of deputy attorneys, investigators, and such other administrative personnel as necessary to discharge the duties of the Office of the Special Prosecutor. Compensation for the Special Prosecutor's staff, including deputy attorneys, shall be based upon reasonable rates for attorneys of similar qualifications in government service and commensurate with their skill, efforts and experience. It is understood that in the performance of his duties the Special Prosecutor shall utilize office space provided by his law firm, Winston & Strawn, LLP, with reimbursement for incidental costs for telephone or internet connections, or other office equipment and miscellaneous expenses incurred.

IT IS FURTHER ORDERED that the Special Prosecutor shall have unfettered access to reports, records, and other materials related to this matter currently in the possession of the Cook County State's Attorney's Office and its investigative partners, including the Chicago Police Department and the Cook County Inspector General, and may consider those materials in discharging his duties and conducting any investigations.

IT IS FURTHER ORDERED that the Special Prosecutor shall submit fee and associated cost petitions for the consideration of this Court at regular intervals, not to exceed three (3) months, for submission to and payment by the Cook County Board of Commissioners.

IT IS FURTHER ORDERED that at the conclusion of his investigation, the Special Prosecutor shall submit a final report to this Court and for the benefit of the Cook County Board of Commissioners detailing the progress and ultimate results of the investigation as well as criminal prosecutions commenced.

ENTERED: _____
Michael P. Toomin,
Judge of the
Circuit Court of Cook County

ENTERED
AUG 23 2019
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

DATE: _____

Exhibit 6

STATE OF ILLINOIS)
) **SS.**
COUNTY OF COOK)

Special Grand Jury No. 2019 MR 00014 of the
Circuit Court of Cook County,

The Grand Jurors chosen, selected and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths present that, on or about January 29, 2019, at and within the County of Cook:

Jussie Smollett

Committed the offense of: DISORDERLY CONDUCT

in that HE, KNOWINGLY TRANSMITTED OR CAUSED TO BE TRANSMITTED, IN ANY MANNER, TO ANY PEACE OFFICER, TO WIT: CHICAGO POLICE OFFICER MUHAMMED BAIG, A REPORT TO THE EFFECT THAT AN OFFENSE HAD BEEN COMMITTED, TO WIT: ON JANUARY 29, 2019, AT AROUND 2:45 A.M., JUSSIE SMOLLETT REPORTED, IN PERSON, THAT HE WAS THE VICTIM OF A HATE CRIME, A VIOLATION OF CHAPTER 720 ACT 5 SECTION 12-7.1(a) OF THE ILLINOIS COMPILED STATUTES, REPORTING THAT ON JANUARY 29, 2019, AT APPROXIMATELY 2:00 A.M., NEAR 341 EAST LOWER NORTH WATER STREET, IN CHICAGO, COOK COUNTY, ILLINOIS, TWO UNKNOWN MALES APPROACHED JUSSIE SMOLLETT, CALLED JUSSIE SMOLLETT RACIAL AND HOMOPHOBIC SLURS, AND STRUCK JUSSIE SMOLLETT, AND THE TWO UNKNOWN MALES MADE PHYSICAL CONTACT OF AN INSULTING OR PROVOKING NATURE WITH JUSSIE SMOLLETT BY PUTTING A ROPE AROUND HIS NECK, AND JUSSIE SMOLLETT KNEW THAT AT THE TIME OF THIS TRANSMISSION THERE WAS NO REASONABLE GROUND FOR BELIEVING THAT SUCH AN OFFENSE HAD BEEN COMMITTED,

IN VIOLATION OF CHAPTER 720 ACT 5 SECTION 26-l(a)(4) / (12-7.1(a)) OF ILLINOIS COMPILED STATUTES ACT 1992 AS AMENDED AND,

contrary to the Statute and against the peace and dignity of the same People of the State of Illinois.

COUNT NUMBER: 1
CASE NUMBER: 20 CR 03050-01

The Grand Jurors chosen, selected and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths present that, on or about January 29, 2019, at and within the County of Cook:

Jussie Smollett

Committed the offense of: DISORDERLY CONDUCT

in that HE, KNOWINGLY TRANSMITTED OR CAUSED TO BE TRANSMITTED, IN ANY MANNER, TO ANY PEACE OFFICER, TO WIT: CHICAGO POLICE OFFICER MUHAMMED BAIG, A REPORT TO THE EFFECT THAT AN OFFENSE HAD BEEN COMMITTED, TO WIT: ON JANUARY 29, 2019, AT AROUND 2:45 A.M., JUSSIE SMOLLETT REPORTED, IN PERSON, THAT HE WAS THE VICTIM OF A BATTERY, A VIOLATION OF CHAPTER 720 ACT 5 SECTION 12-3(a)(2) OF THE ILLINOIS COMPILED STATUTES, REPORTING THAT ON JANUARY 29, 2019, AT APPROXIMATELY 2:00 A.M., NEAR 341 EAST LOWER NORTH WATER STREET, IN CHICAGO, COOK COUNTY, ILLINOIS, TWO UNKNOWN MALES APPROACHED JUSSIE SMOLLETT AND STRUCK JUSSIE SMOLLETT, AND THE TWO UNKNOWN MALES MADE PHYSICAL CONTACT OF AN INSULTING OR PROVOKING NATURE WITH JUSSIE SMOLLETT, POURING AN UNKNOWN CHEMICAL SUBSTANCE, BELIEVED TO BE BLEACH, ONTO JUSSIE SMOLLETT, AND JUSSIE SMOLLETT KNEW THAT AT THE TIME OF THIS TRANSMISSION THERE WAS NO REASONABLE GROUND FOR BELIEVING THAT SUCH AN OFFENSE HAD BEEN COMMITTED,

IN VIOLATION OF CHAPTER 720 ACT 5 SECTION 26-l(a)(4) / (12-3(a)) OF ILLINOIS COMPILED STATUTES ACT 1992 AS AMENDED AND,

contrary to the Statute and against the peace and dignity of the same People of the State of Illinois.

COUNT NUMBER: 2
CASE NUMBER: 20 CR 03050-01

The Grand Jurors chosen, selected and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths present that on or about January 29, 2019, at and within the County of Cook:

Jussie Smollett

Committed the offense of: DISORDERLY CONDUCT

in that HE, KNOWINGLY TRANSMITTED OR CAUSED TO BE TRANSMITTED, IN ANY MANNER, TO ANY PEACE OFFICER, TO WIT: CHICAGO POLICE DETECTIVE KIMBERLY MURRAY, A REPORT TO THE EFFECT THAT AN OFFENSE HAD BEEN COMMITTED, TO WIT: ON JANUARY 29, 2019, AT AROUND 5:55 A.M., JUSSIE SMOLLETT REPORTED, IN PERSON, THAT HE WAS THE VICTIM OF A HATE CRIME, A VIOLATION OF CHAPTER 720 ACT 5 SECTION 12-7.1(a) OF THE ILLINOIS COMPILED STATUTES, REPORTING THAT ON JANUARY 29, 2019, AT APPROXIMATELY 2:00 AM, NEAR THE INTERSECTION OF NEW STREET AND LOWER NORTH WATER STREET, IN CHICAGO, COOK COUNTY, ILLINOIS, JUSSIE SMOLLETT HAD RACIAL AND HOMOPHOBIC SLURS CALLED OUT AT HIM, AND TWO UNKNOWN OFFENDERS APPROACHED JUSSIE SMOLLETT FROM BEHIND, AND JUSSIE SMOLLETT WAS PUNCHED IN THE FACE AND KICKED IN THE BACK, CAUSING BODILY HARM TO JUSSIE SMOLLETT, AND JUSSIE SMOLLETT KNEW THAT AT THE TIME OF THIS TRANSMISSION THERE WAS NO REASONABLE GROUND FOR BELIEVING THAT SUCH AN OFFENSE HAD BEEN COMMITTED,

IN VIOLATION OF CHAPTER 720 ACT 5 SECTION 26-l(a)(4) / (12-7.1(a)) OF ILLINOIS COMPILED STATUTES ACT 1992 AS AMENDED AND,

contrary to the Statute and against the peace and dignity of the same People of the State of Illinois.

COUNT NUMBER: 3
CASE NUMBER: 20 CR 03050-01

The Grand Jurors chosen, selected and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths present that on or about January 29, 2019, at and within the County of Cook:

Jussie Smollett

Committed the offense of: DISORDERLY CONDUCT

in that HE, KNOWINGLY TRANSMITTED OR CAUSED TO BE TRANSMITTED, IN ANY MANNER, TO ANY PEACE OFFICER, TO WIT: CHICAGO POLICE DETECTIVE KIMBERLY MURRAY, A REPORT TO THE EFFECT THAT AN OFFENSE HAD BEEN COMMITTED, TO WIT: ON JANUARY 29, 2019, AT AROUND 5:55 A.M., JUSSIE SMOLLETT REPORTED, IN PERSON, THAT HE WAS THE VICTIM OF A BATTERY, A VIOLATION OF CHAPTER 720 ACT 5 SECTION 12-3(a)(1) OF THE ILLINOIS COMPILED STATUTES, REPORTING THAT ON JANUARY 29, 2019, AT APPROXIMATELY 2:00 AM, NEAR THE INTERSECTION OF NEW STREET AND LOWER NORTH WATER STREET, IN CHICAGO, COOK COUNTY, ILLINOIS, TWO UNKNOWN OFFENDERS APPROACHED JUSSIE SMOLLETT FROM BEHIND, AND JUSSIE SMOLLETT WAS PUNCHED IN THE FACE AND KICKED IN THE BACK, CAUSING BODILY HARM TO JUSSIE SMOLLETT, AND JUSSIE SMOLLETT KNEW THAT AT THE TIME OF THIS TRANSMISSION THERE WAS NO REASONABLE GROUND FOR BELIEVING THAT SUCH AN OFFENSE HAD BEEN COMMITTED,

IN VIOLATION OF CHAPTER 720 ACT 5 SECTION 26-l(a)(4) / (12-3(a)) OF ILLINOIS COMPILED STATUTES ACT 1992 AS AMENDED AND,

contrary to the Statute and against the peace and dignity of the same People of the State of Illinois.

COUNT NUMBER: 4
CASE NUMBER: 20 CR 03050-01

The Grand Jurors chosen, selected and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths present that on or about January 29, 2019, at and within the County of Cook:

Jussie Smollett

Committed the offense of: DISORDERLY CONDUCT

in that HE, KNOWINGLY TRANSMITTED OR CAUSED TO BE TRANSMITTED, IN ANY MANNER, TO ANY PEACE OFFICER, TO WIT: CHICAGO POLICE DETECTIVE KIMBERLY MURRAY, A REPORT TO THE EFFECT THAT AN OFFENSE HAD BEEN COMMITTED, TO WIT: ON JANUARY 29, 2019, AT AROUND 7:15 P.M., JUSSIE SMOLLETT REPORTED, IN PERSON, THAT HE WAS THE VICTIM OF A BATTERY, A VIOLATION OF CHAPTER 720 ACT 5 SECTION 12-3(a)(1) OF THE ILLINOIS COMPILED STATUTES, REPORTING THAT ON JANUARY 29, 2019, AT APPROXIMATELY 2:00 AM, NEAR THE INTERSECTION OF NEW STREET AND LOWER NORTH WATER STREET, IN CHICAGO, COOK COUNTY, ILLINOIS, TWO UNKNOWN OFFENDERS APPROACHED JUSSIE SMOLLETT FROM BEHIND AND ENGAGED IN A PHYSICAL ALTERCATION WITH JUSSIE SMOLLETT, CAUSING BODILY HARM TO JUSSIE SMOLLETT, AND JUSSIE SMOLLETT KNEW THAT AT THE TIME OF THIS TRANSMISSION THERE WAS NO REASONABLE GROUND FOR BELIEVING THAT SUCH AN OFFENSE HAD BEEN COMMITTED,

IN VIOLATION OF CHAPTER 720 ACT 5 SECTION 26-l(a)(4) / (12-3(a)) OF ILLINOIS COMPILED STATUTES ACT 1992 AS AMENDED AND,

contrary to the Statute and against the peace and dignity of the same People of the State of Illinois.

COUNT NUMBER: 5
CASE NUMBER: 20 CR 03050-01

The Grand Jurors chosen, selected and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths present that on or about February 14, 2019, at and within the County of Cook:

Jussie Smollett

Committed the offense of: DISORDERLY CONDUCT

in that HE, KNOWINGLY TRANSMITTED OR CAUSED TO BE TRANSMITTED, IN ANY MANNER, TO ANY PEACE OFFICER, TO WIT: CHICAGO POLICE DETECTIVE ROBERT GRAVES, A REPORT TO THE EFFECT THAT AN OFFENSE HAD BEEN COMMITTED, TO WIT: ON FEBRUARY 14, 2019, AT AROUND 12:15 P.M., JUSSIE SMOLLETT REPORTED, IN PERSON, THAT HE WAS THE VICTIM OF AN AGGRAVATED BATTERY, A VIOLATION OF CHAPTER 720 ACT 5 SECTION 12-3.05(f)(2) OF THE ILLINOIS COMPILED STATUTES, REPORTING THAT ON JANUARY 29, 2019, NEAR 341 EAST LOWER NORTH WATER STREET, IN CHICAGO, COOK COUNTY, ILLINOIS, TWO UNKNOWN MALES, ONE OF WHOM WORE A MASK, APPROACHED JUSSIE SMOLLETT AND ENGAGED IN A PHYSICAL ALTERCATION WITH JUSSIE SMOLLETT, AND THE TWO UNKNOWN MALES MADE PHYSICAL CONTACT OF AN INSULTING OR PROVOKING NATURE WITH JUSSIE SMOLLETT BY PUTTING A ROPE AROUND HIS NECK, AND JUSSIE SMOLLETT KNEW THAT AT THE TIME OF THIS TRANSMISSION THERE WAS NO REASONABLE GROUND FOR BELIEVING THAT SUCH AN OFFENSE HAD BEEN COMMITTED,

IN VIOLATION OF CHAPTER 720 ACT 5 SECTION 26-l(a)(4) / (12-3.05(f)(2)) OF ILLINOIS COMPILED STATUTES ACT 1992 AS AMENDED AND,

contrary to the Statute and against the peace and dignity of the same People of the State of Illinois.

COUNT NUMBER: 6
CASE NUMBER: 20 CR 03050-01

SPECIAL GRAND JURY NO. 2019 MR 00014
General No. 20 CR 03050-01

Circuit Court of Cook County
County Department
Criminal Division
Special Grand Jury No. 2019 MR 00014

The People of the State of Illinois

v.

Jussie Smollett

INDICTMENT FOR

FILED
FEB 11 2020
DOROTHY BROWN
CLERK OF CIRCUIT COURT

DISORDERLY CONDUCT

A TRUE BILL

Foreperson of the Grand Jury

WITNESS

Investigator Thomas C. Wilson, Office of the Independent Inspector General, Cook County, Illinois

Detective Michael Theis, Chicago Police Department

Filed FEBRUARY 11, 2020
Dorothy Brown, Clerk

Bail $

Exhibit 7

STATEMENT ON DISMISSAL OF CHARGES FOR JUSSIE SMOLLETT

March 26, 2019

"After reviewing all of the facts and circumstances of the case, including Mr. Smollet's volunteer service in the community and agreement to forfeit his bond to the City of Chicago, we believe this outcome is a just disposition and appropriate resolution to this case.

In the last two years, the Cook County State's Attorney's Office has referred more than 5,700 cases for alternative prosecution. This is not a new or unusual practice. An alternative disposition does not mean that there were any problems or infirmities with the case or the evidence. We stand behind the Chicago Police Department's investigation and our decision to approve charges in this case. We did not exonerate Mr. Smollet. The charges were dropped in return for Mr. Smollet's agreement to do community service and forfeit his $10,000 bond to the City of Chicago. Without the completion of these terms, the charges would not have been dropped. This outcome was met under the same criteria that would occur for and is available to any defendant with similar circumstances."

Exhibit 8

Clerk of the Circuit Court of Cook County

PEOPLE OF THE STATE OF ILLINOIS

VS **NUMBER: 19CR0310401**

SMOLLETT, JUSSIE

CERTIFIED STATEMENT OF CONVICTION / DISPOSITION

I, DOROTHY BROWN, Clerk of the Circuit Court of Cook County, Illinois, and keeper of the records and seal thereof do hereby certify that the electronic records of the Circuit Court of Cook County show that:

The States Attorney of COOK COUNTY FILED AN INDICTMENT/INFORMATION with the Clerk of the Circuit Court.

Charging the above named defendant with:

COUNT	STATUTE	DEGREE	DESCRIPTION	ARREST DATE
001	720-5/26-1(A)(4)	F4	FALSE REPORT OF OFFENSE	2/21/2019
002	720-5/26-1(A)(4)	F4	FALSE REPORT OF OFFENSE	2/21/2019
003	720-5/26-1(A)(4)	F4	FALSE REPORT OF OFFENSE	2/21/2019
004	720-5/26-1(A)(4)	F4	FALSE REPORT OF OFFENSE	2/21/2019
005	720-5/26-1(A)(4)	F4	FALSE REPORT OF OFFENSE	2/21/2019
006	720-5/26-1(A)(4)	F4	FALSE REPORT OF OFFENSE	2/21/2019
007	720-5/26-1(A)(4)	F4	FALSE REPORT OF OFFENSE	2/21/2019
008	720-5/26-1(A)(4)	F4	FALSE REPORT OF OFFENSE	2/21/2019
009	720-5/26-1(A)(4)	F4	FALSE REPORT OF OFFENSE	2/21/2019
010	720-5/26-1(A)(4)	F4	FALSE REPORT OF OFFENSE	2/21/2019
011	720-5/26-1(A)(4)	F4	FALSE REPORT OF OFFENSE	2/21/2019
012	720-5/26-1(A)(4)	F4	FALSE REPORT OF OFFENSE	2/21/2019
013	720-5/26-1(A)(4)	F4	FALSE REPORT OF OFFENSE	2/21/2019
014	720-5/26-1(A)(4)	F4	FALSE REPORT OF OFFENSE	2/21/2019
015	720-5/26-1(A)(4)	F4	FALSE REPORT OF OFFENSE	2/21/2019
016	720-5/26-1(A)(4)	F4	FALSE REPORT OF OFFENSE	2/21/2019

The following disposition(s) was/were rendered before the Honorable Judge(s):

EVENTS AND ORDERS OF THE COURT:

3/7/2019 INDICTMENT/INFORMATION-CLERKS OFFICE-PRESIDING JUDGE

Clerk of the Circuit Court of Cook County

PEOPLE OF THE STATE OF ILLINOIS

VS **NUMBER: 19CR0310401**

SMOLLETT, JUSSIE

CERTIFIED STATEMENT OF CONVICTION / DISPOSITION

I, DOROTHY BROWN, Clerk of the Circuit Court of Cook County, Illinois, and keeper of the records and seal thereof do hereby certify that the electronic records of the Circuit Court of Cook County show that:

The States Attorney of COOK COUNTY FILED AN INDICTMENT/INFORMATION with the Clerk of the Circuit Court.

3/11/2019 APPEARANCE FILED

3/11/2019 NOTICE OF MOTION/FILING

3/12/2019 DEFENDANT ON BOND

MARTIN, LEROY K, JR.

3/12/2019 APPEARANCE FILED

MARTIN, LEROY K, JR.

3/12/2019 OTHER

REQUEST FOR MEDIA COVERAGE IS ALLOWED FOR THE DATE OF 3-14-19

MARTIN, LEROY K, JR.

3/12/2019 CONTINUANCE BY AGREEMENT

MARTIN, LEROY K, JR.

3/14/2019 CASE ASSIGNED

MARTIN, LEROY K, JR.

3/14/2019 DEFENDANT ON BOND

WATKINS, STEVEN G

3/14/2019 MOTION TO WITHDRAW AS ATTORNEY - FILED

JACK B. PRIOR

WATKINS, STEVEN G

3/14/2019 DEFENDANT ARRAIGNED

WATKINS, STEVEN G

3/14/2019 PLEA OF NOT GUILTY

WATKINS, STEVEN G

Clerk of the Circuit Court of Cook County

PEOPLE OF THE STATE OF ILLINOIS

VS **NUMBER: 19CR0310401**

SMOLLETT, JUSSIE

CERTIFIED STATEMENT OF CONVICTION / DISPOSITION

I, DOROTHY BROWN, Clerk of the Circuit Court of Cook County, Illinois, and keeper of the records and seal thereof do hereby certify that the electronic records of the Circuit Court of Cook County show that:

The States Attorney of COOK COUNTY FILED AN INDICTMENT/INFORMATION with the Clerk of the Circuit Court.

3/14/2019 ADMONISH AS TO TRIAL IN ABSENT

WATKINS, STEVEN G

3/14/2019 MOTION FOR DISCOVERY

WATKINS, STEVEN G

3/14/2019 DISCOVERY ANSWER FILED

WATKINS, STEVEN G

3/14/2019 CASE MANAGEMENT ORDER ENTERED

WATKINS, STEVEN G

3/14/2019 STATE DISCOVERY DEADLINE SET

WATKINS, STEVEN G

3/14/2019 DEFENDANT PRETRIAL MOTION DISCOVERY DEADLINE SET

WATKINS, STEVEN G

3/14/2019 FINAL PRETRIAL CONFERENCE DATE SET

WATKINS, STEVEN G

3/14/2019 TARGET DISPOSITION DATE SET

WATKINS, STEVEN G

3/14/2019 PERMISSION TO LEAVE JURISDICTION

SEE COURT ORDER

WATKINS, STEVEN G

3/14/2019 PRE-TRIAL SERVICE MONITORING PROGRAM

D. TO NOTIFY PRE-TRIAL 48 HRS IN ADVANCE & 24 HOURS AFTER RTN.

WATKINS, STEVEN G

Clerk of the Circuit Court of Cook County

PEOPLE OF THE STATE OF ILLINOIS

VS **NUMBER: 19CR0310401**

SMOLLETT, JUSSIE

CERTIFIED STATEMENT OF CONVICTION / DISPOSITION

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The States Attorney of COOK COUNTY FILED AN INDICTMENT/INFORMATION with the Clerk of the Circuit Court.

3/14/2019 OTHER

G/J TRANS. TENDERED TO BOTH PARTIES

WATKINS, STEVEN G

3/14/2019 CONTINUANCE BY AGREEMENT

WATKINS, STEVEN G

3/14/2019 REQUEST EXTERNAL MEDIA COVERAGE - FILED

3/14/2019 HEARING DATE ASSIGNED

3/25/2019 ORDER ENTERED

SETTING HEARING ON REQUEST FOR EXTENDED MEDIA COVERAGE

WATKINS, STEVEN G

3/26/2019 CASH BOND REFUND PROCESSED FORWARDED ACCOUNTING DEPARTMENT **$9,900.00**

D1375606 CITY OF CHICAGO

3/26/2019 DEFENDANT ON BOND

WATKINS, STEVEN G

3/26/2019 CASE ADVANCED

WATKINS, STEVEN G

3/26/2019 OTHER

STRIKE DATES 4/2 & 4/17

WATKINS, STEVEN G

3/26/2019 NOLLE PROSEQUI

WATKINS, STEVEN G

3/26/2019 OTHER

Clerk of the Circuit Court of Cook County

PEOPLE OF THE STATE OF ILLINOIS

VS **NUMBER: 19CR0310401**

SMOLLETT, JUSSIE

CERTIFIED STATEMENT OF CONVICTION / DISPOSITION

I, DOROTHY BROWN, Clerk of the Circuit Court of Cook County, Illinois, and keeper of the records and seal thereof do hereby certify that the electronic records of the Circuit Court of Cook County show that:

The States Attorney of COOK COUNTY FILED AN INDICTMENT/INFORMATION with the Clerk of the Circuit Court.

BOND D 1375606 TO CITY OF CHICAGO

WATKINS, STEVEN G

3/26/2019 CHANGE PRIORITY STATUS

WATKINS, STEVEN G

3/28/2019 OTHER

PETITION WITHDRAWN

MARTIN, LEROY K, JR.

4/1/2019 NOTICE OF MOTION/FILING

4/2/2019 DEFENDANT NOT IN COURT

DEFT. APP. WAIVED. ATTY FOR THE MEDIA IN COURT.

WATKINS, STEVEN G

4/2/2019 DEFENDANT NOT IN COURT

FOR THE MEDIA NATALIE SPEARS & JACQUE GIANNI

WATKINS, STEVEN G

4/2/2019 DEFENDANT NOT IN COURT

ASA: CATHY MCNEIL STEIN & JESSIA SCHELLER

WATKINS, STEVEN G

4/2/2019 DEFENDANT NOT IN COURT

FOR D. SMOLLETT BRIAN WATSON

WATKINS, STEVEN G

4/2/2019 MOTION FILED

BEFORE CT. MEDIA INTERVENORS, EMERG, MTN FOR THE PURPOSE OF OBJECTING

Clerk of the Circuit Court of Cook County

PEOPLE OF THE STATE OF ILLINOIS

VS **NUMBER: 19CR0310401**

SMOLLETT, JUSSIE

CERTIFIED STATEMENT OF CONVICTION / DISPOSITION

I, DOROTHY BROWN, Clerk of the Circuit Court of Cook County, Illinois, and keeper of the records and seal thereof do hereby certify that the electronic records of the Circuit Court of Cook County show that:

The States Attorney of COOK COUNTY FILED AN INDICTMENT/INFORMATIONwith the Clerk of the Circuit Court.

WATKINS, STEVEN G

4/2/2019 MOTION FILED

TO & VACATING THE SEALING ORDER. CT ENTERS WRITTEN BRIEFING ORDER

WATKINS, STEVEN G

4/2/2019 MOTION FILED

STATES HEARING

WATKINS, STEVEN G

4/2/2019 CONTINUANCE BY AGREEMENT

WATKINS, STEVEN G

5/9/2019 DEFENDANT NOT IN COURT

WATKINS, STEVEN G

5/9/2019 MOTION FILED

ATTY FOR ST. IN CT. ATTY FOR MEDIA INTERVENORS IN CT INSPC. GEN. IN CT

WATKINS, STEVEN G

5/9/2019 MOTION FILED

ON MEDIA INTERVENORS ER MTN TO INTERVENE FOR THE PURPOSE OF OBJ. TO VACATE

WATKINS, STEVEN G

5/9/2019 MOTION FILED

THE SEALING ORDER AND STATUS ON COOK COUNTY STATE ATTY MTN

WATKINS, STEVEN G

5/9/2019 MOTION FILED

TO MODIFY SEAL ORDER

Clerk of the Circuit Court of Cook County

PEOPLE OF THE STATE OF ILLINOIS

VS **NUMBER: 19CR0310401**

SMOLLETT, JUSSIE

CERTIFIED STATEMENT OF CONVICTION / DISPOSITION

I, DOROTHY BROWN, Clerk of the Circuit Court of Cook County, Illinois, and keeper of the records and seal thereof do hereby certify that the electronic records of the Circuit Court of Cook County show that:

The States Attorney of COOK COUNTY FILED AN INDICTMENT/INFORMATIONwith the Clerk of the Circuit Court.

WATKINS, STEVEN G

5/9/2019 WITNESSES ORDERED TO APPEAR

FOR ARGUMENTS

WATKINS, STEVEN G

5/9/2019 CONTINUANCE BY AGREEMENT

WATKINS, STEVEN G

5/16/2019 DEFENDANT NOT IN COURT

WATKINS, STEVEN G

5/16/2019 MOTION FILED

ARUGUMENTS ON MEDIA INTERVENORS EMERG, MTN TO INTERV. FOR PURPOSE OF OBJECTING

WATKINS, STEVEN G

5/16/2019 MOTION FILED

TO VACATING THE SEALING ORDER.

WATKINS, STEVEN G

5/16/2019 MOTION FILED

MEDIA'S ATTY IN COURT. D'S ATTY IN COURT, COOK COUNTY STATE ATTY IN COURT.

WATKINS, STEVEN G

5/16/2019 WITNESSES ORDERED TO APPEAR

FOR RULING

WATKINS, STEVEN G

5/16/2019 CONTINUANCE BY AGREEMENT

WATKINS, STEVEN G

Clerk of the Circuit Court of Cook County

PEOPLE OF THE STATE OF ILLINOIS

VS **NUMBER: 19CR0310401**

SMOLLETT, JUSSIE

CERTIFIED STATEMENT OF CONVICTION / DISPOSITION

I, DOROTHY BROWN, Clerk of the Circuit Court of Cook County, Illinois, and keeper of the records and seal thereof do hereby certify that the electronic records of the Circuit Court of Cook County show that:

The States Attorney of COOK COUNTY FILED AN INDICTMENT/INFORMATIONwith the Clerk of the Circuit Court.

5/23/2019 DEFENDANT NOT IN COURT

WATKINS, STEVEN G

5/23/2019 MOTION FILED

ATTY FOR INTERVENORS , ATTY. FOR STATE. MEDIA INTERVENORS

WATKINS, STEVEN G

5/23/2019 MOTION FILED

ER MOTION TO INTERVENORS FOR THE PURPOSE OF OBJECTING TO & VACATING SEALING

WATKINS, STEVEN G

5/23/2019 MOTION FILED

ORDER GRANTED SEE 10 PAGE COURT ORDER.

WATKINS, STEVEN G

5/23/2019 MOTION FILED

STATES MOTION TO MODIFY SEALING ORDER IS MOOT.

WATKINS, STEVEN G

5/23/2019 CHANGE PRIORITY STATUS

WATKINS, STEVEN G

5/23/2019 VACATE ORDER

ORDER OF MARCH 26, 2019

HEARINGS

3/14/2019	9:00 AM Continued to	Criminal Division, Courtroom 101
3/14/2019	9:00 AM Motion	Criminal Division, Courtroom 101

Clerk of the Circuit Court of Cook County

PEOPLE OF THE STATE OF ILLINOIS

VS **NUMBER: 19CR0310401**

SMOLLETT, JUSSIE

CERTIFIED STATEMENT OF CONVICTION / DISPOSITION

I, DOROTHY BROWN, Clerk of the Circuit Court of Cook County, Illinois, and keeper of the records and seal thereof do hereby certify that the electronic records of the Circuit Court of Cook County show that:

The States Attorney of COOK COUNTY FILED AN INDICTMENT/INFORMATIONwith the Clerk of the Circuit Court.

3/14/2019	9:00 AM By Agreement	Criminal Division, Courtroom 101
3/14/2019	9:00 AM Continued to	Criminal Division, Courtroom 304
3/26/2019	9:30 AM Hearing	Criminal Division, Courtroom 304
3/26/2019	9:30 AM Continued to	Criminal Division, Courtroom 304
4/2/2019	9:00 AM Motion	Criminal Division, Courtroom 304
4/2/2019	9:00 AM Continued to	Criminal Division, Courtroom 304
4/2/2019	9:00 AM Continued to	Criminal Division, Courtroom 304
4/2/2019	9:00 AM Continued to	Criminal Division, Courtroom 304
4/17/2019	9:30 AM By Agreement	Criminal Division, Courtroom 304
5/9/2019	9:30 AM By Agreement	Criminal Division, Courtroom 304
5/9/2019	9:30 AM Continued to	Criminal Division, Courtroom 304
5/9/2019	9:30 AM Continued to	Criminal Division, Courtroom 304
5/9/2019	9:30 AM Continued to	Criminal Division, Courtroom 304
5/9/2019	9:30 AM Continued to	Criminal Division, Courtroom 304
5/16/2019	9:30 AM By Agreement	Criminal Division, Courtroom 304
5/16/2019	9:30 AM Continued to	Criminal Division, Courtroom 304
5/16/2019	9:30 AM Continued to	Criminal Division, Courtroom 304
5/16/2019	9:30 AM Continued to	Criminal Division, Courtroom 304
5/23/2019	9:00 AM Continued to	Criminal Division, Courtroom 304
5/23/2019	9:00 AM By Agreement	Criminal Division, Courtroom 304
5/23/2019	9:00 AM Continued to	Criminal Division, Courtroom 304
5/23/2019	9:00 AM Continued to	Criminal Division, Courtroom 304

Clerk of the Circuit Court of Cook County

PEOPLE OF THE STATE OF ILLINOIS

VS **NUMBER: 19CR0310401**

SMOLLETT, JUSSIE

CERTIFIED STATEMENT OF CONVICTION / DISPOSITION

I, DOROTHY BROWN, Clerk of the Circuit Court of Cook County, Illinois, and keeper of the records and seal thereof do hereby certify that the electronic records of the Circuit Court of Cook County show that:

The States Attorney of COOK COUNTY FILED AN INDICTMENT/INFORMATIONwith the Clerk of the Circuit Court.

5/23/2019 9:00 AM Continued to Criminal Division, Courtroom 304

PLEAS, DISPOSITIONS AND SENTENCES:

Plea:

001	3/14/2019	PLEA OF NOT GUILTY
002	3/14/2019	PLEA OF NOT GUILTY
003	3/14/2019	PLEA OF NOT GUILTY
004	3/14/2019	PLEA OF NOT GUILTY
005	3/14/2019	PLEA OF NOT GUILTY
006	3/14/2019	PLEA OF NOT GUILTY
007	3/14/2019	PLEA OF NOT GUILTY
008	3/14/2019	PLEA OF NOT GUILTY
009	3/14/2019	PLEA OF NOT GUILTY
010	3/14/2019	PLEA OF NOT GUILTY
011	3/14/2019	PLEA OF NOT GUILTY
012	3/14/2019	PLEA OF NOT GUILTY
013	3/14/2019	PLEA OF NOT GUILTY
014	3/14/2019	PLEA OF NOT GUILTY
015	3/14/2019	PLEA OF NOT GUILTY
016	3/14/2019	PLEA OF NOT GUILTY

Clerk of the Circuit Court of Cook County

PEOPLE OF THE STATE OF ILLINOIS

VS **NUMBER: 19CR0310401**

SMOLLETT, JUSSIE

CERTIFIED STATEMENT OF CONVICTION / DISPOSITION

I, DOROTHY BROWN, Clerk of the Circuit Court of Cook County, Illinois, and keeper of the records and seal thereof do hereby certify that the electronic records of the Circuit Court of Cook County show that:

The States Attorney of COOK COUNTY FILED AN INDICTMENT/INFORMATION with the Clerk of the Circuit Court.

Disposition:

001	3/26/2019	NOLLE PROSEQUI
002	3/26/2019	NOLLE PROSEQUI
003	3/26/2019	NOLLE PROSEQUI
004	3/26/2019	NOLLE PROSEQUI
005	3/26/2019	NOLLE PROSEQUI
006	3/26/2019	NOLLE PROSEQUI
007	3/26/2019	NOLLE PROSEQUI
008	3/26/2019	NOLLE PROSEQUI
009	3/26/2019	NOLLE PROSEQUI
010	3/26/2019	NOLLE PROSEQUI
011	3/26/2019	NOLLE PROSEQUI
012	3/26/2019	NOLLE PROSEQUI
013	3/26/2019	NOLLE PROSEQUI
014	3/26/2019	NOLLE PROSEQUI
015	3/26/2019	NOLLE PROSEQUI
016	3/26/2019	NOLLE PROSEQUI

Sentence (Credit):

Clerk of the Circuit Court of Cook County

PEOPLE OF THE STATE OF ILLINOIS

VS **NUMBER: 19CR0310401**

SMOLLETT, JUSSIE

CERTIFIED STATEMENT OF CONVICTION / DISPOSITION

I, DOROTHY BROWN, Clerk of the Circuit Court of Cook County, Illinois, and keeper of the records and seal thereof do hereby certify that the electronic records of the Circuit Court of Cook County show that:

The States Attorney of COOK COUNTY FILED AN INDICTMENT/INFORMATION with the Clerk of the Circuit Court.

I hereby certify that the foregoing has been entered of record on the above captioned case.

Date: 3/4/2020

Dorothy Brown

DOROTHY BROWN
CLERK OF THE CIRCUIT COURT OF COOK COUNTY

Printed: 3/4/2020 4:20:03 PM

Exhibit 9

Criminal Division-Bond Audit Form **2nd Signature** _____

Name Jessie Smollett **Refund $** 9,900 **201**

Case # 19CR03104-01 **Bond #** D-1375606

Team Review/Verification Unit/(Bond Refund Dept)

- o **Defendant's Name**
- o **Case/Ticket Number**
- o **Bail Bond Number**
- o **Bail Bond Amount Set**
- o **Bail Bond Deposit Amount**

Bail Bond Money Refund to:

- o Attorney #_____
- o Provider/Surety
- o Defendant
- o Public Defender
- o Victim
- X Other City of Chgo
- o Deduct Bond Money to satisfy Costs, Fines &

Sea Order

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

DATE: 3/26/2019 TIME: 11:23AM
IN: 0037-0001 RN: 00855030
DIST: 01 DIV: Criminal
CRM10119 CASHIER: SHARONP CR#: 402

ATTORNEY NO: 00000

REF CASE NO: 19cr03104-01
REF OTHER:

CASE TOTAL: $9,900.00
Bond Refund $9,900.00
BOND BR BOND NUMBER: d-1375606
TOTAL BOND AMOUNT: $10,000.00
REFUND AMOUNT: $9,900.00
PAYEE: City Chgo
CHANGE $0.00

RECEIPT 0001 OF 0001
TRANSACTION TOTAL: $9,900.00

THANK YOU

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ceipt.
-sheet

ey

FOR INTERNAL USE ONLY:
Supervisor's Initials: _____

Bail Bond Audit Unit (Daley Center #1005)

- o Defendant's Name
- o Case/Ticket Number
- o Bail Bond Number
- o Bail Bond Amount Set
- o Bail Bond Deposit Amount

Bail Bond Money Refund to:

- o Attorney
- o Provider
- o Defendant
- o Public Defender
- o Victim
- o Other

- o Deduct Bond Money to satisfy Costs, Fines & Fees

I verified the bail bond against the:

- o Bail Bond Receipt
- o CBR to Attorney
- o Court Sheet
- o Court Order
- o Probation/Supervision Order

- o This bail bond amount is equal to or greater than $500. I have attached a copy of the court sheet.
- o This bail bond amount is equal to or greater than $5000. I have attached a copy of the court sheet, verified that a Court Clerk Bond Processor and a Manager have initialed the Bail Bond Receipt.

Reviewed/Verified by: _____

Date: _____

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

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 20 CR 03050-01
	)	
JUSSIE SMOLLETT,	)	
	)	
Defendant.	)	

REPLY TO RESPONSE TO MOTION TO DISMISS INDICTMENT FOR VIOLATION OF DEFENDANT'S RIGHT AGAINST DOUBLE JEOPARDY

INTRODUCTION

The Double Jeopardy Clause protects against multiple punishments for the same offense, which bars the attempt by the Office of the Special Prosecutor ("OSP") to re-prosecute Mr. Smollett on behalf of the State of Illinois one year after all charges against him were dismissed—*after* Mr. Smollett forfeited his $10,000 bond in detrimental reliance on the State's representations and *after* he gave up his substantial right to a speedy trial.

As explained below, the arguments raised by the OSP in its Response to Mr. Smollett's Motion to Dismiss Indictment for Violation of Defendant's Right Against Double Jeopardy (hereafter "Response") each lack merit:

I. Double Jeopardy is, in fact, at issue because Mr. Smollett was previously criminally punished. For purposes of double jeopardy, jeopardy attaches when criminal punishment is imposed. Furthermore, double jeopardy principles trump the State's ability to reinstate charges that have been *nol-prossed.*

II. The bond forfeiture, even if deemed "voluntary," constitutes legal punishment for purposes of double jeopardy. The OSP's reliance on the purported "voluntariness" of Mr. Smollett's bond forfeiture belies common sense. By the OSP's reasoning, any negotiated sentence imposed pursuant to a guilty plea (which must be freely and "voluntarily" given) would not constitute legal punishment. Moreover, based on the City of Chicago's representations, a federal court in a related proceeding has already found that the dismissal of the Prior Charges was *involuntary*.

III. Contrary to the OSP's contention, Mr. Smollett's payment of $10,000 to the City of Chicago amounts to a "fine" despite the fact that he was not convicted of a crime. The OSP conveniently ignores settled law that defendants can be punished criminally without admitting guilt or being convicted of any crime. The OSP also ignores public statements by the CCSAO that Mr. Smollett's case was dismissed as part of a deferred prosecution or pretrial diversion program. Courts applying double jeopardy principles to such programs have held that jeopardy attaches when a defendant completes the terms of the program and the case is dismissed, barring subsequent prosecution even in the absence of a conviction or sentence.

IV. There is nothing inconsistent about Mr. Smollett's position in this case and his position in the pending civil case. While Mr. Smollett maintains his innocence (as he has from day one), he accepted legal punishment in order to have the previous charges against him promptly dismissed and for the sake of finality. Such a disposition is not inconsistent with innocence or a claim for malicious prosecution.

V. Whether the prior proceedings are void or voidable do not affect the double jeopardy analysis. If there, in fact, had been a defect in the authority to prosecute Mr. Smollett, the only person who could properly challenge the validity of the proceedings would be Mr. Smollett—and he has not done so. Mr. Smollett should not be prejudiced and further punished (and deprived of a benefit which he bargained for) as a result of the *government's* mistake or error.

VI. Finally, it is well settled that the rules with regard to double jeopardy should not be applied in a rigid, mechanical nature. Because Mr. Smollett forfeited a substantial amount of money in detrimental reliance on the CCSAO's representations and the court's actions in dismissing his case, and gave up his right to have a speedy trial because he believed he was receiving finality from the agreement, the policies of the Double Jeopardy Clause would be frustrated by further prosecution.

BACKGROUND

In his prepared written Information Release on February 11, 2020, Special Prosecutor Dan K. Webb acknowledged that Mr. Smollett was previously punished but took issue with the lenity of the punishment. Specifically, he noted that during the initial criminal prosecution of Mr. Smollett, the "***only punishment*** for Mr. Smollett was to perform 15 hours of community service . . . [and] requiring Mr. Smollett to forfeit his $10,000 as restitution to the City of Chicago." Ex. 3 to Defendant's Motion at 2 (emphasis added). Now, in response to Mr. Smollett's motion to dismiss the indictment for violation of his right against double jeopardy and *in direct contravention of his own words only a month earlier*, the Special Prosecutor argues that Mr. Smollett was not "punished" in the prior proceeding.

The OSP has made it no secret that its decision to re-prosecute Mr. Smollett was motivated[1] by its disagreement with the disposition that the Cook County State's Attorney's Office ("CCSAO") agreed to and that the court imposed. As Special Prosecutor Webb explained in his Information Release, a "major factor in the OSP's determination that further prosecution of Mr. Smollett [wa]s in the interests of justice" was the inability of the CCSAO to satisfy the OSP with documentary evidence that the disposition in Mr. Smollett's case was similar to "other dispositions of similar cases." Ex. 3 to Defendant's Motion at 1; *see also id.* at 2 ("the OSP has obtained sufficient factual evidence to determine that it disagrees with how the CCSAO resolved the Smollett case"). But this kind of second-guessing by another prosecutor is precisely the kind of harm that the Double Jeopardy Clause safeguards against. *See United States v. Halper*, 490 U.S. 435, 451 n.10 (1989) ("the Double Jeopardy Clause protects against the possibility that the Government is seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding"), *abrogated on other grounds by Hudson v. United States*, 522 U.S. 93 (1997).

Here, the CCSAO has repeatedly and expressly stated that the disposition of the prior charges in Mr. Smollett's case was part of an "alternative prosecution program" or a "diversion." While it does not appear that any court in Illinois has confronted this precise issue, sister courts which have considered the application of double jeopardy principles to such programs have held that ***jeopardy attaches when the defendant completes the program and when the charges are dismissed***, thereafter barring further prosecution under the Double Jeopardy Clause. These holdings are consistent with the United States Supreme Court's explicit directive 140 years ago

[1] The re-prosecution of Mr. Smollett was not provoked by any action or unfulfilled condition by him; on the contrary, Mr. Smollett fully held up his end of the bargain with the CCSAO. In fact, despite investigating this matter for nine months since August 23, 2019, the OSP has not found any evidence that Mr. Smollett, or anyone on his behalf, engaged in any wrongdoing related to resolving the prior charges against him. *See* Ex. 3 to Defendant's Motion at 1.

that punishment pursuant to a compromise agreement, even in the absence of a conviction or judgment, bars a second punishment for the same offense. *See United States v. Chouteau*, 102 U.S. 603, 611 (1880). These holdings are also consistent with the Supreme Court's directive that the question of assessing whether jeopardy attaches is not to be decided by any mechanical test. *See Illinois v. Somerville,* 410 U.S. 458, 467-71 (1973); *United States v. Jorn*, 400 U.S. 470, 486-87 (1971); *United States v. Sisson*, 399 U.S. 267, 305-308 (1970).

It is undisputed that Mr. Smollett held up his end of the bargain by satisfying the State as to his performance of community service and forfeiting his $10,000 bond. Therefore, when the court accepted this disposition and entered an order dismissing the charges and forfeiting the bond, ***jeopardy attached,*** thereby barring further prosecution of him under the Double Jeopardy Clause.

Moreover, the OSP is equitably estopped from re-prosecuting Mr. Smollett. The successive prosecutions of Mr. Smollett by the CCSAO and the OSP must be viewed as the acts of a single sovereign under the Double Jeopardy Clause, *see Brown v. Ohio,* 432 U.S. 161, 164, fn. 4 (1977) (citing *Waller v. Florida*, 397 U.S. 387 (1970)), since both prosecutions were initiated on behalf of the State of Illinois. *See* Ex. 5 to Response (Order appointing Dan K. Webb as the special prosecutor and noting that "the Special Prosecutor shall be vested with the same powers and authority of the elected State's Attorney of Cook County, limited only by the subject matter of this investigation"). The State of Illinois, represented by the CCSAO, previously made an agreement with Mr. Smollett, which the court approved. In detrimental reliance on the CCSAO's representations and the court's actions, Mr. Smollett forfeited a substantial amount of money. He also gave up his right to have a speedy trial because he believed he was receiving finality from the agreement. Although Mr. Smollett fulfilled his obligations and upheld his end of the bargain, more than a year later, he has been dragged back into court here, having to bear

the burden, expense, and mental anguish of a new prosecution—simply because a different state court judge (and his appointed special prosecutor) did not agree with the prior disposition of the case by the CCSAO, and its approval by another trial court judge. The Court should not allow Mr. Smollett to be further prejudiced as a result of his reliance on what he reasonably believed was, and what the trial court accepted on the record as, an agreement or deal with the State.

The arguments raised by the OSP in its Response are a red herring and a transparent attempt to distract from the inescapable conclusion that Mr. Smollett was previously punished for the same conduct that is at issue in this case. The OSP begins by making the absurd statement that in exchange for "voluntarily" giving the City of Chicago $10,000 (through release of his bond), "[Mr. Smollett] received a very valuable benefit," namely the dismissal of his pending case. Response at 1. It defies all credibility to suggest that there was somehow a valuable benefit to Mr. Smollett by the illusory finality of this case followed by more than one year of dragged-out court proceedings which then culminated in a new indictment and new prosecution, along with the accompanying expense, humiliation, and anguish. It is certainly not what he bargained for or relied on when satisfying the CCSAO as to his community service, forfeiting the $10,000 bond, and giving up his right to a speedy trial.

Furthermore, the OSP's reliance on the purported "voluntariness" of Mr. Smollett's bond forfeiture belies common sense. Indeed, even formal plea agreements with the government must be "voluntarily" entered into by a defendant in order for the court to accept them. The voluntary nature of such a plea deal does not render the resulting sentence, including a negotiated sentence, any less of a punishment than one imposed upon a defendant *involuntarily*.

But perhaps the most obvious demonstration of the OSP grasping at straws is its contention that the charges Mr. Smollett is currently facing are somehow new and different than the charges he previously faced, and which he was already punished for. In its tortured effort to

distinguish the six "New Charges" from the sixteen "Prior Charges," the OSP wholly misconstrues Mr. Smollett's representation about the charges in the pending civil action. The OSP tells this Court that Mr. Smollett himself acknowledged the uniqueness of the New Charges by stating that "the new charges are distinguishable" from the Prior Charges. Response at 4 (quoting *City of Chicago v. Smollett,* 19 cv. 04547, Dkt. 78 at p. 11–12, n.2). However, at no time did Mr. Smollett acknowledge the uniqueness of the New Charges. Rather, in the filing referred to by the OSP, Mr. Smollett simply noted that "the new charges are distinguishable in that they include six counts of disorderly conduct compared to the 16 counts in the prior criminal proceedings." *See City of Chicago v. Smollett,* No. 19-cv-04547, Dkt. 78 at p. 12, n.2. Indeed, the New Charges are essentially a subset of the Prior Charges.

Moreover, contrary to its assertion, the OSP cannot plausibly dispute that the New Charges mirror the Prior Charges in nearly every respect. Both the Prior Charges and the New Charges allege that Mr. Smollett committed disorderly conduct by reporting to Officer Muhammed Baig that on January 29, 2019, at approximately 2:00 AM, two unknown males approached Mr. Smollett, called Mr. Smollett racial and homophobic slurs, and made physical contact of an insulting or provoking nature with Mr. Smollett. *Compare* Ex. 2 to Response (Prior Charges, Counts 1-8) *with* Ex. 6 to Response (New Charges, Counts 1-2). The Prior Charges and the New Charges also both allege that Mr. Smollett committed disorderly conduct by reporting to Detective Kimberly Murray that on January 29, 2019, at approximately 2:00 AM, Mr. Smollett had racial and homophobic slurs called out at him and that two unknown offenders approached him from behind, punched him in the face, and kicked him in the back. *Compare* Ex. 2 to Response (Prior Charges, Counts 9-16) *with* Ex. 6 to Response (New Charges, Counts 3-5). The only substantive difference between the Prior Charges and the New Charges is that the latter tacks on an additional closely related crime—*i.e.,* that Mr. Smollett allegedly committed

disorderly conduct by telling Detective Robert Graves that on January 29, 2019, at approximately 2:00 AM, two unknown males approached Mr. Smollett, engaged in a physical altercation with him, and made physical contact of an insulting or provoking nature with Mr. Smollett. *See* Ex. 6 to Response, Count 6. This additional closely related criminal charge, however, does not alleviate the double jeopardy barrier to the New Charges. *See United States v. Jackson*, 363 B.R. 859, 867 (N.D. Ill. 2007) ("[C]ourts should use the 'same elements' test to determine whether two punishments are for the same offense within the meaning of the Double Jeopardy Clause.") (citing *United States v. Dixon*, 509 U.S. 688, 696 (1993)); *Dixon*, 509 U.S. at 696 ("The same-elements test . . . inquires whether each offense contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars additional punishment and successive prosecution."); *accord People v. Crosby*, 2017 IL App (1st) 121645, ¶ 18 (citing *People v. Sienkiewicz*, 208 Ill. 2d 1, 5 (2003)).

While the OSP has spent substantial resources investigating this matter since August 2019, and it presumably intends to spend substantial more monies prosecuting this matter through trial, the question remains, what is it all for? In expressing that the OSP disagreed with how the CCSAO resolved the Smollett case, the OSP pointed out that the CCSAO resolved the charges without "requiring that Smollett participate in the CCSAO Deferred Prosecution Program (Branch 9), which he was eligible to participate in, and which would require a one-year period of court oversight of Mr. Smollett." Ex. 3 to Defendant's Motion at 2. The Court should take notice that Mr. Smollett has now effectively completed this program, which provides that after 12 months, charges are dismissed upon successful completion of the agreement and repayment of restitution. *See* Cook County State's Attorney, *Felony Diversion Programs* (last checked on May 20, 2020), *available at* https://www.cookcountystatesattorney.org/resources/felony-diversion-programs.

As the OSP notes, Mr. Smollett was eligible to participate in the program, since he has no prior felony convictions, no violence, weapons, or DUI charges, and no violent misdemeanor convictions within the last 10 years. *See id.* And more than one year has elapsed since the disposition of his case, during which time Mr. Smollett has had no new arrests or contact with law enforcement. On the contrary, Mr. Smollett has continued to do community service and to make charitable donations, as he did long before charges were ever filed against him. *See, e.g., Jussie Smollett Playing Santa Claus in Flint . . . Money & Toys for Kids*, TMZ (Dec. 24, 2019), *available at* https://www.tmz.com/2019/12/24/jussie-smollett-donates-10k-to-flint-kids-program/ (noting that Mr. Smollett paid a surprise visit to Flint, Michigan where he helped surprise a school with new backpacks and toys and donated $10,000 to the Flint KIDS program); Michael Sneed, *Jussie Smollett donating $5,000 for face masks in Cook County*, CHICAGO SUN TIMES (Apr. 10, 2020), *available at* https://chicago.suntimes.com/columnists/2020/4/10/21216990/jussie-smollett-donating-5000-dollars-3000-face-masks-cook-county-coronavirus-chicago (noting that Mr. Smollett is donating $5,000 to purchase 3,000 face masks for the Cook County Health Foundation to battle Chicago's COVID-19 pandemic); Luck, *Jussie Smollett Donates Over $30K Toward COVID-19 Relief Efforts,* KISS105.3 (Apr. 26, 2020), *available at* https://kissnwa.com/jussie-smollett-donates-over-30k-toward-covid-19-relief-efforts/ (noting that Mr. Smollett has donated over $30,000 to supply over 10,000 masks and care packets to such facilities as Harlem Hospital in New York City, Cook County Hospital in Chicago, the Clinic for Us in Leimert Park through the Black AIDS Institute, as well as supplying emergency relief housing for women and children affected by domestic violence during COVID-19 through the Jenesse Center); Miss2Bees, *Jussie Smollett Donates $125K to Several Black Charities,* THE SOURCE (Nov. 29, 2018), *available at* https://thesource.com/2018/11/29/jussie-smollett-donation/ (noting that Mr. Smollett donated $125,000 from his music tour to a number of

charities that he supports including the Black AIDS Institute, Flint KIDS, South Africa's SKY Foundation, the Trayvon Martin Foundation, Colin Kaepernick's Know Your Rights Camp, ACLU, and the Anthony Burrell Dance School).

Furthermore, restitution is inapplicable in this case.[2] And perhaps most importantly, such a program does not require the participant to plead guilty to the charges he is facing. *See* Cook County State's Attorney, *Felony Diversion Programs* (last checked on May 11, 2020), *available at* https://www.cookcountystatesattorney.org/resources/pre-plea. Thus, for all practical purposes, Mr. Smollett has completed the deferred prosecution program which the OSP complains the CCSAO did not require Mr. Smollett to complete. Had Mr. Smollett been enrolled in the program, his case would have been dismissed by now. Thus, putting aside the fact that the instant prosecution is barred by the Double Jeopardy Clause, there is also absolutely no logical sense to allow the re-prosecution of Mr. Smollett, other than to harass and further violate his constitutional rights and waste taxpayer money. The Court should dismiss the indictment, accordingly.

ARGUMENT

I. Double Jeopardy Is At Issue Because Mr. Smollett Was Previously Criminally Punished.

The fundamental issue here is whether Mr. Smollett was previously criminally punished, which implicates double jeopardy in the present proceedings. *See Whalen v. United States*, 445 U.S. 684, 688 (1980) ("The Fifth Amendment guarantee against double jeopardy protects not only against a second trial for the same offense, but also against multiple punishments for the

[2] As Mr. Smollett explained in his Motion to Dismiss, Illinois courts have repeatedly held that a police department or government agency is not considered a "victim" within the meaning of the restitution statute. *See, e.g., People v. Chaney,* 188 Ill. App. 3d 334 (3d Dist. 1989); *People v. Winchell,* 140 Ill. App. 3d 244 (5th Dist. 1986); *People v. Gaytan*, 186 Ill. App. 3d 919 (2d Dist. 1989); *People v. Evans*, 122 Ill. App. 3d 733 (3d Dist. 1984); *People v. Lawrence*, 206 Ill. App. 3d 622 (5th Dist. 1990); *People v. McGrath,* 182 Ill. App. 3d 389 (2d Dist. 1989).

same offense." (internal quotations and citations omitted)) The OSP attempts to muddle the issue by asserting that the attachment of jeopardy is a fundamental threshold question to any double jeopardy analysis and that double jeopardy is not at issue here because jeopardy never attached in the prior proceeding. Response at 5-6. But the OSP relies on inapposite cases, as they address the attachment of jeopardy in cases where no punishment was imposed in the first proceeding. *See People v. Bellmyer*, 199 Ill. 2d 529, 537-40 (2002) (issue was whether jeopardy had attached at a stipulated bench trial where the court ultimately rejected the stipulations, with the court concluding that jeopardy had, in fact, attached); *People v. Cabrera,* 402 Ill. App. 3d 440, 453 (1st Dist. 2010) (issue was whether jeopardy had attached when the court rejected and vacated a guilty plea before proceeding to trial, with the court concluding that because the guilty plea hearing was properly terminated, setting the case for trial "was not an event that terminated the jeopardy that attached"). In *Cabrera*, the court actually distinguished itself from this case, stating: "We note that the State here 'is not attempting to impose multiple punishments for a single offense.'" 402 Ill. App. 3d at 450-51 (quoting *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 307 (1984)). The court explained that "because the subsequent bench trial was part of the same continuous prosecution, placing the defendant in jeopardy but once, the sentence imposed after the verdict following the bench trial did not subject the defendant to multiple punishments under the double jeopardy clause. " *Id.* at 453.

Citing to only a single case, the OSP asserts that "[j]eopardy attaching is a prerequisite even in situations where a defendant asserts a challenge based on a fear of multiple punishments for the same offense." Response at 5 (citing *People v. Delatorre*, 279 Ill. App. 3d 1014, 1019 (2d Dist. 1996)). However, the proposition in *Delatorre* which the OSP relies on was dicta and not supported by any authority whatsoever. The issue in *Delatorre* was whether jeopardy had attached at a prior civil forfeiture proceeding where the defendants had not filed a claim as

required to contest the forfeiture. In rejecting the defendants' argument that there should be a distinction in the application of the double jeopardy clause to multiple punishments for the same offense in separate proceedings as compared to a successive prosecution for the same offense, the court suggested that "the general proposition in *Serfass* that there can be no double jeopardy without a former jeopardy is as appropriate to multiple punishments for the same offense when sought in separate proceedings as it is to successive prosecutions for the same offense." *Id.* (citing *Serfass v. United States*, 420 U.S. 377, 391-92 (1975)). However, neither the court in *Delatorre*, nor the OSP in its Response, cites to any other authority so holding. Notably, *Serfass* did not hold that jeopardy must have attached in the prior proceeding in order for double jeopardy to bar further prosecution based on multiple punishment. In fact, *Serfass* did not address multiple punishment at all. Rather, the issue in *Serfass* was whether the Double Jeopardy Clause permits an appeal under 18 U.S.C. § 3731 from a pretrial order dismissing an indictment. *See Serfass*, 420 U.S. at 387.

A. For purposes of double jeopardy, jeopardy attaches when criminal punishment is imposed.

The OSP has not cited, and our research has not uncovered, any authority which provides that jeopardy must attach in the traditional sense (empaneling and swearing of jury in a jury trial, swearing in of first witness at a bench trial, or acceptance of guilty plea) in cases implicating the multiple punishment prong of the Double Jeopardy Clause. Rather, the guidance by the High Court is that imposition of a criminal punishment is itself another method by which jeopardy attaches. *See United States ex rel. Marcus* v. *Hess,* 317 U.S. 537, 548-49 (1943) (citing *Helvering v. Mitchell,* 303 U. S. 391, 397-98 (1938) ("[C]riminal punishment . . . subject[s] the defendant to 'jeopardy' within the constitutional meaning."). The Illinois Supreme Court has likewise recognized that double punishment is distinct from the other double jeopardy protections. *See, e.g., People v. Milka*, 211 Ill. 2d 150, 174 (Ill. 2004) ("The purpose of the

prohibition of double jeopardy, ***questions of double punishment aside,*** finds expression in the maxim *nemo debet bis vexari pro una et eadem causa*, no one shall be twice vexed for one and the same cause.") (emphasis added).

Furthermore, although it does not appear that Illinois has had occasion to consider the issue, our sister courts have held that jeopardy attaches when a defendant successfully completes the terms of a pretrial diversion program. *See, e.g., State v. Urvan*, 4 Ohio App. 3d 151, 158 (Ohio Ct. App. 1982); *Commonwealth v. McSorley*, 335 Pa. Super. 522, 526 (Pa. Super. Ct. 1984). These holdings are also consistent with the United States Supreme Court's explicit directive that punishment pursuant to a compromise agreement, even in the absence of a conviction or judgment, bars a second punishment for the same offense (*see Chouteau*, 102 U.S. at 611), and also with the Supreme Court's charge that the question of assessing whether jeopardy attaches is not to be decided by any mechanical test (*see Somerville,* 410 U.S. at 467-71; *Jorn*, 400 U.S. at 486-87; *Sisson*, 399 U.S. at 305-308). Thus, the fact that Mr. Smollett was previously criminally punished subjected him to "jeopardy" and bars the instant prosecution.

B. Double jeopardy principles trump the State's ability to reinstate charges that have been *nol-prossed.*

Furthermore, the cases cited by the OSP for the proposition that a "*nolle prosequi* is not a final disposition of the case, and will not bar another prosecution for the same offense" are also inapposite because they do not implicate the multiple punishment prong of the Double Jeopardy Clause.[3] Response at 6. *See Milka,* 211 Ill. 2d at 172 (issue was whether the State's entry of a *nolle prosequi* as to one count during trial "operated as an acquittal" so as to preclude continuation of the trial and whether defendant's conviction for felony murder based on the

[3] It must also be remembered that this proceeding is not a reinstatement of charges that were *nol-prossed*. Rather, this is an entirely *different* proceeding before a *different* judge by a *different* prosecutor based on a *different* indictment returned by a *different* grand jury but for the same conduct that was previously *nol-prossed*.

dismissed felony was barred by principles of double jeopardy); *People v. Norris*, 214 Ill. 2d 92, 104 (2005) (issue was whether the State's recharging of defendant, after obtaining a *nolle prosequi* when the officer who issued the citation failed to appear or the court failed to grant a continuance, was barred by Supreme Court Rule 505); *People v. Hughes*, 2012 IL 112817 at ¶ 16 (2012) (issue was whether the court lacked subject matter jurisdiction to accept a guilty plea to a *nol-prossed* charge).

In fact, these cases make clear that double jeopardy principles, when they apply, trump the State's ability to reinstate charges that have been *nol-prossed*. For instance, in *Milka*, the Illinois Supreme Court explained that "the *nol-pros* of a charge, entered after jeopardy has attached, bars prosecution of that charge 'in a subsequent trial'[;] . . . [t]his result is dictated not by the nature of the *nolle prosequi* itself, but by double jeopardy principles, since a subsequent prosecution would deprive defendant of his right to have the first jury, once empaneled, render a verdict." *Milka*, 211 Ill. 2d at 176-77 (internal quotations omitted); *People v. Daniels*, 187 Ill. 2d 301, 312 (1999) ("the granting of a motion to *nol-pros* after jeopardy attaches has the same effect as an acquittal, and the State may not pursue those charges in a subsequent trial"); *see also People v. Hughes*, 2012 IL 112817 at ¶ 25 ("We continue to recognize the validity of this procedure when done before jeopardy attaches, prior to a final judgment, and in the absence of any applicable constitutional or statutory limitations which a defendant may raise."). Thus, although a *nolle prosequi* would not typically bar another prosecution for the same offense, it does so in this case because the *nolle prosequi* was accompanied by a criminal punishment.[4] Since jeopardy attached when punishment was imposed, the instant prosecution is barred.

[4] The State would also be barred from proceeding upon a refiled charge if there was "a showing of harassment, bad faith, or fundamental unfairness." *People v. DeBlieck*, 181 Ill. App. 3d 600, 606 (1989) (and cases cited therein). In *People v. Norris*, 214 Ill. 2d 92, 105 (2005), cited by the OSP in its Response, the court remanded the matters to the circuit court because "in some of

II. The Bond Forfeiture, Even if Deemed "Voluntary," Constitutes Legal Punishment for Purposes of Double Jeopardy.

Without citing to any authority, the OSP argues that the bond forfeiture cannot constitute legal punishment because it was "voluntary" as a condition of the dismissal of charges.[5] Response at 7. This argument is not only illogical but it is also directly contrary to the City of Chicago's position in a related proceeding.

A. By the OSP's reasoning, any negotiated sentence imposed pursuant to a guilty plea would not constitute legal punishment.

A basic prerequisite for any guilty plea is that it be freely and "voluntarily" entered. *See, e.g.,* Ill. Sup. Ct. R. 402(b) ("The court shall not accept a plea of guilty without first determining that the plea is voluntary."); *Boykin v. Alabama*, 395 U.S. 238 (1969) (holding that it is a violation of due process to accept a guilty plea in state criminal proceedings without an affirmative showing, placed on the record, that the defendant voluntarily and understandingly entered his plea of guilty). If the Court were to accept the OSP's reasoning, any negotiated sentence imposed pursuant to a guilty plea would not constitute legal punishment because it was "voluntary." This is obviously not the state of the law. Thus, whether the bond forfeiture, which the OSP recognizes was agreed to by Mr. Smollett "as a condition of the dismissal of his

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these cases, the defendants may be able to show harassment, bad faith, or fundamental unfairness on the part of the State in the refiling of the charges."

[5] While placing great weight on the "voluntariness" of the bond forfeiture, the OSP recognizes that the dismissal was conditioned on the bond forfeiture. As the OSP notes in its Response, the Cook County State's Attorney's Office released a press statement after the dismissal, in which it stated: "The charges were dropped in return for Mr. Smollett's agreement to do community service and forfeit his $10,000 bond to the City of Chicago. Without the completion of these terms, the charges would not have been dropped." Response at 8 n.6 (quoting Ex. 7, March 26, 2019, Press Statement); *see also* Deanna Paul, *Why prosecutors dismissed the charges against Jussie Smollett,* THE WASHINGTON POST (Mar. 28, 2019), *available at* https://www.washingtonpost.com/arts-entertainment/2019/03/27/why-prosecutors-dismissed-charges-against-jussie-smollett/ ("Had there been no forfeiture of his bond to the City of Chicago or community service, we would not have dismissed the charges.").

charges," Response at 7,[6] was "voluntary" has no import on whether the forfeiture constitutes legal punishment.

Similarly, the OSP's categorization of the bond forfeiture as "a choice Mr. Smollett made (and agreed to) to try to avoid the risk of proceeding to trial on the Prior Charges" does not impact the effect of the bond forfeiture as a legal punishment. Response at 8. By the OSP's reasoning, if a defendant chooses to enter a guilty plea to try to avoid the risk of proceeding to trial, any sentence imposed pursuant to that plea cannot constitute legal punishment because it was a "choice." For the same reasons explained above, this notion is contrary to law and belies common sense.

B. Based on the City of Chicago's representations, a federal court in a related proceeding has found that the dismissal of charges was involuntary.

The OSP's argument that the bond forfeiture was "voluntary" is also directly contrary to the City of Chicago's position in a related proceeding, in which the City represented to the court that the bond forfeiture was part of a compromise agreement. The City of Chicago has taken a position contrary to the OSP on this point, which the district court relied on to Mr. Smollett's detriment.

Specifically, on April 22, 2020, the district court dismissed Mr. Smollett's malicious prosecution counterclaim. In doing so, the court made specific findings, ***based on the City's representations,*** that the forfeiture of Mr. Smollett's bond was pursuant to an agreement, referring to it as an "involuntary dismissal." Exhibit 1, *City of Chicago v. Smollett,* 19 cv. 04547, Dkt. 86, at 10. The court stated:

> In this case, according to the Defendants, the City entered the *nolle prosequi* in his case only after Smollett agreed to both the forfeiture of his fine and to serve community service. (Dkt. 38 at 7-8). In short, they assert that the instant matter was terminated with a requirement in return that he perform those two conditions.

[6] *See also* Response at 11 n.14 (describing the bond forfeiture as "an agreed and negotiated condition to the charges being dismissed").

> Involuntary dismissal "is not indicative of the innocence of the accused when [it] is the result of an agreement or compromise with the accused[.]" *Swick*,169 Ill.2d at 513; *see also Logan v. Caterpillar, Inc.,* 246 F.3d 912, 925 (7th Cir, 2001) ("A *nolle prosequi* entered as the result of an agreement or compromise with the accused is not considered indicative of a plaintiff's innocence.").

Id.

Therefore, consistent with the principles of judicial estoppel, the OSP cannot now claim that the bond forfeiture was voluntary. *See People v. Coffin,* 305 Ill. App. 3d 595, 598 (1st Dist. 1999) (The doctrine of judicial estoppel provides that when a party assumes a certain position in a legal proceeding, and succeeded in asserting the first position and received some benefit from it, then that party is estopped from assuming an inconsistent position in a subsequent legal proceeding).

III. Mr. Smollett's Payment of $10,000 to the City of Chicago Amounts to a "Fine."

The OSP argues that Mr. Smollett's payment of $10,000 to the City of Chicago cannot constitute a fine because the court did not enter any "disposition" for the prior charges and because the Certified Statement of Conviction/Disposition does not list any fine. Response at 8-9 (citing Ex. 8). This is irrelevant. The inquiry is whether a particular sanction operates as criminal punishment, *i.e.* the "purpose or effect" of the remedy, not its label. *See United States v. Ward*, 448 U.S. 242, 249 (1980); *see also Hudson v. United States*, 522 U.S. 93, 99-101 (1997) (recognizing that criminal punishment subjects the defendant to jeopardy within the constitutional meaning, and that even ostensibly civil penalties may be so punitive in either purpose or effect that it transforms a civil remedy into a criminal penalty).

A. It is settled law that defendants can be punished criminally without admitting guilt or being convicted of a crime.

The OSP also argues that the bond forfeiture cannot constitute a fine because a fine is a disposition imposed by the court on a *convicted* defendant. *See* Response at 9 (citing 730 ILCS 5/5-1-19 & *People v. Graves*, 235 Ill. 2d 244, 250 (2009)). However, as explained below, the

OSP conveniently ignores settled law that defendants can be punished criminally without admitting guilt or being convicted of any crime. The OSP also ignores public statements by the CCSAO that Mr. Smollett's case was dismissed as part of a deferred prosecution or pretrial diversion program.

It is well settled that a defendant can maintain his innocence and still be punished under the law, as is often the case with pleas of *nolo contendere* or *Alford* pleas. *See Cabrera*, 402 Ill. App. 3d at 451 ("our courts in Illinois are not barred from accepting guilty pleas from defendants that assert their innocence"). In cases where a defendant enters a plea of *nolo contendere*, the defendant is convicted and accepts punishment, even though the accused does not actually admit guilt. *See People v. France*, 2017 IL App (2d) 150201-U, ¶ 10 (explaining that "[i]In a plea of *nolo contendere* a defendant does not admit guilt, but agrees not to dispute the charge at issue"). Illinois courts also recognize an *Alford* plea, in which a defendant pleads *guilty* yet continues to proclaim his innocence. *See id.*; *see, e.g., People v. Barker,* 83 Ill. 2d 319, 332 (1980) (accepting the defendant's *Alford* plea and sentencing the defendant to 20 years' imprisonment).

It is also well settled that under Illinois law, a defendant can be sentenced without a conviction. For instance, court supervision is a sentencing option which may be imposed after a guilty plea but without a conviction. *See* 730 ILCS 5/5-6-1(c) (providing that "[t]he court may, upon a plea of guilty or a stipulation by the defendant of the facts supporting the charge or a finding of guilt, defer further proceedings and the imposition of a sentence, and enter an order for supervision of the defendant" under certain circumstances). The court may also order the payment of fines as a condition of discharge, without an adjudication of guilt or entry of a conviction. *See* 730 ILCS 5/5-6-3(b)(2) (as a condition of probation and of conditional discharge, the court may require the person to "pay a fine and costs"); 730 ILCS 5/5-6-3.1(f) ("Discharge

and dismissal upon a successful conclusion of a disposition of supervision shall be deemed without adjudication of guilt and shall not be termed a conviction for purposes of disqualification or disabilities imposed by law upon conviction of a crime."). Thus, contrary to the OSP's suggestion, a "conviction" is not a prerequisite to the imposition of a fine.

B. Courts applying double jeopardy principles to pretrial diversion programs have held that jeopardy attaches when a defendant completes the terms of the program.

The OSP also ignores the fact that the CCSAO has expressly acknowledged that the disposition in Mr. Smollett's case was tantamount to deferred prosecution or pretrial diversion.[7] *See, e.g.,* Deanna Paul, *Why prosecutors dismissed the charges against Jussie Smollett,* THE WASHINGTON POST (Mar. 28, 2019), *available at* https://www.washingtonpost.com/arts-entertainment/2019/03/27/why-prosecutors-dismissed-charges-against-jussie-smollett/ (State's Attorney's Office spokeswoman Kiera Ellis stating: "The office didn't 'drop' the charges. They dismissed Smollett's case in exchange for his completion of several conditions—a prosecutorial tool known as an alternative to prosecution."); *Top Chicago Prosecutor Kim Foxx Discusses Decision In Jussie Smollett Case*, NPR (Mar. 27, 2019), *available at* https://www.npr.org/2019/03/27/707424666/top-chicago-prosecutor-kim-foxx-discusses-decision-in-jussie-smollett-case (Cook County State's Attorney Kim Foxx stating that the disposition in Mr. Smollett's case "was part of an alternative prosecution program, a diversion" and explaining that "[t]here is an umbrella of things that fall under alternative prosecution. The statute does allow for people to participate in restitution - so the $10,000, which is the maximum allowed under the statute. It does allow them to do community service without having to

[7] Deferred prosecution, also referred to as alternative prosecution or alternative ***sentencing***, or pretrial diversion is a program offered to divert offenders from traditional criminal justice into a program of supervision and services. Programs may impose terms of probation or supervision, some impose extensive and invasive counseling or treatment, others impose fines, while others do not impose sanctions at all. *See generally* 22A C.J.S. Criminal Procedure and Rights of Accused § 290 (Nature and purpose—Deferrals).

acknowledge guilt. For some, the admission of guilt and having that on the record incentivizes them to do those other things that you talked about, whether it was community service or restitution. The statute allows us to choose how we want to proceed on that."); Shelby Bremer, *Jussie Smollett Won't Pursue Charges Against Brothers in Alleged Attack, Attorney Says,* NBC5 CHICAGO (Mar. 28, 2019), *available at* https://www.nbcchicago.com/news/local/jussie-smollett-attorney-tina-glandian-today-show/134750/ (Kim Foxx explaining: "Over the course of the last two years, we've had 5,700 people go through our pretrial diversion process, people who have non-violent offenses and who have no violence in their background," Foxx said. "And so I think when people see this one particular case it feels like an outlier where in fact, it's consistent with how we treat people charged with similar offenses with the same background."); *Smollett Case Could Complicate Career of State's Attorney Kim Foxx,* NBC5 CHICAGO (Feb. 13, 2020), *available at* https://www.nbcchicago.com/news/local/smollett-case-could-complicate-career-of-states-attorney-kim-foxx/2219008/ (Kim Foxx stating: "We have increased the use of diversion in alternative prosecution by 25% and there are literally thousands of people whose cases have not been in the court system because we have used those alternatives," including Smollett); Chuck Goudie, Christine Tressel, and Ross Weidner, *Jussie Smollett update: Prosecutors' surprise deal raises new questions,* ABC7 (Mar. 28, 2019), *available at* https://abc7chicago.com/jussie-smolletts-surprise-deal-raises-new-questions/5223062/ (First Assistant State's Attorney Joe Magats, who handled the case after Kim Foxx recused herself, describing the disposition as "an alternative disposition in that he agreed to do community service. . . He agreed to forfeit his bail, the remainder of his bond, to the city of Chicago. In return for him doing those things, we agreed to dismiss the indictment.").

In fact, it is evident that even prior to an indictment being returned against Mr. Smollett, prosecutors were intending to resolve the case with pretrial diversion. *See, e.g.,* Response at 5

(acknowledging that on February 26, 2019, shortly after the initial complaint was filed against Mr. Smollett, First Assistant Magats wrote: "We can offer the diversion program and restitution. If we can't work something out, then we can indict him and go from there."); *id.* (noting that on February 28, 2019, the Chief of the Criminal Division, Risa Lanier, told detectives "she felt the case would be settled with Smollett paying $10,000 in restitution and doing community service").

While our research has not uncovered any Illinois authority applying double jeopardy provisions to Illinois' diversion program (since it is virtually unheard of for the State to re-prosecute someone who has successfully completed such a program), several sister states have had the opportunity to consider this unusual issue. These cases, which are instructive, hold that jeopardy attaches when a defendant completes the terms of a pretrial diversion program and that subsequent prosecution is barred by the Double Jeopardy Clause, even in the absence of a conviction or sentence.

For instance, the Court of Appeals of Ohio was confronted with this issue in *State v. Urvan*, 4 Ohio App. 3d 151 (Ohio Ct. App. 1982). There, the defendant was charged with receiving stolen property; after successfully completing a pretrial diversion program, the charges were *nol-prossed. Id.* at 154. The defendant was thereafter charged with grand theft in a different county related to the same events as the prior charge of receiving stolen goods. *Id.* After his motion to dismiss on the grounds of double jeopardy was denied, defendant appealed.

In reversing the judgment on appeal, the court first found that the "state will be considered as a single entity whether acting through one or the other of its subordinate units, *i.e.,* Medina or Cuyahoga Counties." *Id.* at 155. The court explained:

> In this case when the state, through its agent Medina County, chose early diversion for the defendant and when he satisfied the terms of the program, he was entitled to receive and did receive a *nolle* of the charge to which the agreement applied. Moreover, if the program is to make logical sense and traffic

> at all in fair treatment, the state's election to pursue the crime of stolen property forecloses its right to undertake pursuit of the grand theft charge through a second agent (Cuyahoga County). ***Jeopardy must attach as a result of the activity of the first (Medina County).*** This conclusion comports both with fairness and the double jeopardy mandate of *Brown v. Ohio, supra.*

Id. at 156 (emphasis added). The court added that "[n]egligence or oversight on the part of Cuyahoga County does not legalize the consequences." *Id.*

The court then explained that "[i]f pretrial diversion programs are to be effective, the state must live up to its agreements. It cannot avoid its obligation by splitting responsibilities between its agencies and pretending that it acts disparately. What it knew and did in Medina County through its agent it knew in legal contemplation in Cuyahoga County and was bound in both places by applicable federal and state constitutional principles." *Id.* at 157. The court also noted that completing the terms of a pretrial diversion program amounts to criminal punishment. As the court explained, "[i]t may seem a novel idea to some, but it is not far-fetched to conclude that success in a diversion program is the constructive equivalent of serving a sentence for the crime charged." *Id.* at 157. Thus, the court held that further prosecution of the defendant was barred because it would "violate[] the spirit and the letter of constitutional Double Jeopardy policy." *Id.* at 158. *See also State v. Monk,* 64 Ohio Misc. 2d 1, 8 (Ohio Com. Pleas 1994) ("Regardless, then, of whether the dismissal constituted jeopardy, here Mr. Monk has been punished already for the offense. Given the same act and set of facts, the state chose to charge Mr. Monk, a first-time offender, with a misdemeanor and to dispose of the matter through a diversionary program as discussed above. He was effectively punished for the offense by being required to participate in the program, pay for it, and to agree to the disclosure of information which could further incriminate him. In fact, his participation in the AMEND Program, costing him time, exposure and expense, was a prerequisite for the charges being dismissed. To prosecute him again is violative of his right not be twice placed in jeopardy for the same

offense."); *City of Cleveland v. Kilbane*, 2000 Ohio App. LEXIS 923 (Ohio Ct. App. 2000) (unpublished opinion) (although prosecutors argued that the trial court erred when it placed the defendant in the pretrial diversion program over their objections and entered a *nolle*, the court of appeals could not address this issue, holding that, since Kilbane had completed the requirements of diversion and the case was dismissed, "[t]his court can no longer afford any relief to the prosecution [because d]ouble jeopardy prohibits further prosecution.").

Similarly, the Superior Court of Pennsylvania (one of two Pennsylvania intermediate appellate courts) confronted this issue in *Commonwealth v. McSorley*, 335 Pa. Super. 522 (Pa. Super. Ct. 1984). There, the defendant was charged with operating a motor vehicle while under the influence of alcohol. *Id.* at 524. Following his arraignment, he received a letter from the operator of a safe driver clinic directing that he was required to attend the driving school and to pay a $50.00 fee for the program, which the defendant interpreted as directing him to report for the Montgomery County Accelerated Rehabilitative Disposition Program ("ARD"). *Id.* at 525. The letter was sent under the letterhead of the District Attorney's ARD/DUI (driving under influence) Division. *Id.* One week later, the defendant received a letter from the Chief of the ARD Division of the Montgomery County District Attorney's Office which instructed the defendant to complete an enclosed questionnaire to determine his eligibility and to return it within ten (10) days in order to be considered for the program. *Id.* After the defendant had successfully completed the requirements of the clinic, he received another letter informing him that he was *ineligible* for ARD because of two prior arrests; the case was then scheduled for trial. *Id.*

The defendant moved to dismiss the charges on double jeopardy grounds; the lower court denied the motion, finding that the defendant "had not been put in prior jeopardy and had not suffered any punishment from ARD or any other criminal penalty." *Id.* at 528. The defendant

appealed, contending that his payment of the $50.00 fee and attendance at the safe driving program was a restriction on his freedom and deprivation of his liberty; accordingly, he maintained that the deprivation amounted to an order of sentence for double jeopardy purposes and that dismissal was required to protect him from multiple punishment. *Id.* at 526. On the other hand, the Commonwealth maintained that the defendant's attendance at the safe driving program was a voluntary act on his part and that it did not "direct" him to enter the safe driving clinic because the Commonwealth is without power to do so. *Id.* The Commonwealth argued that the defendant was therefore never subjected to punishment flowing from a conviction and that jeopardy did not attach. *Id.*

Although the *McSorley* court found that the first letter directing the defendant to appear at the driving classes appeared to be an administrative error and that the procedures outlined in the code of criminal procedure were not followed, the court still found that the defendant detrimentally relied on the letter and that he was justified in doing so. *Id.* at 530. As the court explained, the "inadvertence" occurred within the District Attorney's Office and "[w]hat the district attorney's office knew and did with its right hand (sending the notification that appellant could reasonably have interpreted as evidencing his acceptance into ARD), it cannot take away with its left hand (by claiming that appellant was ineligible)." *Id.* Thus, the court held that the defendant was implicitly accepted into ARD and that the Commonwealth was restrained from further prosecuting him based on double jeopardy. *Id.*

The Supreme Court of Appeals of West Virginia confronted a similar issue in *State v. Maisey*, 600 S.E. 2d 294 (W. Va. 2004), where an 18 year-old defendant had been charged with carrying a concealed and deadly weapon. The trial court issued a pretrial diversion order that required the defendant to complete 50 hours of community service, to not violate any laws, and to not have any unexcused absences from school. After several months passed, the

prosecutor mailed a letter to the defendant's counsel claiming that the defendant had failed to comply with the pretrial diversion order because he had not provided proof of his community service. The prosecutor then filed a motion to terminate the pretrial diversion order and reinstate the criminal complaint and warrant because the defendant had failed to provide proof he had performed the required community service. The court subsequently held a bench trial and found the defendant guilty, fining him $100 plus costs and fees, and sentencing him to 30 days in jail, with only 5 days to be served and the other 25 days suspended in exchange for completion of 50 hours of community service.

After the defendant's motion to dismiss the case on the ground that he had already been punished was denied, he appealed his conviction and sentence to the Supreme Court of Appeals of West Virginia. *Id.* at 297. The defendant argued that the lower court subjected him to multiple punishment by sentencing him to jail time, a fine, and additional community service after he (according to him) had already completed the community service required by the pretrial diversion order. *Id.* In reversing the judgment, the appellate court explained:

> We agree that when a person charged with a criminal offense successfully complies with the terms of a pretrial diversion agreement, the State may not prosecute the defendant for that criminal offense, or for the underlying conduct, in the absence of an agreement that the defendant will plead guilty or *nolo contendere* to a related offense.

Id.

The cases above are instructive. The rationale in these cases is that a participant in a diversion program who successfully completes the program has kept his part of the bargain and should be able to consider the matter closed and final, without fear that the matter will arise again. Here, the CCSAO expressly acknowledged that the prior disposition of Mr. Smollett's case was part of "an alternative disposition" or "pretrial diversion." Because it is undisputed that Mr. Smollett held up his end of the bargain, jeopardy attached at the time he forfeited the bond

and the charges were dismissed. It is also significant that the appointment of a special prosecutor and subsequent re-prosecution of Mr. Smollett was due to a perceived irregularity within the CCSAO, namely Judge Toomin's finding that State's Attorney Kim Foxx had improperly delegated her authority to First Assistant State's Attorney Joe Magats, *see* Response at 3; Ex. 1 to Response a 20-21, and not any wrongdoing on Mr. Smollett's part.

The OSP argues that "[t]he negotiated dismissal in this case . . . is significantly and meaningfully different [because] even if a defendant and prosecutor reached a plea agreement, the terms would need to be accepted by a judge and sentence imposed by a judge." Response at 8 n.7. Contrary to what the OSP suggests, that is precisely what happened here. The CCSAO and Mr. Smollett reached an informal agreement that the charges against Mr. Smollett would be dismissed upon forfeiture of the $10,000 bond. At the hearing on March 26, 2019, the State made a motion to *nolle pros* the charges and to forfeit Mr. Smollett's bond, both of which the court accepted.

This is analogous to a negotiated plea agreement, whereby the State recommends a particular sentence to the judge. Much like the judge in such cases is not required to accept a plea agreement or to impose the recommended sentence, Judge Steven G. Watkins was not required to grant the State's motions to *nolle pros* and to forfeit Mr. Smollett's bond. *See* 725 ILCS 5/103-5; *People v. Gill,* 886 N.E.2d 1043 (Ill. App. Ct. 2008) ("the State must obtain the trial court's consent for a *nolle prosequi*").

The OSP also argues that the bond forfeiture cannot constitute a fine because the CCSAO "does not have the authority to impose a 'fine'." Response at 10. However, in a footnote, the OSP acknowledges that "[t]he judge presiding over the prior case did enter an order to release the bond to the City of Chicago, per the agreement between the parties (see MTD at 2) and at the request of the Cook County State's Attorney's Office," and that "the judge entered an

administrative order to allow the clerk to release the bond and direct it to where the parties wanted it to go." *Id.* at 10 n.11. Indeed, upon granting the State's motions, Judge Watkins entered an Order releasing the D-Bond 1375606 to the City of Chicago. *See* Exhibit 1 to Defendant's Motion. Thus, the bond forfeiture amounting to a fine was, in fact, imposed by the court. And Mr. Smollett was no less punished because the sentence was imposed pursuant to a negotiated agreement than if the judge had imposed the sentence on his own volition. *See, e.g., Dearborne v. State,* 575 S.W.2d 259, 263-264 (Tenn. 1978) ("[Pretrial diversion] is judicial in character in that it involves a procedural alternative to prosecution and a disposition by normal methods."); *Matter of Mohamed*, 27 I&N Dec. 92, 98 (BIA 2017) ("Because only a judge can authorize a pretrial intervention agreement, which in this case included community supervision and community service, restitution, and a no-contact order in addition to the imposition of fees, we conclude that the respondent's admission into a pretrial intervention program under Texas law is a 'form of punishment, penalty, or restraint on the alien's liberty' that was 'ordered' by a judge.").

IV. An Adjudication of Guilt Is Not a Prerequisite to Legal Punishment.

The OSP argues that because Mr. Smollett's guilt has not been admitted or determined, no legal "punishment" could have occurred. Response at 11. As explained above, an adjudication of guilt is not a prerequisite to legal punishment.

The OSP also argues that Mr. Smollett's current position that the bond forfeiture constitutes a "punishment" is wholly inconsistent with his repeated contention publicly and in ongoing civil litigation that the dismissal of the Prior Charges was "due to his innocence" and "indicative of his innocence." *Id.* But there is nothing inconsistent about Mr. Smollett's position in this case and the pending civil case. While he maintains his innocence (as he has from day one), he accepted legal punishment in order to have the previous charges against him promptly

dismissed and for the sake of finality. Indeed, it is typical for defendants to make a choice to plead guilty and accept formal punishment, even when they are innocent. As one court recognized:

> there can be no doubt that there are some circumstances in which individuals who are actually innocent may, voluntarily, choose to plead guilty. Regardless of guilt or innocence, some individuals may choose to accept a guilty plea rather than face the uncertainty of a trial: "The guilty plea process is not perfect. But guilty pleas allow the parties to avoid the uncertainties of litigation. The decision to plead guilty, as we have seen in this case, may be influenced by factors that have nothing to do with the defendant's guilt. The inability to disprove the State's case, the inability to afford counsel, the inability to afford bail, family obligations, the need to return to work, and other considerations may influence a defendant's choice to plead guilty or go to trial." *Tuley*, 109 S.W.3d at 393. See Schmidt, 909 N.W.2d at 787 ("Simply put, in economic terms, defendants engage in a cost-benefit analysis [when deciding whether to enter a guilty plea]. Entering into a plea agreement is not only rational but also more attractive than dealing with the uncertainty of the trial process and the possibility of harsher sentences."). When the plea deal is good enough, "'it is rational to refuse to roll the dice, regardless of whether one believes the evidence establishes guilt beyond a reasonable doubt, and regardless of whether one is factually innocent.'" *Schmidt*, 909 N.W.2d at 787 (quoting *Rhoades*, 880 N.W.2d at 436-37).

People v. Shaw, 2019 IL App (1st) 152994, ¶ 46.

Here, Mr. Smollett did not accept responsibility or plead guilty—because he is innocent. However, he agreed to a form of legal punishment, namely the forfeiture of his $10,000 bond, in order to have the case against him promptly dismissed. Such a disposition is not inconsistent with innocence. *See, e.g., Lindsey v. Tews,* 09 C 1078, 2009 WL 2589524 (N.D. Ill. Aug. 19, 2009) (denying motion to dismiss malicious prosecution claim because community service in connection with *nolle pros* was not necessarily a compromise inconsistent with innocence).

The OSP cites to Black's Law Dictionary to show that punishment is defined as "[a] sanction . . . assessed against a person who has violated the law." Response at 11 (quoting Black's Law Dictionary (11th ed. 2019)). However, this definition actually supports Mr. Smollett's position that the bond forfeiture constitutes punishment. *See Top Chicago Prosecutor Kim Foxx Discusses Decision In Jussie Smollett Case*, NPR (Mar. 27, 2019), *available at*

https://www.npr.org/2019/03/27/707424666/top-chicago-prosecutor-kim-foxx-discusses-decision-in-jussie-smollett-case (State's Attorney Foxx stating that "in order for us to offer Mr. Smollett the opportunity to have conditions in exchange for dropping charges, we have to believe that he committed that - a crime"; "[w]e cannot offer a diversion remedy to someone that we believe is not guilty"). Thus, the bond forfeiture was intended to punish Mr. Smollett.

Furthermore, contrary to the OSP's assertion, a finding or admission that Mr. Smollett "violated the law" is not a legal prerequisite to legal punishment. On the contrary, and as explained above, a defendant can be sentenced and/or punished without any admission or finding of guilt, and even absent a conviction. If a conviction was, in fact, required as a prerequisite to legal punishment, this would vitiate a long line of U.S. Supreme Court precedent holding that punishment imposed in a civil or administrative cases *can* constitute criminal punishment for purposes of double jeopardy. *See Hudson v. United States*, 522 U.S. 93, 99-100 (1997) (enumerating various guideposts the court may consider to determine whether a civil remedy constitutes criminal punishment for double jeopardy purposes) (citing, *inter alia*, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963)).

Finally, the OSP's position that Mr. Smollett "may now have 'buyer's remorse' about the terms of his negotiated resolution because he did not anticipate the events that would follow—namely that a special prosecutor would be appointed and would assess whether he should be further prosecuted," is patently offensive. Mr. Smollett does not take lightly the charges against him in the criminal forum and his agreement with the CCSAO concerns his life, livelihood, and ability to move on from the attack on him in January 2019. He abided by the terms of the agreement with the State of Illinois; the government did not.

V. Whether the Prior Proceedings Are Void or Voidable Do Not Affect the Double Jeopardy Analysis.

Without citing to any authority, the OSP argues that double jeopardy cannot apply because the prior proceedings are void. Response at 13.[8] Even if there was no valid commission to prosecute Mr. Smollett, this would not render the prior proceedings null and void because Mr. Smollett never challenged the allegedly defective commission to prosecute him. *See People v. Woodall,* 333 Ill. App. 3d 1146, 1159 (5th Dist. 2002) ("the right to be prosecuted by someone with proper prosecutorial authority is ***a personal privilege*** that may be waived if not timely asserted in the circuit court") (emphasis added). As the court in *Woodall* explained:

> The defendant has not attempted to demonstrate the harm visited upon him by his prosecutors' defective commission to prosecute. For that matter, he does not even claim that anything evil or wrong occurred in the process to verdict other than that defect. To the extent that the Agency attorneys' lack of proper authority to prosecute somehow inflicted injury, it was a wound that the defendant invited by allowing their presence to go unchallenged. We find no reason to overturn the defendant's convictions.

Id. Here, like in *Woodall*, if there, in fact, had been a defect in the authority to prosecute Mr. Smollett, the only person who could properly challenge the validity of the proceedings would be Mr. Smollett—and he has not done so.

The same analysis applies in the double jeopardy context. In *United States v. Ball*, 163 U.S. 662, 663-64 (1896), three defendants were placed on trial for murder; Ball was acquitted and the other two defendants were convicted. Ball's co-defendants appealed and obtained a reversal on the ground that the indictment had been fatally defective; all three defendants were indicted again. *Id.* at 664. To the new indictment, Ball filed a plea of former jeopardy and former

[8] Prior to the next status in this matter, Mr. Smollett intends to file a motion to dismiss based upon the fact that Dan K. Webb was not properly appointed a special prosecutor and thus lacked legal authority to bring these charges. As the court found in *In re Appointment of Special Prosecutor*, No. 19 MR 00014 (Cir. Ct. Cook Cty. June 21, 2019) (Toomin, J.), the State's Attorney was able to fulfill her duties, did not have an actual conflict of interest, and failed to file a petition for recusal. *See* 55 ILCS 5/3-9008.

acquittal and his co-defendants filed a plea of former jeopardy, by reason of their trial and conviction upon the former indictment, and of the dismissal of that indictment. *Id.* The court instructed the jury to find against both pleas of former jeopardy. *Id.* Following the second trial, all three defendants were found guilty of murder. *Id.* at 666. On appeal, the Court held that the trial court's action was not void but only voidable, and Ball had taken no steps to void it while the government could not take such action; the Court therefore set aside Ball's conviction as violating the Double Jeopardy Clause. *Id.* at 669-70. The Court explained:

> This case, in short, presents the novel and unheard-of spectacle of a public officer, whose business it was to frame a correct bill, openly alleging his own inaccuracy or neglect as a reason for a second trial, when it is not pretended that the merits were not fairly in issue on the first. That a party shall be deprived of the benefit of an acquittal by a jury on a suggestion of this kind, coming, too, from the officer who drew the indictment, seems not to comport with that universal and humane principle of criminal law 'that no man shall be brought into danger more than once for the same offense.' It is very like permitting a party to take advantage of his own wrong.

Id. at 668-69.

The same rationale applies here. The perceived defect in the prior prosecution of was a result of the innerworkings of the CCSAO and entirely unrelated to Mr. Smollett. Since the trial court had jurisdiction of the case and of the defendant, any such defect rendered the prior proceedings *voidable,* not void. Mr. Smollett should not be prejudiced and further punished (and deprived of a benefit which he bargained for) as a result of the *government's* mistake or error.

In *Benton v. Maryland*, 395 U.S. 784, 785 (1969), the defendant was tried in a Maryland state court for burglary and larceny. He was acquitted of larceny but convicted of burglary and sentenced to 10 years in prison. *Id.* The conviction was set aside on appeal because the jury had been unconstitutionally chosen. *Id.* at 786. He was again tried and convicted of both burglary and larceny. *Id.* The appellate court ruled against petitioner on the double jeopardy issue and affirmed his conviction and sentence. *Id.* The Supreme Court granted certiorari. *Id.*

In reversing petitioner's conviction for larceny, the Supreme Court applied the federal double jeopardy standards and held that the larceny conviction violated the Double Jeopardy Clause. *Id.* at 796. Although the State argued that "[o]ne cannot be placed in 'jeopardy' by a void indictment," the Court noted that "[t]his argument sounds a bit strange, . . . since petitioner could quietly have served out his sentence under this 'void' indictment." *Id.*

Courts have also held that a party is estopped from challenging a void sentence when it is the result of a freely negotiated agreement and the other party acted in detrimental reliance. For instance, in *People v. Young,* 2013 IL App (1st) 111733, the defendant entered fully negotiated guilty pleas to first degree murder and attempted murder and received negotiated consecutive sentences of 25 and 10 years. On appeal, the defendant argued for the first time that his sentences were void because they did not include the mandatory statutory firearm enhancement and that he should be allowed to withdraw his plea and plead anew.

The court held that the defendant was judicially estopped from challenging the sentence because it had been freely negotiated and provided him with a benefit in that he received a far lower sentence than was required under the law. The court also noted that the State could not be restored to its original position and that it would be disadvantaged at a trial by the passage of time and the possible unavailability of witnesses to testify. The court also noted that the defendant did not allege that any fraud or misrepresentation had occurred in the original plea agreement.

Here, like in *Young*, the disposition in Mr. Smollett's case was freely negotiated by various members of the CCSAO, including First Assistant State's Attorney Joe Magats and Cook County prosecutor Risa Lanier. And it has never been alleged that Mr. Smollett committed any fraud or misrepresentation in his negotiations with the CCSAO. Therefore, the State of Illinois should be estopped from further prosecuting Mr. Smollett because he cannot be restored to his original position and he will be disadvantaged by the passage of time. The State should also be

estopped from enjoying the benefits of the negotiated agreement (retention of the $10,000 bond) while violating its terms and re-prosecuting Mr. Smollett.

VI. The Policies of the Double Jeopardy Clause Would Be Frustrated by Further Prosecution in This Case.

The underlying aim of the Double Jeopardy Clause, "one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State, with all its resources and power, should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that, even though innocent, he may be found guilty." *Green v. United States,* 355 U. S. 184, 187-88 (1957).

It is well settled that the rules with regard to double jeopardy should not be applied in a rigid, mechanical nature, especially if the situation is such that the interests the rules seek to protect are not endangered and a mechanical application would frustrate society's interest in enforcing its criminal laws. *See Illinois v. Somerville,* 410 U. S. 458, 467-69 (1973). Indeed, the Supreme Court has admonished against the use of "technicalities" in interpreting the Double Jeopardy Clause. *See id.*

Here, for all the reasons explained above, including the fact that Mr. Smollett forfeited a substantial amount of money in detrimental reliance on the CCSAO's representations and the court's actions in dismissing his case, and gave up his right to have a speedy trial because he believed he was receiving finality from the agreement, the policies of the Double Jeopardy Clause would, in fact, be frustrated by further prosecution. *See United States v. Ponto,* 454 F.2d 657, 663-664 (7th Cir. 1971).

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CONCLUSION

If the defendant in this case was John Smith and not Jussie Smollett, a dismissal would be a foregone conclusion. Although the defense is keenly aware that this case has garnered substantial public attention and scrutiny, this case also implicates substantial constitutional rights, which trump the public's quest for truth and justice. There is currently a pending civil case which will allow this matter to proceed to trial, where the facts and evidence surrounding the January 29, 2019 attack on Mr. Smollett can finally come to light (which is something Mr. Smollett wants more than anyone). However, dragging him through another criminal prosecution is a violation of due process and prohibited under the law. While it may not be the most popular decision, dismissal of this indictment is the fair and constitutionally correct decision—and the only decision that is consistent with the fundamental principles of our justice system. A dismissal is also necessary to preserve public confidence in government and the judiciary. The citizens of Illinois, and those charged with crimes in this state, should be entitled to rely on representations made by the State's representatives, and on actions taken by the trial judges whom they appear before, without fear that those actions may later be nullified to their detriment through no fault of their own.

It is beyond dispute that Mr. Smollett has been unfairly treated by the government in this case. He has been "adjudged guilty" by top city officials including the former mayor of Chicago, the current mayor of Chicago, the former Chicago Police Superintendent, and Judge Michael P. Toomin—before any evidence has been presented to any tribunal. This unabashed "presumption of guilt" against him has been contrary to law and in violation of his constitutional rights.

The defense respectfully asks that Your Honor be the first to put aside emotion and to follow the law by treating Mr. Smollett fairly as he (and any other criminal defendant who appears before Your Honor) deserves. As Supreme Court Chief Justice John Roberts aptly noted: "We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have

is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them." Mark Sherman, *Roberts, Trump spar in extraordinary scrap over judges,* ASSOCIATED PRESS (Nov. 21, 2018), *available at* https://apnews.com/ c4b34f9639e141069c08cf1 e3deb6b84?mod=article_inline. Mr. Smollett deserves such equal right.

WHEREFORE, Defendant, Jussie Smollett, by his attorneys, Geragos & Geragos, APC and The Quinlan Law Firm, requests that the indictment be dismissed and all further proceedings in this matter vacated.

Dated: May 20, 2020

Respectfully submitted,

/s/ Tina Glandian

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Attorneys for Jussie Smollett

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

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 20 CR 03050-01
	)	
JUSSIE SMOLLETT,	)	
	)	
Defendant.	)	

NOTICE OF FILING

TO: Dan K. Webb (DWebb@winston.com)
Sean G. Wieber (SWieber@winston.com)
Samuel Mendenhall (SMendenhall@winston.com)
Winston & Strawn, LLP
35 West Wacker Drive
Chicago, IL 60601

PLEASE TAKE NOTICE that on May 20, 2020, the undersigned filed the foregoing Reply to Response to Motion to Dismiss Indictment for Violation of Defendant's Right Against Double Jeopardy with the Clerk of the Circuit Court at the George N. Leighton Criminal Courthouse, 2600 South California Avenue, Chicago, Illinois 60608 via email to: Criminal Felony Services CriminalFelonyservices@cookcountycourt.com, with a courtesy copy provided to Judge Linn through his clerk via email at Amber.Hunt@cookcountyil.gov.

Dated: May 20, 2020

/s/ Tina Glandian

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CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of the foregoing to be emailed on May 20, 2020 to the following attorneys of record:

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Sean G. Wieber (SWieber@winston.com)
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/s/ Tina Glandian
Tina Glandian

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

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 20 CR 03050-01
	)	
JUSSIE SMOLLETT,	)	
	)	
Defendant.	)	

AFFIDAVIT OF TINA GLANDIAN

I, Tina Glandian, have personal knowledge of the matters stated below and submit this affidavit under under penalty of perjury pursuant to 735 ILCS 5/1-109.

1. I am an attorney for Jussie Smollett and am admitted pursuant to Illinois Supreme Court Rule 707 in this matter, *People of the State of Illinois v. Smollett*, Case No. 20 CR 03050-01, pending in the Circuit Court of Cook County, Illinois, County Department, Criminal Division.

2. I submit this Affidavit to authenticate the exhibit attached hereto in support of Defendant's Reply to Response to Motion to Dismiss Indictment for Violation of Defendant's Right Against Double Jeopardy.

3. Exhibit A is a true and correct copy of Docket No. 86, Memorandum Opinion and Order by the Honorable Virgina M. Kendall issued on April 22, 2020 in *The City of Chicago v. Jussie Smollett*, case No. 19-cv-4547, currently pending in the United States District Court for the Northern District of Illinois.

Dated: May 20, 2020

/s/ Tina Glandian

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUSSIE SMOLLET,	)	
Counterclaim Plaintiff,	)	No. 19 C 4547
v.	)	Judge Virginia M. Kendall
CITY OF CHICAGO, et al.,	)	
Counterclaim Defendants.	)	

MEMORANDUM OPINION AND ORDER

The City of Chicago filed this lawsuit against Jussie Smollett seeking to recover costs incurred in connection with the Chicago Police Department's investigation of Smollett for allegedly filing a false police report stemming from a January 2019 attack. Smollett filed a counterclaim against the City of Chicago, CPD Detective Michael Theirs, CPD Detective Commander Edward Wodnicki, CPD Superintendent Eddie Johnson, John and Jane Doe Defendants 1—10, (together "the City Defendants"), Abimbola ("Abel") Osundairo, and Olabinjo ("Ola") Osundairo. Smollett alleges state law claims for malicious prosecution against all Defendants and a malicious prosecution claim under 42 U.S.C. § 1983 claim against the City Defendants. Defendants move to dismiss Smollett's counterclaims for failing to state a claim under Rule 12(b)(6). For the reasons discussed below, the Defendants' motions to dismiss [Dkts. 37, 59] are granted.

BACKGROUND

On a motion to dismiss under Rule 12(b)(6), the Court accepts the complaint's well-pleaded factual allegations, with all reasonable inferences drawn in the non-moving party's favor, but not its legal conclusions. *See Smoke Shop, LLC v. United States*, 761 F.3d 779, 785 (7th Cir. 2014). The facts below are drawn from Smollett's Amended Countercomplaint and are accepted as true for purposes of reviewing this motion. *See Vinson v. Vermillion Cty., Ill.*, 776 F.3d 924, 925 (7th Cir. 2015).

According to the Amended Countercomplaint, on or about January 22, 2019, Smollett received an envelope delivered to the Fox production studio in Chicago which contained a racist and homophobic death threat and a white powdery substance. (Dkt. 33 at ¶ 12). At 2:00 a.m. on January 29, 2019, Smollett was physically attacked by masked men who yelled racist, homophobic, and political slurs at him, poured bleach on him, and hung a noose around his neck outside of his Streeterville, Chicago apartment. (*Id.* at ¶ 13). Smollett's primary attacker wore a balaclava-style mask that covered almost his entire face, except for areas around the eyes and nose, and Smollett saw the attacker was white-skinned. (*Id.* at ¶ 14). Smollett returned to his apartment and saw his artistic director, Frank Gatson, who urged him to call the police. (*Id.* at ¶ 15). Smollett was reluctant to do so. (*Id.*). Gatson called 911 on Smollett's behalf. (*Id.*). CPD officers arrived and Smollett told them truthful details of the attack and cooperated in the investigation. (*Id.* at ¶ 16).

CPD treated Smollett as the victim of a crime initially; however, over the course of the investigation, CPD began to anonymously share false and misleading information about the investigation to the media. (*Id.* at ¶¶ 18–19). In early

February 2019, the media began to report that the attack was a hoax orchestrated by Smollett. (*Id.* at ¶ 21). Smollett agreed to be interviewed by Robin Roberts on ABC's "Good Morning America" to answer questions about the attack on February 14, 2019. (*Id.* at ¶ 22).

On February 14, 2019, the CPD arrested Abel and Ola Osundairo for perpetrating the attack on Smollett. (*Id.* at ¶ 23). The Osundairo Brothers both knew Smollett prior to the attack. (*Id.* at ¶ 24). The brothers initially denied involvement and expressed surprise that they were persons of interest. (*Id.* at ¶¶ 26–27). For the first 47 hours the CPD interrogated the Osundairo Brothers, the Osundairo Brothers stated they were never involved in the attack and never alleged Smollett orchestrated the attack on himself. (*Id.* at ¶ 30). While holding the Osundairo Brothers, the CPD, including John and Jane Doe Defendants, contacted Smollett through his attorney and asked him to come in to sign a criminal complaint against the Osundairo Brothers. (*Id.* at ¶ 31). Smollett asked if the CPD would show him any evidence that the Osundairo Brothers orchestrated the attack, but the CPD told them they would not, and Smollett declined to sign the criminal complaint. (*Id.* at ¶¶ 32–34). The Osundairo Brothers' attorney consulted with her clients, and at or near the time the CPD was required to charge or release them, the Osundairo Brothers then told the police that they had been involved in the attack and that it was orchestrated by Smollett. (*Id.* at ¶¶ 35–36).

Smollett alleges that the CPD, including Detective Commander Wodnicki, Detective Theis, and John and Jane Doe Defendants, took unorthodox steps in

violation of protocol to obtain statements from the Osundairo Brothers and close the investigations. (*Id.* at ¶¶ 38–40). The Osundairo Brothers were released from police custody without charges being filed against them because, according to Smollett, the CPD told the Osundairo Brothers they would go free if they implicated Smollett. (*Id.* at ¶¶ 41–42). CPD sought to have Smollett prosecuted based on the Osundairo Brothers' "false, self-serving, and unreliable" statements, without independent corroboration. (*Id.* at ¶¶ 43–44). On February 20, 2019, the Osundairo Brothers testified before a grand jury in the Circuit Court of Cook County, stating under oath that the attack on Smollett was a hoax that he had orchestrated. (*Id.* at ¶ 46). On February 21, 2019, a felony complaint was filed against Smollett in the Circuit Court of Cook County. (*Id.* at ¶ 47). On March 7, 2019, a felony indictment, based on the testimony of Detective Theis, was returned against Smollett in the Circuit Court of Cook County alleging 16 counts of disorderly conduct, including filing a false police report. (*Id.* at ¶¶ 49–50).

Smollett denies knowledge of the Osundairo Brothers involvement in his January 29, 2019 attack. (*Id.* at ¶ 52). Smollett alleges that the Osundairo Brothers decided with their attorney to advance the hoax narrative to avoid criminal charges, in part because it was already a media narrative. (*Id.* at ¶¶ 53–54). The Osundairo Brothers' attorney stated in interviews that the Osundairo Brothers cooperation with the police was selfless and not motivated by their desire to avoid criminal charges, and she acknowledged that this cooperation shifted the trajectory of the investigation. (*Id.* at ¶¶ 60–62).

On February 21, 2019, Superintendent Eddie Johnson held a press conference to address the arrest of Smollett, stating that the attack was a "publicity stunt" and a "phony attack," for which Smollett paid $3,500 to stage because he was dissatisfied with his salary. (*Id.* at ¶ 66–67). Superintendent Johnson repeated these allegations in interviews on February 25, 2019. (*Id.* at ¶ 68). CPD Officers did not interview Fox executives, producers, or Smollett's manager and agent about whether Smollett was dissatisfied with his salary, which the CPD thought was his motive. (*Id.* at ¶ 69). Smollett alleges that the FBI disputed that Smollett sent himself the letter, an assertion Superintendent Johnson made during his February 21, 2019 news conference.[1] (*Id.* at ¶ 70). The Osundairo Brothers' attorney confirmed in interviews that the $3,500 check paid by Smollett to Abel Osundairo was for training and nutrition, not for the attack, which is consistent with the memo line of the check and corroborated by numerous text messages the CPD obtained between Smollett and Abel. (*Id.* at ¶ 73). During the February 21, 2019 press conference, Superintendent Johnson stated that one of the Osundairo Brothers had spoken on the phone with Smollett about an hour after the attack, but telephone records showed that Smollett's next phone call with Abel was about 18 hours after the attack. (*Id.* at ¶¶ 74–75). A CPD spokesperson said that Superintendent Johnson had "misspoken. (*Id.* at ¶ 75). Superintendent Johnson also said that the Osundairo Brothers had gloves on during

[1] The Court notes that the article Smollett attaches, which he claims shows the FBI "dispute[d]" the assertion he sent himself the letter, does not show that Superintendent Johnson's statement was "baseless" nor "false" as Smollett indicates in his Countercomplaint. (Dkt. 33 at ¶¶ 68, 70). The article Smollett links only indicates Superintendent Johnson may have "overstated things" and that Federal law enforcement sources were still investigating. *See* https://www.tmz.com/2019/02/22/jussie-smollett-letter-police-chief-superintendent-fbi/.

the staged attack but that as far as the CPD could tell, the scratches and bruising on Smollett's face were self-inflicted. (*Id.* at ¶ 76). Smollett alleges that Superintendent Johnson had no basis for that statement since CPD officers knew that the doorman at Smollett's building reported that he had scratches and bruising on his face immediately after the attack. (*Id.* at ¶ 77).

Smollett alleges that the CPD, including Detective Wodnicki, Detective Theis, Superintendent Johnson, and John and Jane Doe Defendants, knew or should have known that the Osundairo Brothers' statements were unreliable. (*Id.* at ¶ 78). The CPD had substantial evidence that supported Smollett's account and undercut the Osundairo Brothers' story that the attack was a hoax, which CPD officers ignored to close the investigation. (*Id.* at ¶ 81). Smollett claims a text sent from Abel about ten hours after the attack which stated, "Bruh say it ain't true, I'm praying for a speedy recovery. Shit is wild," is significant because the Osundairo Brothers did not claim that Smollett told them to send such a text or to claim the message was pretextual. (*Id.* at ¶¶ 82–83). Smollett states that most of the text messages between Smollett and Abel discuss training and nutrition, thus giving rise to an inference that incriminating texts were innocuous. (*Id.* at ¶ 86). One text, which Smollett admits is "susceptible to an incriminating interpretation," read: "Might need your help on the low. You around to meet up and talk face to face?" (*Id.* at ¶¶ 85, 87). Smollett claims that the context of the text was that Smollett asked Abel to meet in person to ask him to acquire herbal steroids while he was in Nigeria. (*Id.* at ¶ 86). Smollett claims that the Osundairo Brothers falsely told CPD officers that the text was

Smollett's initial communication to solicit the Osundairos to help him stage the attack, when really it was to enlist the help of his "personal trainer" to obtain banned herbal steroids and help him lose weight. (*Id.* at ¶¶ 88–93).

Smollett alleges that the CPD ignored evidence that supports his case. He claims that the CPD ignored text messages from the Osundairo Brothers demonstrating "a strong homophobic sentiment," (*Id.* at ¶¶ 94–96), and evidence and statements from two independent witnesses indicating that a young white male was involved in the attack. (*Id.* at ¶¶ 97–103). Smollett also claims evidence was ignored that showed the Osundairo Brothers' statements were unreliable, namely that the Osundairo Brothers told CPD officers that Smollett told them not to bring their cell phones to the attack, but statements from an Uber driver and Yellow Cab driver that served as transportation indicated that they did have their cell phones. (*Id.* at ¶¶ 104–10).

LEGAL STANDARD

On a motion to dismiss a counterclaim under Rule 12(b)(6), the Court construes the counterclaim as it would a complaint, in the light most favorable to the counterclaim-plaintiff, accepts the factual allegations as true, and draws all reasonable inferences in the counterclaim-plaintiff's favor. *Reynolds v. CB Sports Bar, Inc.*, 623 F.3d 1143, 1146 (7th Cir. 2010). A complaint need contain only a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). That statement must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). However, a counterclaim-plaintiff's claim need only be plausible, not

probable. *Indep. Trust Corp. v. Stewart Info. Servs. Corp.*, 665 F.3d 930, 935 (7th Cir. 2012). A claim has facial plausibility when the counterclaim plaintiff pleads factual content that allows the court to draw the reasonable inference that the counter-defendant is liable for the misconduct alleged. *NewSpin Sports, LLC v. Arrow Electronics, Inc.*, 910 F.3d 293, 299 (7th Cir. 2018) (quoting *Ashcroft*, 556 U.S. at 678). Yet the complaint "must actually suggest that the movant has a right to relief, by providing allegations that raise a right to relief above the speculative level." *Windy City Metal Fabricators & Supply, Inc. v. CIT Technology Financing Services*, 536 F.3d 663, 668 (7th Cir. 2008) (quoting *Tamayo v. Blagojevich*, 526 F.3d 1074, 1084 (7th Cir. 2008). Evaluating whether a countercomplaint is sufficiently plausible to survive a motion to dismiss is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *McCauley v. City of Chicago*, 671 F.3d 611, 616 (7th Cir. 2011) (citing *Iqbal*, 556 U.S. at 678).

DISCUSSION

Smollett brings two claims against Defendants: a state law violation of malicious prosecution against both the City Defendants and the Osundairo Brothers; and a federal malicious prosecution claim under 42 U.S.C. § 1983 against the City Defendants.

I. Smollett Does Not Plead Sufficient Facts to Show State Law Malicious Prosecution

Smollett alleges a state law malicious prosecution claim against the City Defendants for their conduct in obtaining the "false and unreliable" statements from the Osundairo Brothers, using those statements as the basis for the criminal

complaint against Smollett, and ignoring contradictory evidence. (Dkt. 33 at ¶ 118). Smollett also claims that the City Defendants lacked probable cause to bring charges. (*Id.* at ¶¶ 123–126). Smollett alleges that Superintendent Johnson's public statements demonstrated malice and a lack of good faith in instituting criminal proceedings. (*Id.* at ¶ 127).

In order to bring a malicious prosecution case under Illinois law, Smollett must show: (1) the commencement or continuance by the defendant of an original judicial proceeding against him; (2) the termination of the proceeding in his favor; (3) the absence of probable cause for the proceeding; (4) malice; and (5) damages. *Barnes v. City of Centralia*, 943 F.3d 826, 833 (7th Cir. 2019); *see also Grundhoefer v. Sorin*, 20 N.E.3d 775, 780 (Ill. App. Ct. 2014)). The absence of any of one of these elements bars Smollett from pursuing the claim. *Johnson v. Saville*, 575 F.3d 656, 659 (7th Cir. 2009) (citing *Swick v. Liautaud*, 662 N.E.2d 1238, 1242–43 (Ill. 1996)).

In a malicious prosecution case, all elements cannot be pled until the proceedings are terminated in the plaintiff's favor. *See Sneed v. Rybicki*, 146 F.3d 478, 481 (7th Cir. 1998) (citing *Heck v. Humphrey*, 512 U.S. 477, 487 (1994). Smollett argues that his case has been terminated because a *nolle prosequi* was entered in his favor. The City argues the *nolle prosequi* in his case is distinct since it gave leave to the Special Prosecutor to reinstate charges. (Dkt. 38 at 5; Dkt. 56 at 4). In most cases "a *nolle prosequi* is not a final disposition of a case but is a procedure which restores the matter to the same state which existed before the Government initiated the prosecution." *Washington v. Summerville*, 127 F.3d 552,557 (7th Cir. 1997).

In this case, according to the Defendants, the City entered the *nolle prosequi* in his case only after Smollett agreed to both the forfeiture of his fine and to serve community service. (Dkt. 38 at 7-8). In short, they assert that the instant matter was terminated with a requirement in return that he perform those two conditions. Involuntary dismissal "is not indicative of the innocence of the accused when [it] is the result of an agreement or compromise with the accused[.]" *Swick*,169 Ill.2d at 513; *see also Logan v. Caterpillar, Inc.*, 246 F.3d 912, 925 (7th Cir, 2001) ("A *nolle prosequi* entered as the result of an agreement or compromise with the accused is not considered indicative of a plaintiff's innocence.") At this stage, the Court must take the facts alleged in the Amended Countercomplaint as true. Smollett only asserts that the case was dismissed and does not allege the other conditions. The City in its response, attaches the Certified Record from his case, but the Record only shows the *nolle prosequi* of the charges against him and does not show the other conditions. (Dkt. 56-1). Although Smollett asserts in his Countercomplaint that the Chief of Police stated publicly regarding his case: "In our experience, innocent individuals don't forfeit bond and perform community service in exchange for dropped charges," he asserts this to show that the Chief exhibited malice toward him. (Dkt. 33 at ¶ 113). Of course, the Court could merely ask the Counter-Plaintiff to file an affidavit pursuant to his Rule 11 obligations to provide the Court with the agreement entered into when his charges were dropped. Yet, the Court need not do so since there is another reason that Smollett cannot allege that the charges were resolved in his favor and that is the existence of the Special Prosecutor.

The case that was once dismissed has returned in the form of a Special Prosecutor who had the ability to investigate and press criminal charges against him. It could hardly be said that the case is over since the Special Prosecutor has charged him again. Now he faces the same allegations brought in February 2020 by the Special Prosecutor when another grand jury brought an indictment after hearing the results of a six-month investigation. *See* February 11, 2020 Order, No. 2019 MR 00014. Smollett has been charged with four counts of disorderly conduct for filing a false police report. *Id.* Given this, it cannot be said that the case has terminated, nor can it be said that the case has terminated in Smollett's favor.

Smollett is correct that at this stage, the Court must take his well-pled allegations as true. However, this does not mean that the Court must ignore public documents that are available to the Court such as the indictment from the Special Prosecutor.

Even assuming that Smollett could establish that there was a final disposition in his favor, he must next be able to allege that Defendants did not have probable cause to arrest him. Smollett argues that there was no probable cause because the Osundairo Brothers' statements were unreliable and CPD ignored evidence that supported his account of what occurred that night. (Dkt. 47 at 10–11). Here, however, there was evidence lending itself to probable cause, and the existence of probable cause "acts as a complete defense to an action for malicious prosecution." *Johnson*, 575 F.3d at 659. "In a malicious-prosecution case, probable cause is defined as 'a state of facts that would lead a person of ordinary care and prudence to believe

or to entertain an honest and sound suspicion that the accused committed the offense charged.'" *Williams v. City of Chicago*, 733 F.3d 749, 759 (7th Cir. 2013) (quoting *Gauger v. Hendle*, 954 N.E.2d 307, 329–30) (Ill. App. Ct. 2011). Probable cause is merely the "probability or substantial chance" that criminal activity exists but "does not require the existence of criminal activity to be more likely true than not true." *Thayer v. Chiczewski*,705 F.3d 237, 246 (7th Cir. 2012).

Here, probable cause was met by the Osundairo Brothers' statements to the police and the corroborating evidence of those statements, including videotaped evidence. While Smollett alleges the statements were unreliable and self-serving, he ignores that there was additional evidence to corroborate the Osundairo Brothers' statements, including suspicious texts between the parties and the deposit of a large check to Abel shortly before the attack. (Dkt. 33 at ¶¶ 73, 85, 87). Smollett alleges the Osundairo Brothers' statements were unreliable because they are self-serving, but a reasonable ground for belief of the guilt of an accused may be on information from other persons. *Squires-Cannon v. Forest Preserve District of Cook Cty.*, 2016 WL 561917, *3 (N.D. Ill. Feb. 12, 2016) (citing *Turner v. City of Chicago*, 415 N.E.2d 481, 485 (Ill. App. Ct. 1980). Smollett further states that since this corroborative evidence has allegedly innocuous explanations and because there was exculpatory evidence the police did not investigate, the police lacked probable cause. (Dkt. 47 at 11). While police may not ignore "conclusively established" evidence that defeats probable cause or "clearly exculpatory facts," they do not have to "investigate every potentially exculpatory detail." *Nelson v. Vill. of Lisle*, 437 Fed. App'x 490, 494 (7th Cir. 2011).

Given the Osundairo Brothers' confession, plus corroborating evidence, there was ample probable cause causing a person of ordinary care and prudence to believe or to entertain an honest and sound suspicion that the accused committed the offense charged. *Williams*, 733 F.3d at 759. As there is probable cause, there can be no malice. "Malice" in the context of malicious prosecution means that "the officer who initiated the prosecution had any other motive other than that of bringing a guilty party to justice." *Aleman v. Vill. of Hanover Park*, 662 F.3d 897, 907 (7th Cir. 2011) (citations omitted). Here, CPD's motive was bringing Smollett to justice for a crime it had probable cause to think he committed. Therefore, Smollett's state law claim of malicious prosecution is dismissed against all defendants.

II. Smollett Does Not Plead Sufficient Facts to Show a Section 1983 Claim

Smollett next alleges a violation for "malicious prosecution" under § 1983. In his pleadings, Smollett does not indicate under which amendment of the Constitution he brings his claim. However, there is no cause of action for malicious prosecution based on the Fourth Amendment. *Manuel v. City of Joliet*, 903 F.3d 667, 670 (7th Cir. 2018). Recognizing this, Smollett attempts to justify his pleadings stating that "[d]espite the malicious prosecution heading, the factual allegations plausibly state a claim under Section 1983 for the City Defendants' violation of Mr. Smollett's Fourth Amendment rights." (Dkt. 47 at 13). Smollett then claims that the City violated his Fourth Amendment rights by holding him in custody without probable cause. (*Id.* at 14).

Smollett cannot now attempt to state that he was bringing a Section 1983 claim for unlawful detention when his Countercomplaint makes no such reference. Having been caught attempting to bring a claim that does not exist, Smollett attempts to retrofit the pleadings and claim that, despite changing the underpinnings of his § 1983 claim, sufficient notice of an unlawful detention claim has been provided to the City Defendants so as to not violate Federal Rule of Civil Procedure 8. (*Id.* at 14). There is not sufficient notice to apprise the City Defendants that Smollett would be bringing an unlawful detention claim rather than a malicious prosecution claim. As pleaded, Count II pertains to "instituting criminal proceedings against Smollett without probable cause." (Dkt. 34 at ¶ 139). While Count II mentions Smollett was deprived of his liberty because "he was in custody for approximately ten hours, and he had restrictions placed on his travel following his surrender to police on February 21, 2019, until the dismissal of charges against him on March 26, 2019," it is clear that this was intended as an injury resulting from the malicious prosecution and not the injury itself. (*Id.* at ¶ 154). Smollett urges that we allow his reply to the City's motion to dismiss serve as a supplement to his pleadings, however, there is no support for allowing a litigant to completely amend his complaint with a new count that is not pled in the original. In fact, this Court and other courts in this Circuit have dismissed complaints where parties have attempted to improperly bring malicious prosecution claims under § 1983. *See Blackmon v. City of Chi.*, 2020 WL 60188, at *4 (N.D. Ill. Jan. 6, 2020); *Neita v. City of Chicago*, 2019 WL 5682838, at *4 (N.D. Ill.

Nov. 1, 2019). Smollett has failed to state a claim under § 1983 for which relief can be granted and thus this Count is dismissed.[2]

CONCLUSION

For the forgoing reasons, the City Defendants' and Osundairo Brothers' Motions to Dismiss [Dkts. 37, 59] are granted with prejudice as to Count I as proceedings are currently ongoing in state court and he cannot bring a state malicious claim until proceedings have been terminated. Count II is dismissed without prejudice. If Smollett wishes to file an Amended Countercomplaint consistent with this Order, he must do so within 21 days of the entry of this Order.

Virginia M. Kendall
United States District Judge

Date: April 22, 2020

[2] Smollett's § 1983 would also fail as the CPD can show probable cause based on Smollett's pleadings, as discussed in Part I. An essential element of the Constitutional Right to not be held in custody is that it must be without probable cause. *Manuel*, 903 F.3d 670.

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

People of the State of Illinois,	)	
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	)	
	)	No. 20 CR 03050-01
Jussie Smollett,	)	
	)	
Defendant.	)	
	)	

SUR-REPLY TO MOTION TO DISMISS INDICTMENT FOR ALLEGED VIOLATION OF DEFENDANT'S RIGHT AGAINST DOUBLE JEOPARDY

Mr. Smollett's ***34-page*** Reply brief is an unsuccessful attempt to distract the Court's attention away from the fundamental threshold issue in any double jeopardy analysis (and the dispositive issue here)—***whether jeopardy attached in the first proceeding***—while also raising new arguments for the first time,[1] mischaracterizing the OSP's Response brief,[2] and misrepresenting facts and law.[3]

[1] For example, Mr. Smollett contends that the OSP should be "equitably estopped" from prosecuting Mr. Smollett because the CCSAO—an entity of the State of Illinois like the OSP—previously negotiated an agreement to dismiss the charges in return for Mr. Smollett forfeiting his bond. *See* Reply at 4, 31–32. This "estoppel" argument is not only wrong, as discussed further on pages 9–10 below, but it was never raised in Mr. Smollett's Motion to Dismiss, and the Court should strike any such arguments that have been improperly presented for the first time in Mr. Smollett's Reply.

[2] For example, Mr. Smollett incorrectly cites the OSP's Response for two statements by Joseph Magats and Risa Lanier in February 2019 during the resolution of the first proceedings. *See* Reply at 19–20. Neither of these statements were quoted or cited in the OSP's Response brief.

[3] For example, citing to the OSP's February 11, 2020 Information Release, Mr. Smollett claims "the OSP has not found any evidence that Mr. Smollett, or anyone on his behalf, engaged in any wrongdoing related to resolving the prior charges against him." Nothing in the Information Release supports this inaccurate statement. Mr. Smollett also incorrectly states that the "New Charges are essentially a subset of the Prior Charge" (Reply at 6), when it is clear on the face of the new indictment, and as the OSP explained in its

Even putting aside the fatal flaw of wholly failing to address in his initial motion the issue of jeopardy attaching (which necessitates dismissal of his motion), Mr. Smollett ***still*** has not shown either (1) that jeopardy attached in his prior case or (2) that, somehow, contrary to established law, jeopardy did not need to attach. Rather, Mr. Smollett contends, based on case law from other states about defendants who either ***entered into or completed*** actual diversion programs, that jeopardy attached when he "effectively" completed the Felony Deferred Prosecution Program. Reply at 7, 18–25. But this argument is a non-starter, as there is no dispute that Mr. Smollett did not enter into the Felony Deferred Prosecution Program (nor do his actions—a voluntary forfeiture of $10,000 and 15 hours of community service without any period of court supervision—meet the statutory requirements of the Felony Deferred Prosecution Program).

Alternatively, Mr. Smollett asks the Court to disregard fundamental principles of sentencing (not to mention statutory definitions relating to sentences and dispositions), to conclude that his voluntary relinquishment of his $10,000 bond "amounts" to a fine, and thus, a "punishment."

Moreover, in an attempt to avoid the legal requirement that jeopardy attach (since it did not in his prior case), he asks the court to make findings untethered to the law. He asks the Court to conclude that the State's *nolle prosequi* before jeopardy attached means the OSP is barred from prosecuting him—which it does not. He even asks the Court to adopt his subjective belief that his negotiated *nolle prosequi* meant that he had obtained finality—which it does not. And, he invites this Court to hold, contrary to established law, that jeopardy attached in the absence of the case progressing through established stage gates—which it did not.

In short, this Court's analysis should begin and ends with one fundamental principle: ***Mr.***

Response, that the New Charges also allege that Mr. Smollett made a false report on February 14, 2019 when the Prior Charges only alleged false reports made on January 29, 2019.

Smollett had not been put in jeopardy when the charges were dismissed; therefore, every other argument raised in retort is moot, and this Court must deny Mr. Smollett's motion to dismiss.

I. Even in a "Multiple Punishments" Double Jeopardy Challenge, Jeopardy Must Attach in the First Instance.

Mr. Smollett contends that the double jeopardy analysis is somehow different when a challenge is brought under a "multiple punishments" theory. *See* Reply at 10 (explaining that the OSP's citations to Illinois double jeopardy authority are "inapposite" because they did not involve a "multiple punishments" challenge). However, Mr. Smollett offers no other authority to rebut bedrock Illinois Supreme Court and U.S. Supreme Court law that ***"[t]he starting point in <u>any</u> double jeopardy analysis, of course, is determining whether or not jeopardy had attached***." *People v. Bellmyer*, 199 Ill. 2d 529, 538 (2002) (quoting *People ex rel. Mosley v. Carey*, 74 Ill. 2d 527, 534 (1979)) (emphasis added); *see also Serfass v. United States*, 420 U.S. 377, 388 (1975) (stating that the U.S. Supreme Court has "consistently adhered to the view that jeopardy does not attach, and ***the constitutional prohibition can have no application***, until a defendant is put to trial before the trier of facts, whether the trier be a jury or a judge.").[4] (emphasis added) (internal quotation marks omitted).

Indeed, the Illinois Supreme Court has repeatedly stated that "[t]he protections against double jeopardy are triggered ***only after the accused has been subjected to the hazards of trial and possible conviction***." *Bellmyer*, 199 Ill. 2d at 537 (emphasis added); *People v. Daniels*, 187 Ill. 2d 301, 309–10 (1999) (same). This holding derives directly from *Serfass* which stated that "[b]oth the history of the Double Jeopardy Clause and its terms demonstrate that ***it does not come***

[4] Mr. Smollett claims that "*Serfass* did not hold that jeopardy must have attached in the prior proceeding in order for double jeopardy to bar further prosecution based on multiple punishment." Reply at 11. This is plainly wrong, as *Serfass* clearly holds that double jeopardy has "no application" unless jeopardy attaches. *Serfass*, 420 U.S. at 388.

into play until a proceeding begins before a trier having jurisdiction to try the question of the guilt or innocence of the accused." *Serfass*, 420 U.S. at 391 (emphasis added) (internal quotation marks omitted); *see also People v. Cervantes*, 2013 IL App (2d) 110191, ¶ 51 ("The guarantee against double jeopardy is not implicated before that point in the proceedings when jeopardy attaches.").

Further, Mr. Smollett tries—and fails—to rebut the notion that jeopardy attaching is a prerequisite even under a "multiple punishment" double jeopardy challenge by incorrectly trying to distinguish case law the OSP cited. *See* Reply at 10–11 (criticizing the OSP's reliance on *People v. Delatorre,* 279 Ill. App. 3d 1014 (2d. Dist. 1996) as "dicta and not supported by any authority whatsoever."). But, *Delatorre* explicitly supported its holding by relying on "the general proposition in *Serfass* that there can be no double jeopardy without a former jeopardy." *Delatorre*, 279 Ill. App. 3d at 1019. In fact, this fundamental proposition has been repeatedly recognized by both Illinois and federal courts in "multiple punishment" double jeopardy challenges. *See, e.g.*, *United States v. Torres*, 28 F.3d 1463, 1465 (7th Cir. 1994) (finding that jeopardy did not attach in parallel civil forfeiture proceeding where defendant did not appear, and stating "[y]ou can't have double jeopardy without a former jeopardy."); *People v. Kim*, 284 Ill. App. 3d 637, 638–40 (2d. Dist. 1996) (finding that jeopardy did not attach when defendant was issued a civil tax assessment and demand for payment, and stating "[i]t is obvious that there can be no double jeopardy without a former jeopardy."). Moreover, *Delatorre*'s holding has been adopted by other Illinois courts in "multiple punishment" challenges. *See, e.g., People v. Portuguez*, 282 Ill. App. 3d 98, 101 (3d. Dist. 1996) ("We find the decision in *Delatorre* to be well-reasoned. We adopt its analysis and follow its holding.").

Accordingly, there can be no serious dispute that jeopardy must have attached in a prior

proceeding "***in <u>any</u> double jeopardy analysis***"—including the present case. *Bellmyer*, 199 Ill. 2d at 538 (emphasis added).[5]

II. Jeopardy Did Not Attach Here Because Mr. Smollett Was Never Punished or Fined, and He Admittedly Did Not Enter Into or Complete Any Sort of Deferred Prosecution or Diversion Program.

Tellingly, Mr. Smollett did not offer ***any basis*** for jeopardy attaching in his initial motion, and his Reply brief attempts to: (1) disregard the fundamental principle that punishment requires more than mere acquiescence by a defendant, (2) cobble together a novel theory adopted by courts in other states which, even if adopted by this Court, is not supported by the facts of his own case, and (3) ignore the fact that he received exactly what he bargained for—a *nolle prosequi*.

A. Mr. Smollett's Case Did Not Proceed Far Enough for Jeopardy to Attach.

The law is crystal clear—and Mr. Smollett does not dispute—that jeopardy attaches: "(1) at a jury trial when the jury is empaneled and sworn; (2) at a bench trial when the first witness is sworn and the court begins to hear evidence; and (3) at a guilty plea hearing 'when the guilty plea is accepted by the trial court.'" *People v. Cabrera*, 402 Ill. App. 3d 440, 447 (1st 2010) (quoting *Bellmyer*, 199 Ill. 2d at 538). As noted above, it is also undisputed that Mr. Smollett's case did not pass through any of these stage gates. Rather, it was dismissed via a motion for *nolle prosequi* a mere 12 days after Mr. Smollett was arraigned, and well before a jury was empaneled or any witness was sworn. Thus, under the traditional and well-established jurisprudence regarding double jeopardy, jeopardy did not attach.

[5] Mr. Smollett also repeatedly states that the double jeopardy analysis "should not be applied in a rigid, mechanical nature." Reply at 2, 4, 12, 32 (citing *Illinois v. Somerville*, 410 U.S. 458, 467 (1973)). But, as the U.S. Supreme Court recently clarified in an appeal from Illinois, the "rigid, mechanical" rule that *Somerville* referred to was "***not whether jeopardy had attached***, but whether the manner in which it terminated (by mistrial) barred the defendant's retrial." *Martinez v. Illinois*, 572 U.S. 833, 840 (2014) (per curiam) (emphasis added).

B. Mr. Smollett Was Not Punished in His Prior Case.

While seeming to concede that jeopardy attaching is a prerequisite to any double jeopardy analysis, Smollett argues—without citing any legal basis—that jeopardy can attach if a defendant is "punished," contending (1) that his voluntary bond forfeiture "amounts" to a fine, and thus a "punishment" (Reply at 16), and (2) that he was "punished" because he "effectively" completed the Felony Deferred Prosecution Program. Reply at 3–4, 7.

As to the bond forfeiture, Mr. Smollett offers no legal citation for his position that a voluntary forfeiture of bond can constitute or ever has constituted "punishment."[6] Mr. Smollett also tries to distance himself from the voluntary nature of his forfeiture by claiming that it was "in fact, imposed by the court" because Judge Watkins granted the agreed motion to direct the ***Clerk*** to ***release*** the bond to the City of Chicago. Reply at 26. In other words, the court did not order ***Mr. Smollett*** to do anything—it merely directed the ***clerk*** what to do with the funds Mr. Smollett ***chose*** to relinquish. *See* Response, Ex. 3 at 3 ("Motion, State, to release D-Bond 1375606 to the City of Chicago will be granted."); Response, Ex. 4 ("IT IS HEREBY ORDERED that the Clerk of the Circuit Court of Cook County shall release Bond No. D1375606 **payable to the City of Chicago** … ."). As a result, Mr. Smollett's bond forfeiture was ***not*** a part of a "sentence" ordered by the Court. *See* 730 ILCS 5/5-1-19 ("'Sentence' is the disposition imposed by the court on a convicted defendant."); 730 ILCS 5/5-4.5-15(a) (listing the types of "dispositions").

Furthermore, contrary to Mr. Smollett's contention, the OSP did not argue or suggest that a "conviction" is a prerequisite to the imposition of a fine. Reply at 17–18. Instead, the OSP stated

[6] Mr. Smollett contends that the OSP's emphasis on the voluntary nature of his forfeiture is misplaced because plea agreements must be entered into voluntarily. Reply at 14-15. However, a plea of guilty—which must be entered voluntarily—is followed by a ***court-ordered*** disposition or sentence, which does not have to abide by any plea agreement by the State and the defendant, and is ***not*** voluntary. Reply at 14–15. Thus, Mr. Smollett's ***voluntary*** decision to forfeit his bond, which was not ordered by any court, undermines any notion that it was somehow an imposed legal punishment.

that, under Illinois statutes, a "fine" is one of many specifically-delineated "appropriate dispositions" for a felony, and that Mr. Smollett was "not given a sentence of ***any*** disposition," thus precluding the possibility that a fine was Mr. Smollett's disposition. *See* OSP's Response at 8–9 (citing 730 ILCS 5/5-4.5-15(a) (listing the types of "dispositions")).[7] Therefore, contrary to Mr. Smollett's contention that the Certified Statement of Conviction/Disposition—which only shows that the initial 16 charges were dismissed *nolle prosequi*—is "irrelevant" (Reply at 16), his lack of ***any*** sentence and disposition (including a "fine") is of the utmost relevance, and a clear representation of his lack of punishment.[8]

As to his contention that he was punished because he "effectively" entered into a diversion program, it is undisputed that Mr. Smollett did not, in fact, enter into any such program. *See* Reply at 9 (emphasis added) ("***Had Mr. Smollett been enrolled in the program***, his case would have been dismissed by now.").[9] Indeed, if Mr. Smollett were to have entered into the Felony Deferred Prosecution Program, his case would have been transferred to Branch 9 of the Cook County Circuit Court (which it was not), he would have entered into a written agreement with the State setting

[7] Mr. Smollett also ignores the important statutory requirement that a "fine" cannot be the "sole disposition for a felony" and "may be imposed only in conjunction with another disposition." 730 ILCS 5/5-4.5-15(b). Because there was no other "disposition" entered, the $10,000 forfeiture cannot have been a "fine."

[8] Notably, Mr. Smollett urges the Court to ignore the "label" and examine the "purpose or effect" of the sanction to determine whether it operates as a criminal punishment. Reply at 16 (citing *Hudson v. United States*, 522 U.S. 93, 99–101 (1997) and *United States v. Ward*, 448 U.S. 242, 249 (1980)). But, both *Hudson* and *Ward* analyzed whether a "statutory scheme was so punitive either in purpose or effect" to turn a civil penalty into a criminal punishment. *Ward*, 448 U.S. at 248–49; *Hudson*, 522 U.S. at 99. This "purpose or effect" test applied when analyzing a civil statutory scheme is simply inapplicable in the present criminal context.

[9] In fact, any opportunity Mr. Smollett had to enter into the Felony Deferred Prosecution Program ended when he entered a plea of Not Guilty on March 14, 2019 because it is a "pre-plea" program. *See Cook County State's Attorney, Felony Diversion Programs* (last checked on June 5, 2020), available at https://www.cookcountystatesattorney.org/resources/felony-diversion-programs. He cannot now claim that he "effectively" completed the Felony Deferred Prosecution Program by entering into an agreement that occurred at a time when entering into that Program was not possible.

forth requirements he must meet (which he did not), and a court would have "enter[ed] an order specifying that the proceedings be suspended while [Mr. Smollett] is participating in a Program of not less 12 months" (which did not occur). 730 ILCS 5/5-6-3.3(b); *see also See Cook County State's Attorney, Felony Diversion Programs* (last accessed on June 5, 2020*),* available at https://www.cookcountystatesattorney.org/resources/felony-diversion-programs; General Administrative Order: 11-03 "Cook County State's Attorney's Deferred Prosecution Program." Instead, Mr. Smollett's case was dismissed on March 26, 2019—not 12 months later "[u]pon fulfillment of the terms and conditions of the Program." 730 ILCS 5/5-6-3.3(f).

Even if the Court were inclined to accept Mr. Smollett's suggestion to "take notice that [he] has now ***effectively*** completed this program" 12 months later, despite having spent that year without being under court supervision (Reply at 7, emphasis added),[10] Mr. Smollett ***still has not completed*** at least one of the defined "conditions" of the program—namely, he did not "make full restitution to the victim." 730 ILCS 5/5-6-3.3(c)(3).[11] The $10,000 Mr. Smollett relinquished cannot constitute "full" restitution given that, according to the City's ongoing civil suit to recover

[10] Mr. Smollett cites a handful of out-of-state cases that generally stand for the proposition that jeopardy can attach following the successful completion of a diversion program. *See* Reply at 20–24 (citing *State v. Urvan*, 4 Ohio App. 3d 151 (1982), *Com. v. McSorley*, 335 Pa. Super. 522 (1984), and *State v. Maisey*, 215 W. Va. 582 (2004)). Besides having no jurisdictional value in this Court, these cases have no application here because all of them involved *actual* entrance or completion of a court-ordered or invited diversion program—not "effective" completion of a program.

[11] Mr. Smollett contends that Illinois courts have "repeatedly held that a police department or government agency is not considered a 'victim' within the meaning of the restitution statute." Reply at 9, n. 2 (citing cases from 1990 or earlier). However, more recent cases have clarified that several prior "opinions contain language that could be read out of context" as to whether a police department could be a "victim" entitled to restitution. *See People v. Danenberger*, 364 Ill. App. 3d 936, 944 (2d Dist. 2006) ("[W]e do not hold that a law enforcement agency can *never* be a victim entitled to restitution …the real rationale of these opinions is that a law enforcement agency ought not be compensated for the public money that it spends in performing its basic function of investigating and solving crimes."). Accordingly, "there is no *per se* rule prohibiting a law enforcement agency from receiving restitution." *People v. Ford*, 2016 IL App (3d) 130650, ¶ 29 (affirming restitution to police department to repair damaged police vehicle).

its costs in investigating Mr. Smollett's case, the City expended $130,106.15.[12] Additionally, the statutory requirement for a defendant ordered to do community service under the Felony Deferred Prosecution Program is 30 hours, while Mr. Smollett merely completed 15 hours before his case was *nolle'd*. Thus, Mr. Smollett did nothing, besides perhaps not getting arrested for a year, that would be "tantamount" to completing the requirements of Felony Deferred Prosecution Program as he claims. Reply at 18. Stated differently, he did not in actuality—or even effectively—complete the Felony Deferred Prosecution Program, thereby making the non-precedential out-of-state cases he cites irrelevant.

In sum, because Mr. Smollett's bond forfeiture was not a fine and Mr. Smollett never entered into or completed the Felony Deferred Prosecution Program, or any semblance of that program, Mr. Smollett was never previously put in jeopardy or punished.

C. The *Nolle Prosequi* Does Not Bar Re-Prosecution

As the OSP explained in its Response, a *nolle prosequi* does not inherently bar re-prosecution. More specifically, because the *nolle prosequi* was entered in this case before any attachment event occurred, it does not bar re-prosecution of Mr. Smollett by the OSP. *Daniels*, 187 Ill. 2d at 312 (1999) ("If the allowance of a motion to nol-pros is entered before jeopardy attaches, the *nolle prosequi* does not operate as an acquittal, and a subsequent prosecution for the

[12] The OSP made reference to two pleadings from the ongoing civil case in its Response brief. *See* Response at 4, 11 (citing *City of Chicago v. Smollett,* 19 cv. 04547, Dkt. 47, 78). In response to those references, the Court asked to receive copies of the cited pleadings if both sides were amenable to the Court's request. The OSP informed the Court that it would provide the requested pleadings. But Mr. Smollett's counsel objected to the Court's "consideration" of the pleadings altogether. Then, despite this objection, Mr. Smollett's Reply brief referenced those same pleadings (Reply at 6), and then even cited, quoted and attached in total the district court's order stemming from those pleadings to wrongly argue that "judicial estoppel" prevented the OSP from claiming Mr. Smollett's bond forfeiture was voluntary. Reply at 15–16. In attempting to resolve this issue, the OSP has subsequently reached out to Mr. Smollett's counsel multiple times to see whether they would withdraw their objection in light of their own repeated references to the civil pleadings and order in the Reply brief—but Mr. Smollett's counsel has not responded. Regardless, Mr. Smollett's Reply brief undermines any objection to the Court's review and consideration of the aforementioned civil pleadings, and as such, the Court should proceed with reviewing these public filings.

same offense could legally proceed."); *c.f., People v. Milka*, 211 Ill. 2d 150, 176 (2004) (recognizing that a *nolle prosequi* after jeopardy attaches bars prosecution on subsequent charges).

Furthermore, a prosecutor's decision to *nolle* a case does not mean that the prosecutor will not or cannot decide later to prosecute that defendant for those, or similar, charges in a new proceeding—such action (absent the attachment of jeopardy) is within the prosecutor's discretion.[13] Stated differently, a *nolle prosequi* is not a final disposition. *People v. Norris*, 214 Ill. 2d 92, 104 (2005). However, contrary to this established principle, Mr. Smollett now tries to assert—for the first time—that, in addition to his double jeopardy arguments, the OSP is somehow "equitably estopped" from prosecuting him because he believed that he had obtained "finality" through his agreement with the State. Reply at 4–5, 32. But, Mr. Smollett never bargained for—and the State never agreed to—finality. Rather, he bargained for, and received, a *nolle prosequi*—a resolution that, under the law (absent jeopardy having attached), leaves the door open for a defendant to be re-prosecuted. Thus, Mr. Smollett received the benefit of his negotiated bargain and cannot now—either under the protections of the Double Jeopardy Clause or his new theory of equitable estoppel—avoid prosecution.

III. Double Jeopardy Cannot Apply Because the Prior Proceedings Are Void

Finally, Mr. Smollett challenges Judge Toomin's ability to declare that the prior proceedings are void because Mr. Smollett asserts that (1) he did not challenge the CCSAO's initial prosecution, and (2) he contends that "Dan. K. Webb was not properly appointed a special prosecutor and thus lacked legal authority to bring these charges." Reply at 29, n. 8. However, such arguments are irrelevant because Judge Toomin's ruling remains fully intact and "good law,"

[13] Of note, there also is not a time limitation (other than the statute of limitations) for when a prosecutor could re-prosecute.

despite Mr. Smollett's failed (and untimely) effort to challenge it.[14] Thus, in addition to the reasons set forth in the sections above, because Judge Toomin (correctly) found that the prior proceedings were void, Mr. Smollett's current charges were brought on a clean slate. As a result, and as a matter of law, there cannot be a double jeopardy violation.

[14] Mr. Smollett chose not to appeal either of Judge Toomin's rulings on June 21, 2019 and August 23, 2019 relating to the appointment of the Special Prosecutor and Mr. Webb's appointment as Special Prosecutor—including the denial of his motion to intervene—though he attempted, unsuccessfully, to unwind the appointment and dismiss the present charges by petitioning to the Illinois Supreme Court. *See* Smollett v. Toomin, No. 125790, Illinois Supreme Court, March 6, 2019 Order Denying Emergency Motion by Movant Jussie Smollett for a Supervisory Order (available at https://courts.illinois.gov/SupremeCourt/SpecialMatters/2020/125790-1.pdf); Smollett v. Toomin, No. 125790, Illinois Supreme Court, March 6, 2019 Order Denying Emergency Motion to Stay Proceedings in the Circuit Court of Cook County, Case. No. 20 CR 3050 (available at https://courts.illinois.gov/SupremeCourt/SpecialMatters/2020/125790-2.pdf).

CONCLUSION

For the foregoing reasons, the Office of the Special Prosecutor respectfully requests that this Court deny Mr. Smollett's Motion to Dismiss Indictment.

Dated: June 5, 2020

Respectfully Submitted,

/s/ Dan K. Webb

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

People of the State of Illinois,	)	
	)	
	)	
	)	
	)	
	)	No. 20 CR 03050-01
Jussie Smollett,	)	
	)	
Defendant.	)	
	)	

NOTICE OF FILING

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YOU ARE HEREBY NOTIFIED that on June 5, 2020, the undersigned filed the attached Sur-Reply to Motion to Dismiss Indictment for Alleged Violation of Defendant's Right Against Double Jeopardy with the Clerk of the Circuit Court at the George N. Leighton Criminal Courthouse, 2600 South California Avenue, Chicago, Illinois 60608, via email to: Criminal Felony Services CriminalFelonyServices@cookcounty.com, with a courtesy copy provided to Judge Linn through his clerk via email at Amber.Hunt@cookcountyil.gov.

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PROOF OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing to be emailed to the following attorneys of record on June 5, 2020:

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STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

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

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff,
vs.
JUSSIE SMOLLETT,
Defendant.

Case No. 20-CR-03050-01

REPORT OF VIDEO-CONFERENCE PROCEEDINGS at the hearing in the above-entitled cause, before the Honorable JAMES B. LINN, one of the judges of said Division, on the 12th day of June, 2020.

APPEARANCES:

DANIEL K. WEBB,
SEAN WIEBER and
SAMUEL MENDENHALL,
Special Prosecutors,
appeared for the People;

TINA GLANDIAN,
WILLIAM QUINLAN and
DAVID HUTCHINSON,
appeared for the Defendant.

REPORTED BY:
Rosemarie LaMantia
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THE COURT: Smollett.

For a matter with the special prosecutors, and I'm asking is the special prosecutor Mr. Webb and his office available? I see Ms. Glandian and Mr. Hutchinson and Mr. Quinlan. And I see a special prosecutor too.

This is the case of People Versus Jussie Smollett. Is everybody ready to proceed on that?

MR. WIEBER: Yes, your honor, on behalf of the OSP we're ready to proceed.

THE COURT: I'm asking lawyers, please, identify yourselves for the record and who you're representing.

MS. GLANDIAN: Good morning, your honor. Tina Glandian on behalf of Mr. Smollett.

MR. QUINLAN: Good morning, your Honor. William J. Quinlan and David Hutchinson on behalf of Mr. Smollett too.

THE COURT: Okay. And who is here for the special prosecutor's office?

MR. WIEBER: Your Honor, Sean Wieber, W-I-E-B-E-R, deputy special prosecutor.

MR. WEBB: Your Honor, also Dan Webb from the special prosecutor's office and Sam Mendenhall from the special prosecutor's office is appearing today for the

special prosecutor.

THE COURT: All right. We're here today to deal with the defense motion to dismiss the indictment on double jeopardy grounds.

Is Mr. Smollett watching these proceedings or listening to these proceedings?

MR. QUINLAN: I believe, your honor, I've spoken to him, I know he was dialing in as of four minutes ago. I am texting with him right now. He is getting on. I will say when I heard your call I did text him and say I thought you were running a few minutes behind because I thought the call was going on. He is getting on right now. He is just texting me.

THE COURT: All right. I am offering him the opportunity to appear just by way of audio, without video. If he -- certainly if he wants to appear by video, he can but he is offered the chance just to appear by audio. I do think he should hear these proceedings. We are talking about a substantive motion today. So let me know when he is on, at least by way of audio and then we can deal with this motion.

MR. QUINLAN: Sure. Can you give me two seconds, your Honor? I apologize.

THE COURT: Yes, sir.

THE DEFENDANT: I'm here.

THE COURT: I'm sorry, relax. It's okay.

Mr. Smollett is here, and you're appearing by audio, and you're waiving your right to appear by video, but you're going to be present as far as --

THE DEFENDANT: Yes, sir.

THE COURT: By the way, where are you right now, geographically? Just generally what city are you in?

THE DEFENDANT: Myself?

THE COURT: Yes.

THE DEFENDANT: Los Angeles.

THE COURT: Okay. That's fine.

All right. We have -- I received the pleadings from the lawyers. The defense filed a motion to dismiss on jeopardy grounds, a 16 page motion. Over the course of time, the government, the special prosecutor I should say filed a 14 page response. Petitioner filed a 34 page response -- reply to the response and the government, special prosecutor rather filed a 12 page sur-reply to that motion. I think -- I've got all of the pleadings, all 76 pages of them, of course there are some exhibits. The parties wish to oral argue the -- argue orally in support of your pleadings?

Who will be arguing for the petitioner?

MS. GLANDIAN: Your honor, I will be doing the oral argument today.

THE COURT: Sure. Ms. Glandian, what would you like to say in support or your written motion?

MS. GLANDIAN: Well, your Honor, I'm happy to start, this is obviously our motion, however I do want to point out that the preponderance at this point now that we've raised the former jeopardy issue, the burden of proof is actually on the office of the special prosecutor to show by a preponderance of the evidence that the case is not barred by the double jeopardy clause, and so I wanted to start with that.

I think this case is obviously very interesting and very novel in that, you know, certainly with our research we couldn't find anything that was factually even very close to this case and the reason for that is typically if a criminal defendant upholds his end of the bargain, if there is an agreement, whether formal or informal, with the prosecutor and the defendant holds up his end of the bargain, the case is never re-charged.

And so this is obviously an unusual situation where Mr. Smollett back in March of 2019 made a

decision, and for him it was a difficult decision because as the court knows he has adamantly maintained his innocence since the charges were first filed, and when we had -- when the prosecutor put this offer on the table of a dismissal, once they were satisfied that he had been doing and was doing community service, and if he were to forfeit his bond, they would dismiss the charges. That was a difficult decision for him at the time because he did want to clear his name. He didn't want there to be an admission of guilt because that is not his position, however, he also saw the affect this was having on his life, on his career, on -- you know, he couldn't even go outside. His family, everybody was -- people were receiving threats and that was a scary and uncertain time for him, and we had told him we're happy to take this matter to trial but you're looking at least at about a year. If we want to get the discovery, review that, prepare for trial, this is going to hang around for almost a year. And so he made a decision to waive his speedy trial rights at the time to accept that disposition, which was -- we went back and forth with the State's Attorney's Office at the time and the decision was that if he forfeits the bond and the prosecutor was satisfied he finished his community

service, that the charges would be dropped. He did that. Nothing on his end changed after that.

And here we are, you know, almost a year and a half later because of irregularities, if the court wants to call it that, within the State's Attorney's Office, and he should not be penalized for that.

I think it's interesting the office of the special prosecutor has now taken the position and they repeatedly state in their pleadings that Mr. Smollett has not been punished. And, you know, we would ask the court to take judicial notice of Dan Webb's own words, and these weren't words that were spoken hastily, you know, in some sort of a press conference or upon inquiry by the court, but in a prepared, written statement that he issued on the day of the new indictment. He specifically in his own words said that the initial criminal prosecution of -- that during the initial criminal prosecution of Mr. Smollett, well, the only punishment for Mr. Smollett was to perform 15 hours of community service and requiring Mr. Smollett to forfeit his $10,000 as restitution to the City of Chicago.

So at the time before we raised the issue of this being barred by double jeopardy the special prosecutor had acknowledged in his own words that he had

been punished, but in his information of release he goes on to basically state that he disagrees with the disposition previously given by the State's Attorney's Office and now that is exactly the type of evil that the double jeopardy clause is meant to protect.

There cannot be second guessing, different prosecutors will view the same case in different ways and a criminal defendant deserves the right to rely on representations made by the state's officials and to a disposition which at the time was represented to be a final disposition.

Now, I understand it was nolle -- it was a nolle pros, which if there hadn't been -- not been a bond forfeiture, I agree that the State's Attorney's Office could have decided to re-prosecute, however, the law is very clear that when you have double jeopardy and you have nolle pros, the double jeopardy trumps the nolle pros.

So even if there were typically, you know, the State's Attorney could re-prosecute the case, they cannot do so if there is double jeopardy at issue here.

Now, that said, there is various arguments that were raised in the sur-reply that I'd like to address.

I know, you know, here we talked a lot about the -- there shouldn't be a rigid, mechanical application of the double jeopardy clause and the court really should adhere to the spirit of what the clause intended to protect.

And just to give the court an outline of what Mr. Smollett has been through in light of this -- what typically would be deemed a low level Class 4 felony, which would long had been resolved by now.

So here we had -- in February of 2019 the initial bond hearing and he appeared for that.

A couple weeks later he appeared in court because the media had requested extended media coverage.

Two days after that he appeared for his arraignment.

And in March again he appeared at the time that the State's Attorney's Office moved to nolle pros the case and that was dismissed.

Immediately after, the same date his charges were dismissed, the Chicago Police Department released a large volume of discovery.

And then on March 27th, following day, the media intervened and they tried to get an unsealing of the records that in our opinion were properly sealed,

however because there was so much public interest in this case the court ultimately granted the unsealing, but for months Mr. Smollett still had attorneys who were regularly that he had to pay to appear to represent him because there was no -- there was an ongoing process, and then simultaneously the City of Chicago also, you know, sued him and is trying to -- and that's an ongoing case, which he intends to fight.

And so here I understand that this case has drawn a lot of scrutiny and the public wants to know what happened, and, again, if anybody wants the facts of that night to come out, it is Mr. Smollett and that is precisely why he didn't settle the civil case. It would have cost him and it would have been much easier for him to just pay the demand that the city made if he -- at the time the criminal case had been dismissed and if he had paid that demand, he could have moved forward but he did want the opportunity to clear his name.

That does not mean he needs to do that simultaneously and be dragged through another criminal prosecution when he is already -- all of the purposes behind the double jeopardy, which is to avoid the expense, the humiliation, the burden of a criminal prosecution, he has been enduring since February of

2019, and this is a second entirely new prosecution. This is not the nolle pros where a State's Attorney's Office reinstates the charges.

So even though the office of the special prosecutor keeps discussing this as a nolle pros, this is not actually a reinstatement of charges. These are entirely new charges by a new prosecutor with a new grand jury before a new -- before a new judge your Honor. And so this is not again -- this is far from the typical nolle pros that the special prosecutor keeps invoking.

But that said, again, he has -- he intends to proceed with the civil case. This matter will be ultimately determined in a court of law but he has now -- he long moved out of Chicago because at the time this happened, even though great lengths were taken by Chicago Police Department to redact information as far as the identity of the cooperating witnesses, even though that information was public, what they didn't take great care to do was to redact Mr. Smollett's home address from the documents that were released and so immediately Mr. Smollett's home address was publically released and he immediately moved out of the state of Illinois because it was a dangerous time for him to be

here, and so now he lives out of state. To drag him back into court when he has in affect done everything that the special prosecutor would want him to do.

We had -- the State's Attorney's Office obviously defended this position. They're the ones that came forward and repeatedly said this was the equivalent of a pretrial diversion. This was like a deferred prosecution and they said they do thousands of these, you know, annually, and the court know this. I am sure the court sees other cases, low level felonies get resolved like this every day.

And, again, you know, people talk about celebrity justice and how he has gotten it better. He has gotten it so much worse than an ordinary citizen, an ordinary person charged with a Class 4 felony.

A lot of false report cases don't even get prosecuted and at the time there was a case very close in time to the initial charging of Mr. Smollett. And it was a woman I believe in a park who had made a false police report about a stabbing and that case didn't even get filed on.

And so they've made an example of Mr. Smollett. He has been put through enough, and, again, I think it's in support of the principles of double

jeopardy to dismiss this case and, again, by dismissing this case it does not mean that the facts will not inevitably come out because again there is a parallel proceeding.

And just a few other points I want to address from the sur-reply and then I am open to questions, if the court has any.

I know one of the issues that the special prosecutor raised was that, you know, a fine can't be the only disposition in a felony case. That is, again, already the record shows that at the time of the dismissal it wasn't just the fine. The State's Attorney's Office put on the record that it was satisfied as to his community service. So that was a second component and that is a part of the informal resolution of this case.

THE COURT: Are you saying that the bond money was a fine?

MS. GLANDIAN: So the bond money, you know, at the time because we didn't think we were going to end up here nobody thought that we had to classify the amount as anything other than he agreed to forfeit it, and that was a condition that the State's Attorney's Office was requesting and requiring as a part of the dismissal.

And so when we agreed to it nobody labeled it anything. And I think loosely the State's Attorney at least in public statements has referred to it as restitution, however, when we looked at the issue it actually can't legally be restitution because as we cited to the court there is very clear case law in Illinois that you cannot have criminal restitution separate if they're suing, for instance, in the civil case under a specific statute but in a criminal case you cannot have criminal restitution paid to the city for the investigative costs that the police department incurred because that is their function, and so that can't technically be restitution.

So even though I know in various, you know, different forms this has been referred to as restitution by the State's Attorney's Office, it can't actually be restitution.

So what did -- as far as Mr. Smollett was concerned this money was a fine. It was a penalty that he had to pay in order to resolve this matter and it is something that he agreed to do while maintaining his innocence like many defendants.

When you get a parking ticket, even if you think it was not fair, it was not right, oftentimes you pay the ticket because you want it done, because the

obstacle of trying to challenge it is a lot more burdensome than just paying for something even if you don't believe it was properly issued, you don't think you deserve to pay, you don't think guilty of whatever the parking violation may be or a traffic infraction, whatever the case may be.

And so much like that and so when you compare it and when you look under the law what this forfeiture actually was it was a fine. It was the equivalent of a fine. It could be nothing else.

And, again, the special prosecutor also examined his community service. He did have to go through some of the hoops that somebody doing the pretrial diversion or a deferred prosecution would do you. And it well within the State's Attorney's Office as to how and when to dispose of the case.

And I know that they raised the fact that -- I think they stated somewhere that it's a pre-plea diversion. It's a pretrial diversion.

The State's Attorney's Office has the -- even though may be oftentimes it's offered in bond court, the State's Attorney certainly retains the discretion to offer the pretrial diversion after that proceeding, shortly after he had pled not guilty and that's what

happened in this case.

And we're -- just so the court is clear, we're not the ones who came out and labeled this anything. It was the State's Attorney's Office by numerous different representatives who repeatedly said, yes, we resolved this case as any typical -- just like a pretrial diversion, just like deferred prosecution, that's what it was.

And another interesting thing --

THE COURT: Let my inquire. Didn't -- when the supervising State's Attorney sent out an email to some other people about the case saying that we could offer a diversion, if not, we'll just indict and then take it from there and then apparently they did indict as opposed to putting him in a formal diversion program? Is that not what happened?

MS. GLANDIAN: I think that did happen, your Honor, but nothing precludes the fact that they could offer diversion again weeks later, once they looked more quickly at the evidence, obviously at the time -- I don't know how the charging decision was made. Obviously in our opinion it was an unusual, highly unusual decision to do a 16 count indictment out of one false police report but that's how they decided to

charge it, and so their timing and what went through their heads as to when to offer the disposition that they did that's within their discretion the way I see it but they're the ones who after the fact labeled this, their own actions, as the equivalent of a pretrial diversion. They didn't even say equivalent. They said this was a pretrial diversion, and they handled it in an informal manner, and that is within their discretion.

And, again, what is most I think frustrating to the defense here is had Mr. Webb come forward and said, you know what, we did this investigation, and we found out that there was something improper during the previous negotiations. There was something untoward. There was something unethical. Nothing of that sort.

If anything they looked at all of the communications, all of the records, all of the internal correspondence in the State's Attorney's Office. And what is very clear is that this was an absolutely above board typical negotiation like in any other case and the defense in all of those communications maintained that Mr. Smollett maintains his innocence. He will take nothing short of a dismissal, however, there was some compromise and, again, he ended up agreeing to the forfeiture of the bond and to satisfying them to

community service because he wanted the case over and done with and because there was no required admission of guilt but we recognize that that was in a form of course a penalty. He didn't have to forfeit that and as much as the special prosecutor now wants to say it was voluntary, I guaranty the court Mr. Smollett did not wake up morning and say I want to forfeit $10,000 to the City of Chicago because I appreciate everything I've been through. He did that strictly because he was told that if you forfeit the money this case will be dismissed and he just wanted closure. He wanted finality.

Again, he did want the story to come out and, again, that is why he made the decision not to pay the civil penalty and to proceed to trial in that case so that this does come to light, but he certainly did not expect this to happen.

And, again, I think had there even been new evidence, there was no new evidence that the special prosecutor uncovered. Their information release is crystal clear that they just disagree. They think that was not sufficient punishment. They don't like the way that this was resolved and so now they're going to give it a second bite at the apple, and that is exactly what

the double jeopardy clause prohibits.

And we'd ask this court to put aside all of the emotion that has been involved in this case and to look at this the way you would any other criminal defendant standing before your Honor who has been punished, who has been -- had this case hanging over their head for a year and a half for something that again there is no tangible victim, there is no, again, criminal restitution that is owed.

If they want to try to seek something civilly, again, that is a separate proceeding but criminally there can be no restitution and there is nothing else to impose on Mr. Smollett. This isn't a case where there should be drug treatment. This isn't a case where he needs to complete education. Again, anything he -- and that's why I said, had he been enrolled in a deferred -- in a formal pretrial diversion this would all be -- he would have completed everything he had to complete.

And so we would ask the court to at this point to recognize what he has been through, recognize that it's unsupported. And the cases that we cited, they were out of state cases again because it was very hard to find anything directly on point, but the courts

in those cases really looks at the core of the double jeopardy clause.

Even if there had been a mistake where, you know, in one of the cases we cited a letter had been mistakenly initiated or there was a misunderstanding by the defendant as to the fact that the defendant didn't have an attorney and thought he had to enroll in the courses when he didn't have to, it was an option, however the court looked at that, may be this would have all been avoided if he had a lawyer, however, he did reasonably interpret that to be a requirement. He completed it and we're not going to penalize him again.

And that's what we're asking the court to do. Mr. Smollett reasonably relied on the representations of the State's Attorney, the entire office, and so this was a case that there was no reason to think that this is something that is being done without approval, without authority.

Again, we disagree with the findings that Judge Toomin made and that is the subject of another motion, however, whether he did or not that is not -- that shouldn't affect -- that shouldn't penalize Mr. Smollett. If anything that should bar the prosecution because that is something that was an irregularity if

the court agrees with that within their office, and, again, Mr. Smollett did nothing to invite this. This isn't some sort of invited error or whatever we want to refer to it as. He complied, he had been extremely diligent through all of these proceedings. He hasn't done a single thing that hasn't been required. He's always been present when he's needed to be, even long after the case was dismissed. He went back to his law abiding life, which he has always maintained, which is to do community service, which is to do good deeds and that is who he was before, who he still is, who he has always been.

And so I just think there is absolutely nothing to be gained by further prosecution other than to violate his constitutional rights and to, you know, at this point really harass him. So we would ask the court to dismiss the case.

THE COURT: Thank you.

Mr. Wieber.

MR. WIEBER: Good morning, your Honor. Thank you for carving out some time during your emergency call. Counsel, it's good to see everyone virtually.

On behalf of the State, your Honor, you just heard Ms. Glandian ask you, implore you to put a motion

aside, and we'll do that. She has talked about what the State's burden is and that's not a problem. We're going to embrace it. Why? Defendant's motion fails as a matter of law and it must be denied and I'm going to give -- you heard some law but you've heard no law on the argument today as the legal argument, the legal determination that you actually have to make on their motion, and so it's my obligation to give you that law and to give you a recent framework and I think there is three major points in the response, and I'd like -- I will roadmap those points and I will just spend just a very briefly walk through those three points.

Your Honor, the first point, U.S. Supreme Court and Illinois Supreme Court law is quite clear. It falls into a black letter category. You can't have double jeopardy without former jeopardy.

And as explained in the State's brief, as I will explain a little more in detail, jeopardy never attached and the starting point in any double jeopardy analysis of course is making the determination of whether or not jeopardy has attached. And that actually ends the analysis and the defendant has not overcome that either in 50 pages of briefs that have been submitted nor the argument here this morning, your

Honor, and that is the threshold legal determination.

But point Number 2, your Honor, even if you set that dispositive analysis and that issue aside, the question becomes whether defendant voluntary bond forfeiture, okay, I will put that in quotes, quote, voluntary bond forfeiture, those are not my words, those are the defendant's words in his motion at page 10 pursuant to what the defendant himself also called, quote, an informal agreement, end quote, those are not my words. Those are the defendant's words through his counsel in his reply brief at page 25.

The question of whether or not the voluntary bond forfeiture during an informal agreement constitutes legal punishment for purposes of double jeopardy and legally it does not.

In fact, I'll discuss when a non-pros is entered before jeopardy, the law is quite clear under Illinois Supreme Court law and other law that the State is entitled to either re-file or bring additional or new charges against the individual defendant.

Your Honor, the third point. I'll call it the Hail Mary alternative, and why do I say that. The defendant himself notes that it's without Illinois legal authority and without Illinois legal precedent that

applying a double jeopardy to the Cook County State's Attorney's Office's deferred prosecution program, it is commonly referred to I believe as Branch 9 program, to this case under these facts are unprecedented, especially when the defendant admits, not me, defendant admits:

One, that he never entered into such a program, that's in the reply brief at page 24, but rather, quote, effectively completed the program, reply brief at 7, but also for all practical purposes completed the program, again, in his reply brief at page 9.

Those three fundamental issues are dispositive.

Turning, your Honor, just very briefly on the court issue in which the framework here determination must be made, it must be made, which is we all agree the one truism that I think both the State and the defense agree on is as follows:

Double jeopardy protects against three different types of abuses:

A second prosecution for the same offense after acquittal;

A second prosecution for the same offense

after a conviction;

And multiple punishments for the same offense.

It's that third multiple punishment prong that the defendant has focused his briefing and for which we'll focus the court's analysis.

But jeopardy, your Honor, attaching remains a prerequisite even when the defendant challenges the multiple punishment aspect. How do we know that? We look to U.S. Supreme Court law, we look to Illinois Supreme Court law.

For example, the Bellmyer case that the State cites, 2002 case. There Illinois Supreme Court says quite frankly, quote, the starting point in any double jeopardy analysis of course is determining whether or not jeopardy has attached.

Okay. We'll take that as a fundamental principle for which we actually all do agree.

What -- where do we go from there? Cabrera, a First District 2010 case that we cite, I think is the best roadmap for your Honor's determination on that threshold issue of whether or not jeopardy has attached. And it quite clearly articulates three instances when jeopardy attaches.

One, when there is a jury trial where the jury is impaneled and sworn.

Two, when there is a bench trial, when the first witness is sworn, and the judge begins to take evidence.

And, three, if there is a guilty plea hearing, when the guilty plea is accepted by the trial court.

Those are the recognized standards under Illinois law for which the jeopardy can attach. That's the threshold issue. Applied to our facts, your Honor, as Ms. Glandian has pointed out about what occurred in March of '19 in the 19CR case, Mr. Smollett's case was dismissed 12 days after arraignment.

In what fashion, if fashion matters, they said that they hadn't thought about it. They didn't know what name to put on certain aspects. Here's the name. It's a nolle pros and then we look at the caselaw.

What does caselaw, the legal determination here say, we cite two supreme court cases from Illinois, the Hughes case, the Milka case and then also a Norris case, a Third District case, which quite clearly articulates that when a non-pros is entered before

jeopardy attaches the State is entitled to re-file those charges or to bring new charges.

That is exactly what's happened here.

Looking at whether or not it's a punishment, a voluntary release of a punishment is the next argument that Ms. Glandian has brought up.

What is it? What is the $10,000? I can tell you what I believe it to be because I'll use the defendant's own words, and I'll also importantly tell you what it is not.

It is voluntary consideration for the non-pros. He paid $10,000 and 15 hours of community service in exchange for finality? No. He did not in exchange for finality. It was in exchange for nolle pros and you just heard, although I don't think Ms. Glandian was the lawyer negotiating that deal, instead it was former Judge Holmes negotiating that deal on behalf of Mr. Smollett, the subjective intent does not matter. We look at what actually occurred, what was the consideration that the Cook County State's Attorney's Office thought, was the author of the nolle pros? What did the defendant bring, the $10,000, that is the voluntary consideration, and because now he has a subjective intent that perhaps either, A, didn't

understand, or, B, his counsel did not understand what it is that they were bringing to the table and what it is that they wanted does not fall at the special prosecutor's feet. It was a condition of the dismissal, be it a non-pros. It was not a sanction imposed by Judge Watkins. It was not a disposition entered by Judge Watkins. He had not been convicted or sentenced and no court ordered Mr. Smollett to forfeit his bond, in fact, you heard it, it was in exchange for the non-pros.

So the concept as a legal punishment, again, you first have to get through the double jeopardy analysis of attachment, which hasn't been addressed at all by the defendant because they know they can't get out from underneath it so they leave it alone at the legal punishment analysis but that analysis also falls short.

Your Honor, on what I call the point 3, the Hail Mary, the concept of effectively completing a deferred prosecution program without actually enrolling in it to me belies not only common sense, but it's at no moment under your legal analysis under the law.

The defendant admits he did not enter into a DPP or a diversion or Branch 9 or any other program of

that sort, instead, instead, he entered in the informal agreement.

How do we know that he didn't enter into the Branch 9? Well, one, he admits it. Two, as you know, I moonlight as a prosecutor, your Honor, you live in the world, you have a better understanding than I of the Branch 9 requirements but at a minimum I've educated myself to have a good understanding that it requires a written agreement with the State that has to be then presented to the judge presiding over that and it lists a whole laundry list of requirements and there can be added requirements but there is at least some core compliance. For example, submitting yourself to pretrial services, paying full restitution, can't possess marijuana or other drugs, you can't break the law. There is an intense community service hour requirement, nearly 100 hours if you're not employed for the duration, and importantly it requires a minimum one year check-ins.

We know he didn't participate in it and instead they say he effectively complied but effective compliance is no compliance at all because there was no actual enrollment.

Your Honor, just very briefly on a couple of

points that Ms. Glandian has brought up as it relates to the reply.

The concept of the information release that Mr. Webb put forth in conjunction with the special grand jury's six count indictment in February of '20, I worked -- I've had the pleasure of working with Dan since I joined the firm in 1999. He serves as a mentor to me. I think there is no doubt that both his legal career both as a prosecutor, going back to the federal courts, but then obviously as a civil trial lawyer, he has done a lot of things, but here is one thing that I know that he has never done. He has never changed black letter law through the release of a press statement. You can't. There is no law that was cited for this proposition because it doesn't exist.

The concept that the prosecutors' own words can change Illinois Supreme Court or U.S. Supreme Court law is not supported not only by Illinois cases but anywhere in the juris prudence of American history as we've seen that legal tenement play forward. So as much as I could say that he has worked some magic in other cases the concept that he could through that press release had used that word that it would have a legal meaning for purposes of your assessment today on the

double jeopardy again belies the law.

The last point, your Honor, is Ms. Glandian has raised what was going on perhaps in Mr. Smollett's own mind for what he bargained for. It is neither here nor there. I don't need to prove nor do I need to question as to what was either in his lawyer's mind or his mind, but what does matter, your Honor, is looking at the effect of what it is that they actually entered into, which is a non-pros with zero certainty of finality and it's that loophole, if you wanted to call it, that allows under Illinois Supreme Court case law for a prosecutor just like Mr. Webb did to reassess and to present charges and it does not at all trigger the double jeopardy attachment, the punishment analysis, has clearly not anything to do with the DPP program, and it's for those reasons, your Honor, based on the law as applied to these facts that we can and we ask and I think you must deny defendant's double jeopardy motion and we thank you for the consideration.

THE COURT: Okay. Ms. Glandian, do you have any other comments you wants to make?

MS. GLANDIAN: Just very briefly, your Honor. Obviously we did extensive briefing in this case. (Unintelligible) -- that were just raised, we have

already addressed and distinguished in our pleading. I didn't want to be redundant today and go through everything that we already extensively briefed, however, in response to that I do want to note that we clearly cited United States Supreme Court law that says, and I'm going to quote, United States Marcus V Hess, and that is 317 US 537, which cites another U.S. Supreme Court case, Helvering V Mitchell. And I quote, criminal punishment subject the defendant to jeopardy within the constitutional meaning.

So they bring up these jeopardy and punishment as if they're separate things. We head on address the fact that we don't -- we're not disputing whether jeopardy needs to attach or not, because jeopardy did attach in this case. And it is very clear that in a case where a defendant is criminally punished that is effectively -- this is not the traditional requirement for jeopardy to attach in the sense of a jury needs to be impaneled and sworn in, when it comes to the multiple punishment prong of the double jeopardy clause, jeopardy attaches when there is criminal punishment and that is what our initial motion had focused on the fact that Mr. Smollett was criminally punished in this case.

And not only have we cited United States Supreme Court law, again Illinois has not had the occasion to address this precise issue, however the sister state courts that have looked at this issue have said in a case of pretrial diversion said you don't actually need a guilty plea for an adjudication of guilt in order for the multiple punishment prong to apply.

In the equivalent context where there has been a pretrial diversion program and somebody has completed certain things like a driving program or community service and the case has been dismissed the court has said at that point because they've effectively been punished and doing those things is the equivalent of a criminal sentence that jeopardy attaches at that point.

So in this case the fact the office of the special prosecutor could talk about the previous negotiation but they were not privy to them. This was long before they were involved. So they actually don't know and I know there was some reference that I wasn't the one negotiating this. I was very much involved. I represented Mr. Smollett from his initial criminal proceedings. So even though I may not have been on those particular emails I was always his counsel during

these proceedings and I know better than the office of the special prosecutor what the intent and what the negotiations were.

He did not get a nolle -- he did not agree to forfeit $10,000 in order to nolle pros this case for possibly what, a two week period, and then the State could re-prosecute? So this was for finality. The understanding and the agreement and possibly the court may need to hold -- if the court is going to give that consider -- consider -- give that argument any weight possibly we need an evidentiary hearing as to what -- what was agreed upon but for us this was a clear understanding that this was the end case, that the nolle pros was the, you know, but for them discovering something that they did not previously know, if he did what he was supposed to and everything was -- all of our representations had been accurate, which they were, that this would be the end of the case. So he had bargained for finality. That is what we thought we were getting. It's unfair now to turn back and say that could have been his subjective -- it wasn't a subjective belief. That was what was negotiated and bargained for. And it's not that we're unhappy with our bargain. It's that we're unhappy that they're not -- that the State is not

holding up its end of the bargain after he acted in detrimental reliance and he gave up not only $10,000, not only did he have to satisfy the prosecutors' (unintelligible) -- his community service but he gave up critical fundamental rights. He didn't want this to hang over his head for three years but at this point that's -- and obviously this COVID situation happened to even come along unexpectedly and delay matters further but this is something that happened in January of 2019. We're now June 2020 without a trial date. This matter could have been long resolved had there not been these promises which were not upheld and so he did it for finality. He would have at that time if he -- if he thought these charges may pop up again later, he would have just exercised his right to a speedy trial and had this resolved and, you know, it may have well also resolved the civil case, instead he has both proceedings now hanging over his head.

And, again, it is -- I don't want to rehash all of the legal arguments, if the court has any specific question, but jeopardy did attach. It attached not because it was dismissed nolle pros but because there was a bond forfeiture, which was something that the court ordered.

And the court should keep in mind as well all of this, just the same way typically a prosecutor can make a sentencing recommendation to the court, and the court may accept it or may reject it, and the court had the option to object to reject the nolle pros. The court had the option to reject the bond forfeiture. These were all things that had to be ordered by the court and were ultimately ordered by the court.

So it's absolutely no different than any other trial diversion, you know, absent a piece of paper -- (unintelligible) paperwork, which, again, the prosecutor was well within its discretion to say they're not requiring in this case.

MR. WIEBER: Your Honor, just 15 seconds, just briefly on just one point and then I'll be done and happy to entertain any questions.

I think there is some misunderstanding in briefing the subjective intent and now a mention of an evidentiary hearing. My point is it does not matter one iota on the legal analysis of what the subjective intent is. One only needs to look at what the legal result of the negotiations was, which was a nolle pros. Again, subjective intent for everyone involved is utterly irrelevant for legal analysis.

THE COURT: Okay. Ms. Glandian, anything else?

MS. GLANDIAN: No, I think we have covered it, your Honor.

THE COURT: Everybody is -- with their oral arguments?

All right. I'm prepared to talk about this case now and bear with me because I'm going to do a little bit clerical analysis on the case also.

I'm getting all of my information from the pleadings that had been given to me. They are very, very substantial. They're totally thorough, drawn by both sides. From the pleadings I've able to glean the historical context of the case. And part of the historical context of the case -- context because I believe impacts whether double jeopardy is applied here or not.

So I will start at the beginning. In the beginning when this case happens, and I've been referring by the pleadings -- to the pleadings and incorporating by all of the pleading by reference into my findings and my rulings today, but it begins on January 22nd, 2019. And at that point the petitioner Mr. Smollett reported to the Chicago Police Department that he received a letter in the mail. The letter

contains some white powder of unknown substance and it had threatening messages, including both racist and homophobic messages enough that he felt he needed to call the police, and he contacted police about that letter.

A week later on January 29th, a 911 call was made on behalf of Mr. Smollett not by him personally but by somebody on his behalf indicating that at 2:00 o'clock in the morning he had gone out to buy a sandwich and that he was attacked by two masked people. The masked men attacked him physically. They attacked him verbally. The attack besides being beaten indicated that he was being attacked verbally in a racist fashion and homophobic fashion. Among other things he claimed that -- it was claimed that a rope was placed around his neck, some kind of unknown substance was poured on him, and the attackers were announcing to him while they were doing this that their motive perhaps that this is MAGA country and because of their racism and homophobic attitudes that that was the purpose for the attack.

Now, it turns out and I think we all agree and it's not a secret, petitioner, Mr. Smollett, he was known in some circles as a television actor. He was on a show called Empire, that it was recently a popular

show amongst the people, people knew about it, and perhaps because of his celebrity and because of the nature of the claims, the extreme unsettling nature of these claims, this attracted quite a bit of attention from both the media, public officials, all the way from President Donald Trump on down condemning what appeared to have happened to Mr. Smollett, what he was claiming happened to him. The press was all over this case, became something of great public interest. There was quite a bit of attention placed upon it and the Chicago Police Department responded.

And when there are matters where there is great press attention and public concern, you can expect that there would be perhaps more of an effort by the police to get on top of it and solve it and at one point up to the 16 detectives were involved in the investigation of these claims.

Well, ultimately over a period of time during the course of the investigation, some of the dust settled, the Cook County State's Attorney's Office and at that time and still now the State's Attorney of Cook County is Kim Foxx, her office presented evidence before the Cook County Grand Jury and at the conclusion of that presentation on March 8th of 2019 the Grand Jury

returned a true bill against Mr. Smollett for lying about this and making false police reports. It was a 16 count indictment all for disorderly conduct. They're all Class 4 felonies and talking about different theories and different things that he had done according to the Grand Jury within the statute that were in violation of the law but basically for making it up, that it was a hoax and it was a false police report.

The matter went through normal channels. And I think it is necessary to talk about this, to talk about what happened on the date this case was dismissed and whether jeopardy attached or not, but through normal channels the case was assigned to one of my colleagues here in the criminal courthouse, Judge Steve Watkins.

The matter went to Judge Watkins and I believe it was on March 14th when Mr. Smollett appeared with counsel, and he was arraigned, entered a plea of not guilty, bond had been set, the discovery process had begun.

On that date both sides, both the prosecution and the defense, Mr. Smollett's attorneys agreed to come back to court on April 17th for a discovery check date.

It turns out on March 25th there had been some request by the media for extended coverage. They

wanted cameras in the courtrooms and other privileges and wanted to be present in a fashion that's provided for in some cases, had to go through -- make a lot of arrangements to do so but that request had been made and Judge Watkins signed an order on the 25th talking about setting a date of April 2nd for -- to discuss media coverage and whether extending media coverage be allowed or not allowed and if so under what circumstance.

So at that point we had two court dates. We had a date of April 2nd to talk about media coverage. We had a court date of April 17th marked as a discovery check date.

The very next day after Judge Watkins signed the order for the discussion of media coverage to take place on April 2nd, on March 26th, the parties appeared in court. The case was advanced. There was no notice given to the media, they were obviously interested, not that it is necessarily legally required, no notice was given to the Chicago Police Department, although that is not legally required, it appeared that there was really no general notice given to any of the people except the parties appearing in court. Mr. Smollett was there with counsel, and the State's Attorney's Office was there, and this was the colloquy that took place, and I'm

reading from the transcript, and this is what we're talking about today, this is whether jeopardy attached under these circumstances.

First there was some pleasantries. Good morning. How are you? Motion to advance is allowed. And Judge Watkins asked, all right, what are we doing? And this is the response from the assistant state's attorney, Judge, on today's date the State does have a motion in this case. After reviewing the facts and circumstances of the case including Mr. Smollett's volunteered service to the community and agreement to forfeit his bond to the City of Chicago, the State's motion to in regards to this indictment is to nolle pros. We believe -- (unintelligible) position and appropriate resolution to this case. And then there was discussion about the order about the bond being released to a particular person on behalf of the City of Chicago. Mr. Smollett's counsel at the time, Ms. Brown Holmes, Judge, we absolutely agree. We'd also ask the court to immediately seal the records, and that was basically the sum and substance of the proceedings.

So we have to ask today did jeopardy attach on that date of March 26th, 2019?

I will note that things happened quickly

after that.

The first thing that happened was -- even though the case appeared without notice to anybody, wasn't long held as a secret, everybody in the world seemed to know about this case almost immediately. The media again had tremendous attention placed on this case. All kinds of things were said and done about it. There appeared to be great engage in the community about what happened and how it happened and why it happened and again what exactly happened. There appeared to be quite a bit of distress in the public forum about the circumstances of that had been taken place, the short transcript I just read to you.

So what happened next is this and this is significant. On April the 5th, 2019, a citizen Sheila O'Brien appearing pro se came before the presiding judge of the criminal division, Judge Leroy Martin, asking that a special prosecutor be employed into investigate the circumstances of what happened on March 26th, the entirety of the matter, indicating in her opinion that it was very inappropriate and that a special prosecutor would be required in the interest of justice to search out the truth and to actually double back and prosecute Mr. Smollett for what was -- he was accused of doing

originally, of course he's always presumed innocent.

Ms. O'Brien appeared pro se. She's in fact a retired lawyer. We all met. She is a retired judge. She has been an associate judge in two different counties in the State of Illinois. She actually served as an Illinois Appellate Court justice previously but she appeared in this matter pro se.

Judge Martin in his wisdom in recognizing the public interest in this case and trying to make sure that things were handled the most appropriate possible way decided to ask another judge, not from this building, Judge Michael Toomin, who at that point was a presiding judge in the juvenile division, Circuit Court of Cook County, to review this matter and to deal with Ms. O'Brien's pro se motion.

Judge Toomin is well respected. Nobody has ever questioned his integrity nor his legal acumen. I think it's fair to say that he enjoys a fantastic reputation among all sides of the bar and has for may years. He served for many years, in fact, he was actually in this building as a trial court judge. He served himself as an Illinois Appellate Court justice. He has been asked on previous occasions of matters of great public interest and concern to deal with whether

it's a special prosecutor's appointment for certain matters, and he was tapped into again for his knowledge, his wisdom and his integrity to review the petition.

There were hearings held. The hearings at some point I understand were contentious. The Cook County State's Attorney's Office, Ms. Foxx's office was opposing the motion. They were against the appointment of the special prosecutor but ultimately after taking the matter under advisement Judge Toomin in a 21 page written order did appoint the special prosecutor in this case. In this case it was Dan Webb who brought along with him Mr. Wieber and Mr. Mendenhall to investigate this matter.

And there were two general responsibilities.

Now, I'm not quoting verbatim but I'm talking generally about what Judge Toomin had in mind when he appointed the special prosecutor in this case, what their task was and what he wanted them to do.

Number 1 was in general would it be in the interest of justice to prosecute Jussie Smollett for that which was cited in the original indictment for the felony disorderly conduct claims that were originally brought against him, was that in the interest of justice?

And Number 2 whether there were any concerns that the special prosecutor might investigate concerns either legal or ethically about the handling of the original case, means that have gone on pre-indictment and post-indictment, enough that the special prosecutor ought to investigate, report back to the court and indicate whether or not they thought further proceedings on their behalf were required.

I will note that when Judge Toomin prepared this order putting the task to the special prosecutor about the possibility of Jussie Smollett being prosecuted for this matter, he never considered the possibility that jeopardy had already attached. He was well aware of what happened on March 26th. We have the same transcript that I just recited from. There was no question about the facts of what happened but it never occurred to him that he was asking somebody to consider prosecuting somebody that they can't prosecute constitutionally because double jeopardy attached, but he did have other concerns as well besides his ignoring the jeopardy issue because he never saw it at that point or never if he did consider it didn't consider it worthy of mention in his order, but he did have concerns about things that happened within the Cook County State's

Attorney's Office involving Miss Foxx in particular.

The matter as we've already described, this matter of great public interest, the press was contactually talking about the case and at one point Ms. Foxx indicated that she was recusing herself from participation in the case and she was at some point candid and acknowledged the fact that she had had ex parte communications with people on behalf of Mr. Smollett, she talked at least to one family member of Mr. Smollett ex-parte. Whether these conversations were -- during the course of the investigation, whether he was still considered a victim of the crime or a suspect in the crime, I think that was a fluid matter but in any event she acknowledged that she had had conversations with people on his behalf and she told the public and told members of her office that she was recusing herself from further proceedings.

Judge Toomin was very concerned about that and he talked at some length in his order that there is no such thing as a colloquial recusal or an informal recusal. If the State's Attorney does recuse themselves from any matter, and it doesn't matter what the matter is or what county the state's attorney is in in Illinois, but any time a State's Attorney believes it is

necessary to recuse themselves they cannot merely assign someone from their own office to go ahead and continue with the prosecution, the handling of the case, can't work like that. They have to go back and get another prosecutor, a special prosecutor to address it, that the office is recused along with the State's Attorney, and he was very concerned about how that happened.

And Judge Toomin also believed, he went on in some descriptive language, talked about the fact that since the State's Attorney had recused herself and the State's Attorney had ignored apparently some advice within her own office from other supervisors that she couldn't recuse herself in that fashion, just assign the case to somebody else, but nonetheless continued to do so, he was concerned about what that meant for the future of the proceedings and according to Judge Toomin everything that happened from the moment she recused herself was void because once she said she is recused there is no State's Attorney on the case. Until there is a special prosecutor on the case everything that happened is void.

Now, the recusal on this case was announced and became a matter of public knowledge on February 13th, 2019.

The indictment meant was returned on March 8th, so the recusal came before the matter even came back from the Grand Jury, and the nolle pros of course happened on March 26th.

So what is left? So the court has to decide now what happened on March 26th is that double jeopardy.

The court will note obviously that we're here now because the special prosecutor's office, Mr. Webb, Mr. Wieber, Mr. Mendenhall, they did accept the task given to them by Judge Toomin. They went before another Grand Jury. They got the Grand Jury to turn a true bill, now a six count indictment against Mr. Smollett.

Now, I will note that we're talking about the same basic incident although the indictment returned by the special prosecutor's Grand Jury is different than the State, it talks about different events and different facts than the indictment brought originally by the Cook County State's Attorney's Office, the original 16 count indictment. So it's similar but the particulars are indeed dramatically different.

The case got assigned to this court and was -- when the case came to this court for assignment several things happened on that date.

Now, again, I am incorporating by reference

all the pleadings in this case. What I'm not considering, although you're arguing it, both sides are talking about it, but I can't consider things totally outside the record. By that I mean -- (unintelligible) statements made to the press by other side, things that the petitioner or his lawyers may have said to the press, or other communications outside of court, I'm not considering those. Statements of the special prosecutor in press releases, I am not considering those as well. I am not cherry picking little things that were said by people and taking it out of context. I believe I am confined to what happened on this short transcript, which I've already read into the record, and which is a matter of record.

I am persuaded again that I've gotten all of the applicable law that applies to this case by the submissions by both sides. They're as thorough as could possibly be.

And I will note that what happened next was of interest.

When we came to court, Mr. Smollett appeared in court. He had counsel. He had supporters. The special prosecutor appeared. There were three lawyers. I got a court file. I was about to start the way we

always start a case the first time with an arraignment and I was asked by the defense to delay the arraignment. Why? Because I was told that that very day, the date the case was set for arraignment, the case was assigned to this courtroom, that a petition had been filed with the Illinois Supreme Court challenging Judge Toomin's order saying that he was in error, that he should not have signed the order that he signed, that the proceedings never should take place and shouldn't get to an arraignment because what Judge Toomin did was wrong and in error and I was asked to delay the arraignment.

So a brief discussion about that, was indicated that there was no stay from the supreme court, even though a petition had been filed. The special prosecutor indicated that they hadn't seen the filing of the supreme court yet alone had a chance to respond to it, but in any event the court, this court, myself, I agreed to continue on in a normal fashion.

We had an arraignment. A plea of not guilty was entered. Bond was set. Discovery process had begun and I did receive and accept the motion to dismiss that we're talking about now, the motion to dismiss on double jeopardy grounds.

Well, the motion was substantial. It was

thorough and the special prosecutor of course wanted a chance to respond and read it, and we set up a briefing schedule and the briefing schedule was finally completed, and I got two submissions from both sides and now we're here today.

I will note that between the date of the arraignment in this courtroom and today's date, the Illinois Supreme Court did rule on the petitioner's motion to dismiss claiming that Judge Toomin was in error when he declared that prior proceedings under Kim Foxx be void from the moment that she had recused herself, they did weigh in. They denied that motion. They just denied it based on the pleadings. So as far as this court can tell Judge Toomin's order appointing the special prosecutor and not finding any problem with double jeopardy grounds that order stands at this point at least according to the Illinois Supreme Court.

So let's say that Judge Toomin is correct and all the proceedings are void, we can't have jeopardy on something that happened that something is void. If it's void ab initio, you cannot have double jeopardy, so the motion would be denied just on that grounds alone because nothing ever happened because it was void in the first place.

But let's assume argument, arguendo, let's talk about the fact that, well, maybe it wasn't void, maybe there is other reviews that we can make of Judge Toomin's ruling at a later time, let's say it's not void, did double jeopardy attach for what happened on March 26th.

Now, in the most simple terms now, I think we can all agree, and I'm just trying to make it as easy and basic as possible but there are two prongs to look at when you're talking about double jeopardy.

One, you can't be prosecuted more than once for the same offense;

And, two, you can't be punished more than once for the same offense.

I think it's clear, everybody knows that he wasn't -- there was no trial in this case. There was no jury empaneled, no witnesses were sworn, no evidence was heard, no guilty pleas were ever entered, either an altered plea or non-altered plea, nothing like that ever happened. There was no adjudication in this case.

Then the question becomes, well, was there punishment enough for double jeopardy to attach, and the punishment that is being urged is the voluntary service in the community and the agreement to forfeit his bond

to the City of Chicago.

Now, it's urged to be looked at as punishment in two possible ways.

And one of the ways is that it's really like a deferred prosecution, although I think both sides agree and there is no -- nobody is suggesting otherwise the case didn't take a normal course of action by statute or by Cook County's general rules and procedures for a deferred prosecution. It didn't go to another branch court. It wasn't monitored by another judge. There was not a year of supervision or monitoring in the case that ever took place. There were no conditions that were opposed by any judge. It was all things outside of what would normally happen if there is a deferred prosecution, the case went to Branch 9.

So it wasn't -- I cannot find here that this can be treated as deferred prosecution because it certainly wasn't.

Then the question becomes, well, maybe you should look at it as a fine, and that the -- the money that was forfeit ought to be considered a fine. Now, I've looked again at the transcript and there was an agreement to forfeit the bond money that was posted in return for the nolle pros. The agreement was -- was

kept by the Cook County State's Attorney's Office, whether it was void or not void, they kept up their half of the bargain but does that agreement mean that double jeopardy attached.

The concern I have about talking about this as a fine is that if you look at the Illinois statutes on what a fine is, a fine is something that happens as -- it's one of the available remedies and one of the available sentences for a criminal conviction or a finding of guilt where somebody is placed on supervision.

You cannot have any criminal penalty whether it is jail, whether it is probation, conditional discharge, supervision, fines, community service, none of that can be ordered on the innocent or the presumed innocent or the un-adjudicated. That can only happen if somebody is found guilty.

Now, it's been made abundantly clear that Mr. Smollett is absolutely asserting his innocence. He is absolutely presumed to be innocent. To say that he paid a fine which would be a criminal penalty and it can only be imposed on somebody that is guilty in some fashion or another does not apply in this case.

So it wasn't a deferred prosecution. It's

not a fine. There was an agreement between the State's Attorney at that time, whether it's void or not void, the agreement was met, but to say that he was either prosecuted, which he wasn't, that he -- go to trial I should say, he wasn't. There was never an adjudication, that he was criminally punished because you can't have a criminal punishment without there being a predicate finding of guilty, that didn't occur also.

Now what happened on March 26th I don't know exactly how to describe it. I've been on both sides of the bar and on the bench for decades now. I've never quite seen a transcript anything like that. Perhaps clarity will come about that at some later date. There may be other people to address that.

So without knowing exactly what did happen I do know what didn't happen and what didn't happen is that double jeopardy attached to that proceeding.

Accordingly the motion to dismiss is respectfully denied.

Inquire now, does the government, the special prosecutor, have you completed discovery? Is discovery complete?

MR. WIEBER: Yes.

THE COURT: All right.

MR. WIEBER: Can you hear me?

THE COURT: I can

MR. WIEBER: Your Honor --

THE COURT: Yes.

MR. WIEBER: This is Stan Wieber on behalf of the special prosecutor's office. Discovery has been complete. I can give you the details on the date they were completed on, but we provided -- but the answer to your question is yes.

THE COURT: Okay. We had talked previously that there may have been some perhaps federal reports -- (unintelligible) reports, has that been made available to you and tendered?

I don't want to know anything about what is in them but whether they have been tendered.

MR. WEBB: Your Honor's protective order that had been entered -- you entered that order on April 22 of '20 to help facilitate the federal aspects and those were tendered and have been tendered by the end of April.

THE COURT: Okay. So the government is done with discovery. So now my question is of the defense, Ms. Glandian, Mr. Quinlan, Mr. Hutchinson, do you anticipate any additional pretrial motions?

I'm not talking about motions in limine for trial but other pretrial motions.

MS. GLANDIAN: Yes, your Honor.

First of all, to address the discovery, the special prosecutor's office has indeed turned over a voluminous amount of discovery. I think it's close to a terabyte. We have been diligently --

THE COURT: Close to what? What did you say?

MS. GLANDIAN: A terabyte.

THE COURT: Okay.

MS. GLANDIAN: It was just a very, very large amount.

THE COURT: I don't know what that is but okay.

MR. QUINLAN: Your Honor, to put that in perspective -- this is Bill Quinlan. It's about literally the library of Congress as far as pages.

THE COURT: Okay.

MR. WEBB: I don't believe that's the case but --

THE COURT: Okay. Okay. Look. They have completed discovery. You're telling me it's a lot, that you have a lot to do. I get that.

My question, first of all, before I start asking you when you can file your answer to discovery is do you think you have any other pretrial motions to

file? Do you have anything you want to try to suppress, any 4th, 5th or 6th amendment claims, anything of that nature?

MS. GLANDIAN: Yes, but before on the discovery issue as we have gone through the process we've made a list, there are items that we believe are missing from the discovery. So they're saying it's complete, however in our view --

THE COURT: Tell me what is missing?

MS. GLANDIAN: There is a lot of investigative reports that are incomplete. There are certain things that are redacted, certain things that don't exists and then there is also some --

THE COURT: When you say investigative reports, are you talking about Chicago Police reports?

MS. GLANDIAN: David, do you want to address -- do you want to address the discovery? I think you have more of a --

MR. HUTCHINSON: Yes, so I mean, I think part of the point is that in light of the volume of data, you know, like we haven't been able to find certain notes of interviews with witnesses like really the key witnesses in this case --

THE COURT: Are you talking about Chicago Police

notes?

MR. HUTCHINSON: Or the office of special prosecutors' interviews of those witnesses from their subsequent investigation.

So, yes, so both the Chicago Police Department and the subsequent --

THE COURT: All right. All right. Are counsels communicating with each other about discovery? Are you telling them what you think you're missing and giving them a chance to respond to that?

MR. QUINLAN: Let me -- if I can just maybe from a -- (inaudible) perspective, to be fair, what we've tried to do and we can do it -- we didn't want to do it piece by piece, we've been trying to go through this, get a list of what we think is missing and partly just to the size and the way it was presented, and that's not any fault of Winston or the OSP, it came to us electronically, and trying to navigate through it in different, you know, electronic forms to make sure we can open everything --

THE COURT: (Unintelligible.)

MR. QUINLAN: Yeah, so we've been trying to go through it, make sure we have everything and not go to them and say, oh, we gave it to you, where is it, and

then come to them with a list, and between that and a little bit of a sheltering in place, if you will, we are fully completed with that --

THE COURT: All right.

MR. QUINLAN: -- but there are some issues. I'm sorry. I don't mean to talk over you.

THE COURT: No, no, I think I understand, so -- answer. The government thinks they're done with discovery and you think there may be a few things missing and you want to have a chance to get that organized and talk to them and see --

MR. QUINLAN: 100 percent, correct. Yes.

THE COURT: All right. Next question, and I am talking to the defense, do you anticipate any additional pretrial motions?

MR. QUINLAN: We do. We do. We will be filing a motion with -- at least at a minimum -- aside from the discovery issues, which you know we're not complete with --

THE COURT: Right. Right.

MR. QUINLAN: -- we are going to file a motion with respect to -- I'll say jurisdiction but really what it gets to -- and your Honor has alluded to it in its ruling -- but we're going to raise an issue with respect

to, you know, the preliminary findings of the office of special counsel which will deal with the appointment because it was obviously as you talked about Judge Toomin and, you know, his reputation --

THE COURT: Are you asking me to make a ruling that is different than the Illinois Supreme Court already ruled?

MR. QUINLAN: Well, to be fair, your Honor, and I'll do this in the pleadings, but I don't think the Illinois Supreme Court had ruled that the appointment was proper. What they ruled was they didn't want to hear it in a supervisory order, and then it needs to go through the proper --

THE COURT: Fair enough.

MR. QUINLAN: -- in order to do that I need to raise that with your Honor.

THE COURT: Okay. When -- where is that motion?

MR. QUINLAN: It is close to near final. I know there was -- as you know there was some back and forth with the clerk about whether we could be heard today because of some conflict --

THE COURT: Right.

MR. QUINLAN: -- some of which was mine to be fair, and we intend to file that and I'm going to say in

short order and give a bad -- you know, something that may make Mr. Hutchinson, you know, scream, but, I think --

THE COURT: What is short order -- what generally does short order mean?

MR. QUINLAN: It means in a week.

THE COURT: Okay. Fine. Okay. Well, any other pretrial motions other than that one?

MR. QUINLAN: There could be, to be fair, in the discovery there could be some pretrial motions that glean from that discovery and so I'm not in a position to tell you right now that we don't have any others that we'll glean from that discovery but as we stand right now, those are -- and, you know, Ms. Glandian and Mr. Hutchinson can correct me -- those are the ones that, you know, we're sort of focussing on right now as diligently as we can.

THE COURT: Okay. Well, as -- there is a little bit of uncertainty as to when judges like myself are sitting on any given date explored, I think my availability to sit is going to expand in the near future, I'm hoping so, may be we don't have to do this on Zoom entirely either but those are things in the future to be decided. So I've been asked to continue

all matters on today's call to July 17th, just as a matter of course, understanding that we got a lot of moving parts here with the special prosecutor and lawyers living in different locations. We can talk about that later, but I want to just put it on the docket right now for July 17th and in the interim I'll ask the parties to talk to each other about what you need from each other, and what you might need from me.

I cannot tell you with certainty when I'll be sitting on the bench after this month. I will be sitting next week, next Friday, I'm available and sitting and if something comes to my attention, I will be here and the following week, the next two Fridays I will be here, but after that I haven't gotten the schedule yet, so it's a little bit uncertain.

So if it's all right with everybody, if you all agree, I will put it over to July 17th with the understanding that I will certainly be as accommodating as I can to try to work with you and make your schedule simpler.

Is that okay to just put it on the docket for that day right now? Waive Mr. Smollett's appearance for that date because I don't believe anything substantive will happen on that particular date. Is that agreeable,

Ms. Glandian?

MR. QUINLAN: It's agreeable to Mr. Smollett.

THE COURT: Special prosecutors, is that agreeable?

MR. WEBB: Yes, your Honor, it's agreeable to put it down for the 17th, yes, your Honor.

THE COURT: And I will have a clerk -- (unintelligible) has been talking to me, she is not available now, she is having a baby today, but there is a new clerk Joe O'Connell. I think he has already reached out to you, and you can talk to him about the scheduling matters, and he will certainly be receptive to -- (unintelligible).

So I'm going to put this over by agreement July 17th. I'll mark it as a discovery check date. I'm hoping to receive your pleadings. If you have another motion to file, which is called a jurisdiction motion, I'd like to get that as soon as it's available. You'll of course give it to the other side so they can prepare a response, and be ready for that.

Case is continued by agreement July 17th, discovery check date. Defendant's appearance will be waived.

Anything else I can help anybody with today?

MS. GLANDIAN: No.

MR. WEBB: Your Honor, Dan Webb on behalf of the special prosecutor. I think you've covered all of the issues. Thank you.

THE COURT: All right. Well, thank you much.

(The above-entitled cause was continued to July 17, 2020.)

STATE OF ILLINOIS)
) SS.
COUNTY OF C O O K)

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

I, ROSEMARIE LAMANTIA, an Official Court Reporter for the Circuit Court of Cook County, Illinois, County Department, Criminal Division, do hereby certify that I reported in shorthand the proceedings had on the hearing in the above-entitled cause; that I, therefore, caused the foregoing to be transcribed into typewriting, which I hereby certify to be a true and accurate transcript of the Report of Proceedings had before the Honorable JAMES B. LINN, Judge of said court, on the 12th day of June, A.D., 2020, and contains all of the evidence had and testimony taken on said date.

Rosemarie LaMantia
_____

Rosemarie LaMantia

Official Court Reporter

Dated this 26th day
of June, 2020.

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

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff, v. JUSSIE SMOLLETT, Defendant.	No. 20 CR 03050-01 Honorable James B. Linn

DEFENDANT'S MOTION TO DISMISS INDICTMENT AND MEMORANDUM OF LAW IN SUPPORT

Defendant Jussie Smollett respectfully requests that the Court dismiss this matter for three independent reasons. First, the circuit court erred when ruling the original prosecution of Mr. Smollett—including the dismissal of the case against him—void. Second, the Special Prosecutor that refiled the charges against Mr. Smollett was not properly appointed under Illinois law, and therefore this present action against Mr. Smollett must be found void. Finally, and in the alternative, the appointment of the Special Prosecutor, and the power granted to him, was overly vague and broad, and thus was an abuse of discretion that must be invalidated and reexamined. In further support of this Motion, Mr. Smollett states as follows:

INTRODUCTION

1. Mr. Smollett requests that the Court dismiss this matter. The circuit court's conclusion to void the original prosecution against Mr. Smollett was in error. Additionally, the Special Prosecutor was not properly appointed under section 3-9008 of the Counties Code, 55 ILCS 5/3-9008, the limited statutory authority by which the circuit court can appoint a special prosecutor. Moreover, the Special Prosecutor was improperly vested with overly broad duties that resulted in an improper second prosecution of Mr. Smollett, on essentially identical charges that were previously *nolle prossed* by the duly-elected State's Attorney.

RELEVANT BACKGROUND

2. The renewed criminal prosecution stems from a racist and homophobic attack on

Mr. Smollett on January 29, 2019, by masked men. Although Mr. Smollett was initially treated as the victim of a hate crime, the Chicago Police Department later accused Mr. Smollett of staging the hate crime and filing a false police report.

3. On March 7, 2019, the State's Attorney's Office filed a felony indictment against Mr. Smollett in the Circuit Court of Cook County, case number 19 CR 3104, alleging 16 counts of disorderly conduct, namely filing a false police report in violation of Chapter 720, Act 5, Section 26-1(a)(4) of the Illinois Compiled Statutes Act of 1992, as amended.

4. On March 26, 2019, the State's Attorney's Office moved to *nolle pros* all 16 counts. The Honorable Steven G. Watkins granted the motion and dismissed the case against Mr. Smollett. The $10,000.00 bond Mr. Smollett had posted was forfeited, as agreed by the parties. Judge Watkins also ordered the records in this matter sealed.[1]

5. At the time, this matter had drawn national attention and the sudden dismissal of all charges without proper explanation caused public confusion.

6. On April 5, 2019, Sheila M. O'Brien, in *pro se*,[2] filed a Petition to Appoint a Special Prosecutor to preside over all further proceedings in the matter of the *People of the State of Illinois v. Jussie Smollett* (hereafter "Petition"). *See* Exhibit 1.

7. Mr. Smollett and Cook County State's Attorney Kim Foxx filed separate oppositions to the Petition. *See* Exhibit 2 & Exhibit 3.

8. On May 10, 2019, Judge Martin transferred the matter to the Honorable Michael Toomin of the Juvenile Justice Division.[3]

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1 On May 23, 2019, Judge Watkins granted the Media Intervenors' "Emergency Motion to Intervene for Purposes of Objecting to and Vacating the Sealing Order," which had been filed on April 1, 2019. Mr. Smollett's records were unsealed on a rolling basis following the circuit court's May 23, 2019 Order.

2 Ms. O'Brien had no relation to the case; rather, she asserted standing based on her status as a resident of Cook County who was unsatisfied with the unexplained dismissal of charges against Mr. Smollett.

3 On May 2, 2019, the parties appeared before Judge LeRoy Martin, Jr. to address the various motions that had been filed. During the hearing, Ms. O'Brien filed a suggestion of recusal based on recent media reports that Judge Martin's son worked for the Cook County State's Attorney's Office as an Assistant State's Attorney. After argument by Ms. O'Brien and counsel, the court adjourned the hearing until May 10, 2019, so Judge Martin could read and consider Ms. O'Brien's

9. On June 21, 2019, Judge Toomin issued a written order nullifying the original proceedings and granting the appointment of a special prosecutor. Specifically, Judge Toomin appointed a prosecutor authorized as follows:

> "to conduct an independent investigation of any person or office involved in all aspects of the case entitled the People of the State of Illinois v. Jussie Smollett, No. 19 CR 0310401, and if reasonable grounds exist to further prosecute Smollett, in the interest of justice the special prosecutor may take such action as may be appropriate to effectuate that result. Additionally, in the event the investigation establishes reasonable grounds to believe that any other criminal offense was committed in the course of the Smollett matter, the special prosecutor may commence the prosecution of any crime as may be suspected."

Exhibit 4.

10. On July 19, 2019, Mr. Smollett filed four motions: (1) Motion for the Substitution for Cause of the Honorable Michael P. Toomin, Judge Presiding, and for Appointment of Another Cook County Judge to Hear Concurrently Filed Motions; (2) Motion to Intervene Instanter; (3) Motion for Reconsideration of the June 21, 2019 Order Granting the Appointment of a Special Prosecutor; and (4) Motion to Disclose Transcripts of Grand Jury Testimony. *See* Exhibit 5; Exhibit 6, Exhibit 7; Exhibit 8. Petitioner O'Brien opposed the motions and Mr. Smollett filed replies in support of his motions. *See* Exhibit 9.

11. On July 31, 2019, the parties appeared before Judge Toomin and, at that time, Judge Toomin denied the motion for substitution of judge for cause. In doing so, the court stated:

> And for these reasons -- both of them, the lack of a valid affidavit and the fact that the bias and prejudice are shown by matters occurring within this proceeding -- I will deny the motion to transfer this case, and the motion for substitution of Judges shall be and is hereby denied.[4]

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suggestion of recusal and any response the State's Attorney's Office chose to file. The court subsequently found that recusal was unnecessary, but transferred the matter "in the interest of justice."

[4] Mr. Smollett maintains that his motion for substitution of judge for cause was improperly denied because (1) an affidavit was not required where actual bias and prejudice could be established from the assertions in the Court's June 21, 2019 Order itself; (2) the affidavit by Mr. Smollett's counsel affirming the basis for the substitution of Judge Toomin for cause was adequate; and (3) despite his finding that no extrajudicial source was involved, the June 21, 2019 Order indicated that a fair judgment was impossible.

Exhibit 10 (Tr. at 13).

12. As to the motion to intervene, Mr. Smollett, through counsel, argued that he "should be entitled to intervene in a case that directly impacts him, in which [h]is interests are not represented, and in which constitutional concerns are raised." Exhibit 6. Nonetheless, Judge Toomin ruled that the appointment of counsel would not necessarily directly impact Mr. Smollett:

> THE COURT: You say directly impact him?
>
> MS. GLANDIAN: Correct.
>
> THE COURT: Seems to me, by recalling the granting of the prayer for relief, I indicated that the Special Prosecutor saw fit, if there was a reasonable ground to re-prosecute Mr. Smollett, and if it was in the interest of justice, that was within the purview of his grant of authority.
>
> I don't consider that to be a direct -- direct cause or effect upon Mr. Smollett. It is conditional. It could happen; it could not happen. But it's not a direct consequence of the authority to further prosecute him, if these contingencies are met.
>
> MS. GLANDIAN: And your Honor, I believe the law is -- may or will be bound. It's not will be bound, but it's may, may be bound. And so as your Honor just conceded, he may be bound if the Special Prosecutor determines that they believe it's appropriate to further prosecute him.
>
> THE COURT: Okay.
>
> MS. GLANDIAN: And so I think it's fundamentally unfair for him not to have an opportunity to raise these issues, and to actually visit the grounds upon which the Court even appointed the Special Prosecutor, which we believe is flawed, and again, I think it's in everyone's interest to actually address that motion on its merits and for the Court to look at that order again, and the basis on which it was granted.

Exhibit 10 (Tr. at 20-21).

13. Judge Toomin later added:

> One further issue I would like to address, and that is under the intervention statute, while the party need not have a direct interest in the pending suit to intervene, he must stand to gain or lose by direct legal operation and effect of the judgment in that suit. If his interest is speculative or hypothetical, this does not constitute sufficient evidence or sufficient interest to warrant intervention.

Exhibit 10 (Tr. at 31).

14. In denying the motion to intervene, the Court stated:

> Post-judgment intervention is limited to situations where it is the only way of protecting the rights of the intervenor.
>
> That is not applicable here for the reasons I earlier expressed, that it's not the – has no direct effect upon the rights of the intervenor. ***These issues could be raised at any time if, in fact, Mr. Smollett was prosecuted.***

Exhibit 10 (Tr. at 28) (emphasis added).

15. Accordingly, Judge Toomin ruled:

> The Court will deny the motion to intervene. Based upon that ruling, there is no basis to proceed with the motion for reconsideration, the Court having ruled that there is no right to intervene as is requested, and the -- also the motion to publish the Grand Jury transcript that was referred to in Counsel's pleadings.

Exhibit 10 (Tr. at 32).

16. On August 23, 2019, over Mr. Smollett's objection, the Court appointed Dan K. Webb, a private attorney, as the special prosecutor to preside over further proceedings in this matter. *See* Exhibit 11.

17. On February 11, 2020, pursuant to an investigation led by Mr. Webb, a special grand jury indicted Mr. Smollett of six counts of disorderly conduct, namely filing a false police report in violation of Chapter 720, Act 5, Section 26-1(a)(4) of the Illinois Compiled Statutes Act of 1992, as amended. The charges arise from the January 29, 2019, attack on Mr. Smollett, which was previously the subject of a 16-count indictment against him in the Circuit Court of Cook County, case number 19 CR 3104 (filed on March 7, 2019 and dismissed on March 26, 2019). Exhibit 12.

18. On February 24, 2020, Mr. Smollett filed an Emergency Motion for Supervisory Order Pursuant to Rule 383 and Movant's Explanatory Suggestions in Support of the Motion in the Supreme Court of Illinois ("Emergency Motion for Supervisory Order"), which sought a Supervisory Order compelling Judge Toomin to vacate the order entered June 21, 2019, granting the appointment of a special prosecutor and the order entered on August 23, 2019, appointing Dan

K. Webb as the special prosecutor. *See* Emergency Motion for Supervisory Order, *Smollett v. Toomin*, Case No. 125790 (Ill. filed Feb. 24, 2020), Exhibit 13.

19. On March 2, 2020, Mr. Webb, *sub nom*. Office of Special Prosecutor, filed a Response in Opposition to Movant's Emergency Motion for Supervisory Order. *See* The Office of the Special Prosecutor's Response in Opposition to the Emergency Motion for Supervisory Order, *Smollett v. Toomin*, Case No. 125790 (Ill. filed Mar. 2, 2020), Exhibit 14.

20. On March 6, 2020, the Clerk of the Supreme Court entered a one-sentence order summarily denying the Emergency Motion for Supervisory Order. *See* Mar. 6, 2020, Letter from C. Taft Grosboll to W. Quinlan, Exhibit 15.

ARGUMENT

21. Mr. Smollett respectfully submits that this prosecution must be found void and dismissed. First, the original prosecution against Mr. Smollett was dismissed by a circuit court judge upon the motion of the State's Attorney, and that decision should not have been second-guessed by another circuit court judge of parallel jurisdiction. Next, this matter wholly stems from the improper and unlawful appointment of the Special Prosecutor. The Special Prosecutor was appointed in a manner that failed to comply with applicable law, as established by section 3-9008 of the Counties Code. 55 ILCS 5/3-9008. Finally, and in the alternative, the appointment of the Special Prosecutor was overly broad and vague, and thus must be invalidated and reexamined.

22. The appointment was contrary to Illinois law for numerous reasons. Section 3-9008 provides the legal framework by which a court may appoint a special prosecutor. Subsections (a-5) and (a-10) authorize the appointment of a special prosecutor on a petition by an interested person or on the court's motion in two discreet situations—when the State's Attorney has a conflict of interest or when the State's Attorney is unable to fulfill his or her duties. The court, when appointing the Special Prosecutor, specifically found that neither of these circumstances existed.

23. Subsection (a-15) provides that a court shall appoint a special prosecutor when a State's Attorney files a petition for recusal. Despite the clear requirements of the statute and the undisputed fact that the State's Attorney did *not* file such a petition, the court appointed a special

prosecutor. Appointing a special prosecutor under subsection (a-15) absent a State's Attorney's petition for recusal is unprecedented and contrary to the statute's plain language. *See In re Appointment of Special Prosecutor*, 2019 IL App (1st) 173173, ¶¶ 23–30.

24. As support for the appointment of the Special Prosecutor, the court determined that all prior proceedings against Mr. Smollett were null and void. Such a ruling was without basis in fact or law and wholly undermines the appointment of a special prosecutor here.

25. Section 3-9008 provides that before appointing a private attorney, the court shall first contact public agencies "to determine a public prosecutor's availability to serve as a special prosecutor at no cost to the county and shall appoint a public agency if they are able and willing to accept the appointment." 55 ILCS 5/3-9008(a-20). Here, the court indicated that it had contacted numerous public agencies but that only three public prosecutors had advised him of their willingness to serve as the special prosecutor in this case. When counsel for Mr. Smollett objected to the appointment of Mr. Webb based on the fact that three public prosecutors were available for the appointment, the court stated that although the three public officials were willing to serve as the special prosecutor, it was his opinion that they were willing but not "able." The court failed to provide any explanation for his conclusion. Such action was in excess of the authority provided under the law.

26. Because Judge Toomin's order improperly appointed the Special Prosecutor, the actions taken by the Special Prosecutor are void, and this case should be dismissed. *See People v. Ward*, 326 Ill. App. 3d 897, 902 (5th Dist. 2002) (explaining that prosecution is void if a case is not brought by properly appointed prosecutor).

27. Because Judge Toomin denied Mr. Smollett's motion to intervene to move for reconsideration of the order granting the appointment of a special prosecutor, Judge Toomin never considered Mr. Smollett's legal challenges to the order.

28. Furthermore, while the Supreme Court of Illinois denied the Emergency motion for a supervisory order, it did so summarily without any discussion on the merits of the argument. Accordingly, the arguments raised herein have not yet been considered on the merits by any court.

WHEREFORE, Mr. Smollett respectfully requests that the Honorable Court grant his Motion to dismiss this matter in its entirety based on the unlawful and improper appointment of the Special Prosecutor that brought these charges.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

I

The unprecedented renewed prosecution of Mr. Smollett stems from the improper appointment of a special prosecutor. The Special Prosecutor's appointment was premised in large part on the court's improper determination that Ms. Foxx informally recused herself as well as the court's improper conclusion that such recusal rendered the entirety of the proceedings against Mr. Smollett—from his arrest to the dismissal of the charges against him—null and void. Indeed, even if there was no valid authority to initially prosecute Mr. Smollett, this would not nullify the prior proceedings because the right to be prosecuted by someone with proper prosecutorial authority is a personal privilege held here by Mr. Smollett who has not challenged that prosecution. On the contrary, an Assistant State's Attorney acting with the permission and authority of the State's Attorney properly represented the People of the State of Illinois at all times during the initial proceedings. Thus, the appointment was erroneous and invalid.

Illinois law sets forth a clear framework that applies to the appointment of a special prosecutor. *See* 55 ILCS 5/3-9008. Illinois courts interpret section 3-9008 narrowly according to the plain language of the statute. *See In re Appointment of Special Prosecutor*, 2019 IL App (1st) 173173, ¶¶ 23-30 (concluding that section 3-9008 should be read narrowly consistent with plain language of statute and legislature's intent); *McCall v. Devine,* 334 Ill. App. 3d 192, 204 (1st Dist. 2002) (noting that appointment of special prosecutor warranted only if situation falls within 5/3-9008). The Special Prosecutor here was appointed despite the fact that none of the statutory requirements were met. Although the court indicated that the appointment was premised on section 5/3-9008(a-15), the statutory prerequisite for the appointment, namely the filing of a petition for recusal by the State's Attorney, was not met. The State's Attorney did not file a petition for recusal

on the record and, therefore, on this basis alone, the court appointed the Special Prosecutor in a manner that violates the provisions in section 3-9008(a-15).

Moreover, even if the Court does not find the appointment of the Special Prosecutor invalid under section 3-9008 as a threshold matter, the Special Prosecutor is vested with impermissibly vague and overbroad authority. The order appointing the Special Prosecutor failed to limit the investigation in any way or to specify a date or event that would terminate the Special Prosecutor's appointment. The broad prescription of authority to the Special Prosecutor, namely that the Special Prosecutor may "further prosecute" Mr. Smollett if reasonable grounds exist, is vague and overbroad. Tellingly, the order appointing the Special Prosecutor concedes that the appointment is based almost entirely on media reports and not on facts or evidence.[5]

Mr. Smollett respectfully submits that the Court should dismiss the charges against him because such charges are based on the improper appointment of the Special Prosecutor.

ARGUMENT

I. The Court Should Dismiss This Matter Because The Original Proceedings Should Not Have Been Nullified And Because The Special Prosecutor Was Not Properly Appointed.

Mr. Smollett is currently facing criminal charges that were filed by the Special Prosecutor. As discussed below, the court exceeded its authority when nullifying the original proceedings, and therefore, the Special Prosecutor was not properly appointed. Absent the statutory prerequisite for the appointment of a special prosecutor, the court not only erroneously appointed a special

[5] Importantly, in ruling on the petition for the appointment of a special prosecutor, the court was not called upon to make a determination as to Mr. Smollett's guilt or innocence of the prior charges. Rather, the court was required to determine whether the evidence in support of the petition established the statutory criteria for the appointment of a special prosecutor in accordance with section 3-9008. The Petition wholly lacked factual evidence to support any findings as to Mr. Smollett's guilt. Rather, Petitioner O'Brien admitted that "[t]he evidence for this petition is what is reported in the press, not traditional evidence under oath." Ex. 1, p. 16. And the court essentially agreed that it relied heavily on media reports as support for the factual allegations in the petition. *See* Ex. 4, p. 2. ("Petitioner's factual allegations stem from a number of articles published in the Chicago Tribune, the Chicago Sun-Times and other newspapers as well as local broadcasts, together with Chicago Police Department reports and materials recently released by the State's Attorney's Office. Although the court recognizes that portions of these sources may contain hearsay rather than 'facts' within the semblance of a trial record, the materials provide a backdrop for consideration of the legal issues raised by the petition.").

prosecutor, but in so doing it provided an overbroad and vague delegation of authority to the special prosecutor. Indeed, the court appointed the Special Prosecutor in a manner that effectively rewrote the special prosecutor statute (55 ILCS 5/3-9008) and deprived the State's Attorney the discretion which Illinois law expressly grants the office.

A. The Special Prosecutor Was Improperly Appointed Based On The Improper Ruling That The Prior Proceedings Were Null and Void.

The appointment of the Special Prosecutor resulted from the improper ruling that State's Attorney Foxx's purported informal "recusal" rendered the entirety of the proceedings—from Mr. Smollett's arrest to the dismissal of the initial charges against him—null and void. In the order, the court erroneously concluded that because State's Attorney Foxx could not delegate her authority to her first assistant:

- There was no duly elected State's Attorney when Jussie Smollett was arrested;
- There was no State's Attorney when Smollett was initially charged;
- There was no State's Attorney when Smollett's case was presented to the grand jury, nor when he was indicted;
- There was no State's Attorney when Smollett was arraigned and entered his plea of not guilty; and
- There was no State's Attorney in the courtroom when the proceedings were *nolle prossed.*

Ex. 4, p. 20.

1. State's Attorney Foxx had the power to delegate her authority to her first assistant

The Special Prosecutor was appointed due to the incorrect finding that that by recusing herself and appointing Joe Magats as "the Acting State's Attorney for this matter," State's Attorney Foxx attempted to create an office which she did not have the authority to create. Ex. 4, p. 16. But Ms. Foxx did not attempt to create a new office, nor did she appoint Joe Magats as a special prosecutor in this case. Rather, Ms. Foxx delegated her authority to one individual, her first

assistant, to be exercised in a particular, individual, criminal prosecution. Such a delegation has been sanctioned by Illinois courts. *See, e.g., People v. Marlow,* 39 Ill. App. 3d 177, 180 (1st Dist. 1976) ("As illustrated by the evidence, the request procedure used in this case fully observed the 'strict scrutiny' admonition set forth in *Porcelli*. The State's Attorney of Cook County delegated his authority to one individual, his first assistant, to be used only when he himself was not available. This delegated power was exercised with discretion and care."); *see also Scott v. Ass'n for Childbirth at Home, Int'l,* 88 Ill. 2d 279, 299 (1981) ("Where a statute vests power in a single executive head, but is silent on the question of subdelegation, the clear majority view is that the legislature, 'understanding the impossibility of personal performance, impliedly authorized the delegation of authority to subordinates.'") (quoting 1 A. Sutherland, Statutory Construction § 4.14 (4th ed. 1972)).

None of the cases that the court relied on support the contention that State's Attorney Foxx could not delegate her authority to her first assistant. *People v. Munson*, 319 Ill. 596 (1925), and *People v. Dunson*, 316 Ill. App. 3d 760 (2d Dist. 2000), are inapplicable, as they involve the delegation of authority to ***unlicensed*** prosecutors. Here, State's Attorney Foxx turned the Smollett case over to her first assistant, Joe Magats, whom Judge Toomin described as "an experienced and capable prosecutor." Ex. 4, p. 16.

The court also relied on *People v. Jennings*, 343 Ill. App. 3d 717 (5th Dist. 2003), *People v. Ward*, 326 Ill. App. 3d 897 (5th Dist. 2002), and *People v. Woodall,* 333 Ill. App. 3d 1146 (5th Dist. 2002) as support for its position; however, those cases are readily distinguishable. All of those cases involved the delegation of power to attorneys from the State's Attorneys Appellate Prosecutor's office—not the first assistant, as was the case here. Unlike assistant state attorneys, "[a]ttorneys hired by the [State Attorney's Appellate Prosecutor's Office] are not constitutional officers. Their powers are derived from the statute that created them, and those powers are strictly limited by the authority conferred upon the Agency by our state legislators." *Woodall,* 333 Ill. App. 3d at 1149 (citing *Siddens v. Industrial Comm'n,* 304 Ill. App. 3d 506, 510-11 (4th Dist. 1999)). As one court explained, "the State's Attorneys Appellate Prosecutor's Act (Act) (725 ILCS

210/4.01 (West 1998)) provides specific instances in which attorneys employed by the State's Attorneys Appellate Prosecutor's office may represent the State, with the most obvious instance being when a case is on appeal." *Ward*, 326 Ill. App. 3d at 901. In each of these cases, attorneys from the appellate prosecutor's office exceeded their authority to prosecute **as prescribed by statute**. *See, e.g., id.* at 902 (because "[t]he Cannabis Control Act, under which defendant was prosecuted, is not expressly listed . . . prosecution under this Act [was not] allowed by attorneys from the State's Attorneys Appellate Prosecutor's office"); *Jennings*, 343 Ill. App. 3d at 725 ("Section 4.01 of the Act does not specifically include a murder prosecution as an instance in which an employee of the appellate prosecutor's office may assist a county State's Attorney in the discharge of his or her duties."); *Woodall*, 333 Ill. App. 3d at 1149 (noting that the Act limits the types of cases in which attorneys from the State's Attorneys Appellate Prosecutor's office may assist local prosecutors in the discharge of their constitutionally based duties and concluding that the appointment process relied on by the State was flawed).

In contrast to the State Attorney's Appellate Prosecutor's office, the Supreme Court of Illinois has explained that Assistant State's Attorneys are "officers for the performance of the general duties of the offices of state's attorney." *People ex rel. Landers v. Toledo, St. L. & W.R. Co.*, 267 Ill. 142, 146 (1915). Accordingly, "[a]n Assistant State's Attorney is generally clothed with all the powers and privileges of the State's Attorney; and all acts done by him in that capacity must be regarded as if done by the state's attorney himself." *People v. Nahas*, 9 Ill. App. 3d 570, 575–76 (3d Dist. 1973) (citing 27 C.J.S. District and Pros. Attys. Sec. 30(1)). Indeed, "the legislative purpose in creating the office of Assistant State's Attorney (Sec. 18, c. 53, Ill. Rev. Stat.) was to provide an official who should have full power to act in the case of the absence or sickness of the State's Attorney, or in the case of his being otherwise engaged in the discharge of the duties of office, in the same manner and to the same extent that the State's Attorney could act, and we also believe that the General Assembly in using the term, 'a State's Attorney' did intend that an assistant could act." *Nahas*, 9 Ill. App. 3d at 576.

In *Office of the Cook County State's Attorney v. Ill. Local Labor Relations Bd.*, 166 Ill. 2d

296 (1995), the Supreme Court of Illinois specifically discussed the statutory powers and duties of the Cook County State's Attorney and Assistant Cook County State's Attorneys. The Court held that the assistants were vested with the authority to exercise the power of the State's Attorney, played a substantial part in discharging the statutory mission of the State's Attorney's office, and acted as "surrogates for the State's Attorney" in performing the statutory duties of the State's Attorney. *Id.* at 303.

The General Assembly intended, and the cases have long held, that an Assistant State's Attorney legally has the same power to act on behalf of the State's Attorney either by virtue of the office of Assistant State's Attorney, or as specifically authorized by the State's Attorney, pertaining to (1) initiating criminal prosecutions against a person; (2) intercepting private communications; and (3) procedures that may result in a person being deprived of his or her liberty for life. *See, e.g., People v. Audi,* 73 Ill. App. 3d 568, 569 (5th Dist. 1979) (holding that an information signed by an Assistant State's Attorney rather than the State's Attorney himself was not defective); *People v. White,* 24 Ill. App. 2d 324, 328 (2d Dist. 1960), *aff'd,* 21 Ill. 2d 373 (1961) (rejecting defendant's argument that an Assistant State's Attorney does not have the power or authority to prosecute by information in his own name in the county court); *Nahas,* 9 Ill. App. 3d at 575-76 (holding that the authorization of an eavesdropping device by a First Assistant, rather than the State's Attorney, was proper because "[a]n Assistant State's Attorney is generally clothed with all the powers and privileges of the State's Attorney; and all acts done by him in that capacity must be regarded as if done by the State's Attorney himself"); *Marlow,* 39 Ill. App. 3d at 180 (holding that the State's Attorney can delegate his authority to give eavesdropping consent to a specifically indicated individual); *People v. Tobias,* 125 Ill. App. 3d 234, 242 (1st Dist. 1984) (holding that an Assistant State's Attorney has the authority to sign a petition to qualify the defendant for a life sentence under the habitual criminal statute, which provides that such petition be "signed by the state's attorney").

Accordingly, the Special Prosecutor was appointed based on the incorrect ruling that State's Attorney Foxx did not have the power to delegate authority in the original Smollett matter

to her first assistant, Joe Magats, and that by doing so, she invoked a permissive recusal under 55 ILCS 5/3-9008(a-15), authorizing the appointment of a special prosecutor.

2. Ruling the original proceedings void was an error

The ruling that resulted in a nullification of the arrest, prosecution, and dismissal of charges against Mr. Smollett, was based on five cases that are readily distinguishable: *People v. Jennings*, 343 Ill. App. 3d 717 (5th Dist. 2003), *People v. Ward,* 326 Ill. App. 3d 897 (5th Dist. 2002), *People v. Woodall,* 333 Ill. App. 3d 1146 (5th Dist. 2002), *People v. Munson*, 319 Ill. 596 (1925), and *People v. Dunson,* 316 Ill. App. 3d 760 (2d Dist. 2000). Significantly, none of these cases support the conclusion that the prior proceedings against Mr. Smollett are null and void. In the order, the court quoted the following excerpt from *Ward*: "If a case is not prosecuted by an attorney properly acting as an assistant State's Attorney, the prosecution is void and the cause should be remanded so that it can be brought by a proper prosecutor." *Ward,* 326 Ill. App. 3d at 902. However, the court in *Woodall*—also relied upon by the court—actually distinguished *Ward* and *Dunson* and held that the defective appointment of special assistant prosecutors **did not nullify** the defendant's judgment of conviction in that case. *Woodall,* 333 Ill. App. 3d at 1161.

The court in *Woodall* began its analysis by explaining that "[t]here are only two things that render a judgment null and void. A judgment is void, and hence, subject to attack at any time, only when a court either exceeds its jurisdiction or has simply not acquired jurisdiction." *Id.* at 1156 (citing *People v. Johnson,* 327 Ill. App. 3d 252, 256 (4th Dist. 2002)). The court also noted that it failed "to comprehend how the prosecutors' flawed station in this case could serve to deprive the court of jurisdiction and thus void the defendant's convictions, when the prosecutorial pursuit of people actually placed twice in jeopardy could not." *Woodall,* 333 Ill. App. 3d at 1157. The court then went on to explain why neither *Ward* nor *Dunson* supports the proposition that a prosecution by attorneys who lacked the legal authority to act on the State's behalf would render the proceedings null and void. *Id.*

First, *Woodall* noted that *Ward* does not, in fact, stand for such a proposition, as: "The author of the *Ward* opinion cited the aged decision in a manner that warned that it did not exactly

stand for the proposition stated. . . . [T]he term 'void' was not used in conjunction with a jurisdictional analysis, and a question over whether or not the trial court acquired jurisdiction was not raised." *Woodall*, 333 Ill. App. 3d at 1157. The court further noted:

> *Ward* should not be read as the source of a novel jurisdictional rule that would void all convictions procured by licensed attorneys who, for whatever reason, mistakenly believe that they are authorized to act on the State's behalf and who are permitted to do so by those being prosecuted. Any defect in an attorney's appointment process or in his or her authority to represent the State's interests on a given matter is not fatal to the circuit court's power to render a judgment. The right to be prosecuted by someone with proper prosecutorial authority is a personal privilege that may be waived if not timely asserted in the circuit court.

Id. at 1159.

Second, *Woodall* distinguished *Dunson*, in which the court held that a prosecution by a prosecutor who did not hold an Illinois law license rendered the convictions void as a matter of common law. *Id.* at 1160. The *Woodall* court explained: "Our case is not one where the assistance rendered, even though it was beyond the statutory charter to assist, inflicted any fraud upon the court or the public. The State was represented competently by attorneys who earned the right to practice law in this state. There was no deception about their license to appear and represent someone else's interests in an Illinois courtroom." *Id*. at 1160–61.[6]

As noted above, *Woodall* held that "the right to be prosecuted by someone with proper prosecutorial authority is ***a personal privilege*** that may be waived if not timely asserted in the circuit court." *Woodall*, 333 Ill. App. 3d at 1159 (emphasis added). Thus, if there, in fact, had been a defect in the authority to prosecute Mr. Smollett, the only person who could properly challenge the validity of the proceedings would be Mr. Smollett—and he has not done so.

Although *Woodall* held that the State's Attorney did not have the authority to unilaterally create a special assistant office by appointing attorneys employed by the State's Attorney's Appellate Prosecutor's office to conduct trial on his behalf without county board approval, it nonetheless found that the defective appointment of the special assistant prosecutors did not nullify

[6] *Dunson* relied heavily on *Munson*, an older case from 1925. Although *Woodall* did not separately address *Munson*, that case also involved the unauthorized practice of law and is distinguishable for the same reasons as *Dunson*.

the defendant's judgment of conviction. *Woodall,* 333 Ill. App. 3d at 1161. The court explained:

> The defendant has not attempted to demonstrate the harm visited upon him by his prosecutors' defective commission to prosecute. For that matter, he does not even claim that anything evil or wrong occurred in the process to verdict other than that defect. To the extent that the Agency attorneys' lack of proper authority to prosecute somehow inflicted injury, it was a wound that the defendant invited by allowing their presence to go unchallenged. We find no reason to overturn the defendant's convictions.

Id. Here, like in *Woodall,* because any such defect has gone unchallenged by Mr. Smollett, there is no basis on which the court could have voided the original proceedings against Smollett.

Similarly, in *Jennings,* the court held that although the attorney who tried the case for the State did not have the authority to prosecute the defendant, the defendant waived his right to challenge the defective commission of the attorney. *People v. Jennings,* 343 Ill. App. 3d 717, 727 (5th Dist. 2003). *Jennings* explained: "The defendant does not argue and the record does not indicate that he was harmed by Lolie's prosecution. At no time in the proceedings did the defendant object to the trial court's recognition of Lolie as a prosecutor. The defendant, therefore, waived his right to challenge Lolie's defective commission to prosecute." *Id.*

Analyzing the cases that the court relied on as the basis for the appointment of the Special Prosecutor illustrates that the court erroneously ruled that the entirety of the original proceedings—from Mr. Smollett's arrest to the dismissal of the charges against him—were null and void. On the contrary, the record supports the conclusion that the People of the State of Illinois were properly represented by an Assistant State's Attorney acting with the permission and authority of the State's Attorney at all times during the proceedings.

B. The Court Appointed the Special Prosecutor Based on the Erroneous Finding that the State's Attorney Recused Herself Under 55 ILCS 5/3-9008(a-15).

Section 3-9008(a-5), (a-10) and (a-15) of the Counties Code provide three bases on which a court may exercise its discretion to appoint a special prosecutor. Here, although a Petition for Appointment sought the appointment based on subsections (a-5) and (a-10), the court appointed the Special Prosecutor based exclusively on subsection (a-15). In the June 21, 2019, order, the court rejected Petitioner's argument that State's Attorney Kim Foxx was unable to fulfill her duties

stemming from her "familiarity with potential witnesses in the case." *See* 5/3-9008(a-5). (Ex. 4, p. 12-13.) The court also recognized that "Petitioner has failed to show the existence of an actual conflict of interest in the Smollett proceeding." *See* 5/3-9008(a-10). (Ex. 4, p. 14) Nonetheless, based on public statements and an internal memorandum stating that State's Attorney Foxx had "recused" herself from this matter, the court found that "a reasonable assumption exists" that State's Attorney Foxx had invoked a permissive recusal under 55 ILCS 5/3-9008(a-15), which can be done for "any other reason he or she deems appropriate." *Id.* By so concluding, the court misapplied the law and exceeded its authority by appointing the Special Prosecutor.

Section 3-9008(a-15), provides: "Notwithstanding subsections (a-5) and (a-10) of this Section, ***the State's Attorney may file a petition to recuse himself or herself from a cause or proceeding*** for any other reason he or she deems appropriate and the court shall appoint a special prosecutor as provided in this Section." 55 ILCS 5/3-9008(a-15) (emphasis added).

Although section 3-9008(a-15) provides that the court shall appoint a prosecutor when a State's Attorney files "a petition to recuse himself or herself from a cause or proceeding for any other reason he or she deems appropriate," it is undisputed that State's Attorney Foxx never filed a petition for recusal or otherwise alerted the court of her recusal. *Id.* Importantly, State's Attorney Foxx opposed the Petition and unambiguously stated that she did not intend to formally or legally recuse herself under subsection (a-15). Ex. 3, ¶ 9 (distinguishing between a public announcement of recusal and the clear statutory provision in subsection (a-15) that "places the decision to file (or not file) a formal recusal motion squarely within [the State's Attorney's] exclusive discretion."). Nonetheless, the court concluded that "[a] review of the record confirms our understanding that what was intended by Ms. Foxx, and what indeed occurred, was an unconditional legal recusal. Her voluntary act evinced a relinquishment of any future standing or authority over the Smollett proceeding. Essentially, she announced that she was giving up all of the authority or power she possessed as the duly elected chief prosecutor; she was no longer involved." Ex. 4, p. 15-16. The order appointing the Special Prosecutor did not rely on any legal authority to support its ruling that the informal use of the term "recusal" in a public statement and internal memorandum constituted

an unconditional legal recusal under Illinois law to essentially strip the State's Attorney of any future standing or authority in the matter.

In interpreting a statute, the primary rule of statutory construction to which all other rules are subordinate is to ascertain and give effect to the true intent and meaning of the legislature. *Village of Cary v. Trout Valley Ass'n,* 282 Ill. App. 3d 165, 169 (2d Dist. 1996). In order to determine the legislative intent, courts must read the statute as a whole, all relevant parts must be considered, and each section should be construed in connection with every other section. *Id*. Courts should look to the language of the statute as the best indication of legislative intent, giving the terms of the statute their ordinary meaning. *Id.* A statute is to be interpreted and applied in the manner in which it is written, when it is permissible to do so under the Constitution, and is not to be rewritten by a court in an effort to render it consistent with the court's view of sound public policy. *Kozak v. Retirement Board of the Firemen's Annuity & Benefit Fund,* 95 Ill. 2d 211, 220 (1983) (citations omitted).

Section 3-9008(a-15) provides that the State's Attorney ***may*** file a petition for recusal "for any other reason" he or she deems appropriate. The plain and unambiguous language of the statute indicates that the State's Attorney is not required to file such a petition but may do so in his or her discretion. In other words, the filing of such a petition is permissive, not mandatory, and thus falls under the State's Attorney's discretion. *See In re Estate of Ahmed,* 322 Ill. App. 3d 741, 746 (1st Dist. 2001) ("As a rule of statutory construction, the word 'may' is permissive, as opposed to mandatory.").

Here, not only did State's Attorney Foxx not file such a petition, but she expressly stated that she did not intend to formally and legally recuse herself. By deeming the use of the word "recusal" in a public statement and internal memorandum as the equivalent of filing a petition for recusal under section 3-9008(a-15), the Special Prosecutor was appointed in a manner that effectively rewrote the statute and deprived State's Attorney Foxx the discretion which the statute expressly grants her. And contrary to the court's ruling, any such informal statements did not effectuate a legal recusal by State's Attorney Foxx. *See, e.g., People v. Massarella,* 72 Ill. 2d 531,

538 (1978) ("At two separate arraignments, assistant State's Attorneys made noncommittal statements that the Attorney General was in charge of the case. These comments do not express, as the defendant urges, exclusion of or objection by the State's Attorney.").

Importantly, once the court found that subsections (a-5) and (a-10) of section 3-9008 did not apply to this case, the inquiry should have ended. Unlike these two subsections which begin with the phrase, "The court on its own motion, or an interested person in a cause or proceeding, civil or criminal, may file a petition alleging . . .," subsection (a-15) contains no such clause. Instead, subsection (a-15) provides that a State's Attorney may file a petition to recuse herself, and only if that happens can the court appoint a special prosecutor. Thus, it is clear that the circuit court cannot appoint a special prosecutor pursuant to subsection (a-15) on its own motion or on the petition of an interested person. Subsection (a-15) is applicable only when it is invoked by the State's Attorney—which was not done in this case.

The State's Attorney filing a petition for recusal is a statutory prerequisite to the appointment of a special prosecutor under 55 ILCS 5/3-9008(a-15). There is no authority allowing the court to appoint a special prosecutor under subsection (a-15) absent a formal recusal petition. Reading such a grant into the statute would be contrary to the statute's plain language and the Illinois legislature's intent that the statute be construed narrowly. *See In re Appointment of Special Prosecutor,* 2019 IL App (1st) 173173, ¶¶ 23–30; *see also In re Mortimer*, 44 Ill. App. 3d 249, 251 (1st Dist. 1976) (explaining that a special prosecutor may be appointed only if case falls within limited circumstances set forth in statute). Indeed, allowing the appointment of a special prosecutor under subsection (a-15) without the State's Attorney's recusal would raise constitutional concerns and disenfranchise the electorate who voted for her. *See McCall*, 334 Ill. App. 3d at 205. Because the statutory prerequisite was not met here, the trial court exceeded its authority in granting the appointment of a special prosecutor. In such circumstances, the remedy is to dismiss the action as void. *See Ward,* 326 Ill. App. 3d. at 902 ("If a case is not prosecuted by an attorney properly acting as an assistant State's Attorney, the prosecution is void."); *Jennings*, 343 Ill. App. 3d at 726 (explaining *Ward* and noting that "[b]ecause the defendant in *Ward* had specifically challenged

the legitimacy of the prosecutor, the trial court erred in allowing [the special prosecutor] to prosecute the case").

C. The Appointment Was Vague and Overbroad.

The order's broad prescription of authority to the special prosecutor, namely that the special prosecutor may "further prosecute" Mr. Smollett if reasonable grounds exist, is unquestionably vague and overbroad. Ex. 4, p. 21. If it was intended that such further prosecution could only be the result of some potential new discovery of wrongdoing by Mr. Smollett during the pendency of the case (which does not exist as evidenced by the fact that no such allegation has been made almost one year after the Special Prosecutor's appointment and investigation of this matter), this should have been clarified in the order. But if the court intended to authorize the special prosecutor to further prosecute Mr. Smollett for filing a false police report on January 29, 2019 (as alleged in the indictment that was thereafter dismissed), then the order is overbroad and vague as to this critical issue.

Furthermore, the order does not limit the investigation in any way or specify a date or event that would terminate the special prosecutor's appointment. Illinois courts have held that such a deficiency renders the appointment vague and overbroad. *See, e.g., In re Appointment of Special Prosecutor,* 388 Ill. App. 3d 220, 233 (3d Dist. 2009) ("The order's definition of the scope of the subject matter and the duration of Poncin's appointment is vague in that it does not specify an event for terminating the appointment or the injunction. The circuit court should not have issued the appointment without a specific factual basis, and the court should have more clearly limited the appointment to specific matters. Under the circumstances, we view the circuit court's prescription of Poncin's authority to be overbroad and, therefore, an abuse of discretion.").

CONCLUSION

For the foregoing reasons, Jussie Smollett respectfully requests that the Court dismiss this matter in its entirety based on the improper appointment of the Special Prosecutor and enter any other relief that the Court deems fair and just.

Dated: July 17, 2020.

Respectfully submitted,

/s/ William J. Quinlan

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Attorneys for Defendant Jussie Smollett

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

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff, v. JUSSIE SMOLLETT, Defendant.	No. 20 CR 03050-01 Honorable James B. Linn

CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2020, I caused the **Notice of Filing, Defendant's Motion to Dismiss Indictment and Memorandum of Law In Support,** to be electronically submitted to the Clerk of the Circuit Court of Illinois, Criminal Division through the following email address: criminalfelonyservices@cookcountycourt com.

Dan K. Webb
Sean G. Wieber
Samuel Mendenhall
Court Appointed Special Prosecutor
WINSTON & STRAWN LLP
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DWebb@winston com
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SMendenhall@winston com
(service via electronic mail)

I further certify that on July 17, 2020, I caused the above-named filings to be served on the following parties as indicated above.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Maya C. Hermerding

EXHIBITS TABLE OF CONTENTS

AFFIDAVIT OF WILLIAM J. QUINLAN

William J. Quinlan, being duly sworn, states as follows:

1. I am the principal of The Quinlan Law Firm, LLC, counsel for Movant Jussie Smollett, in the matter styled *People of the State of Illinois v. Smollett*, Case No. 20 CR 03050-01, pending in the Circuit Court of Cook County, Illinois, County Department, Criminal Division.

2. I submit this Affidavit in support of the Defendant's Motion to Dismiss Indictment. This Affidavit is submitted to authenticate the documents attached hereto as Exhibits. I have personal knowledge of the matters stated below and would testify competently thereto if called as a witness.

3. Attached hereto as Exhibit 1 is a true and correct copy of the Petition for the Appointment of Special Prosecutor, filed by Sheila O'Brien on April 5, 2019.

4. Attached hereto as Exhibit 2 is a true and correct copy of Jussie Smollett's Opposition to Petition to Appoint a Special Prosecutor and Motion to Petition the Supreme Court to Appoint an Out-of-County Judge to Hear the Petition, filed on April 18, 2019.

5. Attached hereto as Exhibit 3 is a true and correct copy of the Cook County State's Attorney's Objection to the Petition to Appoint a Special Prosecutor, filed on April 30, 2019.

6. Attached hereto as Exhibit 4 is a true and correct copy of the Order Granting the Appointment of a Special Prosecutor, entered on June 21, 2019.

7. Attached hereto as Exhibit 5 is a true and correct copy of Jussie Smollett's Motion for Substitution of Judge for Cause and for Appointment of Another Cook County Judge to Hear Concurrently Filed Motions, filed on July 19, 2019.

8. Attached hereto as Exhibit 6 is a true and correct copy of Jussie Smollett's Motion to Intervene Instanter, filed on July 19, 2019.

9. Attached hereto as Exhibit 7 is a true and correct copy of Jussie Smollett's Motion for Reconsideration of the June 21, 2019 Order Granting the Appointment of a Special Prosecutor, filed on July 19, 2019.

10. Attached hereto as Exhibit 8 is a true and correct copy of Jussie Smollett's Motion to Disclose Transcripts of Grand Jury Testimony, filed on July 19, 2019.

11. Attached hereto as Exhibit 9 is a true and correct copy of Jussie Smollett's Joint Reply to Information to Spread of Record Concerning Pleadings Filed on July 19, 2019 and Petitioner's Responses to Motions, filed on July 30, 2019.

12. Attached hereto as Exhibit 10 is a true and correct copy of the Circuit Court Report of Proceedings in case number 19 MR 00014 on July 31, 2019.

13. Attached hereto as Exhibit 11 is a true and correct copy of the Order Appointing Dan K. Webb as the Special Prosecutor, entered on August 23, 2019.

14. Attached hereto as Exhibit 12 is a true and correct copy of the Indictment entered on February 11, 2020.

15. Attached hereto as Exhibit 13 is a true and correct copy of Emergency Motion for Supervisory Order, *Smollett v. Toomin*, Case No. 125790 filed on February 24, 2020.

16. Attached hereto as Exhibit 14 is a true and correct copy of the Office of the Special Prosecutor's Response in Opposition to the Emergency Motion for Supervisory Order, *Smollett v. Toomin*, Case No. 125790 filed on March 2, 2020.

17. Attached hereto as Exhibit 15 is a true and correct copy of the Letter from C. Taft Grosboll to W. Quinlan dated March 6, 2020,

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

Dated: July 17, 2020

/s/ William J. Quinlan
William J. Quinlan

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

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
	)	
v.	)	
	)	
	)	No. 20 CR 03050-01
JUSSIE SMOLLETT,	)	
	)	
Defendant.	)	
	)	

RESPONSE IN OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS INDICTMENT

The Office of the Special Prosecutor ("OSP") respectfully requests that the Court deny Defendant's Motion to Dismiss Indictment (the "Motion"). In support of its opposition to the Motion, the OSP states as follows:

INTRODUCTION

Mr. Smollett has already twice unsuccessfully challenged the appointment of a special prosecutor—first, before Judge Toomin, and then before the Illinois Supreme Court. Five months after being charged in this case, ***and over a year after the appointment of a Special Prosecutor in June 2019***, Mr. Smollett—for the third time—is again challenging the OSP's jurisdiction and authority in this prosecution. Like his other failed attempts, this one must fail too.

Problematically from the start, Mr. Smollett argues the OSP's appointment ***via orders from June 21, 2019 and August 23, 2019*** (collectively, the "Appointment Orders") is improper for three reasons: ***first***, Judge Toomin erred in finding the initial prosecution against Mr. Smollett in Case No. 19 CR 3104 void; ***second***, Judge Toomin erred in finding that State's Attorney Foxx recused

under 55 ILCS 5/3-9008(a-15), thus allowing for the appointment of the special prosecutor; and ***third***, in the alternative, Judge Toomin's Appointment Orders are vague and overbroad. As is clear on their face, each argument requires this Court to sit as a reviewing court—which, of course, it is not—and find that another circuit court of parallel jurisdiction erred. Because this Court has no jurisdiction or authority to review Judge Toomin's Appointment Orders, the Motion must be denied on this procedural and threshold ground alone.

Even setting aside this outcome-determinative jurisdictional failure, there are other major problems with Mr. Smollett's Motion. ***First***, the proper venue to Mr. Smollett's present (third) challenge to the 2019 Appointment Orders lies with Judge Toomin, who maintains jurisdiction, and Mr. Smollett is free to seek intervention and/or reconsideration of those rulings in that court. However, Mr. Smollett likely waived his opportunity to "timely" intervene under 735 ILCS 5/2-408(a) and challenge the Appointment Orders before Judge Toomin because of the significant passage of time since (1) the entry of the 2019 Appointment Orders and (2) Mr. Smollett's February 2020 indictment. This significant passage of time is set forth below:

- April 5, 2019: Petition to Appoint a Special Prosecutor is filed in Case No. 19 MR 00014.
- June 21, 2019: Judge Toomin grants Petition appointing the special prosecutor.
- July 19, 2019: ***28 days after Judge Toomin's June 2019 order***, Mr. Smollett files a motion to intervene in Case No. 19 MR 00014 and a motion to reconsider Judge Toomin's June 2019 order.
- July 31, 2019: Judge Toomin denies Mr. Smollett's motion to intervene as untimely, ***but indicates Mr. Smollett may file a motion to intervene if he is later prosecuted by the OSP***.
- August 23, 2019: Judge Toomin appoints Dan. K. Webb as Special Prosecutor.
- February 11, 2020: Mr. Smollett is indicted in Case No. 20 CR 03050-01.
- February 24, 2020: Mr. Smollett files two emergency motions before the Illinois Supreme Court, including a motion for a supervisory order requesting that the Court vacate the Appointment Orders.

- March 6, 2020: Illinois Supreme Court summarily denies Mr. Smollett's emergency motions.

- July 17, 2020: ***157 days after indictment and 392 days since Judge Toomin's June 2019 order***, Mr. Smollett files a motion to dismiss indictment in Case No. 20 CR 03050-01 on the grounds that Judge Toomin erred in appointing the special prosecutor.

Second, the Illinois Supreme Court considered ***the exact same arguments*** raised in this motion, and denied Mr. Smollett's identical requests for relief on the pleadings. As this Court put it previously, "[s]o as far as this court can tell Judge Toomin's order appointing the special prosecutor and not finding any problem with double jeopardy grounds that order stands at this point at least according to the Illinois Supreme Court." June 12, 2019, Hr'g Tr. at 52. ***Third***, on the merits, Judge Toomin did not err because he appropriately used his discretion to appoint a special prosecutor and his detailed Appointment Orders are legally supported and reasoned.

Mr. Smollett's efforts to judge-shop and take yet another proverbial bite at the apple in challenging the OSP's appointment and authority to prosecute him must be denied. Mr. Smollett has already tested the waters in challenging the Appointment Orders before Judge Toomin, and when that outcome resulted in disappointment, he went to the Illinois Supreme Court—and now this Court—to find relief from those Orders. Mr. Smollett has likely waived his challenge to the Appointment Orders, but if he does have a viable procedural path to relief, it is certainly not before this Court and must be brought before Judge Toomin. This Court should not hesitate and deny Mr. Smollett's motion to dismiss the indictment.

PROCEDURAL HISTORY

As with much of the Motion, Mr. Smollett's "relevant background" section is almost entirely lifted from the "relevant background" section in his Emergency Motion for Supervisory Order Pursuant to Rule 383 and Movant's Explanatory Suggestions in Support of the Motion

("Emergency Motion") that he filed with the Illinois Supreme Court in February 2020, which is attached hereto as Exhibit A (Mr. Smollett's failed second attempt to challenge the appointment of a special prosecutor). *Compare* Exhibit A at ¶¶ 2–17 *with* Motion at ¶¶ 2–18. As the OSP told the Illinois Supreme Court then (*see* Def.'s Ex. 14), this "relevant background" section omits critical details as provided below.

Following the Cook County State's Attorney's Office's ("CCSAO") decision to dismiss the original 16-count indictment against Mr. Smollett on March 26, 2019 (via a motion for *nolle prosequi*), retired appellate justice Sheila O'Brien filed a *pro se* Petition to Appoint a Special Prosecutor in the matter of *People of the State of Illinois v. Jussie Smollett* (hereinafter, the "Petition"). *See* Def.'s Ex. 1. The case was initially assigned to the Honorable Judge Leroy K. Martin, Jr, and docketed as Case No. 19 MR 00014, *see id.*, but later transferred to Judge Toomin on May 10, 2020. Without moving to intervene, Mr. Smollett "specially appeared" (via counsel) to oppose Ms. O'Brien's Petition on April 18, 2019 (*see* Def.'s Ex. 2), and he continued to have counsel present at all appearances in these proceedings.

On April 26, 2019, Ms. O'Brien filed a Notice to Appear and Produce Pursuant to Illinois Supreme Court Rule 237 directed to Mr. Smollett. *See* Exhibit B. In response, Mr. Smollett filed an Objection and Motion to Quash the Notice to Appear and Produce, and argued that he could not be compelled to appear in the proceedings because "[he] is not a party to this case." *See* Exhibit C at 3. Mr. Smollett did not file a motion to intervene at that time.

On June 21, 2019, Judge Toomin issued a 21-page written order directing the appointment of a special prosecutor "to conduct an independent investigation of the actions of any person or office involved in all aspects of the case entitled *People of the State of Illinois v. Jussie Smollett*, No. 19 CR 0310401, and if reasonable grounds exist to further prosecute Smollett, in the interest

of justice the special prosecutor may take such action as may be appropriate to effectuate that result. Additionally, in the event the investigation establishes reasonable grounds to believe that any other criminal offense was committed in the course of the Smollett matter, the special prosecutor may commence the prosecution of any crime as may be suspected." *See* Def.'s Ex. 4 at 21.

Twenty-eight (28) days after Judge Toomin's order, on July 19, 2019, Mr. Smollett filed four motions, including a Motion for Reconsideration of the June 21, 2019 Order Granting the Appointment of a Special Prosecutor (*see* Def.'s Ex. 7) and a Motion to Intervene Instanter. *See* Def.'s Ex. 6. In Mr. Smollett's Motion to Intervene Instanter, he argued that his motion was timely under 735 ILCS 5/2-408(a)(2) because it had been filed within 30 days of Judge Toomin's order appointing the special prosecutor. *Id.* at 3. Ms. O'Brien's response in opposition to Mr. Smollett's Motion to Intervene argued that his intervention was untimely, and aptly noted that Mr. Smollett had been (1) served with all the pleadings in the proceedings since April 2019 (four months prior), (2) had communicated with counsel, (3) had appeared at each status hearing, (4) had filed pleadings despite not being a party, and (5) had actually fought the notice to appear before the court. *See* Exhibit D.

Judge Toomin denied Mr. Smollett's motion to intervene on July 31, 2019, finding that the motion "was far from timely." *See* Def.'s Ex. 10 at 30. Judge Toomin also found that Mr. Smollett lacked a direct interest in the order appointing the special prosecutor because he only ordered an independent investigation, not the re-prosecution of Mr. Smollett. *Id*. at 31. Moreover, Judge Toomin reiterated on the record that although there seemed to be a question "that because [the order] called for the appointment of a Special Prosecutor, it did not have finality to it," *id.* at 29,

the order appointing the special prosecutor "was not an interim order. It didn't – it didn't pretend to be, it didn't purport to be." *Id.* at 30.

On August 23, 2019, Judge Toomin issued another written order appointing Dan K. Webb as Special Prosecutor in No. 19 MR 00014. *See* Def.'s Ex. 11. That order contained the same investigatory mandate that Judge Toomin had issued in his June 21, 2019 order. *Id*. In addition, Judge Toomin ordered that "the Special Prosecutor shall be vested with the same powers and authority of the elected State's Attorney of Cook County, limited only by the subject matter of this investigation, including the power to discover and gather relevant evidence, to compel the appearance of witnesses before a Special Grand Jury of the Circuit Court of Cook County, to confer immunity as may be deemed necessary, to consider the bar of limitations where applicable, and to institute criminal proceedings by indictment, information, or complaint, where supported by probable cause, upon his taking the proper oath required by law." *Id.* at 2.

At no point did Mr. Smollett appeal any of Judge Toomin's orders—including the Appointment Orders from June 21, 2019 and August 23, 2019, or the July 31, 2019 denial of his motion to intervene.

Following Judge Toomin's Appointment Order on August 23, 2019, the OSP was promptly formed and began conducting an investigation pursuant to Judge Toomin's mandate, including convening a special grand jury. Subsequently, on February 11, 2020, the special grand jury returned a true bill and the OSP filed an indictment charging Mr. Smollett with six counts of disorderly conduct, namely making false police reports in violation of 720 ILCS 5/26-1(a)(4). *See* Def.'s Ex. 12.

Importantly, Judge Toomin continued to maintain—and still maintains—jurisdiction over the proceedings in the underlying matter in Case No. 19 MR 00014. For example, on January 16,

2020, Petitioner O'Brien filed a Petition for Mandamus in Case No. 19 MR 00014 in an effort to stop the CCSAO from using outside counsel in connection with the OSP's investigation. One issue that arose during the briefing of that petition was whether Judge Toomin retained jurisdiction to even decide the petition. On February 14, 2020, Judge Toomin reiterated that his court had retained jurisdiction over, and would continue to retain jurisdiction over, the matter. *See* Exhibit E at 25–27. Additionally, the OSP recently filed a motion before Judge Toomin under Case No. 19 MR 00014 requesting that Judge Toomin enter an order allowing for the public release of the OSP's report entitled *The Office of the Special Prosecutor's Summary of its Final Conclusions, Supporting Findings and Evidence Relating to the Cook County State's Attorney's Office's and the Chicago Police Department's Involvement in the Initial Smollett Case* (the "Summary Report"). In fact, Judge Toomin held a public hearing on the matter on August 28, 2020. *See* Exhibit F.

Finally, on February 24, 2020—the day of Mr. Smollett's arraignment before this Court—Mr. Smollett filed two emergency motions before the Illinois Supreme Court: (1) Emergency Motion to Stay Proceedings; and (2) Emergency Motion for Supervisory Order Pursuant to Rule 383 and Movant's Explanatory Suggestions in Support of the Motion. *See* Exhibit A (Emergency Motion for Supervisory Order). In the latter motion, Mr. Smollett asked the Illinois Supreme Court to both (1) vacate Judge Toomin's June 21, 2019 order granting the appointment of a special prosecutor, and (2) vacate Judge Toomin's August 23, 2019 order appointing Dan. K. Webb as Special Prosecutor. *Id.* at 7–8. The OSP opposed Mr. Smollett's request for relief before the Illinois Supreme Court. *See* Def.'s Ex. 14 (Response in Opposition to Emergency Motion for Supervisory Order). On March 6, 2020, in two one-page orders, the Illinois Supreme Court denied

Mr. Smollett's emergency motions. *See* Def.'s Ex. 15 (order denying Emergency Motion for Supervisory Order).

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO REVIEW JUDGE TOOMIN'S APPOINTMENT ORDERS

A. This Court cannot review the orders of another court of parallel jurisdiction.

As an initial matter, the Motion must be denied because it is jurisdictionally improper. As is clear on the face of the Motion, Mr. Smollett is attempting to (once again) re-litigate Judge Toomin's Appointment Orders. Although Mr. Smollett makes no mention of this Court's jurisdiction or ability to review Judge Toomin's Appointment Orders, there can be no dispute that the matter appointing a special prosecutor is an entirely separate matter, Case No. 19 MR 00014, from the action before this Court, Case No. 20 CR 03050-01. Case No. 19 MR 00014 has not been reassigned or transferred to this Court—in fact, as shown above, Judge Toomin still exercises jurisdiction over Case No. 19 MR 00014.

The law is clear: because this Court is not a reviewing or appellate court, it does not have jurisdiction to review and amend the orders of Judge Toomin, a fellow circuit court judge in an active matter over which Judge Toomin retains jurisdiction. "One circuit judge may not review or disregard the orders of another circuit judge in the judicial system of this State, and such action can only serve to diminish respect for and public confidence in our judiciary." *People ex rel. Phillips Petroleum Co. v. Gitchoff*, 65 Ill. 2d 249, 257 (1976) (internal citations omitted). Merely because circuit court judges are equal in power and authority among divisions "does not provide a license for one judge to ignore orders entered by judges of coordinate authority whether they are in different divisions or different counties." *Bd. of Trustees of Cmty. Coll. Dist. No. 508 v. Rosewell*, 262 Ill. App. 3d 938, 957–60 (1st Dist. 1992) (finding judge who was not a replacement

or successor to judges who entered orders on turnover petitions lacked the authority to rule on the turnover petitions); *see also People ex rel. Kelly, Ketting Furth, Inc. v. Epstein*, 61 Ill. 2d 229, 231 (1974) (finding a Chancery Division judge "should have declined to act" in reviewing Law Division judge's orders because the orders could have been appealed); *People ex rel. MacMillian v. Napoli*, 35 Ill. 2d 80, 81–82 (1966) (finding that Criminal Division judge erred in overruling Municipal Division judge's suppression order).

For example, in *People v. Williams*, the Illinois Supreme Court explained, "[i]f an order is appealable when entered, and no timely reconsideration is obtained from the judge who entered it or from that judge's successor, a dissatisfied party's remedy is appeal, not relitigation before a second coordinate judge." 138 Ill. 2d 377, 388 (1990) (holding trial judge improperly re-opened a suppression decision); *see also People v. DeJesus*, 127 Ill. 2d 486, 494 (1989) (noting that "where a ruling is *immediately* appealable, an aggrieved party's remedy is to appeal, and the second judge should decline to act."). The *Williams* court described with approval an earlier Illinois Supreme Court decision finding that a second judge did not have jurisdiction to review an earlier judge's order reinstating a case because the first judge's error "'could only be corrected by a review of the order [by an appellate court],' not by the later order of a judge of coordinate authority." *Id.* at 390 (quoting *Harris v. Chicago House Wrecking Co.*, 314 Ill. 500 (1924)).

Quite simply, Mr. Smollett is asking for a review of Judge Toomin's Appointment Orders in Case No. 19 MR 00014, which is procedurally and jurisdictionally improper. Notably, Mr. Smollett seemingly agrees in his Motion that a jurisdictional hurdle prevents this Court from reviewing Judge Toomin's Appointment Orders when he complains that the dismissal of his initial charges "***should not have been second-guessed by another circuit court of parallel jurisdiction***."

Motion at 6 (emphasis added). Yet, that is precisely what Mr. Smollett invites this Court to do here.

Because this Court does not have jurisdiction to review Judge Toomin's Appointment Orders, Mr. Smollett's Motion must be denied.

B. Any review of Judge Toomin's Appointment Orders belongs before Judge Toomin.

Mr. Smollett is improperly attempting to judge-shop rather than challenging Judge Toomin's Appointment Orders in the proper venue—before Judge Toomin. In fact, Mr. Smollett has had multiple opportunities to assert such a challenge before Judge Toomin but has not done so.

First, as shown above, Mr. Smollett had an opportunity to file a proper and timely motion to intervene in the underlying matter where Judge Toomin appointed a special prosecutor, but failed to do so. Specifically, Mr. Smollett chose to sit on the sidelines as a "non-party" ***for more than 100 days*** after the Petition was filed and ***for 28 days*** after the issuance of Judge Toomin's June 21, 2019 order granting the Petition before moving to intervene. In fact, as discussed above, his counsel repeatedly appeared at court hearings and submitted papers on his behalf as a non-party.[1] As a result, on July 31, 2019, Judge Toomin correctly held that Mr. Smollett's petition to intervene was not timely:

> Here, the petition ***was far from timely*** as it was in *Ramsey Emergency Services vs. Interstate Commerce Commission*, 367 [Ill.] App. 3d 351. There, the petition was filed after the proceedings were well under way, as they were here. The evidence was closed, as it was here. And, in that case, the Administrative Law Judge had already issued a proposed final order. So all of those requisites were met in *Ramsey*; they were met here as well.

[1] For example, on April 30, 2019, Mr. Smollett filed an Objection and Motion to Quash Notice to Appear and Produce Pursuant to Supreme Court Rule 237 Directed to Jussie Smollett. *See* Exhibit C. In that filing, Mr. Smollett acknowledged that he "is not a party to this case." *Id.* at 3.

Def.'s Ex. 10 at 30–31 (emphasis added); *see Ramsey Emergency Servs., Inc. v. Ill. Commerce Comm'n*, 367 Ill. App. 3d 351, 365 (1st Dist. 2006) ("INENA filed a petition to intervene after Ramsey's application proceedings were already well underway, evidence had been closed, and the ALJ assigned to the case had already issued a proposed final order. The petition to intervene was far from timely."). Therefore, Mr. Smollett ***missed*** his first opportunity to challenge the appointment of the special prosecutor.

Second, after the OSP filed charges against Mr. Smollett on February 11, 2020, Mr. Smollett arguably may have had a direct interest in the existence of the OSP and could have moved to intervene before Judge Toomin to challenge the appointment of the Special Prosecutor, yet decided to seek extraordinary relief from the Illinois Supreme Court instead. In fact, in denying Mr. Smollett's motion to intervene, Judge Toomin held that the appointment of the Special Prosecutor did not directly affect Mr. Smollett at that time because he only ordered the Special Prosecutor to "conduct an independent investigation and re-prosecution is not ordered, but may occur if additional considerations are met, i.e., reasonable grounds exist to re-prosecute Mr. Smollett, and it's in the interest of justice." *See* Def.'s Ex. 10 at 31. Therefore, once Mr. Smollett faced new charges, he could have asserted the same arguments he makes before this Court before Judge Toomin.[2] But, even though Judge Toomin gave Mr. Smollett a specific roadmap regarding the procedure for asserting a potential challenge to the appointment of the special prosecutor, Mr. Smollett elected not to intervene—and still has not tried to intervene—in Case No. 19 MR 00014 following the February 2020 indictment. Accordingly, Mr. Smollett likely has waived his opportunity to "timely" intervene under 735 ILCS 5/2-408(a) and challenge the Appointment

[2] The OSP is not conceding that any attempt to file a motion to intervene (or seek any other relief) in front of Judge Toomin would ultimately be accepted (particularly if it is not timely) or meritorious. The OSP also does not waive any potential objection or argument relating to any such future motion or other challenge to Judge Toomin's prior decisions in this matter.

Orders before Judge Toomin, as his latest challenge to the Appointment Orders via the Motion comes ***157 days since the indictment and 392 days since Judge Toomin's June 2019 order***.

Third, despite having a roadmap from Judge Toomin, and being reminded of this roadmap by the OSP in its March 2, 2020 brief in its Response in Opposition to Mr. Smollett's Emergency Motion for a Supervisory Order to the Illinois Supreme Court (*see* Def.'s Ex. 14 at 8–9),[3] Mr. Smollett has intentionally chosen file the present Motion before this Court rather than seeking relief from Judge Toomin. Indeed, Mr. Smollett should have implicitly recognized that the Illinois Supreme Court's summary denial of his Emergency Motion was an invitation to undertake the proper procedural channels for challenging the Appointment Orders, i.e., returning before Judge Toomin who maintains jurisdiction over Case No. 19 MR 00014. Thus, it is clear that Mr. Smollett's Motion is an attempt to judge-shop, as he has repeatedly refused to return to Judge Toomin's court to either seek intervention or reconsideration of the Appointment Orders, and has instead brought identical motions before the Illinois Supreme Court, and now this Court, in the hopes of finding a more sympathetic audience for his disappointment with Judge Toomin's Appointment Orders. This Court should not reward Mr. Smollett's blatant judge shopping. *See Hemphill v. Chicago Transit Auth.*, 357 Ill. App. 3d 705, 708 (1st Dist. 2005) ("judges of coordinate jurisdiction should use caution when vacating or amending prior rulings, especially if there is evidence of 'judge shopping' by the party receiving the adverse ruling.") Furthermore, this Court should not overlook Mr. Smollett's initial failure to file a timely motion to intervene, nor allow him to bypass the proper procedural vehicle of a motion for intervention before Judge Toomin.

[3] The OSP outlined the same argument in its responsive briefing before the Illinois Supreme Court.

II. THE ILLINOIS SUPREME COURT CONSIDERED THE EXACT SAME ARGUMENTS RAISED BY MR. SMOLLETT AND DID NOT GRANT ANY RELIEF

As this Court knows, and as detailed above, Mr. Smollett filed two emergency briefs—on the day of his arraignment—before the Illinois Supreme Court seeking to vacate the Appointment Orders. *See* Exhibit A (Emergency Motion for Supervisory Order). The OSP opposed those motions and defended Judge Toomin's Appointment Orders on their merits. *See* Def.'s Ex. 14 (Response in Opposition to Emergency Motion for Supervisory Order). On March 6, 2020, the Illinois Supreme Court denied Mr. Smollett's emergency motions, and this case has proceeded in the normal course ever since.

While Mr. Smollett correctly notes that the Illinois Supreme Court denied his motions "without any discussion on the merits of the arguments," it is incorrect to state that these arguments "have not yet been considered on the merits by any court." Motion at 7. In order to deny Mr. Smollett's motions, the Illinois Supreme Court had to "consider" (i.e., review) the arguments and it would belie common sense to suggest otherwise.

As should be apparent, Mr. Smollett's Motion sets forth ***the exact same arguments***, with citations ***to the exact same case law***, that he put forward before the Illinois Supreme Court in his Emergency Motion. *Compare* Exhibit A *with* Motion. Indeed, a quick comparison of the two pleadings reveals that there is virtually no material difference between the two—the arguments have just been reorganized and repackaged under a new heading:

Mr. Smollett's Argument	**Emergency Motion for Supervisory Order (Exhibit A)**	**Motion to Dismiss Indictment**
Judge Toomin Erred Generally	Motion Argument ¶¶ 21–24	Motion Argument ¶¶ 22–25
State's Attorney Foxx had Power to Delegate Authority to Her First Assistant	Memo Section I.A.2. pp. 14–16	Memo Section I.A.1. pp. 10–13

Judge Toomin Erred in Ruling that the Original Proceedings Were Void	Memo Section I.B. pp. 18–20	Memo Section I.A.2. pp. 14–16
Judge Toomin Erred in Appointing Special Prosecutor on a Finding that State's Attorney Foxx Recused Under 55 ILCS 5/3-9008(a-15)	Memo Section I.A.1. pp. 11–14	Memo Section I.B. pp. 16–19
Judge Toomin's Appointment Order Was Vague and Overbroad	Memo Section I.C. pp. 20–21	Memo Section I.C. pp. 20

Because the arguments in this present Motion and the Emergency Motion are nearly identical, Mr. Smollett cannot claim the arguments he sets forth in the present Motion have not been "considered" by the Illinois Supreme Court, which entered an order based on Mr. Smollett's Emergency Motion. Moreover, if the Illinois Supreme Court believed there was some infirmity with Judge Toomin's Appointment Orders or the OSP's prosecution of Mr. Smollett, it certainly would not have summarily denied Mr. Smollett's emergency motions. Accordingly, the orders by the Illinois Supreme Court are, at a minimum, an implicit rejection of the Motion's arguments. *Cf. Levin v. Attorney Registration & Disciplinary Comm'n of Sup. Ct. of Ill.*, 1995 WL 135565, at *3 (N.D. Ill. Mar. 23, 1995) (noting that plaintiff's Rule 383 Supervisory Order motion "contained a similar argument" and "a similar claim" to plaintiff's federal complaint, and that by "denying [plaintiff's] motion for Supervisory Order, the Illinois Supreme Court rejected the constitutional challenges contained in [the complaint]."). Indeed, as this Court put it, "[s]o as far as this court can tell Judge Toomin's order appointing the special prosecutor and not finding any problem with double jeopardy grounds that order stands at this point at least according to the Illinois Supreme Court." June 12, 2019, Hr'g Tr. at 52. Thus, this Court need not second-guess the Illinois Supreme Court's decision to summarily deny these ***exact same arguments*** that were considered by the Court.

III. JUDGE TOOMIN DID NOT ERR IN HIS APPOINTMENT ORDERS

Should this Court decide that it needs to address the merits of the Motion (which it cannot procedurally do, and should not do), this Court should find that Judge Toomin did not err in appointing the special prosecutor. For sake of completeness, the OSP presents this Court with the same counter-arguments it made before the Illinois Supreme Court in defending Judge Toomin's Appointment Orders in response to Mr. Smollett's Emergency Motion for a Supervisory Order. *See* Def.'s Ex. 14. As explained below, the Appointment Orders are well-reasoned and supported by law, and Mr. Smollett's baseless and contradictory arguments should be rejected.

A. Judge Toomin correctly ruled that State's Attorney Kim Foxx made an invalid recusal and appointment of an "Acting State's Attorney," which voided the prior proceedings.

"The decision to appoint a special prosecutor is within the discretion of the trial court." *In re Harris*, 335 Ill. App. 3d 517, 520 (1st Dist. 2002); *see also In re Appointment of Special Prosecutor*, 388 Ill. App. 3d 220, 232 (3d Dist. 2009) (same). Accordingly, when ruling on the Petition and determining whether to appoint a special prosecutor, Judge Toomin was vested with broad discretion. Judge Toomin appropriately exercised his discretion in appointing a special prosecutor, and his ruling is grounded in law and properly reasoned.

Judge Toomin first took note of Cook County State's Attorney Kimberly M. Foxx's public statements that she recused herself "to address potential questions of impropriety based upon familiarity with potential witnesses" (Def.'s Ex. 4 at 7), as well as the CCSAO's internal statements that Foxx "is recused from the investigation involving Jussie Smollett." *Id.* at 6. In light of those statements using the word "recuse"—a term with legal import—Judge Toomin found that a "reasonable assumption exists" that State's Attorney Foxx's decision to recuse herself was based on 55 ILCS 5/3-9008(a-15), which states that a State's Attorney "may file a petition to recuse

himself or herself from a cause or proceeding for any other reason he or she deems appropriate and the court shall appoint a special prosecutor as provided in this Section." *See id*. at 14. Since State's Attorney Foxx failed to file a petition for recusal, Judge Toomin noted that she "depriv[ed] the court of notice that appointment of a special prosecutor was mandated." *Id.* Instead, State's Attorney Foxx (improperly) turned the prosecution of Mr. Smollett over to "Acting State's Attorney" Joseph Magats. *Id.* at 14–16.

Judge Toomin found that, despite the absence of a formal petition or motion recusing State's Attorney Foxx from Mr. Smollett's prosecution, there was no other way to construe the actions of State's Attorney Foxx than an "unconditional legal recusal":

> A review of the record confirms our understanding that what was intended by Ms. Foxx, and what indeed occurred, was an unconditional legal recusal. Her voluntary act evinced a relinquishment of any future standing or authority over the Smollett proceeding. Essentially, she announced she was giving up all of the authority or power she possessed as the duly elected chief prosecutor; she was no longer involved.

Id. at 15–16.

Moreover, Judge Toomin found that State's Attorney Foxx deviated from section 3-9008(a-15) when, instead of allowing the court to appoint a special prosecutor, she created the role of "Acting State's Attorney" in the matter. *Id.* at 16. Indeed, Judge Toomin correctly noted that State's Attorney Foxx "possessed no authority, constitutionally or statutorily, to create that office." *Id.*; *see also* 55 ILCS 5/3-9005(a) (listing the 13 enumerated powers of each State's Attorney, which does not include the power to create subordinate offices or appoint prosecutors following recusal). *Id.* at 16–17.

Judge Toomin noted that Illinois courts have routinely disapproved of similar arrangements where State's Attorneys make invalid recusals under the law and appoint an individual to serve in its place. *See People v. Jennings*, 343 Ill. App. 3d 717, 724 (5th Dist. 2003) ("This type of

appointment cannot be condoned. State's Attorneys are clearly not meant to have such unbridled authority in the appointment of special prosecutors."). As a consequence, courts have found prosecutions pursuant to these invalid arrangements where a State's Attorney acts beyond its authority to be void. *See id.* at 18–20 (collecting cases).

In light of the "reasonable assumption" that State's Attorney Foxx recused herself pursuant to section 3-9008(a-15) and her deviation from that statute in appointing Mr. Magats as "Acting State's Attorney," Judge Toomin correctly ruled that all of the proceedings under the Acting State's Attorney were void:

> There was no duly elected State's Attorney when Jussie Smollett was arrested;
> There was no State's Attorney when Smollett was initially charged;
> There was no State's Attorney when Smollett's case was presented to the grand jury, nor when he was indicted;
> There was no State's Attorney when Smollett was arraigned and entered his plea of not guilty; and
> There was no State's Attorney in the courtroom when the proceedings were *nolle prossed*.

*Id.*at 20.

Thus, at each step of the way, Judge Toomin's 21-page order was reasoned and supported by valid case law as he applied the authority and discretion vested in him by 55 ILCS 5/3-9008 to determine whether a special prosecutor should be appointed. Mr. Smollett has not provided any basis for concluding that Judge Toomin's prior order was improper or that it requires any remedy by this Court.

B. Mr. Smollett's arguments are contradictory and not supported by law.

Mr. Smollett's specific arguments attacking the Appointment Orders each fail.

First, Mr. Smollett takes a confusing, legally unsupported position and makes contradictory statements with respect to the necessity of a recusal petition by the State's Attorney to trigger Judge Toomin's authority to make a ruling under Section 3-9008(a-15). Section 3-

9008(a-15) states that the "State's Attorney ***may*** file a petition to recuse himself or herself from a cause or proceeding for any other reason he or she deems appropriate and the court shall appoint a special prosecutor …" 55 ILCS 5/3-9008(a-15) (emphasis added). While Mr. Smollett admits this language is "***permissive***" and that "the State's Attorney is ***not required*** to file such a petition," he also labels the filing of such a petition a "statutory prerequisite." Motion at 18–19 (emphasis added). It cannot be both. Per the plain language of the statute, the filing of such a petition is permissive and not required. *In re Estate of Ahmed*, 322 Ill. App. 3d 741, 746 (1st Dist. 2001) ("As a rule of statutory construction, the word 'may' is permissive, as opposed to mandatory.").

Judge Toomin also found that State's Attorney Foxx effectively recused herself pursuant to 55 ILCS 5/3-9008(a-15) even though she did not file a formal petition. *See* Def.'s Ex. 4 at 14–16. Therefore, the absence of a formal petition by State's Attorney Foxx—which is permissive and not required—does not preclude the appointment of a special prosecutor. In fact, it would belie common sense to read Section 5/3-9008(a-15) as ***only*** allowing a court to appoint a special prosecutor when a State's Attorney filed a petition, thereby giving the State's Attorney the ability to prevent such an appointment that may be necessary due to improper conduct by the State's Attorney (as Judge Toomin concluded occurred here).

Second, Mr. Smollett's contention that, contrary to Judge Toomin's reasoned conclusion, State's Attorney Foxx could delegate her authority to other Assistant State's Attorneys misses the mark. Of course, Assistant State's Attorneys "are in essence surrogates for the State's Attorney." *Office of Cook Cty. State's Attorney v. Ill. Local Labor Relations Bd.*, 166 Ill. 2d 296, 303 (1995). However, none of the cases Mr. Smollett cites involve such delegation of authority in the context of either the recusal of the State's Attorney or the creation of a subordinate office (i.e., Acting State's Attorney). As Judge Toomin correctly held (based on legal reasoning and citation to case

law), State's Attorney Foxx did not possess the power under Illinois law to both recuse herself (without recusing the entire Cook County State's Attorney's Office) and create the role of Acting State's Attorney to act in her stead. *See* Def.'s Ex. 4 at 16–18. Therefore, State's Attorney Foxx's actions were an improper delegation of her authority under the law.

Third, Judge Toomin correctly held that the prior proceedings following State's Attorney Foxx's recusal were null and void. Under Section 3-9008(a-15), as Judge Toomin detailed, State's Attorney Foxx's recusal required the court to appoint a special prosecutor. *See* 55 ILCS 5/3-9008(a-15). Once Judge Toomin determined (as discussed above) that State's Attorney Foxx's delegation of authority to Joe Magats as the "Acting State's Attorney" was invalid under Illinois law, *see* Def.'s Ex. 4 at 16–18, the necessary remedy was to vacate the prior proceedings and deem them void. *See People v. Munson*, 319 Ill. 596, 604 (1925) (quashing indictment where elected State's Attorney was not licensed to practice law); *People v. Ward*, 326 Ill. App. 3d 897, 902 (5th Dist. 2002) (vacating conviction and stating that "[i]f a case is not prosecuted by an attorney properly acting as an assistant State's Attorney, the prosecution is void and the cause should be remanded so that it can be brought by a proper prosecutor."); *People v. Dunson*, 316 Ill. App. 3d 760, 770 (2d Dist. 2000) (finding that participation of assistant State's Attorney not licensed to practice law in Illinois rendered trial "null and void *ab initio* and that the resulting final judgment is also void.").

Mr. Smollett relies heavily on *People v. Woodall*, 333 Ill. App. 3d 1146 (5th Dist. 2002), in an attempt to avoid this legal (and common sense) outcome by arguing that "the right to be prosecuted by someone with proper prosecutorial authority is a ***personal privilege***," and that because he did not challenge the CCSAO's authority to prosecute him, there was no basis to void the original proceedings. *See* Motion at 15–16. However, the *Woodall* court made clear that the

trial court in that case obtained proper jurisdiction to prosecute the defendant when the State's Attorney properly initiated the proceedings, filed an information charging defendant, and participated in an arraignment where the defendant entered a plea. *Woodall*, 333 Ill. App. 3d at 1156. Thus, the "trial court … obtained proper jurisdiction over the defendant prior to any unauthorized acts being performed" by the agency attorneys, and those later actions "***did not deprive the trial court of its power to act or in any way cause any of its actions to exceed its power***." *Id.* at 1156–57 (emphasis added). Unlike in *Woodall*, the trial court in the original proceedings here (Judge Watkins) never had proper jurisdiction because the proceedings were initiated ***by the CCSAO*** after indictment on March 14, 2019, via Mr. Smollett's arraignment, and at that time, ***the CCSAO was not authorized under Illinois law to prosecute Mr. Smollett due to State's Attorney Foxx's recusal***.

Furthermore, as Judge Toomin noted in his opinion, the issues implicated by an improper recusal and delegation of authority extend well beyond Mr. Smollett and relate to the "integrity of our criminal justice system." Def.'s Ex. 4 at 21. Indeed, Mr. Smollett cannot simply acquiesce to a legal proceeding that had no authority to occur merely because he is pleased with the outcome (which the "Acting State's Attorney" had no authority to negotiate).

Finally, contrary to Mr. Smollett's contention, Judge Toomin's June 21, 2019 order appointing the special prosecutor was not vague or overbroad. *See In re Appointment of Special Prosecutor*, 388 Ill. App. 3d at 234 (noting that the trial court is vested with discretion to craft the "scope of the special prosecutor's authority."). The order specifically delineates two discrete avenues of investigation to the OSP: (1) "to conduct an independent investigation of the actions of any person or office involved in all aspects of the case entitled *People of the State of Illinois v. Jussie Smollett*, No 19 CR 0310401, and if reasonable grounds exists to further prosecute Smollett,

in the interest of justice the special prosecutor may take such action as may be appropriate to effectuate that result"; and, (2) "in the event the investigation establishes reasonable grounds to believe that any other criminal offense was committed in the course of the Smollett matter," to "commence the prosecution of any crime as may be suspected." Def.'s Ex. 4 at 21. This order was tied to and stemmed from the specific conduct and issues in the underlying matter. Furthermore, given that Judge Toomin cannot know or anticipate precisely what potential misconduct a special prosecutor might find, it would belie common sense to handcuff the special prosecutor with a narrower order. As a result, Judge Toomin's tailored, limited, and rational order does not require any further narrowing or specificity.

IV. ALTERNATIVELY, THE COURT SHOULD DIRECT MR. SMOLLETT TO FILE A RENEWED MOTION FOR INTERVENTION BEFORE JUDGE TOOMIN

The relief Mr. Smollett seeks is overbroad and extends well beyond his direct interests. While Mr. Smollett sweepingly seeks to dismiss the February 11, 2020 indictment returned by the special grand jury and avoid personally facing prosecution (which includes new charges), he also invites this Court to call into question Judge Toomin's Appointment Orders. But, any ruling undermining those orders would consequently undermine the legitimacy of the OSP's investigation into ***other entities*** beyond Mr. Smollett, which just recently concluded. *See supra* 7 (discussing the OSP's motion before Judge Toomin to publicly release the OSP's Summary Report).

Therefore, if this Court determines that it is proper to grant Mr. Smollett any relief, the OSP respectfully submits that the Court direct Mr. Smollett to file a new motion to intervene in light of the February 2020 indictment (which Judge Toomin could, of course, deny as untimely or legally insufficient). Then, if Mr. Smollett is allowed to intervene (which the OSP does not

concede would be timely or meritorious), Mr. Smollett would be able to properly seek Judge Toomin's reconsideration of Judge Toomin's appointment of a special prosecutor.

CONCLUSION

For the foregoing reasons, the Office of the Special Prosecutor respectfully requests that this Court deny Mr. Smollett's Motion to Dismiss Indictment.

Dated: August 28, 2020

Respectfully submitted,

/s/ Dan K. Webb

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

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
	)	
v.	)	
	)	
	)	No. 20 CR 03050-01
JUSSIE SMOLLETT,	)	
	)	
Defendant.	)	
	)	

NOTICE OF FILING

TO:

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YOU ARE HEREBY NOTIFIED that on August 28, 2020, the undersigned filed the attached Response in Opposition to Defendant's Motion to Dismiss Indictment with the Clerk of the Circuit Court at the George N. Leighton Criminal Courthouse, 2600 South California Avenue, Chicago, Illinois 60608, via email to: Criminal Felony Services CriminalFelonyServices@cookcountycourt.com, with a courtesy copy provided to Judge Linn through his clerk via email at Joel.OConnell@cookcountyil.gov.

/s/ Sean G. Wieber
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PROOF OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing to be emailed to the following attorneys of record on August 28, 2020:

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STATE OF ILLINOIS)
) ss
COUNTY OF C O O K)

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT - CRIMINAL DIVISION

THE PEOPLE OF THE)
STATE OF ILLINOIS)
) Case No. 20CR-3050
vs.)
)
JUSSIE SMOLLETT)

REPORT OF VIDEO-CONFERENCE PROCEEDINGS had at the hearing in the above-entitled cause before the Honorable JAMES B. LINN, Judge of said Court, on the 10th day of September, 2020.

APPEARANCES:

MR. DAN WEBB,
Special Prosecutor, by
MESSRS. SEAN WIEBER and MATT DURKIN,
Winston and Strawn,
Assistant Special Prosecutor,
Appeared on behalf of the People;

MESSRS. WILLIAM J. QUINLAN and
DAVID HUTCHISON,
Quinlan Lawfirm,
Appeared on behalf of the Defendant;

MS. TINA GLANDIAN,
Geragos and Geragos,
Appeared on behalf of the Defendant.

Grace Brennan
Official Court Reporter
Circuit Court of Cook County
County Department-Criminal Division

THE COURT: People versus Jussie Smollett. I see your name. Are you with us today?

MS. GLANDIAN: Good morning, your Honor.

THE COURT: Where are you physically today, Mr. Smollett?

THE DEFENDANT: New York. New York.

THE COURT: Will counsels identify yourselves for the record for the court reporter. Everybody.

MR. QUINLAN: I guess I will start. William J. Quinlan on behalf of Jussie Smollett.

MS. GLANDIAN: Good morning, your Honor. Tina Glandian for Mr. Smollett.

THE COURT: I can't hear you, Mr. Hutchison.

MR. HUTCHISON: David Hutchinson for Mr. Smollett.

MR. WIEBER: Sean Wieber from the office of the special prosecutor in the Chicago office and I am joined by the special prosecutor, Dan Webb, and deputy special prosecutor Matt Durkin.

THE COURT: If it's okay with the lawyers, I would like to go to breakout room and talk with you a little bit. Is that okay with everybody?

MR. QUINLAN: Fine with me.

THE COURT: Lisa, give me a breakout room with all these visitors.

MS. MORRISON: I am trying. For some reason it's giving me only the opportunity to set up one. I am trying to get it to stop doing that. It was finally going well. It's showing me we have 20 rooms available, but they are not available.

THE COURT: I just need one. Bare with us everybody.

MS. MORRISON: I might have to close Camille's room and start all over.

THE COURT: Lisa, this is just lawyers only.

MS. MORRISON: I know. Judge, I am going to make Joel the host for a minute.

THE COURT: Joel O'Connell, is Joel with us?

MS. MORRISON: He is. He was sending me a message.

MR. O'CONNELL: I am here.

THE COURT: Joel, I am looking for breakout room with multiple lawyers. Can you help us get that done.

MR. O'CONNELL: Sure.

(Whereupon, a discussion was held off the record.)

(Whereupon, the case was passed and recalled.

THE COURT: People versus Jussie Smollett. The lawyers already identified themselves. We have several

matters to deal with today. Mr. Smollett is here on Zoom camera along with the lawyers.

First thing I want to address is the fact that apparently it was made known to the Court and motions were filed that during the course of the Chicago Police Department investigating this case that they had people at the police station, two brothers from Nigeria. They are being interrogated by the police and cameras are on. It was a taped interview.

It was made known to me that at some point attorney for the brothers came to the police station and asked to talk to their clients and that request was granted. It was Gloria Schmidt-Rodriguez appeared and she was given the chance to talk to her clients. How inadvertently the tapes were left on and part -- a portion of their conversation was captured on tape. Nobody noticed it or said anything about it.

This case ultimately went through everything it went through to get where it is today and among the things that happened was special prosecutor was appointed. It was Dan Webb, now being assisted by Mr. Wieber, Mendenhall and Durkin. They went back to a new Grand Jury and indicted Mr. Smollett a second time after the first indictment was dismissed and that's a

different conversation altogether.

In any event, once that happened, Mr. Smollett was arraigned and discovery was started. We have discovery going right away. Defense had just an oral motion for discovery and office of the special prosecutor was very thorough and they gave quite a bit of information to the defense.

It turns out that the office of special prosecutor, and I think this is all undisputed, when they requested discovery, they subpoenaed Chicago Police Department and they received, among other things, tapes of the conversations, interrogation with the police and the two brothers and also they got the tape of the conversation between the two brothers and their lawyer which they shouldn't have had because that's covered by attorney-client privilege. It shouldn't have been taped in the first place. It shouldn't have been tendered to the special prosecutor.

In any event, during the course of discovery, that tape was also inadvertently given to the defense and they had it as well. So everybody has got it. Nobody should have it. It never should have existed. Nobody should have it at all.

I inquired at our last session if the

government wanted to use anything on that tape because the privilege somehow had been overcome. They said absolutely not and they wanted the defense to also agree to not use it based on the privilege.

Defense said two things. Number one, they said it's not for the special prosecutor to assert the privilege. It's not their privilege. The privilege belongs to the brothers and their lawyer and they're right about that.

They also said that, yes, we do want to use it. We think there is something in there that would overcome the attorney-client privilege and it should be available for the defense to use at trial.

I took the matter under advisement. I asked to see in camera under seal that conversation and I did see it. Suffice it to say, I saw no bombshell in there at all. I read the pleadings and the defense did submit under seal the reasons they thought that conversation between the lawyers and their clients somehow should not be privileged for variety of reasons. Because it's under seal and because it's privileged information, I don't want to go into much detail about it.

But I will say I saw absolutely nothing in there that in any possible way indicated that the

attorney-client privilege would be overcome. I also believe that the defense doesn't really need that material to cross examine and confront the witnesses effectively.

The fact that there was a taped interrogation taking place is easily made known to the jury or trier of fact. The fact that the attorney did talk to these people at one point without getting into what was said can easily be made known. It's not a secret that the lawyer talked to her clients.

Then the fact that the clients may have said something differently after talking to their lawyer than they said before, all that is available for the defense. What's not available is what was actually said, the words expressed between the lawyer and their clients.

Because I find that the privilege is not overcome, it's part of the bedrock of American jurisprudence that we protect attorney-client relationships, that these are sacred privilege, I am not finding that any of the content of it is such that there would be an exception to that rule.

So all I need is an assertion from counsel for the Petitioners, witness, I meant to say, saying that she is asserting the privilege and it's going to be

respected and honored and the defense request to use the actual word is denied.

They can certainly tell the trier of circumstances and what was said before they talked to their lawyer and what was said after they talked to their lawyer should they choose to do so. For that reason, I know Ms. Rodriguez-Schmidt did ask to intervene and copy of the proceedings is not necessary. I am trying to keep this under seal. She doesn't have to be heard as long as I have her assertion of the privilege, that will be enough and her motion will be granted.

Next is a Motion to Dismiss based on the defense's suggestion that Judge Toomin erred in appointing special prosecutor, that he didn't follow Illinois law properly. There should have never been a special prosecutor appointed in the first place and that the entire case should be dismissed for that reason.

Both sides have filed very lengthy and thorough pleadings on the matter, but I will give the the lawyers a chance to supplement what was already received by me in writing orally. So the Petitioner's attorneys would like to address this orally in support of the written pleading, I will be glad to hear it.

MR. QUINLAN: Good morning, your Honor. William J. Quinlan on behalf of Mr. Smollett. Along with your statement, we will try to focus exclusively as best we can and what was raised in the response trying to address what was raised by the special prosecutor in response to our Motion.

Just to recap what we filed and to be clear, our Motion to Dismiss is a jurisdictional motion. Mr. Smollett was charged and arraigned before your Honor. He is a defendant before your Honor. He has an absolute right to bring a Motion to Dismiss For Lack of Jurisdiction. Jurisdiction because this Court lacks jurisdiction because he wasn't properly indicted by a proper authority who is under our State Constitution duly elected and exclusively has that authority to charge and decide when not to charge, to bring charges and decide when to dismiss and that was brought in front of your Honor because that is where Mr. Smollett sits and lies as a criminal defendant before you.

The Illinois Supreme Court has been clear and they said in the case of People v. Novak which was back in 1994, a request to appoint a special prosecutor for the purpose of investigating and possibly charging individuals with a criminal offense raises different

concerns relating to the Separation of Powers doctrine. That is paramount in the Illinois Constitution.

It is settled that the state's attorney is a member of the executive branch of government and solely vested with exclusive discretion in the initiation and management of a criminal prosecution. What we are dealing here is specifically with separation of powers issues, the idea that the executive branch charges and obviously the judicial branch decides.

Mr. Smollett has filed a Motion to Dismiss, jurisdictional motion to dismiss, where he respectfully submitted or asked the prosecution must be found void and dismiss which is a claim before. The original prosecution against Mr. Smollett was dismissed by a Circuit Court Judge, Judge Watkins, upon the motion of the state's attorney. And that decision should not be second guessed by a circuit Judge of another parallel jurisdiction.

I raise this, and you will see in the response brief, and you will hear from either Mr. Wieber or Mr. Webb, you can't revisit what Judge Toomin did. Under that logic, Judge Toomin can't revisit what Judge Watkins did and Judge Watkins properly dismissed that claim.

Second, this matter wholly stems from the improper and unlawful appointment of special prosecutor. Special prosecutor was appointed that failed to comply with Illinois law as established by Section 3-9008 of the counties code.

Finally, and in the alternative, we raise the appointment of special prosecutor was overly broad and vague with respect -- and must be validated and reexamined. The appointment was contrary to Illinois law for various reasons but Section 3 dash 9008 provides the frame work which the court may appoint a special prosecutor.

There is many subsections, but a-5 and a-10 authorize the court to appoint a special prosecutor on a petition by either an interested person or the court's own motion in two distinct situations and they make sense when you talk about Separation of Powers doctrine.

There is where the state's attorney has a conflict of interest, the court finds the state's attorney can't do their job because they have a specific conflict of interest and the court makes that determination and they must appoint someone.

Secondly, when the state's attorney is unable to fulfill his or her duties and, again, a decision by

the court. In appointing a special prosecutor here, which again is the crux and core of why we sit before your Honor, okay, which is why we are talking to your Honor about this, the court that decided this specifically found that neither one of those circumstances existed. That is the crux or base of the order that caused this.

Subsection a-15 of these provisions provides a court shall appoint a special prosecutor when the state's attorney files a petition for recusal. Despite the clear requirements of the Statute from the undisputed fact that the state's attorney did not file such a petition, the court appointed a special prosecutor.

And that makes sense because, again, there is a conflict of interest, your Honor. There is absolutely -- they are not unable to fulfill the position. This is the state's attorney's decision to say that he or she, in this case a she, needed to recuse themselves and they make that determination.

THE COURT: Mr. Quinlan, didn't the state's attorney say publicly that she had recused herself from this matter but before the indictment was even brought by her office?

MR. QUINLAN: Two points, your Honor. One which she said was within her office that she recused herself among the office. In saying that, you see state's attorney and, in fact, if I click on the screen Illinois, I am sure I will see a panoply of many state's attorneys. I think Cook County, at least my recollection is when I was in government, is the largest state's attorney office in the country and the state's attorney is not involved in every single decision.

The office operates on its own through that, but the state's attorney always has that authority. Whether the state's attorney chooses to exercise and make those decisions is her prerogative and that's what occurred here.

THE COURT: She is lawyer. I'm sorry. I don't mean to interrupt you. She is an elected official. She is a lawyer. She is a state's attorney. She publicly recused herself.

MR. QUINLAN: She said she recused herself, but allowed her office to make decisions. She made the decision. That doesn't mean she has authority.

As Mr. Webb pointed out and we talked about this in his press release regarding looking at Kim Foxx, he said so the office knows this, that Kim Foxx knew

what was proper procedure to recuse the office. That she could have signed this affidavit and done that and what's important there, your Honor, is the state's attorney has every right to say I am not going to personally participate in this decision for my variety of reasons, but I am going to let my assistant do that and we cite numerous cases to you where courts have found with respect to wiretaps specifically that when authorized by an assistant, that is fine. The actual state's attorney does not necessarily have to participate.

And, two, I want to point out to your Honor that it means that Ms. Foxx knew that she wasn't recusing the entire office and she knew how to do that, but she chose not to.

Thirdly, when we talk about Mr. Webb's report, if, in fact, the decision was that everything was void, the real question would be isn't the state's attorney's office, your Honor, aren't they committing some sort of crime or some problem by prosecuting someone under the color of law when it's incorrect? And there's been no findings of that.

I don't think the special prosecutor can say that because if they were, in fact, correct which you

have which the prosecution of Mr. Smollett was improper and they should have known it was improper because she technically recused herself. The reason there was no finding of that, because we don't have that, is because that didn't occur.

What she decided to do, and this happens all the time, she decided to take herself personally out. It didn't mean she lacked authority. It didn't mean she had to make the decision. She was going to allow other people to make the decision and she chose to do that.

She's also restated that and she's been vocal about the fact that she did make the decision. She hasn't recused herself with respect to the manner in which it occurred and, you know, these decisions by these state's attorneys, they had the absolute authority to do that. And, you know, again, if, in fact, what you are saying is true or not true, as a matter of law, what we are creating here is if the state's attorney doesn't file an affidavit and follow the procedures, any disgruntled member of the public can ask a prosecutor to review decisions made by the state's attorneys office and that's exactly why the Court can appoint special prosecutor under the provision looked at here when the state's attorney files such an affidavit saying under

oath, your Honor, that he or she has a conflict and, again, in furtherance of your point, there is a reason why the legislature makes her file an affidavit. The reason she files an affidavit is it's more than just a mere statement of public responsibility to the same.

So, you know, to address some of the other points that were raised by the special prosecutor, they spend, again, much length in front of Judge Toomin with respect to that.

Again, this is a jurisdictional motion. The issue before Judge Toomin whether or not we should be there or not be there, Mr. Smollett is in front of your Honor. The case is in front of your Honor. Whether or not you have jurisdiction is a motion for your Honor to decide.

The fact that Judge Toomin that we were not allowed to intervene and whether it should be there or not is something separate. We are not Judge shopping, your Honor. We are in front of your Honor because we believe we shouldn't have been indicted in the first place and we shouldn't be sitting here; but this is the proper place to bring that motion.

You know. And I think basically that is the gist of it is trying to address everything. We cited

case after case after case where we see circumstances where assistants are acting in the stead of the state's attorney or the boss. That's what occurred here.

The public -- like I said, recusal or her recusing, she understood that. We can see that from Mr. Webb's report is something that she knew she was doing and she knew how it would apply and there is a reason why the legislature makes her file an affidavit in order to do that before she can, from a separation of powers.

Only the state's attorney, your Honor, can give the court the power in this circumstance to appoint a special prosecutor. It belongs exclusively here to her. The legislative gave it to her. The people did when they duly elected her. It is improper for another branch of government like here to try to voice that away from her without her properly tendering, as the Statute says, to the Court.

So we would ask that this be dismissed and we would ask that -- obviously, this is a unique case; but to the extent that Mr. Smollett has been before your Honor, he is certainly entitled to all the rights he would receive just like anybody else and what has happened here is the state's attorney has properly

prosecuted and properly dismissed and, at the request of an individual outside of the law of the Statute, a court has appointed a special prosecutor when the legislature says it provides what should be followed were not followed.

This isn't a close case. This should be dismissed. How we feel about it, we have an obligation to follow the law and the law was not followed here and now there is a basically rubric as to why it should be followed which is the executive branch made the sole discretionary decision to dismiss this case. It was adopted by Judge Watkins. The motion to dismiss was entered.

To use the special prosecutor's own phrase, a Judge of same jurisdiction cannot review that. Not only did Judge Toomin say that that decision was void, he found every other order of Judge Watkins was void. Under their own reasoning in their brief, that can't happen and there is a reason why that can't happen and the reason is the state's attorney office as the state's attorney has to personally recuse the whole office. That didn't happen.

We are just talking about internal logistics that was heard and must follow and is entirely proper

for all the reasons we laid out in the brief. Thank you for taking the time and obviously I will answer any questions you may or may not have.

THE COURT: Mr. Wieber.

MR. WIEBER: Your Honor, on behalf of the State, I will waive argument and simply rest on our opposition papers and I will rest unless your Honor has any questions.

THE COURT: I don't think I have any questions. Thank you, Mr. Quinlan.

All right, I understand this Motion has been brought before me and I understand some of the Petitioner's frustration during the proceedings before Judge Toomin where he was considering and then ultimately appointed a special prosecutor. There was some concerns about whether Mr. Smollett was going to be a party to those proceedings or not.

At some point there was Petitioner, Mr. Smollett, asking leave to intervene in those proceedings before Judge Toomin and he denied that because he didn't feel he had actual interest in the proceedings at that time. It was speculative because his instructions to the special prosecutor was to investigate all matters involving this case to determine

whether in the interest of justice it would be required to bring further criminal charges against Mr. Smollett.

That's what was alleged in the first case or something like that and also to explore, investigate what actually happened in the state's attorney's office and how things were handled by their office and why things happened and at what point did they happen and to answer some questions about that. They even checked to see if there might be some criminal liability for people in the state's attorney's office for their handling of the case as well and special prosecutor endeavored to explore those matters.

At that point, after the appointment of the special prosecutor, not before but after, Mr. Smollett did ask to intervene. He was denied that opportunity and I understand the frustration that counsels may have now and Mr. Smollett may have now because without leave to intervene, you don't have standing to bring an appeal. You can only try to review this in two different ways and you tried both ways.

First you went to the Illinois Supreme Court and asked for a supervisor order asking them to review the things that happened before Judge Toomin in his matter. They denied that motion for supervisor order.

Now you are asking me collaterally because I have -- I am the Judge assigned to the new indictment that I should collaterally review Judge Toomin's order as well. The special prosecutor immediately, even before they filed their pleadings, was very vociferous and very adamant that I had no authority to review this at all because it's not my case.

I point out that the special prosecutor application which is followed by Sheila O'Brien, former appellate court justice, pro se filed a different case number. In fact that was 19MR-14, M R standing for miscellaneous remedies, and she filed that Petition before Leroy Martin, chief of the criminal division.

Judge Martin started hearing the matter for Ms. O'Brien. There were some colloquies. I think representatives for Mr. Smollett may have been present at some of those hearings.

In any event, at some point Judge Martin thought it would be better to transfer this to a different Judge and he found Judge Michael Toomin, very highly respected judge in Cook County for many years, chief of the juvenile division. He had sat as a criminal Judge here in criminal courthouse for many years as well and the matter then went before him.

After Judge Toomin decided to appoint the special prosecutor, again I am repeating myself, Petitioner was not allowed to intervene and they had no appellate rights thereafter.

What happened is the office of the special prosecutor went to a new Grand Jury. They secured a new indictment, 16-count indictment on a 16-count indictment by talking about many of the same things, although the language in the indictment is stated somewhat differently, allegations of felony disorderly conduct against Mr. Smollett. An indictment was returned.

I am asked to review that matter and, first of all, I have to address not only whether Judge Toomin was right or wrong in his analysis, but first thing I have to decide do I even have authority to talk about this at all.

I will point out that I don't believe I do. This is not part of this case number. This indictment and I didn't get assigned to this case or have anything to do with this case until after the second indictment was secured and this indictment was 20CR-305001. The case filed in 2019 was a totally different case number, a totally different proceedings and I don't know.

I think Mr. Wieber may have been correct

immediately when he said I had no authority to hear this. I thought it would be best if he did put something in writing. He put quite a bit in writing about that and I think he was right in the first place. I can't just go to another Judge to look at another case.

In this case it wasn't the fact that Judge Toomin was deciding that Mr. Smollett should be prosecuted. What he did is appoint a special prosecutor to investigate the case. It wasn't known what the special prosecutor may or may not have found.

Special prosecutor ultimately found they wanted to convene a Grand Jury. They did that. Grand Jury returned a True Bill which they did and then they made other investigations relating to the handling of the case by the state's attorney's office. But that was all speculative at the point that he appointed the special prosecutor what they would actually do and what their investigation would lead to. It did lead to this indictment.

I don't see any possible way that I would have authority at this level to revisit Judge Toomin's ruling. So procedurally, I think I am without authority to even consider the motion. So it's denied on that

ground.

I will point out if it ever becomes necessary, now you have appealable issue because now we are talking about something you filed in this court and if you should ever have to go to court of review, it's preserved.

Let's assume arguendo, just for the sake of argument, let's say I had authority and I believe I have authority to review the rulings and findings of Judge Toomin, should I interfere with what he did and what he found.

Judge Toomin signed a very lengthy order and this is after he had heard from witnesses and seen quite a bit of filings and he laid out in great, painstaking detail the entirety of the history of this case. He started at the beginning, what Judge Toomin referred to as the Smollett matter beginning in January 22 of 2019.

The Petitioner called the police department indicating that he received a suspicious envelope with apparently some letters cut out from magazines or newspapers, threatening language and some white powder was included as well. He called the police the first time --

THE DEFENDANT: I did not. I'm sorry.

THE COURT: Okay, thank you. The police were called. Let me put it that way.

THE DEFENDANT: Yes, thank you.

THE COURT: Reported to the police. Please let your lawyers do your talking for you.

THE DEFENDANT: Absolutely.

THE COURT: They are really on it.

Next thing that happened was January 29. Of course, this is what this indictment was all about where the police were called regarding the allegation of an attack that took place about 2:30, 2:00 o'clock in the morning during extremely cold weather, would we called a polar vortex in Chicago where the Petitioner claimed he went to get a sandwich from a Subway restaurant and got attacked by two men that attacked him, white men. They were armed with a rope, some bleach. They were masked yelling racial and homophobic slurs. Bleach was poured on him. Noose type rope was put around his neck and references to this being MAGA country were shouted out by them.

In any event, this got quite a bit of publicity. It was shocking in the beginning of its origin. Some of the publicity, I will note a lot of it may have been generated by the Petitioner himself who

seemed very anxious and eager to talk about this and talk about it to the media, social media and television media and anybody who would listen and all kinds of reporters and was very anxious to talk about this.

Later on there was some investigation. Two people were identified as perhaps offenders or people involved in the case. These were two brothers that the police got notice of.

During the course of these events and with quite a bit of public notice and pressure, by pressure I mean just a lot of attention from all sorts of media, state's attorney Kim Foxx, state's attorney of Cook County, duly elected, indicated she was recusing herself. She had told the public that she had been receiving phone calls from people on behalf of Mr. Smollett, family members and perhaps other people as well and she thought it best to recuse herself from further proceedings.

I am just laying this out because this is all part of Judge Toomin's analysis in the first place is whether special prosecutor should or should not have been appointed.

February 21, 2019, Mr. Smollett did surrender himself to the Chicago Police Department. This is after

any -- they asked him to come to the station and he came in. They didn't have to get a warrant or run around trying to find him or pull him out of some hiding place. He walked into the police station.

Chief of Police at that time, Eddie Johnson, Chief of Police of Chicago, gave a lengthy press conference. He talked about some of the facts of the case and what the police had found and their belief that Mr. Smollett had perpetuated a hoax; it wasn't a real event and he should be criminally liable.

While the Cook County state's attorney's office did proceed to take the matter to the Grand Jury, this is -- again, I am pointing out what Judge Toomin noted and what his analysis was. He said after state's attorney Foxx indicated she recused herself. So on March 8, 2019, the Grand Jury returned a True Bill, 16-count indictment, 16 different counts of felony disorderly conduct against Mr. Smollett, every possible theory about things that, according to the Grand Jury, he said to the police that were false and not true and in violation of the law.

Mr. Smollett was arraigned. He entered a plea of not guilty. Case was set for trial. Case was not set for trial but set for status on discovery.

First date it was given after the arraignment was April 17.

Then on May 25, the parties came before Judge Watkins who had been assigned the case originally. The parties, Mr. Smollett, assistant state's attorney showed up before Judge Watkins. The Judge had been getting a lot of media requests. He had to decide what we are going to do about the requests. There is request for cameras in the court and we have to sort out those details and should they or shouldn't they be allowed and, if so, under what circumstances and what kind of limitations. Another date was set by Judge Watkins to talk about that. So there are two dates set before Judge Watkins, one for the media request about cameras in the courtroom and how the media could be present to report proceedings and the other discovery status date.

Somehow, and this is where things got problematic for everybody, on March 26, the very next day, after they talked to Judge Watkins and asked him to set a court date to talk about the media request, the state's attorney and Mr. Smollett came in without notice to anybody else other than the clerk of the court and Judge Watkins and state's attorney nolle prosed the case. We have already talked about that at some length

during our jeopardy motion. I don't mean to belabor it, but it was a very short proceeding. I am mentioning it now just to point out the things that Judge Toomin had when he was analyzing whether it was proper or not to appoint special prosecutor in the case.

Well, there was tremendous outcry nationally about the nolle pros and the circumstances about it. I will say that this very building seemed to shake with buzz that I hadn't seen in many years since we have had some -- like John Gacy on trial. This really rocked things around here. It got quite a reaction. People were very concerned and up in arms about what happened, why it happened and this is all part of what Judge Toomin had to deal with when looking at this motion filed by Sheila O'Brien for the special prosecutor.

And Judge Toomin did his analysis. He found since state's attorney Foxx had publicly stated she recused herself and she was put on notice by other members of her office that the way to recuse herself would not be to appoint someone else in her office to prosecute the case but actually to go before Chief Judge Martin and make arrangements to get a special prosecutor from outside her office that there was no prosecutor at all and everything that happened was void and it's like

it didn't exist. He talked about it being a ship without a captain that was sailing in unchartered waters.

Judge Toomin looked at it and what the Statute requires. What the rules require for appointment of special prosecutor, you have to show that the state's attorney received was either unwilling or unable to do their job. Either they are recusing theirself and they say they are unable to do the job or unwilling to do their job and Judge Toomin made the finding that Kim Foxx was unable and unwilling to do her job. She indicated she had conflict.

She had already talked to people outside, had conversations with people on behalf of the defendant and made requests of law enforcement to maybe go to a different law enforcement body to investigate the case. The effect was such that she actually recused herself. There is no such thing as partial recusal or colloquial recusal. She may have called it at one point and Judge Toomin thought that special prosecutor was required under these circumstances.

So even though I know and I am certain that I don't have authority to review that order, I find that Judge Toomin was correct; that this case did call for

the appointment of special prosecutor. In fact, it screamed for the appointment of special prosecutor because the public seemed to have lost confidence in what happened and it needed a fresh look and that's what we have.

So the Motion on both grounds is respectfully denied. I don't have authority to revisit the ruling in the first place and if I did, I still would find that Judge Toomin was correct in his analysis in appointing the special prosecutor as he did for all the reasons he stated. I am incorporating by reference everything he put in the written order.

I want to move on now to the other things we have to deal with. Defense very recently made a discovery request and one of their requests, it's a lengthy request; but one of the things they are asking for is to receive the report of the special prosecutor which was completed, the report involving the investigation of the state's attorney's office and their handling of the case. There was, I believe, 58- or 60-page report that was filed with Judge Toomin.

The special prosecutors office also asked Judge Toomin to, in the interest of justice, to release this to the public. There is a lot of information in

that report and Grand Jury proceedings, of course, are not under any circumstances to -- under all circumstances not to be released to the public. They are not for public consumption. Judge Toomin denied that. I don't know that he denied it forever, but he denied it at this point.

The defense says they want it because there may be discoverable matters in there. They may have a point. I know special prosecutor did investigate a lot of things about this case, not just the handling by the state's attorney's office but all things about the case and they put it in a lengthy report.

So what I propose to do is this. I want to receive from the special prosecutor under seal a copy of the special report. I am going to make an in-camera review. Let me see if there may be some parts of it, of the report, that may be discoverable, that may be required under the Sixth Amendment for the defense to have available to them. I need to read it before I know. I don't know what's in there because I haven't seen it.

It's doubtful I will give them any Grand Jury testimony, but they already have the Grand Jury testimony so there is no prejudice there. It's keeping

it out of the public domain is important. That's, I think, what Judge Toomin's goal is. He is denying request for public consumption of the report now.

The defense already has the Grand Jury testimony, but the other findings of the special prosecutor I think I would like to look at to see if there may be something that may be available to the defense and that they would be entitled to under Supreme Court rules. So I will get that as soon as I can from the special prosecutor under seal for in-camera review.

Lastly, I just today received another pretrial motion by the defense. It's a Fifth Amendment claim saying generally that if the special prosecutor is claiming and Judge Toomin found that the state's attorney, Kim Foxx, originally was acting without authority after her recusal and that was the situation when they went to the Grand Jury in the first place, then all those proceedings are totally void and if they are void, how can the special prosecutor handle that matter in front of their second Grand Jury because what I am told happened and I don't think it's in dispute is the second Grand Jury were told things that were said under oath to the first Grand Jury and that was under state's attorney Kim Foxx and that was incorporated by

reference into what the second Grand Jury heard and if those were void, then they shouldn't have been able to be considered by the second Grand Jury. I think that's generally what's in the Motion, but I just received it in writing today.

The special prosecutor indicated he would like 21 days to review that and respond to it and I agree. State will be on notice to have a response on or before October first to tender to the Court and to the the Petitioner and I believe we will resume and will hear that Motion on October 14 at 11:30 again on Zoom camera. Mr. Smollett, you can appear on Zoom camera as well if you will, please.

I will also by that time be able to deal with discovery requests regarding the special report and other discovery issues that may be outstanding. I think we are almost done with the government's obligations under discovery, but I will make in-camera review of the report.

Is there anything else anybody wants to add right now?

MR. WIEBER: Not on behalf of the State, your Honor.

THE COURT: I can't hear you, Ms. Glandian.

MS. GLANDIAN: There are still a few other outstanding issues. I don't know if the Court just wants to us continue to try to resolve that.

THE COURT: The first -- what would you call your first discovery motion was just filed in writing recently. I had always assumed that, okay, they owe you what's in the Supreme Court rules. If what the Supreme Court rules tells them they have to give you, they have to give you. If there are other things outside of their control relevant to the case, they should share it with you. They tell me they have.

Your Motion For Discovery was very broad asking for a lots of things like the cell phones and social media accounts and records of everyone that may testify, things that are pretty broad. So you tell me what you think you really need that they owe you other than the special prosecutor report which I have taken under advisement.

Is there anything else that you think is owed to you by way of discovery?

MS. GLANDIAN: Two categories, your Honor. One category is there were interviews conducted in January of this year between special prosecutor's office and office of the inspector general.

There was a representative present and there were memos that were taken by the office of the inspector general. We received those memos. We haven't received -- as a result of those, there were Grand Jury statements that were produced that were read into evidence. We haven't received the OSP's notes of these lengthy meetings and we believe those notes are -- these are all exculpatory.

It's the defense position these these are witnesses we identified as exculpatory in the filing and they haven't produced those notes to us.

THE COURT: Notes, wouldn't they be work product?

MS. GLANDIAN: They were interview notes that resulted in the statements that they wrote. So the same way that the office of the inspector general has given us their notes documenting what happened and what was discussed at those meetings, we are not expecting work product in their opinions. I think these are the statements that were relayed, notes of the interviews before they were put into a short form for the Grand Jury statement. So that's one.

As far as the Osundairo brothers, we haven't gotten any sort of notes even from the office of the inspector general as to the meeting that they had with

the office of the special prosecutor and they produced live witnesses so they had no Grand Jury statement that was read. It was their prior testimony, but we do know they met for hours with representives of the special prosecutor's office and we have no notes as to what was discussed and their statements at that time which is highly relevant.

THE COURT: I understand what you are saying. Did the inspector general ever issue a report on this case?

MR. QUINLAN: We don't know.

MS. GLANDIAN: Not that we have been provided.

THE COURT: Mr. Wieber, do you happen to know? I think that's Mr. Blanchard's office. Are they still issuing a report? Are they filing reports?

MR. WIEBER: They have not filed a report and whether they will is beyond my current knowledge. There are certain aspects that go beyond their mandate that goes beyond ours and I believe their investigation is ongoing.

THE COURT: Did someone pick up a phone and ask Mr. Blanchard by the way, what are you doing? Are you going to file a report or not file a report?

MR. WIEBER: Clearly conversations have taken place. I am not sure on behalf of the OIIG if they had

made a determination, but it's clearly on their radar.

THE COURT: What do you have to say to what Ms. Glandian has to say what she is entitled to?

MR. WIEBER: We have provided all witness statements and all Grand Jury testimony and anything that remains as far as notes from prosecutors are clearly work product and I have identified that in a letter response to them clearly setting forth and anything that remains would be protected by work product.

I can assure you that all the memoranda memorializing the witness statements are in their possession as of today.

MS. GLANDIAN: We don't have any memoranda summarizing anything from the meetings that you had with the Osundairo brothers.

THE COURT: I assume you talked to the brothers, Mr. Wieber. Did you generate any reports about the meetings?

MR. WIEBER: No.

THE COURT: Or proffer reports, anything like that?

MR. WIEBER: No, your Honor. Just internal witness -- internal opinions, theories, conclusions of the State, purely work product as opposed to formal

memoranda that either the investigator put together or our office and all of those have been tendered.

THE COURT: Did I hear you correctly that you are relying on what the Chicago police wrote up about what these people said to them and what they said to the first Grand Jury? That's all the paper there is about what they said?

MR. WIEBER: No, your Honor. Those are two categories, yes.

Correct. They have all the CPD case files, GPR notes, the entire CPD case file. They have any memoranda written by the OIIG, Mr. Blanchard's office regarding witness statements. They have Grand Jury statements and Grand Jury testimony themselves. Any other memoranda that would be done are work product that contain the opinions, theories and conclusions of the State and that's protected under 412.

MS. GLANDIAN: Your Honor, thick redact. It's hard to believe in a few-hour interview of their main witnesses there would be no other statements that are not documented that are not opinions or work product.

Obviously their verbal and oral statements we are entitled to and I ask they go through the report, they redact any portions of the report that are actually

opinions. Otherwise it's a memorialization of statements made by witnesses in the case who they obviously they are going to call.

We are 100 percent entitled to that information and you can't just hide behind work product and say the entire notes from the interview are all work product. Clearly there are statements in there that were made by the brothers that are relevant to the case.

THE COURT: I guess what she is saying, Mr. Wieber, and correct me if I am wrong, Ms. Glandian, I think she is suggesting that you talked to the brothers before you went to the second Grand Jury and that's what she is talking about. Before they were formally -- I guess they were always witnesses.

Before you were preparing for trial because there wasn't an indictment yet and they had conversations with your witnesses, that's what she is saying. I assume you did, but you didn't generate any reports. Is that right?

MR. WIEBER: Correct. Your Honor has honed in on. Rule 412a1 does control here and that if memoranda had been created containing basically substantially verbatim oral statements, those have been provided. When that didn't occur, they haven't been provided because

memoranda weren't generated in the same fashion. There were attorney notes.

THE COURT: And you're saying there was no substantive differences between what they said previously to law enforcement and the first Grand Jury and what they said to you when you were preparing to go to the second Grand Jury?

MR. WIEBER: Correct. Nothing that would trigger any Brady obligation or anything of that nature. No, correct.

MS. GLANDIAN: Your Honor, if I may add, they met with the brothers for hours and decided not to call them as live witnesses in the second Grand Jury and to rely on invalid transcripts that are null and void.

I think the notes from that interview are critical and I think, again, Supreme Court Rule 401-2 provides the Court with discretionary disclosure that your Honor could say if these are material to the defense and these are the two star witnesses that Dan Webb less than a week ago told Judge Toomin the entire prosecution hinges on the credibility of these two brothers and yet they want to produce -- they sought a search warrant of 20 years of data of Mr. Smollett's data and they meet with the Osundairo brothers for hours

and they don't want to provide notes when they say the the whole case hinges on their credibility when after that meeting they decided not to call them as witnesses before the Grand Jury and not to let the Grand Jury know that they have the right to call them.

THE COURT: All right. I understand what everybody is saying. This is like say, for example, a police officer, a detective was working on a case and you talked to some witnesses for hours and hours and didn't make a report or made a very limited report that obviously didn't show everything that was discussed in hours and then testifies about things that were said. So the remedy is impeachment by omission.

I am not in a position to interfere with what I consider to be lawyers work product. That's what it sounds like to me.

MS. GLANDIAN: Your Honor --

THE COURT: I understand what you are saying. Your Motion to get their notes, their own internal notes, is respectfully denied. They are saying there was nothing substantively different.

You will have a chance at trial when such time comes to aggressively cross examine any witnesses that are called and if you think that you can find

impeachment by omission or anything else, I will give you all the latitude you need to perfect it and accomplish it.

But I am not inclined to give you lawyers' notes of witness interviews. I think that's something above and beyond. I think you have the discovery you are entitled to on that matter and lawyers notes or something you are not necessarily entitled to.

MS. GLANDIAN: Your Honor, those notes contain witness statements that are going to be used at trial.

THE COURT: I don't know what it contains. They already had these witness statements and they are talking to them and I am being told that they are saying the same thing during their preparations that they said before.

In any event, they didn't make any paper on it. It comes down to are you entitled to their notes and notes are about impressions and thoughts and other things that they want to check out. Those are their notes. Those are lawyer notes. That's something totally different. That's something we call work product and you cannot have their work product. Motion is respectfully denied.

Anything else that you think you really,

really need in discovery other than the special prosecutor's reports we already talked about?

MS. GLANDIAN: There is one additional category. We requested communications between the office of the special prosecutor and Gloria Schmidt-Rodriguez because the brothers flip-flopped within a 24-hour window. She released a statement that they will no longer cooperate if they don't get the guns and now they will cooperate because they are getting the guns.

Whatever inducement was given and whatever communications were critical, again, as to their bias, motive, I think it's impeachment and we are entitled to them.

THE COURT: Well, okay. I think what I recall about that, because we talked about that already, they didn't say they were going to lie if they didn't get their property back. They said they wouldn't cooperate.

I am not sure what that means. They wouldn't let themselves be prepared for testimony? It doesn't mean they are going to change the story or flip completely and commit perjury. I am not sure if that's what you are talking about.

MS. GLANDIAN: Your Honor, we don't know. Those are the public statements their attorney decided to put

out. We don't know what communications took place in order for them to switch their position in 24 hours and say they will cooperate.

THE COURT: You can cross examine them about that, too. You can ask them about that and what the word cooperate means. Because cooperate to me, as I saw that unfolding, I thought it meant okay, we are not going to come into their office and let them prep us for trial. They have to put us on cold. That's what I thought they meant by cooperate. I didn't hear them say, oh, we are going to change our story and say something different.

MS. GLANDIAN: Your Honor, we don't know exactly what was said to get them to decide to cooperate. Their attorneys prepared statements. We want the discussion and any communications or e-mails that were sent between the state's attorney's office and the attorney regarding the guns and regarding their cooperation in this case.

THE COURT: Well, there was -- I recall. We had this Motion and I remember you and counsel for the brothers having some arguments about this and I actually gave them some of the property back and on your request, Ms. Glandian, I withheld some and kept it available for evidence because you thought you might need it. I remember that exchange.

Mr. Wieber, is there any dispute about what happened here that the brothers asked for some property back and your office agreed to give them some property back?

MR. WIEBER: Our office has been working with defense counsel, I think primarily Mr. Hutchinson and with CPD, ERPS, E-R-P-S, on tendering the materials. My colleague, Matt Durkin, has been involved in that and facilitated that process.

We have done everything we can do and I don't know what outstanding issues still remain on that. My understanding is we fulfilled our obligation.

THE COURT: She is asking was there any quid pro quo?

MR. WIEBER: Absolutely not, your Honor. It's off-putting to hear quid pro quo. We went beyond 412. I responded twice in writing.

THE COURT: All right. I get it. Absolutely not. She is concerned about the word cooperate.

Is there any of that on what you believe was being talked about when the word cooperate was thrown out there?

MR. WIEBER: My understanding matches what your intuition was. There is no quid pro quo. If you do

this or if you don't do this, you will change your testimony.

We have produced documents. We went beyond 412 so we wouldn't have to have this argument in a public forum. We have supplied those materials. I believe except for two of the documents, Ms. Glandian and Mr. Hutchison were on.

Gloria Schmidt-Rodriguez wasn't just talking to the State. So to suggest there is some hidden agenda, that's not true. They asked for them originally and we gave it to them.

MS. GLANDIAN: We are just seeking truth and justice and transparency. I don't understand if there are communications why we are not entitled. If there are communications, what is the office of the special prosecutor hiding? Why can't we get the report? They are asserting privilege.

THE COURT: It's a report. I don't think there is a report that there was some --

MS. GLANDIAN: I'm sorry. Talking separately about the 59-page report that they are refusing to provide of over 120,000 pages of documents, of 53 witness interviews that they don't want us to have because now they are saying it's irrelevant.

THE COURT: The word cooperate, if I recall now, it came out of counsel's mouth, Ms. Schmidt-Rodriguez. She is the one that used the word cooperate. The brothers didn't say cooperate. She said it.

What I thought it meant was, okay, we are not going to let you interview us any more. We are done talking to you. You put us on cold. That's all I thought it meant.

Mr. Wieber, I think it might be prudent if you put that in writing that whatever negotiations there were regarding return of inventoried property didn't involve any consideration and you can cross examine again, Ms. Glandian, about that issue.

You can bring up the fact you didn't say cooperate and they will get into witnesses on the stand. I didn't say that. My lawyer said that. You will be able to explore it. That's something for the jury to decide.

I am not thinking that you are entitled to anything more other than Mr. Wieber's assertion. He will put it in writing also that, according to him, there was absolutely no quid pro quo for any consideration in returning the property. Anything else?

MR. WIEBER: Not on behalf of the State.

THE COURT: Anything else on behalf of the State?

MS. GLANDIAN: No, your Honor.

MR. WIEBER: Maybe by next time, at some point in time, I would like an opportunity to see their Answer to Discovery as we filed our Motion in February on the day of arraignment and we still have not received a single piece of paper or single -- other than what we can read in the media.

THE COURT: I think what they are saying is they are saying that they want to have all the discovery, the last little bit, before they commit themselves to the report of the special prosecutor that they are going to be entitled to any part of that or not. I think perhaps the defense can file an Answer to Discovery by the next court date.

But I am particularly interested in if you have witnesses not listed in your reports that you are to receive from the government for any affirmative defenses. You should let that be known and I will say that you can file the Answer with leave to supplement it later if I decide to give you portions of the special prosecutor's report or something else comes up. You can always supplement it later. That's not -- that doesn't happen with some frequency, answers to discovery or

supplemented as investigations go on.

I think by October 14 is maybe fair to get Defense Answer to Discovery also with the understanding that I will give you leave to supplement should that arise. You can talk about that on the 14th. Fair enough?

MR. WIEBER: Thank you, your Honor.

THE COURT: Anything else? I wish everybody a good weekend. This case is continued to October 14.

(Which were all the proceedings had in the above-entitled cause.)

STATE OF ILLINOIS)
)
COUNTY OF C O O K)

I, Grace Brennan, Official Shorthand Reporter of the Circuit Court of Cook County, Criminal Division, do hereby certify that I reported in shorthand the proceedings had at the hearing in the above-entitled cause; and that the foregoing transcript is a true and correct transcript of said proceedings.

Grace Brennan "/s/"
Official Shorthand Reporter
Circuit Court of Cook County

Dated this 17th day of September, 2020.

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

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 20 CR 03050-01
	)	
JUSSIE SMOLLETT,	)	
	)	
Defendant.	)	

MOTION TO QUASH AND DISMISS INDICTMENT FOR VIOLATION OF DEFENDANT'S FIFTH AMENDMENT DUE PROCESS RIGHTS

NOW COMES Defendant Jussie Smollett, by and through his attorneys, Geragos & Geragos, APC and The Quinlan Law Firm, LLC, and respectfully moves this Court for an order quashing and dismissing the indictment in this case for violation of Mr. Smollett's due process rights in violation of the Fifth Amendment. In support of this Motion, Mr. Smollett provides the following memorandum of facts and law.

INTRODUCTION

On February 11, 2020, a special grand jury returned a true bill of indictment against Jussie Smollett charging him with six counts of disorderly conduct, namely making four separate false reports to Chicago Police Department officers. The grand jury transcripts provided to the defense in discovery have revealed that the indictment was based on illegal and incompetent evidence, namely the transcripts from prior grand jury proceedings which have been held to be null and void and without legal effect.

Not only did the Office of the Special Prosecutor ("OSP") fail to inform the grand jury that the key testimony by Abimbola Osundairo and Olabinjo Osundairo (collectively the "Osundairo brothers") given in the prior grand jury proceedings has been invalidated and declared to be null and void, but the transcripts also demonstrate that the OSP failed to comply with 725 ILCS 5/112-4(b), which requires the prosecutor to advise the grand jurors of the broad rights and powers bestowed upon them by Illinois law. The record provided to the defense does not reflect that this statutorily required advisement was given at any time including on November 19, 2019 prior to the invalid testimony of the Osundairo brothers being read into evidence. The OSP's failure to inform the special grand jury at the commencement of the proceedings, before each witness testified, and before a true bill was requested, misled the grand jury and deprived Mr. Smollett of his Fifth Amendment right to the due process of law.

The OSP cannot have it both ways. It cannot convene a special grand jury based on Judge Toomin's Order but then rely on the transcripts from those "void" proceedings to secure a new indictment. Furthermore, there is no legitimate reason why the Osundairo brothers were not called to provide live testimony to the special grand jury, particularly when they live locally in Chicago, were available and cooperating with the OSP, and reportedly met with the OSP for hours only one month earlier. *See, e.g., Osundairo Brothers Visit Special Prosecutor's Office in Jussie Case,* TMZ, Oct. 5, 2019, *available at* https://www.tmz.com/2019/10/05/jussie-smollett-osundairo-

brothers-meeting-special-prosecutor/ (noting that TMZ "obtained video of Abel and Ola arriving for the powwow in downtown Chicago . . . to meet with an attorney in Webb's office" and that "the brothers each spent a couple hours with the special prosecutor's team"). Therefore, there is no valid reason why the OSP did not produce the Osundairo brothers as live witnesses before the special grand jury. The only conceivable reason for not producing them as witnesses, and instead relying on transcripts from proceedings which it has urged were null and void, is that the OSP did not want to suborn further perjury by the Osundairo brothers, it did not want to risk having the brothers make additional contradictory statements prior to trial, and it did not want to allow the grand jurors their statutory right to question the Osundairo brothers about the incident.

The OSP's omissions in this regard are substantial and prejudicial. As the OSP recently recognized, the entire prosecution of Mr. Smollett hinges on the credilibity of the Osundairo brothers. *See* Exhibit A [Transcript, *In re Appointment of Special Prosecutor*, Case No. 19-MR-00014, at 10:20-23 (Cir. Ct. Cook Cty. Aug. 28, 2020)] (Dan Webb telling Judge Toomin that "the whole Smollett trial, your Honor . . . depends on the credibility of two brothers called the Osundairo brothers"). When the invalid testimony by the Osundairo brothers is disregarded, the evidence before the grand jury was clearly insufficient to support the indictment against Mr. Smollett. Therefore, in conformity with its previous ruling and to preserve the integrity of the grand jury system, this Court should quash and dismiss the indictment in this case.

RELEVANT FACTS

According to the OSP, Judge Toomin's Order Nullified All Prior Proceedings Including the Grand Jury Proceedings on February 20, 2019 During Which the Osundairo Brothers Testified.

The OSP convened the instant proceedings by authority vested in it by two orders issued by Judge Michael P. Toomin. Specifically, on June 21, 2019, Judge Toomin granted the appointment of a special prosecutor to preside over the Smollett proceedings, and on August 23, 2019, Judge Toomin appointed Dan K. Webb as the special prosecutor in this case.

As this Court knows, Judge Toomin's June 21, 2019 Order nullified the entirety of the proceedings against Mr. Smollett. In the Order, Judge Toomin found that on February 13, 2019, Cook County State's Attorney Kimberly Foxx "quietly announced that she was leaving the case" and that Foxx's so-called recusal was publicly confirmed by Foxx's spokeswoman six days later—on February 19, 2019. Exhibit B [Order at 6-7]. Judge Toomin further found that like during other stages of the proceedings, "[t]here was no State's Attorney when Smollett's case was presented to the grand jury, nor when he was indicted." *Id.* [Order at 20]. Thus, Judge Toomin concluded that all proceedings after Foxx's "recusal" on February 13, 2019 (or February 19, 2019 at the latest) were null and void. *See id.* [Order at 20-21].

The Osundairo brothers testified before the grand jury on February 20, 2019. The caption of the transcript of the grand jury proceeding provides: "PRESENT:

HONORABLE KIMBERLY M. FOXX, State's Attorney of Cook County, Illinois, by: MR. LIAM REARDON." Thus, pursuant to Judge Toomin's June 21, 2019 Order, the grand jury proceeding in which the Osundairo brothers testified is null and void and of no legal effect.

In Obtaining the Instant Indictment Against Mr. Smollett, the OSP Relied on the Invalid and Incompetent Prior Testimony of the Osundairo Brothers.

In convening the instant proceedings, the OSP relied on the authority vested in it by Judge Toomin's Orders, and on numerous occasions, it lauded their validity. For instance, in its Response in Opposition to Mr. Smollett's Motion for a Supervisory Order, the OSP argued that "Judge Toomin correctly ruled that all of the proceedings under the Acting State's Attorney were void." The Office of the Special Prosecutor's Response in Opposition to Movant's Emergency Motion for Supervisory Order Pursuant to Rule 383 and Movant's Explanatory Suggestions in Support of the Motion at 14. After quoting from the June 21, 2019 Order, including that the prior grand jury proceedings and resulting indictment were void, the OSP added that "at each step of the way, Judge Toomin's 21-page order was reasoned and supported by valid case law." *Id.* at 15.

Similarly, in its Response to the Motion to Dismiss Indictment for Alleged Violation of Defendant's Right Against Double Jeopardy, the OSP asserted that "when Judge Toomin granted the motion to appoint a special prosecutor relating to Mr. Smollett's case, he concluded that the actions by the Cook County State's Attorney's

Office relating to the Prior Charges were void. (Ex. 1 at 20.) Among other things, Judge Toomin noted that there was no duly appointed State's Attorney at the time Mr. Smollett was charged, ***indicted***, arraigned, or when the proceedings were nolle prossed (at which time Mr. Smollett voluntarily relinquished his $10,000 bond)." Response to Motion to Dismiss Indictment for Alleged Violation of Defendant's Right Against Double Jeopardy at 13 (emphasis added); *see also id.* at 3 ("Judge Toomin concluded that . . . the prior criminal proceedings against Mr. Smollett were void"); *id.* at 14 ("based on Judge Toomin's order, the New Charges are being brought on a clean slate").

But despite its steadfast position that all the prior proceedings were null and void and that it was proceeding on "a clean slate," the OSP inexplicably relied on these invalid proceedings in order to secure a new indictment against Mr. Smollett.

The OSP Relied on Invalid Evidence to Obtain the New Indictment.

According to the transcripts provided to the defense, the OSP presented testimony to the special grand jury on October 10, 2019, October 29, 2019, November 19, 2019, and February 11, 2020. On these dates, the OSP called only four live witnesses, three of whom testified strictly for the purpose of reading into evidence sworn statements by other witnesses. The primary and only direct "evidence" presented to the special grand jury to show that the attack on Mr. Smollett was a "hoax" was the February 20, 2019 grand jury testimony of the Osundairo brothers (and exhibits thereto) from the initial prosecution of Mr. Smollett—proceedings which have been deemed null

and void. None of the live witnesses who testified before the special grand jury had any personal knowledge tending to show that the January 29, 2019 attack was a hoax. Nor did the sworn statements of the other witnesses provide probable cause for the charges. A synopsis of the testimony before the special grand jury is provided below:[1]

Detective Michael Theis testified before the special grand jury on October 29, 2019. *See* OSP_GJ_001486-001525. His hearsay testimony summarized the government's theory of the case based on the Osundairo brothers' statements to police. *See id.* At no time did Detective Theis disclose that as of October 29, 2019, he was being sued civilly by Mr. Smollett for malicious prosecution and that he had a personal interest in the further prosecution of Mr. Smollett. *See id.*

Other individuals appeared before the special grand jury on November 19, 2019 to read into evidence the grand jury testimony of Abimbola Osundairo and Olabinjo Osundairo from February 20, 2019. *See* Under Seal Exhibit C [OSP_GJ_001526-001624] (Investigator Robert Burton reading Abimbola's testimony); Under Seal Exhibit D [OSP_GJ_001625-001697] (Winston & Strawn's DaWanna McCray reading Olabinjo's testimony). **The OSP never informed the special grand jury that the initial grand jury proceedings had been invalidated by Judge Toomin.** *See* Under Seal Exhibits C & D. Furthermore, no instruction was provided, either before or after the testimony of the

[1] Although the Court previously indicated that this motion need not be filed under seal, in an abundance of caution, redactions are made herein to the portions of this motion which disclose the substance of the testimony provided to the special grand jury. If the Court deems it appropriate, the defense has no objection to unredacting these portions.

Osundairo brothers was read into evidence, that the grand jurors had the right to demand their live testimony if the grand jurors so desired. *See id.* After the testimony of the Osundairo brothers was read into evidence, Investigator Burton was excused without so much as seeing if the grand jurors had any questions about the critical testimony. In stark contrast, the prosecutors asked the grand jurors if they had any questions after other less significant witnesses testified or after other witness statements were read into evidence.[2]

Thomas Wilson, an investigator with the Office of the Inspector General testified on February 11, 2020 for the purpose of reading into evidence two witness statements and summarizing a third witness statement. *See* Under Seal Exhibit E[3] [OSP_GJ_001724-001725]. First, Investigator Wilson read the sworn statement of Rebecca Bell. *See id.* [OSP_GJ_001737-001738]. At the time of the attack, Ms. Bell lived in the same building as Mr. Smollett. *See id.* [OSP_GJ_001738]. She testified that about an hour and a half before the attack, she saw a suspicious white male smoking and talking on his phone around the entrance of the building with a rope hanging from his hip. *See id.* [OSP_GJ_001738-001739]. She further testified that the rope looked different than a rope shown to her by the OSP as the one used in the attack on Mr. Smollett. *See* [OSP_GJ_001740-001741]. Investigator Wilson next read the sworn statement of

[2] Indeed, when given the opportunity to ask questions, several of the grand jurors asked a number of questions during the proceedings.

[3] Under Seal Exhibit E contains excerpts of the transcripts of testimony provided to the special grand jury on February 11, 2020.

Anthony Moore. *See id.* [OSP_GJ_001744]. Mr. Moore testified that he is a Loss Prevention Officer at the Sheraton Hotel near Mr. Smollett's building. *See id.* He recalled that at around 2:00 a.m. on January 29, 2019, while he was patrolling the area, he saw two men in dark clothing run past him. *See id.* [OSP_GJ_001744-001745]. Mr. Moore further testified that although he told officers initially that he shined a flashlight on one of the men's faces and believed he was white-skinned under his face mask, that after being shown images of the Osundairo brothers and being told that they confessed to the attack, he believed he must have been mistaken about the man's skin color which may have been caused by a reflection from his flashlight. *See id.* [OSP_GJ_001745-001749]. Finally, Investigator Wilson read into evidence a summary of Maurice Florence's interview. *See id.* [OSP_GJ_001751-001752]. Mr. Florence testified that he has previously been hired as a personal trainer for Mr. Smollett, including training him up to five times a week at a rate of $100 per hour. *See id.* [OSP_GJ_001757-001761]. Mr. Florence had no personal knowledge of the attack on Mr. Smollett. *See id.* [OSP_GJ_001763]. Investigator Wilson also introduced into evidence various slides, videos, and medical records. *See id.* [OSP_GJ_001772-001779]. He did not have any personal knowledge about the attack on Mr. Smollett.

On February 11, 2020, Frank Bochte, an investigator with the Office of the Inspector General, testified before the special grand jury for the purpose of reading into evidence two witness statements. *See id.* [OSP_GJ_001700-001701]. First, Investigator

Bochte read into evidence a sworn statement by David Elegbe. *See id.* [OSP_GJ_001704]. Mr. Elegbe's statement relayed that he is an Uber driver who was working on the morning of January 29, 2019. *See id.* [OSP_GJ_001710]. He recalled picking up two "dark-skinned black men" at around 1:00 a.m. *See id.* Mr. Elegbe's statement further provided that although he initially told the police that one of the men was speaking on a cell phone during the ride, he did not actually see the phone and it is possible the person was not actually on the phone. *See id.* [OSP_GJ_001711-001712]. Following the statement of David Elegbe, Investigator Bochte read the sworn statement of Mohamud A. Mohamed into evidence. *See id.* [OSP_GJ_001717]. Mr. Mohamed's statement relayed that he is a taxi driver for Yellow Cab and that he had previously told police that he had given a ride to two men in the early morning on January 29, 2019. *See id.* Mr. Mohamed's statement clarified that although he initially told police that he saw the person in the passenger side of the vehicle on a cell phone, he was not certain about this fact and that it is possible that the passenger was not using a cell phone. *See id.* [OSP_GJ_001717-001718].

As noted above, none of the live witnesses or the sworn statements which were read into evidence were based on any personal knowledge about the attack, and particularly whether the attack was a "hoax" by Mr. Smollett. It therefore cannot be disputed that the cumulative testimony by the Osundairo brothers, which testimony

has been invalidated and is of no legal effect, was critical and necessary to the finding of probable cause by the grand jury.

ARGUMENT

Under 725 ILCS 5/114-1(9), the Court may dismiss an indictment which is based solely upon the testimony of an incompetent witness. A trial court also has the inherent power to dismiss an indictment where a clear denial of due process has occurred. *People v. Lawson,* 67 Ill.2d 449, 456 (1977). To permit the dismissal of an indictment, the denial of due process must be unequivocally clear, *People v. Hart*, 338 Ill. App. 3d 983, 991 (2d Dist. 2003), and the prejudice must be actual and substantial, *People v. Torres*, 245 Ill. App. 3d 297, 300 (2d Dist. 1993).

The grand jury determines whether probable cause exists that an individual has committed a crime. *People v. DiVincenzo,* 183 Ill. 2d 239, 254 (1998). The grand jury serves a dual function as an investigatory body and an intermediary between the people and the State. *See* 725 ILCS 5/112–4(b). The prosecutor serves as an advisor to the grand jury and is tasked with informing the grand jury of the proposed criminal charges and the applicable law. *See* 725 ILCS 5/112-4; *DiVincenzo,* 183 Ill. 2d at 254.

The rights and powers of the grand jurors are codified in 725 ILCS 5/112-4(b), which provides in pertinent part:

> The Grand Jury has the right to subpoena and question any person against whom the State's Attorney is seeking a Bill of Indictment, or any other person, and to obtain and examine any documents or transcripts relevant to the matter being prosecuted by the State's Attorney. ***Prior to the***

> ***commencement of its duties and, again, before the consideration of each matter or charge before the Grand Jury, the State's Attorney shall inform the Grand Jury of these rights.***

725 ILCS 5/112-4(b) (emphasis added).

The transcripts provided to the defense by the OSP in discovery demonstrate that the OSP failed to provide this statutorily mandated declaration to the special grand jury to inform the grand jurors of the broad rights and powers bestowed upon them by Illinois law. Not only does the record provided to the defense not contain this required advisement anywhere, but the transcript makes clear that this advisement was not given to the grand jury on November 19, 2019 prior to the invalid testimony of the Osundairo brothers being read into evidence (or thereafter). Thus, based on the record available to the defense, the grand jurors were not aware that they could subpoena and question the Osundairo brothers instead of relying on their one-sided testimony presented by the OSP from proceedings which have been invalidated by the court. The grand jurors were also not advised that they had the power to make their own investigation unaided by the special prosecutor or the court.

The OSP's failure to inform the special grand jury at the commencement of the proceedings, before each witness testified, and before a true bill was requested, misled the grand jury and deprived Mr. Smollett of his right to the due process of law. *See DiVincenzo,* 183 Ill. 2d at 257-58 ("The due process rights of a defendant may be violated if the prosecutor deliberately or intentionally misleads the grand jury, uses known

perjured or false testimony, or presents other deceptive or inaccurate evidence. An indictment may also be dismissed where the prosecutor has applied undue pressure or coercion so that the indictment is, in effect, that of the prosecutor rather than the grand jury. To warrant dismissal of the indictment, defendant must therefore show that the prosecutors prevented the grand jury from returning a meaningful indictment by misleading or coercing it.") (internal citations omitted).

The indictment in this case also cannot stand because it is based on invalid testimony from a void proceeding. *See, e.g., People v. Curoe,* 97 Ill. App. 3d 258, 271 (1st Dist. 1981) (reversing conviction for theft "because [the indictment] was based upon an unsworn summary of testimony offered before a different grand jury"); *Ducey v. Peterson,* 258 Ill. 321, 324 (1913) ("As Rupert had no authority to make the transcript, the same was void, and afforded no basis whatever for the issuance of an execution by the clerk of the circuit court. It follows that the levy and sale by the sheriff were unauthorized, and his deed of no effect.").

WHEREFORE, Defendant, Jussie Smollett, by his attorneys, Geragos & Geragos, APC and The Quinlan Law Firm, LLC, requests that the indictment be quashed and dismissed and all further proceedings in this matter vacated.

Dated: September 9, 2020

Respectfully submitted,

/s/ Tina Glandian
Tina Glandian, Rule 707 Admitted

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Attorneys for Jussie Smollett

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

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 20 CR 03050 01
	)	
JUSSIE SMOLLETT,	)	
	)	
Defendant.	)	

AFFIDAVIT OF TINA GLANDIAN

I, Tina Glandian, having personal knowledge of the following facts, state as follows under penalty of perjury pursuant to 735 ILCS 5/1 109.

1. I am an attorney licensed to practice law before the courts of the State of New York, California, Nevada, and Florida. I am admitted to practice in Illinois in this matter pursuant to Illinois Supreme Court Rule 707. I serve as counsel to the Defendant, Jussie Smollett, in *People v. Smollett*, Case No. 20 CR 03050 01, pending in the Circuit Court of Cook County, Illinois, Criminal Division.

2. I submit this Affidavit in support of Defendant's Motion to Quash and Dismiss Indictment for Violation of Defendant's Fifth Amendment Due Process Rights.

3. Exhibit A is a true and correct copy of the Report of Proceedings of the August 28, 2020 hearing before Judge Michael P. Toomin in *In re Appointment of Special Prosecutor*, Circuit Court of Cook County, Illinois, Case No. 19 MR 00014.

4. Exhibit B is a true and correct copy of Judge Toomin's June 21, 2019 Order granting the appointment of a special prosecutor in *In re Appointment of Special Prosecutor*, Case No. 19 MR 00014.

5. Exhibit C, which is being filed under seal, is a true and correct copy of documents produced in discovery as OSP_GJ_001526 001624 containing transcripts of the special grand jury proceedings on November 19, 2019 in *In re Appointment of Special Prosecutor*, Case No. 19 MR 00014, during which the prior grand jury testimony of Abimbola Osundairo was read into evidence.

6. Exhibit D, which is being filed under seal, is a true and correct copy of documents produced in discovery as OSP_GJ_001625 001699 containing transcripts of the special grand jury proceedings on November 19, 2019 in *In re Appointment of Special Prosecutor*, Case No. 19 MR 00014, during which the prior grand jury testimony of Olabinjo Osundairo was read into evidence.

7. Exhibit E, which is being filed under seal, is a true and correct copy of documents produced in discovery by the Office of the Special Prosecutor containing excerpts of the transcripts the special grand jury proceedings on February 11, 2020 in *In re Appointment of Special Prosecutor*, Case No. 19 MR 00014.

8. To the best of my knowledge, the record provided to the defense does not reflect that the statutorily required advisement of 725 ILCS 5/112 4(b) was given to the

special grand jury at any time including on November 19, 2019 prior to the invalid testimony of the Osundairo brothers being read into evidence.

Dated: September 9, 2020

/s/ Tina Glandian

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Attorney for Jussie Smollett

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

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
v.	)	
	)	
	)	No. 20 CR 03050-01
JUSSIE SMOLLETT,	)	
	)	
Defendant.	)	
	)	

RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS INDICTMENT FOR ALLEGED VIOLATION OF HIS FIFTH AMENDMENT DUE PROCESS RIGHTS

Nearly eight months since the February 11, 2020 felony disorderly conduct charges were filed, Mr. Smollett now brings his ***third attempt*** to dismiss the indictment based on purported legal errors before the Special Grand Jury (the "Motion"). Specifically, and as discussed below, Mr. Smollett sets forth two failed theories for dismissal based on the Office of the Special Prosecutor's (OSP) presentation of evidence to the Special Grand Jury that are based on incorrect characterizations of both the record and the applicable law. Therefore, Mr. Smollett's latest (and hopefully final) attempt to dismiss charges must meet the same fate as his first two failed attempts and must be denied.

First, Mr. Smollett contends that the OSP failed to comply with a provision in the grand jury statute, 725 ILCS 5/112-4(b), which requires that the prosecutor advise a grand jury of its right to subpoena and question persons, and to obtain and examine documents. Yet, this assumption is completely wrong—the OSP did, in fact, inform the Special Grand Jury of its rights

under 5/112-4(b) ***on numerous occasions*** when the Special Grand Jury was in session. *See* Exhibit A, Affidavit of Deputy Special Prosecutor A. Matthew Durkin. Indeed, even though it was under no obligation to do so, the OSP also documented the fact that the Special Grand Jury was informed of its rights under 5/112-4(b) on the day of the impaneling of the Special Grand Jury and the day a True Bill was returned through two affidavits.

Moreover, Mr. Smollett fails to mention in his Motion that ***even if*** the OSP had violated Section 5/112-4(b)—which it did not—Illinois courts have found that such a technical violation of the statute ***is not grounds for dismissing the indictment***. *See People v. Haag*, 80 Ill. App. 3d 135, 139 (2nd Dist. 1979) ("While section 112-4(b) of the Code imposes a duty upon the State's Attorney to advise the Grand Jury in this regard it does not authorize dismissal of an indictment or provide any other penalty or sanction for his failure to do so."). Therefore, Mr. Smollett's argument based on the requirements of Section 5/112-4(b) is not only factually baseless, but also legally wrong.

Second, Mr. Smollett argues that the February 11, 2020 indictment was based on "illegal and incompetent evidence" (Motion at 1)—namely, the testimony from the prior grand jury proceedings in the initial Smollett prosecution (Case No. 19 CR 3104) (the "Initial Smollett Matter") of Abimbola Osundairo and Olabinjo Osundairo (the "Osundairo Brothers")—and that allegedly as a result, "the evidence before the grand jury was clearly insufficient to support the indictment against Mr. Smollett." Motion at 3. This argument is based on two faulty premises: (1) that Judge Toomin's June 21, 2019 opinion made the Osundairo Brothers' testimony null and void, and (2) an assumption about the sufficiency of the evidence the OSP presented to the Special Grand Jury. Contrary to Mr. Smollett's contention that the proceedings or sworn testimony before the grand jury relating to the Initial Smollett Matter were null and void, Judge Toomin found that

the ***resulting disposition***, i.e., the March 26, 2019 *nolle pros*, was null and void, and that conduct stemming from the authority of the ***State's Attorney*** was improper after Cook County State's Attorney Kimberly Foxx recused herself from the Initial Smollett Case. *See* Def.'s Ex. B at 20. Importantly, a grand jury operates separate and apart from the Cook County State's Attorney's Office and its authority is not derived from or tethered to any authority vested in the State's Attorney because, by statute, it is an entity ***sworn in by a court and presided over by the foreperson***. Therefore, any unauthorized actions taken by the Cook County State's Attorney in the Initial Smollett Matter are distinct from the actions of the properly convened grand jury itself, and do not wholly void the sworn testimony and proceedings that occurred before that grand jury.

Furthermore, even if the Osundairo Brothers' grand jury testimony from the Initial Smollett Matter were considered null and void based on Judge Toomin's ruling—which it should not be—Illinois law prohibits challenges to the sufficiency of the grand jury evidence so long as ***some evidence*** relative to the charge is presented. *See People v. DiVincenzo*, 183 Ill. 2d 239, 255 (1998) *abrogated on other grounds by People v. McDonald*, 2016 IL 118882 ("A defendant ***may not seek to challenge the sufficiency of the evidence*** considered by a grand jury if some evidence was presented.") (emphasis added); *see also* 725 ILCS 5/114-1(a)(9) (permitting dismissal of an indictment only when it "is ***based solely*** upon the testimony of an incompetent witness") (emphasis added). Even if Mr. Smollett could legally challenge the competency of the Osundairo Brothers' testimony (which he cannot under Illinois law), as set forth in Mr. Smollett's own Motion (pp. 6–10), the Special Grand Jury that returned the True Bill in February 2020 was presented with a significant amount of evidence aside from the Osundairo Brothers' testimony, over four sessions totaling approximately 18 hours, including (1) live testimonial evidence from Chicago Police

Department Detective Michael Theis; (2) sworn written statements from five different witnesses; and (3) over 65 document and video exhibits.

As a result, Mr. Smollett's due process rights were neither violated during the grand jury proceedings, nor was incompetent or insufficient evidence presented to the Special Grand Jury. Accordingly, the Court must deny Mr. Smollett's ***third*** motion to dismiss the indictment.

ARGUMENT

As the Illinois Supreme Court has repeatedly stated, "[c]hallenges to grand jury proceedings are ***limited***," and a defendant generally "may not challenge the validity of an indictment returned by a legally constituted grand jury." *People v. Wright*, 2017 IL 119561, ¶ 61 (emphasis added) (quoting *DiVincenzo*, 183 Ill. 2d at 255). Importantly, a "defendant ***may not challenge the sufficiency of the evidence*** considered by a grand jury if some evidence was presented." *DiVincenzo*, 183 Ill. 2d at 255 (emphasis added); *People v. Reimer*, 2012 IL App (1st) 101253, ¶ 26 (same); *see also People v. Torres*, 245 Ill. App. 3d 297, 300 (2nd Dist. 1993) ("An indictment returned by a legally constituted grand jury is ***presumed valid and is sufficient to justify trial of the charges on the merits***.") (emphasis added).

A defendant seeking to dismiss an indictment based on alleged prosecutorial misconduct must demonstrate that the prosecutor's purported actions "rise to the level of a deprivation of due process or a miscarriage of justice." *Wright*, 2017 IL 119561 at ¶ 61. However, a trial court's inherent authority to dismiss an indictment because of due process violations "should be used with great restraint and only when a violation is clearly established." *People v. Leavitt*, 2014 IL App (1st) 121323, ¶ 95. "[A] due process violation consisting of prosecutorial misconduct before a grand jury is actually and substantially prejudicial only if without it the grand jury would not have

indicted the defendant." *People v. Cross*, 2019 IL App (1st) 162108, ¶ 55 (quoting *People v. Oliver*, 368 Ill. App. 3d 690, 696–97 (2nd Dist. 2006)).

Mr. Smollett asks this Court to dismiss the February 2020 indictment based on either speculated prosecutorial misconduct that did not occur, or based on supposed invalid evidence that has not been voided (and that was merely one piece of the significant amount of evidence presented to the Special Grand Jury). These arguments, as detailed below, are both factually and legally flawed, and even if true (which they are not) do not even come close to clearing the high legal standard established by Illinois law for dismissing an indictment.

I. The OSP Informed the Special Grand Jury of Its Rights Under 725 ILCS 5/112-4(b), and Mr. Smollett Was Not Denied Due Process.

Much of Mr. Smollett's Motion operates under the entirely ***false assumption*** that the OSP failed to advise the Special Grand Jury of certain rights it has under 725 ILCS 5/112-4(b). That section of the Grand Jury Statute states as follows:

> The Grand Jury has the right to subpoena and question any person against whom the State's Attorney is seeking a Bill of Indictment, or any other person, and to obtain and examine any documents or transcripts relevant to the matter being prosecuted by the State's Attorney. ***Prior to the commencement of its duties and, again, before the consideration of each matter or charge before the Grand Jury, the State's Attorney shall inform the Grand Jury of these rights.***

725 ILCS 5/112-4(b) (emphasis added). Contrary to Mr. Smollett's mere assumption, and as set forth in the Declaration of Deputy Special Prosecutor Durkin, attached hereto as Exhibit A, the OSP informed the Special Grand Jury of its rights under 5/112-4(b) on ***numerous occasions*** when the Special Grand Jury was in session. In fact, the Special Grand Jury was informed or reminded of its investigative powers at ***each*** of the four sessions held leading up to the return of the True Bill. Exhibit A at ¶¶ 5–7.

Specifically, on October 9, 2019 (the day Special Grand Jury was empaneled by Judge Toomin), the OSP specifically walked the Special Grand Jury through the grand jury process, explained that the OSP would serve as an advisor to the Special Grand Jury, and explained the Special Grand Jury had investigative powers, including its rights under 5/112-4(b) to subpoena and question witnesses, and obtain documents and transcripts. *Id.* at ¶ 3. Notably, the OSP documented through affidavits (long before Mr. Smollett filed—or even outwardly mentioned the concept of filing—the present Motion) that it met its statutory obligation. *Id.*

During the next two Special Grand Jury sessions—on October 29, 2019 and November 19, 2019—the OSP reminded the grand jurors of their subpoena power rights, consistent with the powers of a grand jury under Section 5/112-4(b). *Id.* at ¶ 6.

Finally, on February 11, 2020, prior to the Special Grand Jury returning a True Bill, the OSP ***again*** informed the grand jurors of their rights under Section 5/112-4(b). *Id.* at ¶ 7. As it did after the October 9, 2019 session, the OSP again documented through a contemporaneous affidavit that it had fulfilled its statutory obligation under Section 5/112-4(b). *Id.*

Accordingly, and without question, the OSP fulfilled its obligations under Section 5/112-4(b), and thus, did not take any action or inaction that could possibly resemble prosecutorial misconduct rising to the level of a due process violation.

Furthermore—although not cited by Mr. Smollett—***even if*** the OSP had not fulfilled its obligations under Section 5/112-4(b) (which, as explained above, it did), Illinois courts have stated that such a failure on its own ***would not be grounds for dismissal of the indictment.*** *See People v. Haag*, 80 Ill. App. 3d 135, 139 (2nd Dist. 1979) ("While section 112-4(b) of the Code imposes a duty upon the State's Attorney to advise the Grand Jury in this regard it does not authorize dismissal of an indictment or provide any other penalty or sanction for his failure to do so.");

People v. Fassler, 153 Ill. 2d 49, 57 (1992) (citing *Haag* with approval and summarizing its holding with respect to 5/112-4(b)).

Thus, not only is Mr. Smollett's factual assumption about the OSP's conduct incorrect, but his legal argument as to the proper sanction for a Section 5/112-4(b) violation (which did not even occur here) is plainly wrong, too. Accordingly, dismissal of the indictment based on Section 5/112-4(b) is entirely baseless and unwarranted.

II. The Indictment Was Not Based on "Illegal," "Incompetent," "Invalid," or "Insufficient" Evidence.

Mr. Smollett describes the Osundairo Brothers' sworn grand jury testimony from the Initial Smollett Matter as both "illegal and incompetent" (Motion at 1) and "invalid" (Motion at 3), and states that without the Osundairo Brothers' testimony, the evidence before the Special Grand Jury "was clearly insufficient to support the indictment against Mr. Smollett." Motion at 3. These mischaracterizations and arguments are meritless because: (1) Judge Toomin never voided the entirety of the grand jury's proceedings relating to the Initial Smollett Matter; (2) the Osundairo Brothers gave sworn testimony after being placed under oath by a properly empaneled grand jury; and (3) the OSP presented the Special Grand Jury with significant evidence beyond merely the Osundairo Brothers' testimony.

A. Judge Toomin did not find that the sworn testimony of the Osundairo Brothers was void or invalid.

Mr. Smollett's Motion also operates under the incorrect legal assumption that Judge Toomin held, as part of his June 21, 2019 order (*see* Def.'s Ex. B), that "the grand jury proceeding in which the Osundairo Brothers testified is null and void and of no legal effect." Motion at 5. This, too, is plainly wrong.

In concluding the June 21, 2019 order, Judge Toomin found that the ***disposition*** from the Initial Smollett Matter—the March 26, 2019 *nolle pros*—was null and void:

> In summary, Jussie Smollett's case is truly unique among the countless prosecutions heard in this building. A case that purported to have been brought and supervised by a prosecutor serving in the stead of our [duly] elected State's Attorney, who in fact was appointed to a fictitious office having no legal existence. It is also a case that deviated from the statutory mandate requiring the appointment of a special prosecutor in cases where the State's Attorney is recused. And finally, ***it is a case where based upon similar factual scenarios, resulting dispositions and judgments have been deemed void and held for naught.***

Def.'s Ex. B at 20 (emphasis added). Nowhere in Judge Toomin's order does it state that the sworn testimony and proceedings before the grand jury in the Initial Smollett Matter were null and void.

Indeed, the analogous cases with "similar factual scenarios" cited by Judge Toomin in his June 21, 2019 order are cases where the courts explicitly held, like Judge Toomin held here, that the unauthorized actions of a State's Attorney voided the ***final disposition or judgment***. *See People v. Ward*, 326 Ill. App. 3d 897, 902 (5th Dist. 2002) ("If a case is not prosecuted by an attorney properly acting as an assistant State's Attorney, ***the prosecution is void*** and the cause should be remanded so that it can be brought by a proper prosecutor.") (emphasis added); *People v. Dunson*, 316 Ill. App. 3d 760, 770 (2nd Dist. 2000) ("We hold that the participation in the trial by a prosecuting assistant State's Attorney who was not licensed to practice law under the laws of Illinois requires ***that the trial be deemed null and void ab initio and that the resulting final judgment is also void.***") (emphasis added). None of the cases relied on by Judge Toomin suggest that a voided prosecution or disposition results in the sworn testimony and the proceedings before a grand jury being deemed null and void, and, tellingly, Mr. Smollett cites no such authority.

While Judge Toomin's June 21, 2019 order did state that "[t]here was no State's Attorney when [Mr.] Smollett's case was presented to the grand jury" (Def's Ex. B at 20), this does not

mean that the grand jury itself was improperly impaneled or that the sworn testimony of the Osundairo Brothers is invalid. In fact, Mr. Smollett does not even contend (nor could he) that the grand jury at issue was improperly impaneled, or that the Osundairo Brothers were improperly sworn in by the grand jury's foreperson.

Furthermore, Judge Toomin's conclusions regarding the authority of the State's Attorney and actions by her Office do not apply to the grand jury itself—an entity which, by law, is separate and apart from the State's Attorney's Office, which, in turn, merely "serves as advisor to the grand jury." *DiVincenzo*, 183 Ill. 2d at 254. Indeed, the grand jury's authority and power is derived from an Illinois statute (725 ILCS 5/112-4)—not any authority vested in the State's Attorney. In fact, the grand jury is "impaneled, sworn and instructed as to its duties ***by the court***"—not the State's Attorney. 725 ILCS 5/112-2(b) (emphasis added). Additionally, during the proceedings before the grand jury, "***[t]he foreman***"—not the State's Attorney—who is sworn in by ***the court***—not the State's Attorney—"shall preside over all hearings and swear all witnesses." 725 ILCS 112-2(b); 725 ILCS 5/112-4(c) (emphases added). Accordingly, State's Attorney Kimberly Foxx's improper recusal did not invalidate the propriety of the grand jury itself or any sworn testimony that a witness gave before the properly impaneled grand jury in the Initial Smollett Matter.

Importantly, Mr. Smollett does not cite to any case suggesting that ***sworn testimony*** from a prior grand jury proceeding may not be used in a subsequent grand jury proceeding, even if the disposition or judgment in the prior case was voided.[1] Based on the OSP's diligent search of the case law, no such case law exist.

[1] During the June 26, 2020 status hearing, the Court also referenced "115-10 evidence" in a dialogue with Mr. Smollett's counsel about the basis for this Motion (June 26, 2020 Hr. Tr. at 55–57), which is a reference to 725 ILCS 5/115-10.1 covering the admissibility of prior inconsistent statements. As the Court knows, a prior inconsistent statement which "was made under oath" in an another proceeding, including a grand jury

Rather, Mr. Smollett cites to *People v. Curoe*, 97 Ill. App. 3d 258 (1st Dist. 1981) to argue that the indictment must be dismissed "because it is based on invalid testimony from a void proceeding."[2] Motion at 13. However, as noted in the Motion's parenthetical explaining *Curoe*, the appellate court in that case found that the trial court should have dismissed the indictment due to the prosecutor's ***unsworn summary*** of testimony from four witnesses in another grand jury proceeding. *Id.* at 266–71. As such, *Curoe* is inapplicable, as the Osundairo Brothers' testimony was sworn and under oath before a properly empaneled grand jury, and then their testimony was read verbatim in its entirety to the Special Grand Jury.[3] *See* Def's Under Seal Ex. C & D.

Moreover, and as noted in *Curoe*, "the practice of a prosecutor or other law enforcement official reading verbatim the transcripts of sworn testimony presented to an earlier grand jury" has been approved by courts in Illinois. *Curoe*, 97 Ill. App. 3d at 270 ("Several Illinois cases have upheld criminal convictions where the indictments were based solely upon the sworn testimony of the prosecutor reading the transcripts of proceedings before another grand jury."); *see also People v. Bragg*, 126 Ill. App. 3d 826, 832 (1st Dist. 1984) ("It is well established that ... the reading of the evidence presented before the prior grand jury does not prejudice the accused."). Thus, the

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proceeding, is not inadmissible hearsay. 725 ILCS 5/115-10.1(c)(1); *People v. Sangster*, 2014 IL App (1st) 113457, ¶ 85 (noting that grand jury testimony is admissible under section 5/115-10.1 if it is inconsistent with trial testimony). The Court aptly noted that "you need to persuade me that [the Osundairo Brothers' testimony] wasn't under oath, otherwise it may not be available for the prosecutor to use if the criteria for what we call 115-10 evidence is out there. So I want you to look at that." June 26, 2020 Hr. Tr. at 55. Notably, Mr. Smollett's Motion does not address this issue despite the Court's request, or offer any reasoning or case law suggesting that sworn and under- oath testimony from a grand jury proceeding would be inadmissible.

[2] Mr. Smollett also cites to *Ducey v. Peterson*, 258 Ill. 321 (1913) to support this contention, but that case has no applicability (nor is its application explained by Mr. Smollett), as it involved a dispute over the validity of a deed for land.

[3] In addition to reading the Osundairo Brothers' grand jury transcripts, the Special Grand Jury was provided written copies of the transcripts to read along while listening.

fact that the Osundairo Brothers' sworn testimony was presented to the Special Grand Jury via a reading of the transcript (namely, grand jurors reading written copies of the transcripts of that testimony and listening to a witness read the transcripts aloud) is of no import.

As a result, Judge Toomin's order simply cannot be read, either explicitly or implicitly, to mean that the ***sworn*** testimony of the Osundairo Brothers before a properly impaneled grand jury in the Initial Smollett Matter is null and void.

B. Mr. Smollett cannot challenge the sufficiency of the evidence before the Special Grand Jury, but even if he could, the indictment is supported by more than sufficient evidence.

Mr. Smollett audaciously proclaims that "[w]hen the invalid testimony by the Osundairo Brothers is disregarded, the evidence before the grand jury was clearly insufficient to support the indictment against Mr. Smollett." Motion at 3. In support of this self-serving "sufficiency of the evidence challenge," Mr. Smollett argues that "none of the live witnesses or the sworn statements which were read into evidence were based on any personal knowledge about the attack," and that it "cannot be disputed that the cumulative testimony of the Osundairo Brothers ... was critical and necessary to the finding of probable cause by the grand jury." Motion at 10–11. But, even assuming that the Osundairo Brothers' testimony is invalid (which, as explained above, it is not), Mr. Smollett cannot make a sufficiency of the evidence challenge under Illinois law because an overwhelming amount of additional evidence was presented to the Special Grand Jury to establish probable cause that felony disorderly conduct had occurred to support the True Bill returned on February 11, 2020.

As Mr. Smollett correctly notes, the grand jury's role is only to "determine[] whether ***probable cause*** exists that an individual has committed a crime, thus warranting a trial." Motion at 10 (citing *DiVincenzo*, 183 Ill. 2d at 254 (emphasis added)); *see also United States v. Williams*,

504 U.S. 36, 51 (1992) ("It is axiomatic that the grand jury sits not to determine guilt or innocence, but to assess whether there is adequate basis for bringing a criminal charge."). "Probable cause, *i.e.*, sufficient evidence to justify the reasonable belief that the defendant has committed or is committing a crime, does not demand any showing that such a belief be correct or more likely true than false." *People v. Jones*, 215 Ill. 2d 261, 277 (2005) (internal quotation marks omitted). Because the grand jury does not determine guilt or innocence, "grand jury proceedings are not intended to approximate a trial on the merits." *Fassler*, 153 Ill. 2d at 59. As such, "[i]t is the prosecutor's duty to present to the grand jury information that tends to establish probable cause that the accused has committed a crime." *Id.* at 60.

Because the grand jury's role is limited to determining whether probable cause exists, a "defendant ***may not challenge the sufficiency of the evidence*** considered by a grand jury if some evidence was presented." *DiVincenzo*, 183 Ill. 2d at 255 (emphasis added); *Reimer*, 2012 IL App (1st) 101253, ¶ 26 (same); *see also Torres*, 245 Ill. App. 3d at 300 ("An indictment returned by a legally constituted grand jury is ***presumed valid and is sufficient to justify trial of the charges on the merits***.") (emphasis added). Thus, a valid indictment "***is not subject to challenge*** on the ground that the grand jury acted on the basis of inadequate or incompetent evidence." *Fassler*, 153 Ill. 2d at 60 (emphasis added) (quoting *United States v. Calandra*, 414 U.S. 338, 345 (1974)); *see also People v. Sampson*, 406 Ill. App. 3d 1054, 1060 (3rd Dist. 2011) ("Indictments returned by a legally constituted grand jury are unassailable on the grounds that the indictment was based on inadequate or incompetent testimony.").

As noted in Mr. Smollett's Motion (pp. 6–10), the Special Grand Jury did hear a significant amount of evidence aside from the Osundairo Brothers' testimony over the course of four sessions totaling approximately 18 hours, including two full-day sessions. This other evidence included

(1) live testimony evidence from Detective Michael Theis; (2) sworn written statements from five different witnesses; and (3) over 65 document and video exhibits, including hours of video compilations. The Special Grand Jury was also given access to the entire CPD investigative file and all materials the OSP received in response to applicable grand jury subpoenas, which constituted over 25,000 pages of documents for its review. Thus, even assuming the Osundairo Brothers' testimony from the prior grand jury session is invalid (which it is not), Mr. Smollett cannot challenge the sufficiency of the evidence presented to the Special Grand Jury under Illinois law because much more than "some evidence was presented." *DiVincenzo*, 183 Ill. 2d at 255; *Reimer*, 2012 IL App (1st) 101253, ¶ 26; *see also* 725 ILCS 5/114-1(a)(9) (permitting dismissal of an indictment only when it "is ***based solely*** upon the testimony of an incompetent witness") (emphasis added).

Moreover, even if Mr. Smollett could overcome the outcome-determinative hurdles to his argument (i.e., that the Osundairo Brothers' testimony is not invalid, and that he cannot challenge the sufficiency of the evidence before Special Grand Jury), it cannot be seriously disputed that the Special Grand Jury received ample evidence—well beyond the Osundairo Brothers' testimony—to establish probable cause that Mr. Smollett committed felony disorderly conduct in the filing of false police reports.

Accordingly, the Court cannot and should not dismiss the indictment based on the sufficiency of the evidence before the Special Grand Jury.

CONCLUSION

For the foregoing reasons, the Office of the Special Prosecutor respectfully requests that this Court deny Mr. Smollett's Motion to Quash and Dismiss Indictment for Alleged Violation of Defendant's Fifth Amendment Due Process Rights.

Dated: October 1, 2020

Respectfully submitted,

/s/ Dan K. Webb

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

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
	)	
v.	)	
	)	
	)	No. 20 CR 03050-01
JUSSIE SMOLLETT,	)	
	)	
Defendant.	)	
	)	

NOTICE OF FILING

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YOU ARE HEREBY NOTIFIED that on October 1, 2020, the undersigned filed the attached Response in Opposition to Defendant's Motion to Dismiss Indictment for Alleged Violations of His Fifth Amendment Due Process Rights with the Clerk of the Circuit Court at the George N. Leighton Criminal Courthouse, 2600 South California Avenue, Chicago, Illinois 60608, via email to: Criminal Felony Services CriminalFelonyServices@cookcountycourt.com, with a courtesy copy provided to Judge Linn through his clerk via email at Joel.OConnell@cookcountyil.gov.

/s/ Sean G. Wieber
Sean G. Wieber
OFFICE OF THE SPECIAL PROSECUTOR
35 West Wacker Drive
Chicago, IL 60601
Tel: (312) 558-5769
SWieber@winston.com

PROOF OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing to be emailed to the following attorneys of record on October 1, 2020:

William J. Quinlan
David Hutchinson
THE QUINLAN LAW FIRM, LLC
Willis Tower
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/s/ Sean G. Wieber
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EXHIBIT A

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

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
	)	
v.	)	
	)	
	)	No. 20 CR 03050-01
JUSSIE SMOLLETT,	)	
	)	
Defendant.	)	
	)	

AFFIDAVIT OF A. MATTHEW DURKIN

I, A. Matthew Durkin, having personal knowledge of the following facts, state as follows under penalty of perjury pursuant to 735 ILCS 5/1-109.

1. My name is A. Matthew Durkin. I am an attorney licensed to practice law before the Courts of Illinois. I serve as Deputy Special Prosecutor as part of the Office of the Special Prosecutor (OSP) in *People of the State of Illinois v. Smollett*, Case No 20 CR 03050-01, pending in the Circuit Court of Cook County, Illinois, Criminal Division. I assist Dan K. Webb, who was appointed Special Prosecutor on August 23, 2019.

2. I submit this Affidavit in Support of The Office of the Special Prosecutor's Response in Opposition to Defendant's Motion to Quash and Dismiss Indictment for Alleged Violation of Defendant's Fifth Amendment Due Process Rights.

3. The statements contained herein are based on my review the of the transcripts of the Special Grand Jury minutes prepared by the court reporter who was present for each session.

4. The Special Grand Jury was empaneled and sworn in by Judge Toomin on October 9, 2019. The Special Grand Jury returned a True Bill of Indictment against Mr. Smollett for the crime of disorderly conduct under 720 ILCS 5/26-1(a)(4) on February 11, 2020. The Special Grand Jury sat for four sessions leading up to the return of the True Bill on October 9, 2019; October 29, 2019; November 19, 2019; and February 11, 2020.

5. During the first session on October 9, 2019, and consistent with 725 ILCS 5/112-4(b), Deputy Special Prosecutor Shannon T. Murphy informed the Special Grand Jury that it had the right to subpoena and question persons, and to obtain and examine documents. Even though the OSP was under no obligation to do so, Deputy Special Prosecutor Murphy documented the fact that the Special Grand Jury was informed of its rights under 5/112-4(b) through an affidavit, attached hereto as Affidavit Exhibit 1.

6. The Special Grand Jury convened again to hear evidence on October 29, 2019 and November 19, 2019. During both of those sessions, a Deputy Special Prosecutor from the OSP reminded the Special Grand Jury of its subpoena power rights under 5/112-4(b).

7. The Special Grand Jury's last session occurred on February 11, 2020—the day a True Bill was returned charging Mr. Smollett with six counts of felony disorderly conduct under 720 ILCS 5/26-1(a)(4). During that session, Deputy Special Prosecutor Murphy and Deputy Special Prosecutor Sean Wieber again informed the Special Grand Jury of its rights under 5/112-4(b). Deputy Special Prosecutor Murphy also documented the fact that the Special Grand Jury was informed of its rights under 5/112-4(b) through an affidavit, attached hereto as Affidavit Exhibit 2.

Dated: October 1, 2020

/s/ A. Matthew Durkin

A. Matthew Durkin
Deputy Special Prosecutor
OFFICE OF THE SPECIAL PROSECUTOR
35 West Wacker Drive
Chicago, Illinois 60601
Tel: (312) 558-3726
MDurkin@winston.com

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

IN RE APPOINTMENT OF SPECIAL PROSECUTOR	)	**No. 19 MR 00014**
	)	**The Honorable Michael P. Toomin**

AFFIDAVIT

I, Shannon Murphy, Deputy Special Prosecutor, state that pursuant to Sec. 112-4 of the Code of Criminal Procedure of 1963, as amended, in presenting evidence in the above entitled matter to the Special Grand Jury, advised the Special Grand Jury that:

(a) it has the right to subpoena and question any person against whom the Special Prosecutor, acting in place of the Cook County State's Attorney, is seeking a Bill of Indictment, or any other person, and to; and

(b) it has the right to obtain and examine any document or transcripts relevant to the matter being prosecuted.

FURTHER AFFIANT SAYETH NAUGHT,

Deputy Special Prosecutor

Signed and sworn before me on
this 15 day of October, 2019.

Notary Public

"OFFICIAL SEAL"
NINA A ALEXANDER
Notary Public, State of Illinois
My Commission Expires 10/22/2022

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

IN RE APPOINTMENT OF SPECIAL PROSECUTOR	**No. 19 MR 00014**
	The Honorable Michael P. Toomin

AFFIDAVIT

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(a) it has the right to subpoena and question any person against whom the Special Prosecutor, acting in place of the Cook County State's Attorney, is seeking a Bill of Indictment, or any other person, and to; and

(b) it has the right to obtain and examine any document or transcripts relevant to the matter being prosecuted.

FURTHER AFFIANT SAYETH NAUGHT,

Deputy Special Prosecutor

Signed and sworn before me on
this 11th day of February, 2020.

"OFFICIAL SEAL"
NINA A ALEXANDER
Notary Public, State of Illinois
My Commission Expires 10/22/2022

Notary Public

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

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

THE PEOPLE OF THE STATE OF ILLINOIS,

-vs- NO. 20 CR 0305001

JUSSIE SMOLLETT,

Defendant.

REPORT OF VIDEO-CONFERENCE PROCEEDINGS had at the hearing of the above-entitled cause before the Honorable JAMES B. LINN, Judge of said court, on the 30th day of October, 2020.

APPEARANCES:

MR. DAN WEBB,
MR. SEAN WIEBER,
Special Prosecutors;
MR. SAMUEL MENDENHALL,
Deputy Special Prosecutor,
appeared for the People;

MR. WILLIAM J. QUINLAN,
appeared for the Defendant;
MS. TINA GLANDIAN,
appeared for the Defendant.

DIONE R. RAGIN
2650 S. California Ave., 4C02
Chicago IL 60608
Official Court Reporter
C.S.R. #084-004066

THE COURT: Would the lawyers, please, identify yourselves for the Court Reporter.

MR. QUINLAN: William J. Quinlan on behalf of Mr. Smollett.

MS. GLANDIAN: Tina Glandian on behalf of Mr. Smollett.

MR. WEBB: Your Honor, Dan Webb on behalf of the Special Prosecutor's Office.

MR. WIEBER: Your Honor, Sean Wieber on behalf of the Special Prosecutor's Office. And I am also joined by Sam Mendenhall Deputy Special Prosecutor. He is with us in Chicago just not on video.

THE COURT: All right. I see Mr. Smollett is here on zoom camera. Let me just inquire what city are you in right now. I can't hear you. You are muted.

THE DEFENDANT: I'm in New York City, Your Honor.

THE COURT: New York City. Very good. Okay. One of the things we -- where we had left off was the defense had indicated that they didn't get the entirety of all Grand Jury minutes. They got testimony but, they were concerned about whether the Grand Jurors on the second Grand Jury, the Grand Jury that brought the true bill in the instant case, if they were properly advised of the right to question witnesses and to do some of

their own investigations. We had some colloquy back and forth about that. The Special Prosecutors did not want to release the entirety of the -- all the Grand Jury minutes. I finally got the opportunity to make an in camera review of all the Grand Jury minutes and a letter from the Special Prosecutors explaining their reasoning. I understand what they are saying now.

So far as the in camera review is concerned, I am wholly satisfied that the second Grand Jury was advised on multiple occasions about their right to question witnesses, issue subpoenas to their own investigation. And it was done in a wholly proper manner. I don't see that as an issue at all. I understand now some of the concern that the Special Prosecutor had about the entirety of the Grand Jury minutes. That's because if we all recall Judge Toomin's original order was two fold. There were what we call two prongs to their responsibilities as Special Prosecutors. One was the matter involving Jussie Smollett and what he may have been alleged to do. The other was an investigation of the State's Attorney's Office and the Chicago Police Department as far as their handling of the matter, the original matter that that preceded this matter. There was some overlap that appeared to be present because

everything was dealt with in the whole second Grand Jury. And after looking at it and looking at in context, and I emphasize the word in context, I am in agreement with the Special Prosecutor's reasoning that the other matters that they haven't tendered yet ought not to be tendered, that they ought to remain secret, that they are not in violation of Illinois Supreme Court Rules as to what's required by way of discovery. I am confident that all witnesses that testified and all of their testimony including certain witnesses who the Special Prosecutor believes will not be called by them in their case in chief or even rebuttal but that's been tendered as well. So all that testimony is available for impeachment purposes.

But the rest of it I find to be outside what is required by this Supreme Court rules and I find good cause for the Special Prosecutors to take the position they have. And so I am not going disturb that and I am not going to order anything additional as far as that is concerned.

Ms. Glandian, I think you were talking about that last time. Is there anything else you wanted say about that, spread of record?

MS. GLANDIAN: Well, I would just say for the

record that there is a protective order in place that we have signed. We obviously have other sensitive Grand Jury materials that have been produced to us. There has been obviously no issue with anything that has been in our custody being released, you know, in violation of the protective order. So we think both of these investigations are interrelated. We do think that we should get the information now obviously if we don't use it and if that's -- you know, if there is anything we want to use, we can obviously file a motion -- file a motion in limine to address that. But we do think we are entitled to the information. We think they are interconnected and again there is a protective order in place.

We think we should have the materials and then the relevance could be determined at later time but we are already in possession of a lot of Grand Jury materials and there were particularly one category of materials disclosed to us in this case where the Special Prosecutor had a concern. We added some specific language to narrow who could actually see those items and we would be happy to do that again for these materials. But we just at this point feel that there is a lot of items have been kept from our review including

the 60 page report. It is our understanding that that investigation has concluded now. That that's been the issue, the order. So there is no ongoing investigation that's at stake and so the report the Court has already ordered that we can't get that report. Again, you know, we objected to that, and we would ask that at least for the Grand Jury proceedings we see the full transcripts. If there is anything questionable in there, we can obviously address that and the Court can at that point decide whether anything is to be used at trial. But we do think we should at least have that information in case it leads us to anything else that's helpful for our case.

THE COURT: Well, let me also point out that Judge Toomin has chosen not to release the report from the Special Prosecutors. And it's in the same spirit since Judge Toomin is not releasing the report I feel even stronger about the Special Prosecutor's concern about the other Grand Jury matters that in the transcripts that don't involve testimony of witnesses. It's really discussions between them and the Grand Jury about the scope of the investigation. And they talk a lot about things like the order -- well, giving the Grand Jury the expectation of how much time they will be taking each

day and what's going to take place.

But I didn't -- I was looking carefully. I read all of it. And I was looking to see is there any Brady Material here. There wasn't. Is there any -- and certainly you are entitled to the testimony of the witnesses. You have got that. Is there anything else that took place there that should be discoverable that might be available and might be something that I can somehow fathom would be something that could impact the trial and I didn't find any. And so I want to keep -- and due respect to Judge Toomin's order and also the concerns from the Special Prosecutor, Grand Jury proceedings are secret. You have what you need. You have what you are entitled to. The other things I think are discretionary and after -- and I did exhaustive review of every bit of it. I am not finding that it's necessary to turn it over to you, so your record is made. Your objection is preserved and will remain under seal.

MS. GLANDIAN: One additional thing, Your Honor. What was previously before Judge Toomin was not whether this information should be disclosed to the defense. It was whether this should be publically disclosed, and it was Mr. Webb who actually filed the motion and he took

the position that this should be publically disclosed that the report should be publically disclosed. And then after Judge Toomin denied that he actually went so far as to file a motion for reconsideration of Judge Toomin's order.

In all of that, none of that pertains to whether Mr. Smollett is entitled to that information. That completely concerned the public disclosure. So it's our position that Mr. Webb not only took the position but then went so far as to move for reconsideration saying this should be publically disclosed at the very least in this prosecution of Mr. Smollett. As the defendant he is entitled to this information, and I think Judge Toomin's order does not preclude Your Honor from issuing a narrower order in this proceeding that the defendant is entitled to it as opposed to the public and again there is a protective order. This will be just for his and his attorney's eyes only.

THE COURT: Mr. Wieber or Mr. Webb, anything want to add to this conversation?

MR. WIEBER: No, Your Honor, our position made reference to it in the letter sort of set out several reasons. I echo the sentiment that you have had. The only thing I would add is that the protective order for

purposes of that you put in place for this case was the rules already deal with the general protective order and the nature of rules 415 which says what it can and can't be used for. The protective order that was specifically entered in this case, and Ms. Glandian is making conference to and I think incorrectly making reference to as far as purpose of this conversation, surround Federal Grand Jury material that was issued under seal pursuant to Judge Pallmeyer, the Northern District of Illinois, which we only had access to because it had been tendered to us in conjunction from that office. So in order for us to fulfill our rule 412 obligations we had to get a protective order pursuant Judge Pallmeyer's order to get it from you, Your Honor, and that's why you entered the protective order in this case. So they have that material pursuant to your protective order that instructed by Judge Pallmeyer.

THE COURT: Gave the defense some Federal Grand Jury proceedings.

MR. WIEBER: Correct.

THE COURT: Ms. Glandian, I think you have made your record. We are ready to move on.

What else shall we talk about. Tell me what you need and there is a few things I want to bring up and

some suggestions I can may.

MR. WEBB: Your Honor, this is Dan Webb on behalf of the Special Prosecutor's Office. Let me just touch upon one issue that you touched upon at the last status hearing. We have had some internal discussions. Excuse me. In the Special Prosecutor Office, Your Honor, what is it we need to do as lawyers to get things done on this case so the case will be ready for trial. We understand the issue of when the case could be tried. We understand the bigger issues and that's in your category and we have nothing to say about the pandemic. However, I want you to be updated on now that motions to dismiss are behind us, there is three that have been ruled on, we have made full discovery. We have provided all of our discovery. The defense has not and we are waiting for their discovery that's not completed yet. Maybe we can get a date today on when they will complete discovery, but discovery is moving in the right direction to get it done.

What's left are motions in limine that you touched upon the last time and let me update you on that because we are moving forward. Here is where it stands. You told us to get focused on that because that obviously is something that has to get done before the

case is going to go to trial. So here is what we did. We in the Special Prosecutor's Office tried to focus our attention on what are the motions in limine that we are going to file and we actually broke it into two categories. There is four motions that at the outside cut across some big picture issues such as will evidence be admissible about my appointment as Special Prosecutor and whether Judge Toomin made error in appointing me. Number two, whether there will be evidence introduced about the investigation that we did and what Your Honor just referred to as prong two about the State's Attorney's office. And number three was the State's Attorney Office actual handling of the Smollett case. We believe those are completely off base and would not be relevant.

So we had a meet and confer yesterday to talk about these four motions. And the defense -- we had a productive meeting. I won't speak for Ms. Glandian but I think the defense position is they probably are going to be offering evidence that would necessitate us to file those motions. My position was, well, if you are not going to offer the evidence I don't have to file the motion.

THE COURT: Everything you are saying is exactly

where I was going to go. This is what we need to do. The defense needs to file their list of witnesses. And then I need to see the motions in limine. Now you have already indicated some things you think should be off base on I am glad, really glad, that you are having conversations with the defense about this already. When you file your motions in limine, both sides, and you give them to the other side you may find that there is not disagreement. You may be saying I don't want you to do A, B, C and they may say can, yeah, we are not going to do A, B, C so we don't have to discuss it. They may not be contested. But I really want to twiddle down is I need both sides to have their list of witnesses complete, your motions in limine complete, compare and talk to each other about them and then let me know where the disagreements lie.

You may have multiple concerns. And you may be in agreement. Both sides may agree we are not going there. We are not going to call this person. We're not going to suggest this type of theory or present testimony on this thing you are worried about. And let's just try to narrow it down what is in dispute and then we will have a conversation as to what's admissible and what's not admissible. I think it sounds like you

are already doing exactly that. So you need to let them know what you are worried about them doing. They need to let you know if they agree or disagree with you. There may be something that for their on strategy reasons they are not even going to try. So that conversation appears to be underway.

I do need from the defense though you need to get the government your list of witnesses and I need to know your motion also. I guess scope of what's going to be allowed at the trial is important. And that's something we need to discuss but let's find out where we disagree with each other first.

MS. GLANDIAN: Your Honor, we have provided -- sorry. Just for clarification prior the last hearing we had provided our list of potential witnesses to the Special Prosecutor's Office. I know that they want us to narrow that list. We spoke about that a little bit yesterday but we are currently not in a position to do that yet. Yesterday was, as Mr. Webb said a productive meet and confer, but a lot of that was understanding the area and the scope of their case so that we could appropriately advise them of where we anticipate going but that's a dialog --

THE COURT: That's the key thing. When both of you

talk to each other and you have concerns and you say, oh, my God one side or the other they want to go in certain directions. They want to present the trier of fact this information. We don't think that should be allowed at the trial or we have to narrow it or confine it or have some limitations on it. All that is fine for discussion but I need to know what the lines of demarcation are. I need to know where the disagreements are, and as soon as we have that we can have a discussion and wrap up and then we are trial ready.

MR. WEBB: Your Honor, I think are moving in that direction and so the bottom line is that we disclosed several of our motions in limine yesterday. We will continue to discuss those with the other side. We are not going to file any motions until we know we are in complete disagreement so it's ripe for Your Honor's discretion.

And on the first four motions in limine I just -- our plan is we are going to continue to talk to the defense. If we can't reach an agreement, we know they are going to offer evidence. And I have to file the motions. Whatever. We are going to file those motions within two weeks. I know there is no order to do that but we want to keep it moving. And so if we are at

loggerheads, we are going to file those motions. There will be a few others that we will work with them on. They are going to work us on some motions they have where they want to tell us that they have some motions in limine. We are going to do that process and take advantage of it to move it so where you will have all contested motions in limine pretty shortly and we will move it so will be trial ready.

THE COURT: Sounds great to me. Anything else that we need to talk about today? I have one other thing I want to talk about, but anything else that you wanted -- that the lawyers wanted to talk to me about today?

MR. WEBB: No, Your Honor.

THE COURT: When shall we be ready to talk about our motions in limine. When say talk about, when can I have in my possession something in writing showing what is in dispute, the motions in limine that are in dispute, so I'm prepared to argue them. I think it would be to my advantage and benefit to have that up front.

MR. WEBB: Right now we are going to file -- we have internally imposed a regiment on ourselves that the first four motions in limine which are pretty broad based we are going to work with the defense. And if we

reach loggerheads, they will filed in two weeks from today.

THE COURT: Okay. And how long before I can have defense's motion in limine and you can get them to Mr. Webb and Mr. Wieber and Mr. Mendenhall so they can see what they are disagreeing about what's in dispute.

MR. QUINLAN: Your Honor, I speak for me and my firm. I start -- our firm does, our firm starts a three week trial starting next week.

THE COURT: Tell me when you can do it, not when you can't. Just tell me when you can come back to me to talk to me about this.

MR. QUINLAN: From my prospective to the extent that I need to be involved and our firm needs to be involved, I mean we are talking middle of December because am not going to be able to look at it until I am done with this trial.

THE COURT: I can do middle of December.

MR. QUINLAN: -- I don't know if Ms. Glandian --

MS. GLANDIAN: I actually am waiting to hear about a trial date today which may start November 12th. I'm not sure and we will hear about that later. But I would think middle of December sounds like an appropriate time for us to meet.

THE COURT: I happen to be odd number of days in the middle of December so, please, pick an odd number date that works for all of you and I will be here.

We are going all the way until the middle of December. This gives both sides ample time to talk each other about what your motions in limine are. Make sure that their list of witnesses is accurate and current. I will know in advance of that I am sure because I am giving it a longer date. We are talking about six weeks. I will know what the issues are and I will be ready to argue the motion in limine. We can do it in the middle of December. Just give the date middle of December that you have in mind.

MS. GLANDIAN: Your Honor, do you expect this to be a zoom hearing or this will be in-person?

THE COURT: You can come in-person if you want to. I am willing to do it by zoom. These are just legal arguments. It's going to be an evidentiary hearing of sorts. It's going to be legal arguments so I am okay to do it by zoom.

MS. GLANDIAN: Does the 15th or 17th.

MR. WEBB: The 17th would be good for us too, Your Honor.

MR. QUINLAN: The 17th depending on the time, Your

Honor. I have a hearing at 9:30 that should probably go to 11:00.

THE COURT: I can do this case at 11:30. By agreement everybody. All right. By agreement December 17th. I am going to mark this as a discovery check date. And we are going to argue motions in limine. I will ask the parties, please, advise me through my law clerks what are the matters that are in dispute that we really need to discuss that I can make findings as to whether the scope is allowable or not allowable, more probative than prejudicial. All those types of arguments. Let me know what you have in mind.

I don't know if there is proof of other crimes that you are trying to submit here. I am just throwing this out because of the knowledge I have on the case, all the pleadings. You were talking about a letter in the mail that may have preceded these things as part of this indictment. I need to know if that's something that we can talk about in limine also. I want to have that -- those arguments done on the 17th. I need know what's in dispute before that. Okay.

All right. The other thing I wanted to broach is I have been getting some media request and we haven't really talked about this in quite sometime. I am -- I

have been requested the media wants to know if they can come to court. Right now we are on zoom. I have had one media request they want to record the zoom proceedings. And it's a television station. And there may be others as well.

Before I respond to these media request, I certainly want to have input from the attorneys and I need to know what your positions are. So I'm going to ask you to put in writing to me what your thoughts are, what your position is on media. Are you okay or not okay with cameras in the courtroom. Whether it's live broadcast or still cameras. What are your thoughts on that. What do you think about the media recording our zoom sessions. Do you have a position on that one way or the other. I am not going to comit to anything with the media until I hear from the lawyers first. If you put that in writing to me, I will be in a better position to talk to all of you about that.

We can do that on December 17th. We can formally talk about it December 17th because we are already talking about it in the zoom session. We can sort that out and again if everybody is in agreement the Court may be inclined to agree with parties if there is an agreement. But if there is not an agreement, then we

are going to have to discuss it and I will ultimately have to make a decision. That's something we should be mindful of. All right. So get that to me in writing in say a couple weeks time whatever your positions are and perhaps talk to each other as well. I'm not making this suggestions one way or the other as to what your position should be. I just need to know that before we get back to the media and let them know how we are going to handle the request. There are requests and I anticipate there may be more requests as we get closer to the adjudication on this case.

MR. WEBB: Your Honor, we will consult with the defense on the media issues. Do we want to set a date like two weeks from today you want in writing the response to each of us you want some date or --

THE COURT: The earlier. You got more than two weeks. I'd like to have that. I may reach out to you because I may want to just let the media know and the request and see how many requests are out actually. There were some general requests that were made a long time ago and I am still getting some more recent requests and I really need to get your input before I respond to those requests.

MR. WEBB: We will get it to you, Your Honor.

THE COURT: I will reach out to you if I think we need discuss something before the 17th on that issue. Anything else today?

MR. WIEBER: Your Honor, just one item of housekeeping. I think the answer here is yes as you have before allowed the parties to just work between or amongst ourselves on a briefing schedule so if this is in connection with the MIL's, I presume unless you are want to put out an order or deadlines. We know when they are going to be argued. We know, but I imagine we can each cross submit papers and we would at least have an opportunity to put an opposition on and could we work between and amongst ourselves on the dating of that.

THE COURT: Yeah, sure. Work among yourselves. I don't really need to have all this in writing. I am getting lot of written pleadings which is fine. It's something I don't often get on cases that we handle here but that's fine. I am not objecting to it. But these are things if I know what the motions in limine are and we are talking about what's admissible at trial and those are things I think I can deal with in fairly short order. So, yeah, you are free. I'm not putting any -- I am not ordering you to have something in writing by any time certain. Just let me know where the dispute

are. You can tell me orally what your reasoning is. You want to put it writing since you are comfortable doing it that way, that's fine. I will be glad to take it, but, yes, you can work our your own briefing schedule. I prefer you working out your own briefing schedule than me ordering you around. You are in different locations and you have different schedules and I would rather you work it out among yourselves.

MR. QUINLAN: Judge, just so we are clear and obviously it's on the record like I said we have this trial so we are not even going to be able to at least from Quinlan Firm perspective put anything in writing until probably after December 1st just because of this trial that's going to take up the bulk of November.

THE COURT: Yeah, but you got Ms. Glandian and I am still not sure who the first chair is between the two. I think I have two first chairs working for Mr. Smollett is the way I see it. I mean respectfully she is certainly very capable of advocating the position that needs to be advocated. If you really need to be there, I will work with you on that but.

MR. QUINLAN: It's just a resource issue, Your Honor, I mean obviously Winston has a fair amount of lawyers on this. It's obviously a complicated case.

Ms. Glandian is more than capable. I don't mean to imply differently. But she also said she may have a trial as well. I am just trying to make a point that --

THE COURT: She said December 17th is fine. If it's not fine, let me know about it. We are setting it now. This is six weeks in advance. So if you run into a snag on the 17th and you know that we are not going to able to do it on the 17th, then reach out and let me know.

MR. QUINLAN: I think we can. I am just trying to control expectations -- that's all.

THE COURT: Anything else?

MR. WEBB: No, Your Honor.

THE COURT: Wish you a great weekend. Thank you.

MS. GLANDIAN: Thank you.

MR. WEBB: Thank you.

MR. QUINLAN: Thank you.

(Which were all the proceedings had in the above entitled cause.)

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

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

I, DIONE R. RAGIN, Official Court Reporter of the Circuit Court of Cook County, County Department-Criminal Division, do hereby certify that I reported in shorthand the proceedings had on the hearing in the aforementioned cause; that I thereafter caused the foregoing to be transcribed into typewriting which I hereby certify to be a true and accurate transcript of the Report of Proceedings had before the Honorable JAMES B. LINN, Judge of said court.

_____
DIONE R. RAGIN,
Official Court Reporter
#084-004066

Dated this 27th day
of November, 2020.

STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

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

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff,
v.
JUSSIE SMOLLETT,
Defendant.

No. 20 CR 03050-01

REPORT OF VIDEO-CONFERENCE PROCEEDINGS

had at the hearing in the above-entitled cause, before the HONORABLE JAMES B. LINN, one of the Judges of said Division, present in court, on the 15th of October, 2021.

PRESENT:

MR. DAN WEBB, Special Prosecutor,
MR. SEAN WIEBER, MR. SAMUEL MENDENHALL,
MR. MATT DURKIN,
Assistant Special Prosecutors,
appeared via Zoom on behalf of the People;

MR. NENYE UCHE, MR. MARK LEWIS,
MR. RICKY GRANDERSON, MS. TAMARA WALKER,
MR. SHAY ALLEN, MS. HEATHER WIDELL,
MS. TINA GLANDIAN,
appeared via Zoom on behalf of the Defendant.

DANIELLE K. WHITE, CSR, RPR
Official Court Reporter, via Zoom
2650 S. California Avenue, Room 4C02
Chicago, Illinois 60608
Illinois CSR License No. 084-004215

THE COURT: Jussie Smollett.

I see Mr. Smollett. Good afternoon. Where are you today?

THE DEFENDANT: Good afternoon, Your Honor. I'm in New York.

THE COURT: In New York.

Would the lawyers -- everybody who's on Zoom appearing for these proceedings, please identify yourselves for the court reporter and who you represent.

MR. WIEBER: Good morning, Your Honor.

Sean Wieber from the Office of the Special Prosecutor.

MR. WEBB: Your Honor, Dan Webb from the Office of the Special Prosecutor.

MR. MENDENHALL: Good afternoon, Your Honor.

Sam Mendenhall from the Office of the Special Prosecutor.

MR. DURKIN: Good afternoon, Your Honor.

Matt Durkin from the Office of the Special Prosecutor.

THE COURT: Defense lawyers?

MR. UCHE: Good morning, Judge.

Nenye Uche, N-E-N-Y-E, last name, U-C-H-E, for

Mr. Smollett.

MR. LEWIS: Good afternoon, Your Honor.

Mark Lewis on behalf of Mr. Smollett.

MR. GRANDERSON: Attorney Ricky Granderson on behalf of Mr. Smollett.

MS. WALKER: Good afternoon. Attorney Tamara Walker on behalf of Mr. Smollett.

MR. ALLEN: Shay Allen on behalf of Mr. Smollett.

MS. WIDELL: Heather Widell, W-I-D-E-L-L, on behalf of Mr. Smollett.

MS. GLANDIAN: Good afternoon, Your Honor.

Tina Glandian on behalf of Mr. Smollett.

THE COURT: Is that everybody, I think?

Carolyn, if you're there, I would like to have a breakout room with counsels, please.

(Off-the-record discussion.)

THE COURT: The parties are present. Is everybody back from the breakout room?

Okay. Are we all back?

A few matters regarding the discovery, we had a breakout room. The record will show by agreement of the parties a breakout room was held on October 13. We discussed some discovery issues. I can say that Ms. Walker and Mr. Wieber have agreed specifically to

meet in person with each other to open some disks that may have been problematic previously, and that's going to be taken care of and is underway.

There was also a motion to dismiss that was filed on a new theory by new counsels that had not been heard previously. I agreed to allow oral argument on that motion, and I'm going to do that shortly.

Today I received two more motions that came to my attention, at least, today. One of them had been filed yesterday. One is entitled Defendant's Motion to Compel Discovery.

Upon reading the motion, it occurs to me that this is something that had been previously dealt with. You have to bear in mind and understand that at one point Mr. Smollett was represented by Attorneys Quinlan and Glandian and their associates. Much later Mr. Uche and the other lawyers had joined him who are all present here now and whose names have been spread of record joined the team.

I believe that the motion to compel discovery was previously dealt with by prior counsel. We talked about this briefly in the breakout room that we just held. I'm going to deny this and stand by my previous rulings. I'm not going to set oral argument on this

today because I don't think it's necessary because we're covering ground that's already been covered. But leave to file the petition is allowed and that may be part of the record and will stay in the court file.

There's also a motion to disqualify the Office of the Special Prosecutor primarily talking about misjudgments and missteps by Judge Toomin in appointing the Special Prosecutor's Office in the first place. This is another matter that had previously been dealt with at some length by original counsels, not by new counsels. I find this is repetitious and duplicitous. It's something that's already been filed. The verbiage is a little bit different in the motion, and I have no problem allowing the new filing to be made part of the record and part of the court file. I'm going to stand by my prior findings and rulings on that motion as well. The motion is denied. I'm not going to accept oral argument from counsels in support of their motion because we've already had oral arguments about this, but it will be made part of the court file should it become necessary to refer to later.

I will now hear from the defense, if they wish to, on the motion they filed to dismiss the indictment on contractual grounds. And whichever one of you would

like to speak orally in support of your written motion, you're welcome to.

MR. UCHE: Thank you, Judge.

Judge, I just want to go over the motion that I drafted and filed. Before we start, Your Honor -- and I'll be really brief -- I just want to make a point of noting that Mr. Smollett would want nothing more than to go to a jury and clear his name, which we intend to do, but, of course, beyond what the client -- whichever way the client would prefer, we, as attorneys, have to do our own due diligence in filing what we would term technical motions. And, Judge, this is one such technical motion.

Judge, just to get started first, I think the first concern Your Honor raised at the last hearing is the last status date, even though this wasn't fully briefed in front of Your Honor, was the question of --

MR. GRANDERSON: Nenye, we can hear you.

MR. UCHE: Yes.

MR. GRANDERSON: They're letting everybody back into the call so they can hear you.

MR. UCHE: Okay.

MR. GRANDERSON: Okay?

MR. UCHE: Okay. Thank you, Ricky.

Judge, can you hear me?

MR. GRANDERSON: I'm just making you aware so you don't say something --

THE COURT: I can hear him. I can hear him just fine.

MS. WIDELL: We can all hear you. We can hear Nenye fine.

MR. UCHE: So, Judge, I think -- I think the first question you brought up on the last court date in terms of just -- you know, you were -- we were going back and forth as to ideas surrounding this motion, is whether or not it's possible that the Office of the Special Prosecutor is bound by any agreements made by the Cook County State's Attorney's Office. And the answer is resoundingly yes.

And here's why: Judge, the Cook County State's Attorney's Office represents the People of the State of Illinois wherever they reside in Cook County. It is an agency argument that we're making. It is not one that is unique. It is one that is accepted in any theory of law from criminal law to torts and contract.

So, Judge, if the Cook County State's Attorney's Office entered into an agreement, an oral agreement, a non-prosecution immunity agreement with

the defense, in this case, with Mr. Smollett's team and Mr. Smollett, that agreement was performed. The Office of the Special Prosecutor, which is acting in this special case as Special Prosecutors, still represent the State's Attorney's Office. You cannot -- the State of Illinois, in this particular scenario we are talking about, cannot wash their hands clean of an agreement by claiming, well, we have a new agent. The liability will always apply to whoever the principal is. And in this case, the principal is the State of Illinois. So they can change the agent a million times. It doesn't matter. The principal is the liability and the agency still applies to the State of Illinois.

So, Judge, with that being said, in terms of our main argument, is -- the first one is the immunity statute, 724 ILCS 5/114-1 Section 3. Judge, it's as clear as day. It states in there that Your Honor should dismiss a case if there's an immunity agreement. And I cite to case law in that particular argument. And it's clear in this particular case Mr. Smollett was made to do community service. He was also made to do -- to pay his bond, which I will point out he still hasn't received. So the State of Illinois has collected something from Mr. Smollett and has made him

do something that he cannot undo. Two things in this instance, the giving up of his property rights to his money, and, second, performing community service that he did not have to perform but only did upon reliance of their promise to dismiss the case. When they told him that if he performed these two acts they would dismiss the case, that was an offer. He accepted it. He specifically performed and they specifically performed. Not only did they specifically perform. We have a Cook County Judge, Judge Watkins, who enforced this agreement and the case was dismissed. And so, Judge, that's a contract.

In terms of consideration for a contract, Judge, the obvious consideration here is he lost his money and he performed community service. Cook County, the advantage to them is that they received his bond money. It could go either way. It doesn't really matter who gets the advantage or disadvantage, per contracts law.

So, Judge, in that instance, in terms of the statutory requirements, this case should be dismissed. There's an immunity from prosecution that was given to Mr. Smollett, and it should be enforced, as it was already.

Judge, in terms of his due process constitutional argument, Section 2 -- Section 3 of my argument, the case law again is clear. We have People versus Starks.

In Starks, the prosecutor told the defense team that if the defendant in an armed robbery case agreed to do a polygraph test and if it came back negative for the polygraph examination they would dismiss the case. Well, just as in this scenario, he agreed to do it. He agreed to do the polygraph test. It came back negative and the prosecutor reneged. The Illinois Supreme Court said that that was completely unacceptable.

In fact, to quote their language -- and I have it in quotes, but I won't belabor the Court with more -- what was clear was if there was an agreement as alleged and Starks fulfilled his part of it, then the State must fulfill its part. That's on Page 452 of the Starks case law that I cite.

And so, Judge, we have the Starks case where it wasn't your traditional cooperating witness immunity agreement. It was a bit of something else, but it was nonetheless an immunity agreement where they promised Starks immunity from prosecution, in other words, dismissal of the case, if he performed certain acts,

and he did. And that case, again, like all other cases, said, essentially, that that was wrong, what the prosecutor did.

Then we move over to the Navarroli and the Boyt cases. Those two cases -- in those cases, the Court said that the trial court did not have to enforce the agreement because those had to do with plea agreements, which would make sense. In those two cases, you had one where there was an agreement to reduce his sentence and another one where there was an agreement to reduce the charge for the defendant. The Court said the defendants in those cases could easily weigh their -- weigh the deal and go to trial. That was the fix for that.

It is important to note in the Smith case in which I cite, they make a distinction between the Starks group of cases and the immunity agreement cases as well as the Navarroli and Boyt cases. The clear distinction, according to those courts, was that in the immunity agreement, the defendant now has an ultimate right not to be hauled back into court after the performance of specific acts.

Mr. Smollett is no different. Judge, he gave up his bond money and he performed community service

and the case was dismissed.

Judge, which leads now to the fourth argument that I made, public policy argument, which is important. I know there's lawyers that make public policy arguments all the time, but I think it is important specifically for this type of case because in this scenario, as the case law that I cited demonstrated, the judges actually base most of their decisions on public policy. Public policy decision is that the State must be held accountable for whatever promises they make. They can't go around duping people when they are taking property from them or they made them do something.

Judge, what's worse in our scenario compared to the Starks, the Smith, the Boyt, and the Navarroli cases is something that's pretty obvious when you take a look at this case. In those cases, the prosecutors reneged on a deal. In this particular case, the deal was already enforced. The OSP is attempting to resurrect something that has already been done. As I stated before, they're trying to move the proverbial goal post after the proverbial goal has been scored. The danger of this, Judge, is Your Honor, by allowing this prosecution to go forward -- and I don't know,

hopefully Your Honor will not, but assuming you do, Judge, is we open up the floodgates of special prosecution appointments, which in the motion that was filed yesterday is a fear that we raise.

The OSP's appointment as Special Prosecutor was not designed under that statute to appoint a Special Prosecutor every time public sentiment or officials do not like the executive discretion of the State's Attorney.

You have a duly elected State's Attorney in Cook County elected by the voters of Cook County, and that prosecuting office made an executive discretionary decision. No one has to like the decision. No one has to be in agreement with the decision. Some people might like it. Some people might not. It's completely irrelevant to our Supreme Court and to the rules of proper conduct.

That's the bottom line, but what we shouldn't be doing is if you don't like something, hey, I get to get a Special Prosecutor appointed even if the statute, in terms of the appointment, is not really met, but I get to appoint a Special Prosecutor to overturn an executive discretionary decision made by a duly elected official. And, Judge, that is very dangerous. Your

ruling sets precedent for that.

Judge, I will point out that in the entire precedent that we reviewed -- and Your Honor could correct me if I'm wrong -- there is not a scintilla of a case that exists in this scenario, and it doesn't exist because it's never done. Nobody appoints a Special Prosecutor to second-guess an elected official, especially a Special Prosecutor that does not answer to the People of the State of Illinois via election.

If anyone does not like the decision by the Cook County State's Attorney's Office, which I will point out there was absolutely nothing wrong with it, they can vote that person out or run for office, run for State's Attorney. But what we shouldn't be doing in Cook County or the State of Illinois is setting precedent that if you don't like the decision of an elected official, a State's Attorney in this particular case, well, appoint a Special Prosecutor to backdoor around that or short circuit that problem as opposed to running for office.

So, Judge, our case is more egregious. Here we have a deal that was made. And a deal is a deal. That's an ancient principle. A deal was made. It was executed by both parties, and it was enforced by

a Cook County judge, in this case, Judge Watkins. How in the world are we here today?

Judge, I pointed out in my motion, it's easily tempting to sit there and say, hey, you know what, this case has gone far enough, let's just finish it. That's completely dangerous. It's very dangerous, because by finishing something that is based off of illegality, Judge -- and it's our position this is an illegal prosecution based on the law, as we have seen in the Starks case -- we are harming not just the defendant, but the very taxpayers that the OSP represents.

So, Judge, based on the case law it's clear as day. I believe Your Honor ought to dismiss this case. And, Judge, it's our position, the defense position, that if this case is not dismissed -- it's obvious -- if there's any case that it's obvious, it's this one. It's obvious reversible error, Judge.

And, Judge, with that, the defense rests.

THE COURT: Does the Special Prosecutor wish to make any comments in response?

MR. WIEBER: 30 seconds, Your Honor. Very briefly.

The OSP would ask that you summarily deny this most recent motion to dismiss the indictment on the contract theory. It is a rethread of an argument that

we had in -- that was extensively briefed in the late spring and early summer of 2020. It was extensively and vigorously argued by both parties on June 12 of 2020. You thoroughly reviewed the papers. You heard oral argument. You gave a reasoned opinion on the record, spread of record based on fact and the law and you denied the motion, just as you should deny it here today.

Nothing presented in the paper, the last filing that was just filed this Wednesday for this motion to dismiss nor what you've heard today by Mr. Uche in oral argument changes that one iota, and it can be comfortably denied, and that's what we would ask for.

THE COURT: Okay. I've read the new filing. I've listened to arguments. We had previous motions to dismiss that have been filed and dealt with at great length. Most of them prior to the time Mr. Uche and other lawyers involved here joined the case and Mr. Quinlan withdrew. We covered a lot of this ground previously.

There's a little bit of a change in theory on a specific performance claim and contract claim, and it's for those reasons that I allowed Mr. Uche to speak orally in support of his written motion.

I agree it's a little bit of a unique circumstance and that's because of the circumstances that led up to the appointment of the Special Prosecutor that are laid out in Judge Toomin's order. Judge Toomin indicated in his order, among other things, that the proceedings were basically void because of issues that took place by the prosecutor, by the State's Attorney of Cook County, whether she had recused herself completely, but then really didn't recuse herself and what a recusal means.

But, in any event, a Special Prosecutor has been appointed and Judge Toomin has made very clear that there really was no State's Attorney running the show at that time because of the confusion caused by the recusal announcement that was publicly made.

With that said, I am going to deny the motion to dismiss based on specific performance and contract. I will not challenge Judge Toomin's order nor his reason for his order. I cannot find a way to give pretrial relief, so the motion is respectfully denied.

We are --

MR. UCHE: Judge, just some clarity, Your Honor -- and I wouldn't say anything else after this -- Judge, whether Judge Toomin made a finding that there was

some maybe -- and, Judge, correct me if I'm wrong -- I haven't seen a finding that there was any illegality in the agreement that was filed. That is completely irrelevant regarding the Starks case. The Supreme Court doesn't care. The only thing they care about is whether an agreement was entered into between the prosecutor's office.

THE COURT: Judge Toomin's order talked about different reasoning. It wasn't the things you're talking about. He was talking about infirmities with the prosecution doing anything on the case in light of recusal, and I don't mean to get into that. His order speaks for itself. His order will stand for now and my order, and denial of this motion is going to be what the order is as well.

We've got a trial date set for November 29. I'm looking for all the lawyers to be in the courtroom with Mr. Smollett, of course. Room 700 at 10:00 o'clock in the morning. We will start jury selection that day. We will see how quickly we're able to go.

I have been talking with the lawyers fairly actively about predicting how much court time is required. I will tell you again, as I told you before, if we can pick the jury and start evidence the same

day, that would be my preference and choice. I am not sure if we can, but I'm certainly going to try to do that. We will likely be working into the evenings and get this case done sooner rather than later. So expect regular court days to go until 7:00, 8:00 o'clock at night, something like that, which is just the normal course of business for the way things run in Courtroom 700.

I have also discussed with the lawyers the application for extended media coverage on this case. The media and the public are certainly allowed into the courtroom. There will not be cameras at this trial of any sort. This order may be revisited and reviewed. Should post-trial proceedings be necessary and occur, we can revisit that issue, but there will not be cameras in the courtroom. I prepared a written order, and that order can be made available to the public and members of the media today and will be filed today and will be made available today.

Anything else today before we conclude?

10:00 o'clock in the morning. I will look for everybody here at 10:00 a.m. sharp on November 29.

(Which were all the proceedings had in the above-entitled cause.)

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

I, Danielle K. White, CSR, RPR, an Official Court Reporter within and for the Circuit Court of Cook County, Criminal Division, do hereby certify that I have reported in shorthand the proceedings had at the hearing of the above-entitled cause; that I thereafter caused the foregoing to be transcribed into typewriting electronically, which I hereby certify is a true and accurate transcription of my stenographic notes and contains all the matters of the proceedings so taken as aforesaid before the Honorable James B. Linn, Judge of said court.

Official Shorthand Reporter
Circuit Court of Cook County
County Department - Criminal Division
Certification No. 084-004215

Dated this 19th day of
October, 2021.

Office of the Special Prosecutor

Pursuant to Judge Toomin's Order from August 23, 2019
Re People of the State of Illinois v. Jussie Smollett

Dan K. Webb
(312) 558-5856

35 W. Wacker Drive
Chicago, IL 60601

March 7, 2022

Filed with the Clerk of the Circuit Court at the Leighton Criminal Court Building

VIA FILING AND EMAIL
The Honorable Judge James B. Linn
Leighton Criminal Court Building
2600 S. California Ave.
Rm. 700
Chicago, IL 60608
Email: Zipporah.Freeman@cookcountyil.gov

Re: *PEOPLE OF THE STATE OF ILLINOIS v. JUSSIE SMOLLETT*, No. 20 CR 03050-01
Office of the Special Prosecutor's Response in Opposition to Defendant's Motion for Judgment Notwithstanding the Verdict or Motion for a New Trial

Dear Judge Linn:

In anticipation of the upcoming March 10, 2022 hearing, the Office of the Special Prosecutor (OSP) submits this Opposition to Your Honor in response to Mr. Smollett's 83-page "Motion for Judgment Notwithstanding the Verdict or Motion for a New Trial" (the "Post-Trial Motion"). The OSP is also filing this Opposition with the Clerk of the Circuit Court in connection with effecting service on the Court and the parties.

INTRODUCTION

The evidence presented at trial overwhelmingly established Mr. Smollett's guilt beyond a reasonable doubt, as reflected in the jury's unanimous guilty verdict. Nonetheless, Mr. Smollett's 83-page[1] Post-Trial Motion asks this Court to overturn the unanimous jury verdict that found

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[1] During a Zoom conference with the parties on January 13, 2022, Your Honor granted the defense until February 25, 2022—over 11 weeks (78 days) from the verdict—to submit any post-trial motions, which was later spread of record during the January 27, 2022 status hearing. Defense counsel represented to the Court on January 13 that they anticipated any post-trial submission would be between 20 and 25 pages. Then, on February 24, 2022, while the parties were gathered for an in-person hearing and in response to an inquiry from the Court as to the length of the forthcoming post-trial motion, defense counsel revised the prior representation to approximately 40 pages. Yet, *the very next day*, defense counsel filed the aforementioned 83-page Post-Trial Motion—over double in length from their representation to the Court *just 24 hours earlier*.

Given the scheduling of the hearing on March 10, 2022 for oral argument on the Post-Trial Motion, the OSP was provided until March 7, 2022 (five business days) to submit any written response. The Court acknowledged this was a tight timeline, even before the defense filed its 83-page motion, and told the OSP that a formal written response was not necessary because each party would have an opportunity to present and respond to oral arguments during the March 10 hearing. While the OSP understands that it is not required to file a response, it nonetheless submits this opposition in light of the multitude of issues presented

Mr. Smollett guilty of five of six felony counts of disorderly conduct—namely, for making false police reports in violation of 720 ILCS 5/26-1(a)(4). In making this request for an order of acquittal, Mr. Smollett raises a variety of alleged procedural and evidentiary errors, both pretrial and during trial, committed by every party involved in this case—except, of course, Mr. Smollett himself. As just a few examples:

- The OSP allegedly violated Mr. Smollett's constitutional rights during jury selection and allegedly "engaged in a systematic pattern of discriminatory challenges" to prospective jurors (*see* Post-Trial Motion at 14);

- The Court allegedly violated Mr. Smollett's constitutional rights with a "hostile attitude and prejudicial commentary" (*id.* at 61);

- The OSP allegedly engaged in "egregious prosecutorial misconduct" resulting in an alleged "disqualification" (*id.* at 43);

- The Court, Cook County Sheriffs, and the entire Cook County court system allegedly violated Mr. Smollett's constitutional rights by setting and enforcing capacity limits in the courtroom during a global pandemic—at the onset of the highly contagious Omicron COVID-19 variant—where, supposedly, "members of the general public and oftentimes members of the press were denied entry into the courtroom" (*id.* at 26);

- The media and political figures allegedly created a "carnival atmosphere surrounding Mr. Smollett's trial" (*id.* at 61–62); and

- Even the jury allegedly committed error in reaching "inconsistent findings of fact" and an allegedly "legally inconsistent" verdict (*id.* at 57–58).

Despite Mr. Smollett's finger-pointing and scapegoating, an examination of the pretrial and trial record reveals that each of the alleged errors is meritless, riddled with distortions of the record and frequent misapplication of Illinois law. Most importantly, none of these supposed errors remotely rise to a level requiring overturning the jury's unanimous verdict.

As an initial matter, the Post-Trial Motion first asks this Court for "judgment notwithstanding the verdict," or to vacate the jury's verdict and "enter a verdict of not guilty." *Id.* at 1. Yet, in making this request for extraordinary relief, the Post-Trial Motion incorrectly asks this Court to review the evidence and the jury's verdict under legal standards for ***civil cases*** that have no application to this criminal case.[2] Worse, it contends that vacating the conviction and

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in the Post-Trial Motion in order to provide Your Honor with the law and applicable legal framework, and to also correct some of the numerous factual misrepresentations made in the Post-Trial Motion.

[2] In the section titled "The Verdict of the Jury was Contrary to the Manifest Weight of the Evidence," the Post-Trial Motion contends that "[o]verturning a jury's verdict is permissible when the verdict is contrary to the manifest weight of the evidence adduced." *See* Post-Trial Motion at 46–47. In advocating that this Court overturn the jury's verdict on this basis, the Post-Trial Motion cites to the Illinois Supreme Court's decision in *Snelson v. Kamm*, 204 Ill. 2d 1 (2003), which is a ***civil, medical malpractice case***,

entering an acquittal is required for virtually every single alleged error raised in the Post-Trial Motion—no matter the type of error raised. *See, e.g., id.* at 80–83 (claiming that the Court's decision to send an exhibit admitted into evidence to the jury room during deliberations requires acquittal). That is simply wrong.

As Your Honor knows, Illinois courts treat motions for judgment notwithstanding the verdict the same as motions for directed verdict. *See People v. Van Cleve*, 89 Ill. 2d 298, 303 (1982) ("An order directing a verdict and a judgment notwithstanding the verdict are in substance the same, because they provide the same relief and are applicable on the same insufficiency-of-evidence ground."). Accordingly, a judgment of acquittal is ***only*** appropriate "when a trial court concludes, after viewing all of the evidence in a light most favorable to the State, that ***no reasonable juror*** could find that the State had met its burden of proving the defendant guilty beyond a reasonable doubt." *People v. Shakirov*, 2017 IL App (4th) 140578, ¶ 81 (emphasis added); *People v. Robinson*, 199 Ill. App. 3d 24, 38 (1st Dist. 1989) ("[A] motion for judgment notwithstanding the verdict should be granted in instances ***only*** where the State's evidence, when viewed in a light most favorable to the State, is insufficient to support a finding or verdict of guilty.") (emphasis added).

Mr. Smollett has not met, and cannot meet, this incredibly high standard for overturning the jury's verdict. Viewed in the light most favorable to the State (the OSP), the evidence presented during the two-week trial was overwhelming in proving—beyond a reasonable doubt—that Mr. Smollett devised, orchestrated, and carried out a fake hate crime, and then, in violation of Illinois law, reported that fake hate crime to the Chicago Police Department as a real hate crime. During the trial, the jury was presented with the following overview of evidence: (1) the testimony of five Chicago Police detectives and officers who received Mr. Smollett's false police reports and extensively investigated the fake hate crime that Mr. Smollett reported; (2) the testimony of Abimbola and Olabinjo Osundairo (the "Osundairo Brothers"), who set forth in detail Mr. Smollett's efforts to recruit them and carry out the fake hate crime; (3) defense counsel's cross-examination of each of these witnesses; (4) over 40 exhibits, including phone records, text messages, social media messages, video surveillance footage, GPS evidence, receipts, and the $3,500 check written by Mr. Smollett to Abimbola Osundairo; (5) the testimony of six witnesses who testified on behalf of Mr. Smollett's defense; and (6) Mr. Smollett's own testimony and version of the events that attempted (and failed) to rebut aspects of the Osundairo Brothers' testimony.

The jury weighed all of this evidence—including Mr. Smollett's own testimony—during the course of their deliberations over two days and reached a unanimous verdict finding Mr. Smollett guilty on five of the six felony counts of disorderly conduct. That verdict—guilty on five counts and not guilty on one count—reflects that the jury carefully reviewed all of the evidence as it applied to each count in the indictment in reaching their unanimous verdict. Viewed in the light most favorable to the OSP, it simply cannot be said that "no reasonable juror" could find that the OSP did not meet its burden in proving Mr. Smollett guilty beyond reasonable doubt. Based on the overwhelming evidence presented to the jury, there was more than sufficient evidence for

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articulating standards of review for jury verdicts in civil cases. As explained below, the legal standards for reviewing a jury verdict articulated in *Snelson* are not applicable to this criminal case.

a reasonable juror to convict Mr. Smollett on the disorderly conduct charges, and this Court should not disturb the jury's unanimous verdict.

As it relates to Mr. Smollett's requested relief, the Post-Trial Motion is divided into two sections: incorporation of pretrial rulings (Section I); and pretrial and trial issues "not yet addressed by the Court" (Section II). In Section I, Mr. Smollett incorporates extensive prior motions, memorandums, and argument that are part of the record, and seeks relief from all prior rulings by this Court. The OSP incorporates its prior responses, briefs, and arguments as part of the post-trial record. More importantly, Your Honor's prior rulings were proper and required by law, and none of them need to, nor should, be revisited.

In Section II, the Post-Trial Motion sets forth thirteen alleged errors that occurred during the pretrial and trial proceedings. Only two of the thirteen alleged errors raised by Mr. Smollett appropriately seek the relief of judgment notwithstanding the verdict—error six, contending that "the Court erred in denying Mr. Smollett's motion for directed finding of not guilty" (*see* Post-Trial Motion at 43–46); and error seven, arguing that "the verdict of the jury was contrary to the manifest weight of the evidence." *See id.* at 46–48. The Court must evaluate both of these issues under the "sufficiency of the evidence standard" in the light most favorable to the OSP, and for the reasons set forth above, Your Honor should not disturb the jury's unanimous verdict.

The remaining eleven alleged errors raised in the Post-Trial Motion—errors one through five, and eight through thirteen—do ***not*** go to the "sufficiency of the evidence" at trial, and instead involve an array of alleged defects in the trial process that are appropriately analyzed in the context of a motion for a new trial. *See People v. Mink*, 141 Ill. 2d 163, 173 (1990) (in double jeopardy context, comparing reversals based on trial error where "defendant has been convicted through a judicial process which is defective in some fundamental respect" versus reversals for "convictions in evidentiary insufficiency" and stating that the "double jeopardy clause does not preclude retrial of a defendant whose conviction is set aside because of an error in the proceedings leading to the conviction"). Therefore, this subset of alleged errors must be evaluated in the context of standards for evaluating a motion for a new trial.

"[A] posttrial motion for a new trial is a matter for the trial court's discretion." *People v. Arze*, 2016 IL App (1st) 131959, ¶ 86. Because none of the alleged errors have any merit, this Court should exercise its discretion and deny Mr. Smollett's alternative request for a new trial.

ARGUMENT

Alleged Error 1: The Court Did Not Err in Conducting the *Voir Dire*.

The Court's *voir dire* process of the venire was plainly consistent with Illinois law. Illinois Supreme Court Rule 431(a) states as follows:

> The court shall conduct *voir dire* examination of prospective jurors by putting to them questions it thinks appropriate, touching upon their qualifications to serve as jurors in the case at trial. The court may permit the parties to submit additional questions to it for further inquiry if it thinks they are appropriate and shall permit

> the parties to supplement the examination by such direct inquiry ***as the court deems proper*** for a reasonable period of time depending upon the length of examination by the court, the complexity of the case, and the nature of the charges.

Ill. Sup. Ct. R. 431(a) (emphasis added). While Rule 431(a) does contemplate direct questioning by the attorneys, the Rule's language—"as the court deems proper"—makes clear the decision of whether to allow direct questioning is entirely in the Court's discretion. *Id.*

Per Rule 431, the Court conducted *voir dire* by directly questioning the prospective jurors. Moreover, consistent with Rule 431, the Court exercised its discretion and allowed the parties to submit additional questions to be asked during *voir dire*. Both the OSP and the defense submitted supplemental questions for further inquiry of prospective jurors. Indeed, on September 24, 2021, defense counsel submitted ***57 supplemental questions*** for the Court to ask during *voir dire*. By an order on September 29, 2021, this Court informed the defense it would ask the jury virtually all of its 57 supplemental questions, and the Court did so at trial.[3] Moreover, as defense counsel knows, the Court took input from the parties throughout the *voir dire* process as to additional follow-up questions for prospective jurors, and the Court often did ask those additional follow-up questions requested by defense counsel.

Now, Mr. Smollett complains that the Court did not allow defense counsel—instead of the Court—to ask those 57 questions or other follow-ups directly to the prospective jurors. Even assuming the Court's *voir dire* process was in error (it clearly was not), the Post-Trial Motion does not explain how it prejudiced Mr. Smollett, and it simply cannot articulate any prejudice because defense counsel was permitted to question the prospective jurors through its extensive supplemental questions submitted to the Court.

Alleged Error 2: Mr. Smollett Did Not and Has Not Made a *Prima Facie* Showing Under *Batson* to Warrant Revisiting the Court's Prior Rulings.

During the *voir dire*, the Court heard four different oral defense motions made under *Batson v. Kentucky*, 476 U.S. 79 (1986), as to the OSP's use of its preemptory strikes. *See* Trial Tr., 11.29.2021 AM at 219:24–222:17; 224:4–225:16; 227:10–230:21; 257:15–258:11. When such motions are made, under U.S. Supreme Court and Illinois law, "the defendant must make a *prima facie* showing that the prosecutor has exercised peremptory challenges on the basis of race." *People v. Davis*, 231 Ill. 2d 349, 360 (2008). Importantly, merely using preemptory challenges of prospective jurors who are the same race as the defendant "will ***not*** establish a *prima facie* case of discrimination." *Id.* at 361 (emphasis added).

For each of these motions, the Court correctly analyzed the motions under the standard articulated in *Batson* and *Davis*, and found that the defense had ***not*** made a *prima facie* case of discrimination on the basis of race or sexual orientation. *See* Trial Tr., 11.29.2021 AM at 220:20–21 ("There has not been a *prima facie* case made to me for racial discrimination"); *id.* at 225:14–16 ("I'm not finding racial discrimination. So the *Batson* motion is respectfully denied."); *id.* at

[3] Notably, outside of contesting the concept of no direct questioning by counsel during the August 26, 2021 status hearing, defense counsel did not further object to the Court's proposed *voir dire* process with respect to questioning prospective jurors, and did not raise any objection at trial.

227:22–23 ("I'm not finding a *prima facie* showing of sexual orientation discrimination by the Government"); *id.* at 230:9–10 ("I'm not finding discrimination that would give you relief under *Batson*."); *id.* at 257:22–258:1 ("I'm not making a *prima facie* showing here because I know that as soon as she got stricken that a black woman was absolutely guaranteed of being on the jury as alternate number one"). Even though it was not required to do so, because the defense had failed to make a *prima facie* showing, the OSP provided a "race-neutral" explanation for each of the preemptory challenges at issue. *Id.* at 221:2–222:11; 224:11–23; 228:8–24; 258:4–9. The Court heard all of the arguments and denied each of the motions.

This Court never found that the defense established a *prima facie* showing that the OSP utilized preemptory challenges on the basis of race or sexual orientation. The Post-Trial Motion offers no reason to revisit the Court's prior rulings, and instead regurgitates the same arguments it made on the record. Lobbing unfounded acquisitions of juror discrimination that are belied by the record is, unfortunately, completely consistent with Mr. Smollett's attempts to interject race and sexual orientation into these proceedings more generally—just as he did when reporting the fake hate crime to the Chicago Police in 2019. Unequivocally, the accusations that the OSP engaged in "a systematic pattern of discriminatory challenges" are meritless.

Alleged Error 3: **The Court Correctly Ruled That the Accomplice Instruction Was Not Warranted in This Case.**

A trial court has discretion to determine which jury instructions should be given. *People v. Ticey*, 2021 IL App (1st) 181002, ¶ 62. During the jury instruction conference on December 7, 2021, defense counsel sought to include Illinois Pattern Instruction 3.17 ("Testimony of an Accomplice") in the jury instructions. *See* Trial Tr. 12.7.2021 at 156–165. The Court heard argument from defense counsel, and in an exercise of its discretion, sustained the OSP's objection to the inclusion of IPI 3.17 in the jury instructions. *Id.* The Post-Trial Motion repeats the same arguments previously made but, again, offers no reason to revisit the Court's prior ruling.

IPI 3.17 states that "[w]hen a witness says he was involved in ***the commission of a crime with the defendant***, the testimony of that witness is subject to suspicion and should be considered by you with caution." Illinois Pattern Jury Instructions, Criminal 3.17 (emphasis added). As set forth by Your Honor during the jury instruction conference, IPI 3.17—on its face—has no application to this case. The Osundairo Brothers did ***not*** admit, nor was there any evidence, that they were "involved in the commission of a crime with the defendant"—i.e., filing false police reports. Instead, the Osundairo Brothers assisted Mr. Smollett in staging and carrying out the fake attack on Mr. Smollett, which is not a crime under Illinois law. Mr. Smollett—not the Osundairo Brothers—made the decision to file multiple false police reports claiming he was a victim of an actual hate crime.

As noted in the Mr. Smollett's own Post-Trial Motion (*see* Post-Trial Motion at 22), the Comments to IPI 3.17 state that the instruction should be given "(1) if the witness, rather than the defendant, could have been the person ***responsible for the crime***, or (2) if the witness admits ***being present at the scene of the crime and could have been indicted*** either as a principal or under a theory of accountability, but denies involvement." *Id.* (emphasis added). Neither of these has any applicability. The Osundairo Brothers could ***not*** "have been the person[s] responsible for the

crime" because they did not assist or participate with Mr. Smollett in the filing of false police reports. Moreover, the Osundairo Brothers did ***not*** admit to participating or otherwise being present to the reporting of the fake hate crime to police and, therefore, could not have been indicted with disorderly conduct for filing false police reports.

As defense counsel did during the jury instruction conference, it tries to define the fake attack on Mr. Smollett (which is not a crime) as the "crime" under IPI 3.17 when analyzing the applicability of the instruction. But, as set forth by Your Honor during the jury instruction conference and above, defendant's argument is clearly wrong. Simply put, the Court properly and correctly exercised its discretion in declining to give IPI 3.17 in this case.

Alleged Error 4: Mr. Smollett's Right to a Public Trial Was Not Violated.

In the middle of a global pandemic, this Court—together with its courtroom staff and the Cook County Sheriffs—did an admirable job holding a public jury trial in a case with significant media and public attention. This was no easy task. As the Court repeatedly informed the parties pretrial, the Leighton Criminal Courthouse at that time of trial operated under capacity limitations in each courtroom, and Your Honor's courtroom was limited to 57 persons. Nonetheless, this Court found a way to ensure that all necessary parties—the Court, courtroom staff, the Cook County Sheriffs, the OSP, defense counsel, the jury, media, and numerous members of Mr. Smollett's family and friends—were able to attend every day of the trial proceedings. These logistical efforts under the circumstances deserve to be commended, not bashed.

Yet the Post-Trial Motion contends Mr. Smollett's right to a public trial was somehow violated when the Court—under the constraints of the 57-person capacity limit due to COVID-19 restrictions—utilized the entirety of the courtroom for the venire during jury selection, and asked most members of the media,[4] Mr. Smollett's family, and others to step outside the primary courtroom to make room for the venire.[5] This argument is meritless.

As an initial matter, defense counsel did not object to this process at the time, even though the Illinois Supreme Court has said that a "contemporaneous objection is particularly crucial when challenging any courtroom closure." *People v. Radford*, 2020 IL 123975, ¶ 37. Importantly, Your Honor did not "close" the courtroom because it kept all the courtroom doors open so that the media and other members of the public could view and/or listen to the *voir dire* process. Nonetheless, there was no error in proceeding to select the jury with certain individuals and some media

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[4] As admitted in the Post-Trial Motion, the defense objected to having cameras in the courtroom during trial, and the Court respected that objection in declining extended media coverage. Now, post-trial, the defense is complaining that "no members of the press [were] in the courtroom during any of the jury selection process." Post-Trial Motion at 26. Aside from contradicting its prior position, this is also factually inaccurate, as the Court allowed two members of the media to be present in the courtroom during the *voir dire*, with yet others seated or standing in or near the courtroom exits—the doors of which were opened.

[5] The Post-Trial Motion also discusses a "peaceful spectator" named Ambrell Gambrell, a.k.a. Bella BHHAS, who was removed from the courtroom for reasons unrelated to COVID-19 restrictions. The Post-Trial Motion does not explain how a spectator's removal from portions of the trial proceedings somehow infringed on Mr. Smollett's right to a public trial or otherwise prejudiced him.

removed to make room for the venire. As in *Radford*, the Court's use of the entire courtroom for the venire does "not call into question the confidence in the public integrity and impartiality of the court system." *Id.*, ¶ 41. Moreover, members of the venire who did not become jurors, along with the OSP, defense counsel, courtroom staff, Cook County Sheriffs, and media who remained in the courtroom and were able to view the jury selection process from within the room itself, at a minimum, "served as the eyes and ears of the public." *Id.* Notably, Mr. Smollett makes "no assertion that any juror lied or that the State or judge committed misconduct during jury selection, and there was a complete record made of the questioning that took place." *Id.* And, "the courtroom was open for the remainder of the trial." *Id.*, ¶ 40.

Given all of these circumstances, the Court did not err and did not violate Mr. Smollett's Sixth Amendment right to a public trial.

Alleged Error 5: The Court Correctly Exercised Its Discretion in Denying Defense Counsel's Motion for Disqualification.

In a desperate act of gamesmanship during trial, defense counsel improperly manufactured alleged "prosecutorial misconduct" to discredit the OSP in front of the jury by putting up a witness who testified inconsistently with his sworn grand jury statement. Defense counsel then sought a disqualification motion based on this perjured testimony. Mr. Smollett's lawyers' conduct was highly improper and deliberate, as they clearly prepared the witness to offer perjured testimony, and never brought the inconsistent statement to the Court's or OSP's attention pretrial. The Court correctly exercised its discretion in denying the motion, and the defense presents no basis for its reconsideration—especially in light of defense counsel's transparent ruse and improper conduct.

Anthony Moore—a security guard at the Sheraton Grand Hotel and witness in this case—met with the OSP (for 90 minutes) on January 9, 2020, and thereafter provided a sworn grand jury statement. *See* Trial Tr. 12.06.2021 AM at 64:11–66:13; 86:23–87:2. Mr. Moore's statement, under penalty of perjury, was read to the special grand jury in connection with this case. Your Honor is familiar with that statement from reading the entirety of the grand jury transcripts pretrial.[6] And the defense had been in possession of Mr. Moore's grand jury statement since early March 2020 when the OSP made its initial production of discovery.

Additionally, Mr. Moore had been identified by the defense as one of their potential witnesses for trial as earlier as October 13, 2020, when it submitted "Defendant's Preliminary Rule 413(d) Disclosures." Mr. Moore remained on the defense's witness list on October 6, 2021 when it submitted its amended Rule 413(d) disclosures, and on October 29, 2021 when it submitted its second amended Rule 413(d) disclosures.

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[6] The OSP provided the entirety of the grand jury transcripts under seal to Your Honor on October 21, 2020, in connection with the Court's request for an *in camera* review stemming from the Defendant's "Motion to Quash and Dismiss Indictment for Violations of Defendant's Fifth Amendment Due Process Rights." Your Honor then indicated to the parties during a status hearing on October 30, 2020 that the Court had read the grand jury transcripts in their entirety. *See* Hr. Tr. 10.30.2020 at 3:4–5 ("I finally got the opportunity to make an *in camera* review of all Grand Jury minutes ...."); *id.* at 7:2–3 ("I was looking carefully. I read all of it.").

Despite being armed with Mr. Moore's sworn grand jury statement since March 2020 and naming Mr. Moore as one of their witnesses as early as October 2020, defense counsel never provided the OSP, or this Court, with a new statement from Mr. Moore in accordance with Rule 413(d). *See* Ill. Sup. Ct. R. 413(d) (noting that the defense "shall furnish the State" with "[t]he names and last known addresses of persons he intends to call as witnesses, together with their ***relevant written or recorded statements, including memoranda reporting or summarizing their oral statements***") (emphasis added). If defense counsel met or spoke with Mr. Moore pretrial (which it clearly did) and Mr. Moore provided them with a statement that was inconsistent with his sworn grand jury statement, the defense was obligated under the Illinois Supreme Court Rules to disclose that statement. It never did.

Moreover, assuming the defense learned pretrial that a witness was stating he was "pressured" by the OSP, it should have brought it to the Court's attention pretrial and immediately requested the relief it now belatedly claims it was entitled to. Instead, defense counsel deliberately waited to spring this perjured testimony on the Court and the OSP, and in front of the jury, on December 6, 2021—one week into trial, after the close of the OSP's case-in-chief, and with Mr. Moore on the witness stand. This conduct was improper gamesmanship designed to discredit and prejudice the OSP in front of the jury. *See, e.g., In re Est. of Klehm*, 363 Ill. App. 3d 373, 377 (1st Dist. 2006) ("In an effort to discourage tactical gamesmanship, courts have determined that motions to disqualify should be made with reasonable promptness after a party discovers the facts which [led] to the motion.") (internal quotation marks omitted). Defense counsel's tactical scheme even goes as far as falsely asserting that "at no time did the prosecution seek to deny" the accusation. *See* Post-Trial Motion at 43. Nothing could be further from the truth. In connection with the motion, and at a lengthy sidebar, most, if not all, of the above retort was presented by the OSP to the Court and defense counsel. At the time of its ruling, the Court understood all of these circumstances, and in its discretion, correctly denied defense counsel's unfounded motion for disqualification.

Alleged Errors 6 & 7: **The Evidence at Trial Was Overwhelming and More than Sufficient in Establishing Mr. Smollett's Guilt Beyond a Reasonable Doubt.**

As explained above (*see infra* 3–4), Mr. Smollett's contention that the Court erred in denying his motion for a directed verdict (alleged error six) and that "the verdict of the jury was contrary to the manifest weight of the evidence" (alleged error seven) go to Mr. Smollett's request for judgment notwithstanding and for this Court to examine the sufficiency of the evidence. Overturning the jury's unanimous guilty verdict is appropriate only if the Court concludes, "after viewing all of the evidence in a light most favorable to the State, that ***no reasonable juror*** could find that the State had met its burden of proving the defendant guilty beyond a reasonable doubt." *Shakirov*, 2017 IL App (4th) 140578, ¶ 81 (emphasis added). As detailed above, the evidence at trial was overwhelming and more than sufficient in establishing Mr. Smollett guilty of disorderly conduct beyond a reasonable doubt, and it cannot be said that no reasonable juror could find that the OSP has not met its burden of proof.

Alleged Error 8: **There Were No Impermissible Questions about Mr. Smollett's "Post-Arrest Silence."**

The Post-Trial Motion completely misapprehends the OSP's line of questioning during two examinations in alleging that it impermissibly questioned witnesses about Mr. Smollett's "post-arrest silence" in violation of *Doyle v. Ohio*, 426 U.S. 610 (1976). In fact, the OSP did not question a single witness about Mr. Smollett's "post-arrest silence," and therefore, no error occurred.

As background, the OSP introduced at trial State Exhibit 31, which is a text message Mr. Smollett sent to Abimbola Osundairo on the afternoon of February 14, 2019—after finishing a voluntary, non-custodial, interview with Detective Robert Graves, and while the Osundairo Brothers were in CPD custody. In that text message, Mr. Smollett told Abimbola Osundairo the following:

> Brother ... I love you. I stand with you. I know 1000% you and your brother did nothing wrong and never would. ***I am making a statement so everyone else knows.*** They will not get away with this. Please hit me when they let you go. I'm fully behind you.

State Ex. 31 (emphasis added).

The relevant line of questioning came up during the discussion of State Exhibit 31. First, after admitting State Exhibit 31 through Detective Michael Theis, the OSP asked Detective Theis questions about this text message and the supposed "statement" Mr. Smollett intended to put out, including questions like "did you ever become aware of Mr. Smollett making a statement," and "[d]id he ever make a statement that they did nothing wrong and never would?" *See* Trial Tr. 11.30.2021 AM at 174:1–13. ***Defense counsel did not object to this line of questioning***. *Id.* The OSP also questioned Abimbola Osundairo about State Exhibit 31, and asked him about the "statement" Mr. Smollett said he was going to make clearing the Osundairo Brothers names—"did Mr. Smollett ever make any statement ***to the public*** where he admitted that the hate crime was a hoax?" *See* Trial Tr. 12.01.2021 PM at 181:4–11 (emphasis added). Defense counsel did object to this question and answer, and the Court sustained the objection while instructing the jury to "[d]isregard the question and answer." *Id.* at 181:12–14.

The questions set forth above relate only to whether Mr. Smollett ever made a ***public*** "statement" letting "everyone else know" that the Osundairo Brothers "did nothing wrong and never would." State Ex. 31. *Doyle* has no application to such questioning because *Doyle* held that "the use for impeachment purposes of petitioners' silence, ***at the time of arrest and after receiving Miranda warnings***, violate[s] the Due Process Clause of the Fourteenth Amendment," *Doyle*, 426 U.S. at 619 (emphasis added), and clearly these limited questions by the OSP had nothing to do with Mr. Smollett's "silence, at the time of arrest."

Alleged Error 9: **The OSP Did Not Shift the Burden During Rebuttal Argument.**

Prosecutors are given "wide latitude" in closing arguments. *People v. Elizondo*, 2021 IL App (1st) 161699, ¶ 83. Granting a new trial based on alleged improper remarks during closing

argument is only required if "they engendered substantial prejudice against the defendant such that it is impossible to tell whether the verdict of guilt resulted from them." *Id.*, ¶ 84; *see also People v. Legore*, 2013 IL App (2d) 111038, ¶ 59 ("[W]e will reverse a conviction only where the State's comments were so inflammatory or so flagrant that they denied the defendant a fair trial."). Mr. Smollett has not come anywhere close to meeting this high burden.

The OSP did not shift the burden during its rebuttal argument by making a single comment in response to defense counsel's factually unsupported closing argument about "a lot of missing data" of surveillance footage from January 29, 2019. *See* Trial Tr. 12.8.2021 at 132:14–16. "[I]f defense counsel provokes a response in closing argument, the defendant cannot complain that the State's reply in rebuttal argument denied him a fair trial." *Legore*, 2013 IL App (2d) 111038, ¶ 55. That is precisely what happened—the OSP's argument regarding the "missing video" was only made in response to defense counsel's argument that there was "a lot of missing data." Even assuming this single comment was somehow improper (it was not), the Court instructed the jury that "[c]losing arguments are not evidence" (*see* Trial Tr. 12.8.2021 at 6:20–23), and those instructions "may cure errors by ... informing the jury that arguments are not themselves evidence." *Elizondo*, 2021 IL App (1st) 161699, ¶ 86. Simply put, the OSP did not shift the burden of proof, and Mr. Smollett has failed to show that this single comment rises to the level of "substantial prejudice" required to order a new trial.

Alleged Error 10: The Verdicts Are Not Legally Inconsistent.

The jury found Mr. Smollett guilty on Counts One through Five, and not guilty on Count 6. Mr. Smollett assumes that the verdict is inconsistent, and (citing no case law) argues this requires a new trial. *See* Post-Trial Motion at 56–58. What Mr. Smollett ignores is that the Illinois Supreme Court has held that "defendants in Illinois can no longer challenge convictions on the sole basis that they are legally inconsistent with acquittals on other charges." *People v. Jones*, 207 Ill. 2d 122, 133–34 (2003). Therefore, this Court need not entertain whether the jury's verdict was inconsistent "because even if they were, the jury's findings of guilt stand." *People v. Pelt*, 207 Ill. 2d 434, 440 (2003).

Alleged Errors 11 & 12: The Defense Was Given Substantial Latitude to Cross-Examine OSP Witnesses.

"The trial court has ***broad discretion to limit or exclude*** cross-examination that would be irrelevant or unhelpful or that would risk confusing the issues for the jury." *People v. Jenkins*, 2021 IL App (1st) 200458, ¶ 82 (emphasis added). A new trial for alleged limitations on cross-examination is only proper when there is "manifest prejudice to the defendant." *People v. Cornejo*, 2020 IL App (1st) 180199, ¶ 109 (internal quotation marks omitted). Because "the latitude permitted on cross-examination is left largely to the discretion of the trial judge," *id.*, this Court, in its discretion, granted defense counsel substantial latitude to cross-examine OSP's witnesses on areas that had minimal relevance, if any, to the facts of the case.

For example, the defense was given wide latitude to cross-examine multiple OSP witnesses about tweets by Olabinjo Osundairo from 2013 and other sorts of messages. *See, e.g.*, Trial Tr. 11.30.2021 PM at 6:16–9:9 (overruling OSP's objections and allowing cross-examination of

Detective Theis about 2013 tweets). As another example, the Court allowed the defense—over the OSP's pretrial objection—to cross-examine numerous witnesses about the items found during the search of the Osundairo family residence—namely, Abimbola Osundairo's guns and a small amount of drugs. *See id.* at 14:14–30:11 (extensively cross-examining Detective Theis on the guns and drugs found in the residence, and the CPD's actions after recovering the guns and drugs); Trial Tr. 12.01.2021 AM at 22:7–24:5 (cross-examining Abimbola Osundairo on guns found in residence); Trial Tr. 12.02.2021 PM at 62:12–67:1 (cross-examining Olabinjo Osundairo on the same). In addition, the Court granted the defense full latitude to question Abimbola Osundairo about drugs that he purchased at Mr. Smollett's request, and a visit to a bathhouse with Mr. Smollett in 2017. *See* Trial Tr. 12.02.2021 AM at 15:20–22:6, 32:16–34:5. The record is littered with examples like those above where the defense cross-examined OSP witnesses—with virtually no limitation—on matters that had nothing to do with the substance of the case.

Mr. Smollett's argument that he was "prevented" from cross-examining Detective Theis and Olabinjo Osundairo "on homophobic topics" is meritless and relies on convenient omissions and distortions of the record. *See* Post-Trial Motion at 63–67, 73–79. The Court allowed Detective Theis to be questioned at length about Alex McDaniels—who was not a witness in this case or a witness called at trial—and tweets and other messages from Olabinjo Osundairo that defense counsel contended were homophobic. *See* Trial Tr. 11.30.2021 PM at 6:16–9:9; Trial Tr. 11.30.2021 AM at 221:8–224:23. Moreover, the Court gave ample leeway to question Olabinjo Osundairo about those same tweets and other messages. *See* 12.02.2021 Trial Tr. PM at 25:10–33:3, 54:10–58:12. Even after the Court properly exercised its discretion in reminding defense counsel that the examination was getting "a little far [a]field," it subsequently allowed the defense to continue cross-examining Mr. Osundairo on these very same topics. *Id.* at 54:10–58:12.

The record simply belies any argument that the defense was "prevented," or really even limited, in any way in its cross-examination of the OSP's witnesses. Moreover, any perceived "prejudicial commentary" was the Court's proper exercise of its discretion in controlling the scope and manner of cross-examination.

Alleged Error 13: **The Court Properly Allowed the *Good Morning America* Video, Which Was Admitted Into Evidence, to Go Back to the Jury Room.**

Finally, "[i]t is well-established that whether evidentiary items ... should be taken to the jury room rests within the discretion of the trial judge." *People v. Hollahan*, 2020 IL 125091, ¶ 11 (internal quotation marks omitted). The Court correctly exercised its discretion in sending State Exhibit 9 (the *Good Morning America* video)—admitted into evidence—back to the jury room.[7] The Post-Trial Motion falsely states State Exhibit 9 "had been used only for impeachment." *See* Post-Trial Motion at 80. Rather, the video was authenticated, received into evidence, and published to the jury ***without any objection from the defense***. *See* Trial Tr. 11.30.2021 AM at 80:2–81:3.

The defense also incredulously suggest that it was "only able to clarify and explain the portion of the video that were actively published to the jury during trial." *See* Post-Trial Motion

[7] The Post-Trial Motion also references unidentified demonstrative exhibits and trial transcripts that went back to the jury room, but the crux of this alleged error focuses on the *Good Morning America* tape.

at 82. This simply is not true, since Mr. Smollett took the witness stand and was asked questions by defense counsel about the *Good Morning America* interview. *See* Trial Tr. 12.6.2021 PM at 113:13–115:21. Because State Exhibit 9 was already in evidence by the time Mr. Smollett took the stand, the defense could have played the entirety of the video with Mr. Smollett if it wished.

* * *

The OSP looks forward to further responding to the Post-Trial Motion during the March 10, 2022 hearing.

Respectfully submitted,

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